Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11938/2018

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 11 July 2019 **On 7 August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

JUSTIN [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Anyiam, Counsel, instructed by KC Law Chambers, Solicitors

For the Respondent: Miss Cunha, Home Office Presenting Officer

REMAKE DECISION AND REASONS

1. This is an appeal from a decision of First-tier Tribunal Judge Young dated 10 March 2019. The appellant is an 18 year old Jamaican national born on 24 December 2000. He entered the United Kingdom on 7 August 2017 on a visitor visa that was valid from 21 July 2017 until 21 January 2018.

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Background

2. On 21 December 2017 (prior to the expiration of his visa) the appellant made a claim for indefinite leave to remain in the United Kingdom as a dependant of his father, Mr [SAS] (the father) who has had settled status in the United Kingdom since 17 December 1999.

3. That claim was refused by the respondent on 16 May 2018, principally on the ground that it did not come within the terms of paragraph 298 of the Immigration Rules in that the father did not have sole responsibility for the appellant's upbringing. Responsibility was found to be shared between the father and his mother, [T M], who still lives in Jamaica. No error of law was found in relation to this aspect of the decision, and the factual finding is undisturbed.

4. What was not addressed or resolved by Judge Young was whether, in the alternative, under paragraph 298(i)(d), there were serious and compelling family or other considerations which would make the appellant's exclusion undesirable. It is that issue which now falls for determination.

5. When I set aside Judge Young's decision, I gave permission to the appellant to adduce further evidence. A paginated bundle was duly served which contained unsigned witness statements from several individuals. At the hearing, Mr Anyiam, for the appellant, informed me that he no longer relied on the evidence of the appellant's half-brother, [ROS], his half-sister, [JS], or his step-mother, [SS]. I have therefore disregarded those unsigned statements.

6. I also directed the service of Skeleton Arguments by both parties. Mr Anyiam duly served one, albeit out of time. Miss Cunha, for the respondent, apologised for failing to comply with my direction and relied solely on her oral submissions.

The issues

7. At the opening of the hearing, Mr Anyiam and Miss Cunha agreed as to the ambit of the appeal and the issues which fell to be determined. The principal matter, and predominantly one of fact, was whether under 298(i)(d) there were serious and compelling family or other considerations which would make the appellant's exclusion undesirable. The representatives agreed that were I to be satisfied that the appellant had made out his case on this issue, the matter should be determined in his favour and the appeal should be allowed. Were I not to be satisfied, then I should proceed to consider the case under Article 8 of the European Convention on Human Rights outside the Immigration Rules, adopting the staged approach commended in **Regina v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27** at paragraph 17, per Lord Bingham of Cornhill.

The law

8. There was broad consensus between Mr Anyiam and Miss Cunha as to the law to be applied. Both referred me to **Mundeba (s 55 and para 297(i)(f)), (sub-nom**

<u>Mundeba v Entry Clearance Officer, Nairobi)</u> [2013] UKUT 88 (IAC), which concerned the mirror image of paragraph 298, namely entry clearance as opposed to leave to remain. Miss Cunha placed particular reliance on paragraphs 34 and 37.

> 34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.
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> […]
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> 37. Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come into play where there are other aspects of a child's life that are serious and compelling - for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve inquiry as to whether:-
> (i) there is evidence of neglect or abuse;
> (ii) there are unmet needs that should be catered for;
> (iii) there are stable arrangements for the child's physical care.
> The assessment involves consideration as to whether the combination of circumstances sufficiently serious and compelling to require admission

Evidence

9. Mr Anyiam called the appellant and his father to give evidence. Each adopted their signed witness statement as their evidence-in-chief. There was some limited cross-examination from Ms Cunha and I asked each of them a few questions of my own for clarification. Mr Anyiam relied on a signed statement from the appellant's mother, who was not present to give evidence as she lives in Jamaica. The fact that her evidence was not tested in cross-examination is a matter I take into account when considering the weight which can be attached to it.

10. The appellant's evidence was to the effect that he cannot return to Jamaica as his mother is in a relationship with a partner, with whom she has a young daughter. He has subjected the appellant to physical and mental abuse, such that he cannot reasonably return to his mother's home. He says he cannot live independently due to fear of gang violence. He says he is well supported by his family in the United Kingdom and has been offered places for a degree course in business at the University of Leicester, Nottingham Trent University and De Montfort University commencing in September 2019. He says his fees and subsistence will be covered by his father. He has predicted grades of B, B, C for the A levels that he sat earlier this year, the results of which are pending.

