



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/32833/2011

THE IMMIGRATION ACTS

Heard at Field House
On 4 December 2013

Determination Promulgated
On 6 January 2014

Before

MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE TAYLOR

Between

ALVIN BRISETT

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Heywood, Counsel, instructed by Lawrence Lupin Solicitors
For the Respondent: Miss A Everett, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an unusual case. It is to be hoped that it is unique although feared that it might not be. The appellant is now 54 years old. He is a citizen of Jamaica. He came

to the United Kingdom with his mother on 29 August 1973 when he was 13. She and he were granted indefinite leave to remain. He has, however, not spent his life in the United Kingdom usefully or lawfully.

2. He has numerous convictions, summarised by the First-tier Tribunal in one of the two determinations to which his circumstances have given rise in a decision promulgated on 9 January 2012 as follows: 4 offences against a person committed between 1986 and 1997, 18 offences of theft and kindred offences committed between 1976 and 2004, one offence of public order in 2004, 3 drug offences between 1979 and 2007, 2 offences involving fire arms, one of which was a shotgun and offensive weapons, in 1977 and 1997 and two miscellaneous offences as well as driving offences.
3. Of particular note, on 6 August 1993 he was convicted of robbery and sentenced to seven years' imprisonment. On 20 July 2004 for theft and threatening behaviour he was sentenced to twelve months' imprisonment. On 22 May 2007 for dangerous driving and possession of a Class A drug and failing to surrender to his bail he was sentenced to a twelve month community order. On 20 October 2009 for theft and common assault he was sentenced to a term of imprisonment of nine months plus four ninths consecutive, making a total sentence of thirteen months in all.
4. The facts were that he stole £15 from the back pocket of a Mr Plumb. When he attempted to restrain the appellant he ran off. He was chased by a member of the public, Mr Hudson. The appellant punched him to the head causing damage to his neck which at the date of the sentence was still being treated with physiotherapy. Because the events occurred in the sequence that they did the offence was not robbery but had they occurred in reverse order it would have been. For a man of his age to commit such an offence involving the infliction of quite significant violence on another individual was, from the point of view who are responsible for maintaining law and order in this country as well as immigration control, deeply dispiriting.
5. In a Determination and Reasons promulgated on 12 October 2010 the First-tier Tribunal described him on the basis of a concession made by his then representative as "a career criminal". In the light of that history it is unsurprising that steps were taken to deport him. What is surprising is that steps were not taken until comparatively recently. The obvious stage at which deportation action should have been taken was shortly before or immediately after the conclusion of his seven year sentence for robbery in 1993.
6. After his conviction in 2004 he was served with a decision to deport him against which he appealed. Before the appeal was heard the Secretary of State made a decision to take no further action and none was taken. None was taken, less surprisingly, following his conviction on 22 May 2007. Following his conviction on 20 October 2009 exactly two months later, on 10 December, notice of liability to deportation under Section 32 of the UK Borders Act 2007 was served. That decision was, however, withdrawn and on 18 March 2010 notice was served of the Secretary

of State's decision that it was conducive to the public good that he should be deported. He appealed against that decision to the First-tier Tribunal. On 12 October 2010 the First-tier Tribunal dismissed his appeal. The sole issue before that Tribunal was whether or not deportation would breach his right to respect for private and family life under Article 8 ECHR.

7. The First-tier Tribunal found that the presumption then stated in paragraph 364 of the Immigration Rules that deportation was in the public interest was not outweighed by the appellant's Article 8 rights. Those rights were founded on (1) his then 37 years' residence in the United Kingdom, (2) his relationship with his two adult sons and one grandchild. The First-tier Tribunal found that the appellant's relationship with his elder son was strained because he, the son, "is disgusted with the appellant's behaviour" and that his relationship with his grandchild was punctuated by periods of imprisonment and could in any event be sustained by Skype from Jamaica.
8. The First-tier Tribunal's conclusion was that the appellant's family life in the United Kingdom was "tenuous, erratic and superficial". It rejected his claim that he should be given a second chance because he had spurned the first given to him following his conviction in 2004. He applied for permission to appeal to the Upper Tribunal. Permission was refused finally on 18 February 2011. On 9 March 2011 when his appeal rights were exhausted the Secretary of State signed a deportation order. On 10 March the appellant applied to the Secretary of State for that order to be revoked. On 21 March 2011 she notified her decision to refuse to revoke the order and certified the claim as clearly unfounded. Removal directions were set for 24 March. On 26 March the appellant submitted grounds of challenge to that decision which relied irrelevantly on ZH (Tanzania) [2011] UKSC 45 and Pankina [2010] EWCA Civ 719 and two further appellate decisions of no conceivable relevance. On 30 March 2011 the Secretary of State refused to revoke the decision to certify the claim or to treat further representations as giving rise to a fresh claim under paragraph 353 of the Immigration Rules.
9. There was no challenge by judicial review to that decision. On 31 March on the way to the aeroplane by which he was to be removed from Gatwick the appellant claimed asylum on the basis that he was a homosexual and would be persecuted if returned to Jamaica. On 3 November 2011 the Secretary of State rejected that claim but treated it as an application to revoke the deportation order which she rejected but did not on this occasion certify.
10. The appellant exercised his right of appeal to the First-tier Tribunal. In a Determination and Reasons promulgated on 9 January 2012 the First-tier Tribunal robustly rejected the asylum claim noting that his claim to fear persecution in Jamaica on the ground of his homosexuality to have been made for the very first time when re-interviewed after making his asylum claim on 3 June 2011. The First-tier Tribunal rejected the evidence called in support of the appellant's claimed homosexuality as not credible.

