Upper Tribunal
(Immigration and Asylum Chamber)

Appeal no: **HU/12859/2017**

THE IMMIGRATION ACTS

At **Field House**
on **08.05.2019**

Decision and Reasons Promulgated
on **21.05.2019**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Courtney [B]

appellant

and

Secretary of State for the Home Department

respondent

Representation:
For the appellant: *S Chelvan* (counsel instructed by JM Wilson, Perry Barr)
For the respondent: Mr Toby Lindsay

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Malcolm Parkes), sitting at Birmingham on 10 August 2018, to dismiss a human rights appeal against deportation by a citizen of Jamaica, born 1980. The

NOTE: *the anonymity direction made at first instance will continue, extending to the families, but not the appellant himself.*

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earlier history of the appeal proceedings appears in *Kiarie and Byndloss* [2017] UKSC 42.

2. That decision was based on a Home Office decision of 4 October 2014, following the deportation order signed on the 2nd, refusing the appellant's article 8 human rights claim, and certifying it under s. 94B of the Nationality, Immigration and Asylum Act 2002, so that he could only appeal from outside this country, and a supplementary decision letter to the same effect on 4 September 2015. Following the decision of the Supreme Court, a further decision letter was issued on 4 October 2017, revoking the previous ones, but once again refusing the appellant's human rights claim, but this time with an in-country right of appeal.

3. The hearing judge began his decision with a brief recital of the decisions before him, referring both to the 2015 and 2017 letters as 'supplementary' (to the original one from 2014). Mr Chelvan's first point (ground 1) was that this was wrong in principle, since the 2017 letter had revoked the earlier ones. I asked him to specify what relevant information it gave which was neglected by the judge: he was unable to do so, but took his stand on principle. Mr Lindsay pointed out that the significant change in the Home Office's position had been the withdrawal of the certificate, following the decision of the Supreme Court.

4. There is nothing whatever before me to show that the judge was unaware of that, or of anything relevant in the current state of affairs on the facts of the case, or the present legal position, and this ground is rejected. Ground 2 suggests that this appellant should be regarded as a person who has been lawfully resident in the UK for most of his life. Once again, he was born in 1980, and did not come here till 2002; the first-tier hearing was in 2018.

5. On the authorities (see for example *SC* (Jamaica) [2017] EWCA Civ 2112, at paragraphs 53 and 69), it is now quite clear that 'most of his life' does involve a simple calculation, on which this appellant could not succeed. It follows that ground 2 also fails.

6. Ground 3 challenges the judge's approach to the fact-finding exercise involved in deciding on the best interests of any children involved. Since in this case the judge found very clearly (see his paragraph 51) that it would be in these children's best interests for the appellant "… to remain in the UK to give support to their mothers and facilitate their meeting as an extended family member", this cannot be of any real significance, and this ground fails too.

7. As the judge went on to point out, this does not answer the question as to whether it would be unduly harsh for the appellant's children to remain in the UK without him, though of course it will be relevant to it. That is the point on which this appeal must turn, and the remaining grounds are about the judge's approach to it.

8. The first thing that has to be said about that, on grounds 4 and 5, is that, while at one time it seemed to be settled (see for example in *MM (Uganda)* [2016] EWCA Civ 617))

that the criminal and immigration history of the (main) appellant must be taken into account, it has now been conclusively established, in *KO (Nigeria)* [2018] UKSC 53, that this is not to be done. That decision of course came after the first-tier hearing in this case, and the judge could not have been expected to anticipate it; but the approach taken in it. still has to be followed.

9. In this case, the judge did take significant account of the appellant's criminal history, not the minor offences between 2010 and 2012, but his conviction for possession of class 'A' drugs with intent to supply in 2013, for which he was sentenced to three years' imprisonment. The sentencing judge had regarded his rôle as significant, though mitigated to an extent by his lack of knowledge of what specific drugs he was storing in his house. Judge Parkes understandably regarded the fact that he was storing class 'A' drugs there at all, while his children slept upstairs, as an aggravating feature of the case against him on deportation.

10. While the judge is criticized in the grounds for giving the appellant less than full credit for staying out of trouble since then, on the basis that he has been involved in the present litigation, that point, even if it were established, must fall away with the rule in *KO*. If the appellant's misconduct can no longer be taken into account on the question of whether his removal would be unduly harsh for his children, neither can his later reform, whether complete or partial.

11. On ground 6, the only relevance of the appellant's past conduct is as to any current effect on his children's welfare. Since the judge accepted that he had been out of trouble since 2013, whether with the incentive of these proceedings or not, this does not seem to arise, and ground 6 could not invalidate the judge's decision, subject to the point at grounds 4 and 5.