11. The father confirmed this, estimating the cost for international student fees to be in the order of £12,000 per annum. He said he would also pay subsistence as the

appellant would have to live away from home. He conceded in questions from me that the appellant's sixth form schooling since arriving at the United Kingdom had been at taxpayers' expense, as had the appellant's occasional use of NHS facilities since he became an over-stayer on his visit visa.

12. The appellant and his father stated that the appellant had originally come to the United Kingdom for a holiday but he carried with him a sealed letter from his mother indicating that she could no longer cope with caring for the appellant. There are no other family members in Jamaica with whom the appellant can stay.

The respondent's case

13. Miss Cunha relied, almost exclusively, on the respondent's refusal letter dated 16 May 2018. The preponderance of the respondent's reasoning is directed to the question of sole responsibility. On the issue which I must now determine, the letter merely states:

> "Furthermore you have failed to provide evidence of serious and compelling family or other considerations which make exclusion of you from the United Kingdom undesirable."

14. Relying on paragraph 34 of **Mundeba** (above) Miss Cunha submits that the appellant has failed to meet the high threshold required for demonstrating serious and compelling family or other considerations under paragraph 298(i)(d). She says the evidence of abuse by the mother's partner is uncompelling, although she did not challenge the appellant's evidence on this matter in cross-examination.

15. She contends that the prospect of gang violence is pure conjecture, unsupported by any evidence. In any event, she submits that the appellant will not be returning to his family home but will be living independently as a university student. She states that his family life can continue with his mother and half-sister, something which has pertained for the majority of his life, whilst his father has largely been absent. She suggests that the appellant would be equally well served at the University of the West Indies in Kingston to which he would have applied had he stayed in Jamaica.

16. Miss Cunha further submits, placing reliance on **R (on the application of Agyarko *v* Secretary of State for the Home Department [2017] UKSC 11,** that there is nothing to prevent the appellant making a fresh application for a student visa once he has returned to Jamaica. She says that the appellant presents as a healthy and adaptable young man and, since he has now obtained his majority, the Tribunal should give no regard to the fact that he was under 18 when he made his application and remained so at the date of the refusal letter.

17. In relation to the alternative claim outside the Rules, Miss Cunha relies on the statutory public interest considerations, particularly the maintenance of immigration control. She submits that the appellant cannot rely on a family life

considerations established during a period when his immigration status in the United Kingdom was precarious.

The appellant's case

18. Much of Mr Anyiam's skeleton argument was directed to duty of the respondent, and by extension, this Tribunal to have regard to the welfare of children. He expressly cites section 55 of Borders, Citizenship and Immigration Act 2009, and refers me to the statutory guidance, *Every Child Matters* (2009), and to the provisions of Article 3 of the United Nations Convention on the Rights of the Child.

19. Mr Anyiam states I should treat the appellant as a minor since that was his status at the date of his application, and remained so at the date of the respondent's refusal letter. He submits that the appellant's best interests lie in his remaining in the United Kingdom, and that this should be a primary consideration. He refers me to **ZH (Tanzania) v Secretary of State for the Home Department** [2011] UKSC 4, and to Lord Kerr's observation at paragraph 46 that,

> "What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result"

20. The principal submission on the appellant's behalf is that he has satisfied the requirements of rule 298(i)(d) as elucidated in **Mundeba**. Mr Anyiam makes specific reference to the appellant's ill-treatment at the hands of his mother's partner, albeit he was unable to locate a confirmatory letter in this regard from the appellant's school in Jamaica which he believed had been before the First-tier Tribunal. He says that the appellant's welfare will be jeopardised were he to return to Jamaica. He would be liable to ill-treatment at his mother's home, and cannot live independently due to financial constraints and the gang culture prevalent in Jamaica. Student lodgings, though perfectly acceptable in term-time and funded by his father, do not provide year-round accommodation and for at least some of the time the appellant would be required to live within the hostile environment of his mother's home.

21. In relation to Article 8 outside the Immigration Rules, Mr Anyiam submits that there would be a significant interference with the appellant's family life were he to be returned to Jamaica. Whilst there may have been a breach of immigration control, and family life established when the appellant's status has been precarious, this is an instance where the sins of the father should not be visited on the son.

Discussion and disposal

22. Having regard to the totality of the evidence placed before me, I am narrowly persuaded that the requirements of paragraph 298(i)(d) have been made out, in that there are serious and compelling family or other considerations which would make the appellant's exclusion undesirable.