11. Significantly it also rejected his claim that his family were aware of his homosexuality but had chosen not to attend the hearing to give evidence about it. It agreed with the Home Office Presenting Officer's submission that

"his family do not wish to lie to the Tribunal about the appellant's sexuality and have chosen not to support him in misleading or we find that it could be that the appellant has not informed them about his current appeal based on untruthful facts".

12. We have today admitted initially *de bene esse* but eventually without opposition from the Home Office Presenting Officer Miss Everett to whom we are grateful the evidence of Angela Lin, a volunteer who has befriended the appellant while he has been in immigration detention for some two and a half years following the conclusion of his criminal imprisonment. She has become persuaded by him that he is a homosexual. We have no doubt whatever about the truthfulness of her evidence and the genuineness of her belief but unlike the First-tier Tribunal she has not had to consider his own evidence and the evidence who it had found to be untruthful of a witness called for him and has perhaps not had in mind the full background which we have just summarised. We respect her view but do not accept it. We are satisfied that the First-tier Tribunal reached a conclusion on this issue to which it was entitled to come and which we find persuasive. In our view the asylum claim was what would have seemed to the appellant the last throw of the dice in an untruthful attempt to avoid the consequences of his own actions.
13. The First-tier Tribunal went on to consider the Article 8 claim. It devoted an extended passage to a re-statement of the substantive and procedural law governing it including a lengthy citation from Devaseelan [2002] UKIAT 00282. In its final paragraph it stated its finding that the claim based on family life was now weaker than that considered in [2010] because the family had not attended to support the appellant's appeal.
14. A conventional approach to decision-making might then have led the First-tier Tribunal to conclude that taking the first decision of the First-tier Tribunal as the starting point nothing further had occurred or been advanced to justify departing from its finding. If so, no legitimate ground of challenge on the basis of an error of law could have arisen to its reasoning. What however it did was to state the following.

"80. However given the case law as set above and the submissions of Miss Trendell that the appellant's major offence of robbery was committed some twenty years ago in 1993, we find, as a panel that we would not have come to the same decision in the previous panel. We find that previous decision is draconian given the length of time the appellant has been in the United Kingdom, the fact that the respondent specifically chose not to take deportation action against the appellant in 2004 and 2007 and his

offences since 1993, although serious have required community sentences, suspended sentences and relatively short custodial sentences.

81. We find that we are bound by the findings of the previous decision panel's made on 12 October 2010. The case of Devaseelan applies and we cannot go behind their findings. The First-tier Tribunal and the Upper Tribunal upheld their decision and found no error of law in their approach."

15. This gave rise to a ground of appeal to the Upper Tribunal that the First-tier Tribunal had misunderstood or misapplied Devaseelan. Instead of treating the first decision as a starting point it treated it as determinative. Permission to appeal was eventually given to the Upper Tribunal. Upper Tribunal Judge King, in a Determination and Reasons promulgated on 26 July 2010 held that although the First-tier Tribunals choice of language was unfortunate, the absence of any new fact meant that it had made no material error of law. The appellant sought permission to appeal from the Court of Appeal which was eventually granted. The parties then requested the Court of Appeal to allow the appeal by consent which on 10 October 2013 it did for reasons set out in a Statement of Reasons the heart of which is to be found in paragraph 7

"The appellant's grounds of appeal were that the First-tier Tribunal misdirected itself in law in considering the import of the guidance given in Devaseelan as interpreted in Jebah and Secretary of State for the Home Department [2004] EWCA Civ 804 to be that a previous decision made on 12 October 2010 was binding rather than regarding it as a starting point for its December 2011 assessment. The Upper Tribunal then erred by failing to find that the First-tier Tribunal had materially erred in law by regarding itself as being bound the previous decision of 12 October leaden it to dismiss the appeal before it."