12. Mr Chelvan did not address me in any detail at all on grounds 7, 8, 9 or 10. Ground 7 mainly criticizes the judge for taking what is described as a 'moralistic' and 'ethnocentric' approach to the appellant's private life, where he has begotten children with three different women. Leaving aside entirely the question of what a number of people in the appellant's own community might think of that, this point is wholly immaterial, given that the judge nevertheless found it was in the children's best interests for him to be allowed to stay.

13. The only relevance of anything in these grounds is where the judge's findings might have affected his approach to the present interests of the children. Here the criticism turns on what he said at paragraphs 43 – 45:

> "43. Ordinarily it is in a child's best interests to live with both parents in a stable and caring environment. The Appellant is directly responsible for that not being possible for his children in this case. There are a number of ways in which the Appellant has not put the children's best interests as a primary consideration in his behaviour. The Appellant's criminal offending was not prevented by his parental responsibilities which increased in serious[*ness*] as time went by …

44. [*is about the point discussed at **9***].

45. The situation I have to assess is entirely of the Appellant's own making. In a number of different ways, pursuing a number of relationships (some simultaneously) and his criminal offending the Appellant has put his own interests first, relegating the needs of his partners and children. His obligations to his partners and children did not appear to cause him to reflect on how his actions might affect others and his description of how his wife's health affected him led him to commit the most serious of his offences rather than to focus on where his responsibilities lay."

14. Despite the criticism of those paragraphs at 7A – H, it is quite clear that they all relate to the history of how the appellant's present family situation came about. On the other hand, at 46 the judge accepts that he maintains a relationship with all his children, and unreservedly accepts that this is not a cynical ploy on his part. Equally at 48 he accepts that all the appellant's children see each other regularly, and enjoy it.

15. The suggestion at ground 8 that the children should have been separately represented is not one which was made at any previous stage of the proceedings, including by the independent social worker who reported on the appellant's side, and I cannot accept that it shows any material error of law on the part of the judge. It is also quite clear that, when he accepted at 47 that the appellant "… facilitates all the children having contact with each other at weekends …", he was referring back to the appellant's own evidence at 22 that they all came to stay with him, and his contention that they would not spend the time together if he were not there.

16. The judge's only qualification on that is to say that the loss of contact would not be inevitable if the mothers involved sought to co-operate for their children's sake. Clearly he recognizes that this is not particularly likely, in view of the findings he goes on to make at 48; but it needed to be said that the mothers did have their own responsibility for the children's happiness. That is enough to dispose of ground 8.

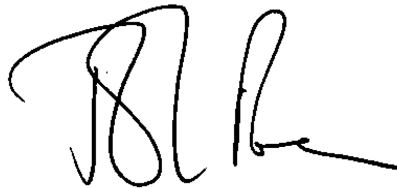
17. Ground 9 criticizes the judge's conclusions at 49 – 51; but the real complaint is about his finding at 49 that the families had coped while the appellant was in prison. No detailed reference was made, either in the grounds or in Mr Chelvan's submissions before me, which did no more than touch on this point, to the grounds for the independent social worker's conclusions, on which it is based. Whether the expression 'coped' or 'survived' is used, the judge had the facts of what happened while the appellant was in prison well in mind. He nevertheless found at 48 that the appellant's removal would cause the children distress, and they might return to bad behaviour which had happened while he was in prison. Equally at 50 he accepted that the appellant's removal to Jamaica would effectively sever any contact he had with the children, which of course his imprisonment here had not done. All this resulted in a positive finding at 51 that it would be in the children's best interests for him to be allowed to stay here.

18. In the end, all that was required was for the judge to give full weight to this finding, as he undoubtedly did; but without taking the appellant's past conduct against him, as now required by *KO*. The experienced judge knows best whether that past conduct was a decisive factor for him, or merely a significant one, and will be perfectly capable of re-deciding the case without taking account of it. As made clear in *RA* (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), the approach is as set out by Jackson LJ in *NA (Pakistan) & another* [2016] EWCA Civ 662.

19. A further hearing will give both parties an opportunity to present any views they may have on the point. Since this exercise will involve subtraction, rather than addition of a factor, I see no reason why any further evidence should be required. The appeal should be re-listed before Judge Parkes: while I have directed, as usual, that this hearing should be at Birmingham, the same advocates as before me may wish to appear at it, and they can apply to him for it to be heard in London.

Appeal allowed on past conduct point only

Further hearing in First-tier Tribunal before Judge Parkes at Birmingham



(a judge of the Upper Tribunal)
Date: 21.05.2019