23. I am satisfied that the appellant was subject to some degree of abuse at the hands of his mother's partner (albeit not of the severity contended for by Mr Anyiam) and that there is a real risk that this may be repeated were the appellant to be returned to Jamaica. Notwithstanding Mr Aryiam's inability to identify any corroborative documentary evidence from the appellant's school in Jamaica, the appellant's basic narrative was not challenged in cross-examination by Miss Cunha and I consider the appellant to be a credible witness, who gave his testimony in a measured and truthful manner. There is corroboration for the appellant's account in the witness statement of his mother. Whilst I approach her evidence with caution, mindful that it was not subject to cross-examination, she is candid as to the culpable conduct of her partner. In the overall context of this case, I consider that I can safely accept it as inherently honest. I also accept the unchallenged evidence that there are no other family members living in Jamaica who might be in a position to accommodate the appellant.

24. The surrounding evidence points to the appellant being an industrious young man who has been welcomed into the extended family of his father and become assimilated into their lives and that of his schoolmates in the United Kingdom, where he has thrived. I consider that this case goes beyond a mere parental wish for their child to live and be educated in the United Kingdom. I agree with Miss Cunha that the prospect of gang violence is pure conjecture, and place no reliance on it. However the risk of physical or emotional harm at the hand of his mother's partner has been adequately demonstrated. Whilst that risk would be eliminated or reduced for so long as the appellant was living in student accommodation, the appellant has no reasonable access to accommodation during university vacations other than his previous home with his mother and half-sister and this, as I have found, would not be a safe environment for him.

25. I reject Miss Cunha's submission that I should disregard entirely the fact that the appellant was a minor at the time of his application and determine the appeal on the basis that he is now an adult. Achieving one's eighteenth birthday cannot be regarded as a bright line. The process of emotional maturity and social independence is gradual and tribunals must have regard to the fact that many young people, particularly those engaged in full-time tertiary education, remain dependent one or more parent for accommodation and for financial, emotional and practical support.

26. In my assessment of the evidence, the family considerations in this instance, including the appellant's welfare, are highly suggestive of past ill-treatment which is a strong indicator of future abuse. Whilst the appellant is now 18 years and 6 months old, he was a minor when the respondent determined his application, and it does not appear that these considerations featured in the reasons given for refusing leave to remain. The fact that the appellant is now an adult does not detract from this. Nor do I consider it appropriate to require the appellant to return to Jamaica and make a fresh application for a student visa.

27. Since I am satisfied that the requirements of paragraph 298(i)(d) are met, this appeal must be allowed under the Immigration Rules.

28. The foregoing conclusion is sufficient to be dispositive of this appeal and consideration of Article 8 outside the Immigration Rules is therefore otiose. However, since I heard full argument on the point, and in the event that these proceedings go further and I am found to have been wrong in my application of the Immigration Rules, I propose to set out what my findings would have been on this alternative basis. I do so in attenuated form.

29. Applying the **Razgar** approach in assessing the impact of Article 8, my conclusions are: (1) the proposed removal of the appellant would be an interference with the exercise of his right to respect for his family life. He is now well settled with his father, step-mother and half-siblings and has a social circle in his school and community, notwithstanding that the majority of life has been spent in Jamaica in the care of his mother; (2) this interference would have consequences of such gravity as potentially to engage the operation of Article 8; (3) the interference is in accordance with the law, and (4) necessary in a democratic society; but (5) in this instance, it is not proportionate to the legitimate public end sought to be achieved.

30. The best interests of the appellant (a minor at the time of his application) are that he remain in the United Kingdom with his father, step-mother and half-siblings as he embarks on his university education. This is a primary consideration, and one which is not readily dislodged. Whilst the appellant's family life has been largely established whilst his immigration status has been precarious, that was almost entirely the fault of his parents and should not be held against him under the statutory public interest considerations at section 117B of the Nationality, Immigration and Asylum Act 2002. Whilst I have already noted that the appellant's sixth form education was a burden on taxpayers, as was his occasional use of the National Health Service, the unchallenged evidence of the appellant's father was that he would be responsible for the appellant's university fees, accommodation and subsistence as the appellant does not qualify for a student loan. Thanks to his father, the appellant has a sufficient degree of financial independence. The appellant ably demonstrated before me his fluency in the English language and a level of mature self-confidence beyond his years. I do not envisage any potential difficulties in respect of his integration into society. This is an application which ought properly to have been granted by the respondent when the appellant was a minor, and it would be disproportionate to refuse it on the basis that he has subsequently obtained his majority.

31. In the circumstances, had I not been satisfied that the requirements of paragraph 298(i)(d) of the Immigration Rules were met, I would additionally have allowed this appeal under Article 8 of the European Convention on Human Rights outside the Rules.

Notice of Decision

(1) An error of law having been found, and the decision of the First-tier Tribunal set aside, it is remade allowing the appellant's appeal under paragraph 298(i)(d) of the Immigration Rules;

(2) No anonymity order is made.

Signed *Mark Hill* Date 1 August 2019

Deputy Upper Tribunal Judge Hill QC