16. The matter was accordingly remitted to this Tribunal for further consideration. This judgment is the product of that further consideration.
17. We have first of all to determine the approach which we should take to the appeal, erroneous statement of law made by the First-tier Tribunal on the second occasion. The approach which we adopted is as follows.
- (i) We recognise that the First-tier Tribunal on 9 January 2011 did not determine the fundamental Article 8 question it had to determine would interfere with the appellant's right to respect for his private and family life which would be affected by his deportation be justified as necessary in a democratic society for the prevention of disorder or crime or in shorthand or summary proportionate. What the First-tier Tribunal did as Judge King correctly recognised was to purport to decide an issues which it was no part of its function to decide would it have reached the same decision on the facts considered by the First-tier Tribunal.

- (ii) We must acknowledge the First-tier Tribunal's error of law in failing to adopt the correct approach.
 - (iii) We must identify the facts found by both Tribunals.
 - (iv) We must reach our own conclusion about the determinative issue based on those findings.
18. There is in reality now little dispute about the important facts in this case. The first important fact is that the appellant has been in the United Kingdom for 40 years. Even allowing for any discounted periods of imprisonment he has spent at least 30 years at liberty in the United Kingdom.
 19. Secondly, no Tribunal has found and the Secretary of State has not asserted that he retains any family or social ties in Jamaica. Today unlike the second hearing before the First-tier Tribunal his quite extensive wider family in the United Kingdom has attended to lend him mortal support. It is in our judgment self-evident that his family ties and private life all lie in the United Kingdom.
 20. Third, he has an appalling criminal record. The best that can be said about it, especially in the light of the evidence given by Miss Lin before us, is that he may at the age of 54 have reached the point to which even career criminals sometimes reach of putting crime behind him but that a hope and very far from being a certainty.
 21. He has in recent years a very poor immigration history. On the basis of the findings about his asylum claim and the fact which we have recited about his attempts to frustrate what would have been lawful removal he has taken every conceivable step including advancing a false case to frustrate lawful removal.
 22. And here the conclusions are tentative and based on the evidence of Miss Lin, he has since his release from immigration detention in January of this year and probably for the first time, complied strictly with the requirements imposed upon him by the terms of his bail and more important has not reoffended or given rise to the fear on the part of Miss Lin that he would reoffend. She has told us and we accept that although he is living in very straightened circumstances in an area in which his old criminal associates also live, he has not as far as she knows succumbed to easy temptation or crime to supplement his indigent circumstances. All that can be discerned from that is that there may now be grounds for hope but it is a factor that he is entitled now to pray in aid.
 23. Of all of the factors which we have summarised and taken into account and which are founded save as to Miss Lin's evidence upon the findings of earlier Tribunals, the most important is that he has spent all his adult life in the United Kingdom. We are satisfied that by virtue of that fact alone and the lack of ties to Jamaica that he has become a British problem not a Jamaica problem.

24. We turn then finally to a factor that was not present when the First-tier Tribunal last considered his case. Changes to the Immigration Rules were introduced with effect from 9 July 2012. Rule 399A now provides:

“This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK”

25. Paragraph 398B of the Rules identifies one of the conditions under which the automatic deportation provisions apply.

“The deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months.”

26. Although the deportation actions were not taken in his case under those Rules the fact that the Secretary of State has adopted them as her current policy is a relevant consideration.

27. Paragraph 399B provides:

“This paragraph applies where paragraph 399 or 399A applies limited leave may be granted for a period not exceeding 30 months.”

28. The provision makes it plain that the Secretary of State has a discretion hence the word “may” but what it does indicate is that in the case of someone in respect of whom the automatic deportation provisions are invoked, the Secretary of State may in circumstances such as those of this appellant instead of continuing to pursue action grant him short term limited leave to remain.

29. The issue in this case is easy to state but given the background that we have described not an easy decision to make. We are persuaded on balance, we emphasise on balance, that the Secretary of State should now in the light of all of the material to which we have referred accede to the suggestion that the deportation order should be revoked. We are considering the matter as of now as we are entitled to do because this is an in-country appeal, we decide that the Secretary of State's decision to refuse to revoke the deportation order should be overturned and accordingly in the circumstances which we sincerely hope will never arise again we allow this appeal.

30. We add as an afterthought and for the benefit of the appellant and I look at him directly in saying this, that if he were to commit a serious criminal offence again, by which I mean a crucial offence punishable with a sentence of imprisonment, and were he to be sentenced to imprisonment as a result of doing so, the Secretary of State will be free to resume action to secure his deportation to Jamaica. There comes a time even in the lengthy history of a man who has spent 40 years in the United Kingdom when enough is enough. You are as a result of our decision not today at that point but should you reoffend seriously again you will have reached it.

Signed

Date

Mr Justice Mitting