



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/01480/2014

**THE IMMIGRATION ACTS**

**Heard at City Tower  
On 30 June 2015**

**Decision & Reasons Promulgated  
On 23 July 2015**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS  
UPPER TRIBUNAL JUDGE HANSON  
DEPUTY UPPER TRIBUNAL JUDGE M<sup>C</sup>GINTY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**HR**

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer

For the Respondent: Mrs M Chaggar, Counsel, instructed by Khan & Co  
Solicitors

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent. Breach of this order can be punished as a contempt of court. We make this order because the main reasons for the First-tier Tribunal allowing the appeal concern the claimant's relationship with his daughter K who was born in 2004 and is now 11 years old. She is entitled to privacy.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant” against the decision of the Secretary of State that he had to be deported by reason of Section 32(5) of the UK Borders Act 2007. The decision was made on 10 July 2014.
3. We remind ourselves that it is not for us to decide at this stage if the claimant *should* be deported but to decide if the First-tier Tribunal erred in law in allowing the appeal.
4. We begin by looking carefully at the decision of the First-tier Tribunal.
5. This shows that the claimant is a citizen of Jamaica. He was born in May 1969 and so is now 46 years old. He arrived in the United Kingdom as a visitor in December 1999 when he was 30 years old and has remained there.
6. He had leave in different capacities until 30 June 2002. On 13 July 2002 he married a British citizen, ARO. He gave the Home Office confirmatory evidence of his marriage in December 2003 and in January 2004 applied, out of time, for further leave to remain as a husband of a person present and settled in the United Kingdom. That application was refused in September 2009.
7. His first child, K, a daughter, was born on 23 May 2004 to the claimant and ARO.
8. In February 2006 the claimant was charged with an offence of assault occasioning actual bodily harm. He did not attend court and no further action was taken on the allegation. We mention it because it appears in the papers but it is of little if any relevance now.
9. In July 2007 a warrant was issued relating to an offence of intending to supply Class A drugs. The claimant failed to attend the Magistrates’ Court in December 2007.
10. On 10 September 2009 his application for leave to remain as a settled person was refused.
11. On 21 September he was served with a form confirming his status as an overstayer and in December 2009 he was listed as an absconder after he failed to report to the Midlands Enforcement Unit in Solihull.
12. He came to the attention of the police in August 2010 and was arrested and taken to Wolverhampton Central Police Station.
13. In October 2010 he was convicted of two offences of possessing Class A drugs with intent to supply. The first related to heroin and the second to crack cocaine. On 25 October 2010 he was sentenced to 42 months imprisonment for each offence to run concurrently.

14. In January 2011 notice informing him of his liability for deportation and a questionnaire was served on the claimant at the prison where he was detained and, as a consequence of his response, in February 2011 a children's referral form was sent to the local authority social services to see if the claimant's daughter was known to them.
15. On 28 February 2011 social services notified the Secretary of State that they had been involved in the care and welfare of K since 2006 and she was at that time living with one AR at an address in their area.
16. On 24 January 2012 her foster parents, Mr and Mrs R, applied for a special guardianship order for the claimant's daughter, K. It seems that Mrs R was the claimant's maternal aunt.
17. On 9 May 2012 the appellant was due for conditional release from prison but was detained under immigration service powers. On 28 May 2012 he was granted bail subject to reporting conditions and he resided with Mr and Mrs R in the same home as his daughter K. On 18 December 2012 the local authority children's services advised that the claimant had applied to the Family Court for "custody" of his daughter K and they would not be opposing the application.
18. On 10 April 2013 Social Services confirmed that the guardianship application was due to be heard in May 2013 and on 14 June 2013 K went into the care of the appellant and his partner Ms V.
19. On 17 September 2013 the claimant's application for further leave to remain was refused. The decision was not appealable.
20. On 25 September 2013 a letter was received from Ms V confirming that she is in a "subsisting relationship" with the appellant. Ms V is a British citizen. The papers show that a son E was born in 2013. He is the child of the claimant and Ms V. He is not yet 2 years old.
21. On 27 November 2013 the Secretary of State received a letter from the claimant's solicitors, Khan & Co, enclosing a court residence order dated 28 August 2013 showing that K was to reside with the claimant.
22. The First-tier Tribunal Judge accepted that the claimant's marriage to ARO deteriorated as a consequence of ARO's drug addiction and when their daughter K was about 2 years old ARO left the claimant and their daughter, with the result that the claimant and his daughter were for a time homeless and living in shelters or even on the streets. It was against that background Mr and Mrs R offered help.
23. The First-tier Tribunal Judge was satisfied that the offences for which the appellant was sent to prison in October 2010 at the Crown Court were the same offences for which he had failed to appear before the magistrates in December 2007. It follows that the offences for which the claimant should be deported were committed more than 8 years ago. Clearly it is wholly to the claimant's discredit that the case took so long to get to Court and

clearly it is unremarkable that the claimant has not been convicted of any offences while he was in prison but he has avoided getting into further trouble for some time now.

24. The judge further accepted that the only time the claimant had been away from his daughter was when he was in prison between October 2010 and May 2012. During that time K was cared for by Mr and Mrs R.
25. The judge accepted that soon after the claimant had been released from prison on licence K's biological mother applied for a residence order even though neither the claimant nor his daughter had heard from ARO for many years.
26. On 28 August 2013 an order was made that K reside with her father, the claimant.
27. The claimant is now in a relationship with Ms V who is a British citizen. The judge accepted that they lived as a family unit with K and Ms V's child from an earlier relationship called P and that the appellant and Ms V had a child together, E, and that Ms V was pregnant with their second child.
28. At paragraph 16 of the determination the judge directed himself, correctly, that he had to consider paragraph 399 of HC 395 and ask himself if "it would be unduly harsh" for them to live in Jamaica and if it would be "unduly harsh" for them to remain in the United Kingdom without their father.
29. The judge then reminded himself that K was born in the United Kingdom, that she was then 10 years old and had never been to Jamaica, that she was well settled in school and was now in a stable environment.
30. The child E was then 17 months old and lived with his half-sister K and her half brother, P in a stable family environment. His mother was born in the United Kingdom and is a British citizen and has family ties there.
31. Both children are British citizens and clearly entitled to all the benefits and advantages that that citizenship brings. The judge noted the respondent's contention that "despite the fact that both children are British and that K is now aged 10 and settled in school that they could both go and live with their father and that it would be reasonable for them to relocate to Jamaica". The judge also noted from the proceedings in the Family Court that there is a residence order and that it was clear to him that K was unhappy being separated from her father when he was in prison and wanted to be reunited with him.
32. Ms V made it clear that she was unable to care for K on her own as a single parent.
33. Apparently it was K's wish that she maintained a close relationship with Mr and Mrs R and their children but she did not want to stay with them permanently.

34. Crucially at paragraph 17 of his Decision the judge accepted the claimant's evidence that he had been resident in the United Kingdom since 1999 and he no longer had any family living in Jamaica. The judge was further satisfied there was a close bond between the claimant and his daughter and that bond would not be replaced by Ms V and/or Mr and Mrs R caring for her without the claimant's presence.
35. The judge based this finding in part on an independent social worker's report.
36. The judge then said:

"In my assessment, therefore, it would be unduly harsh to expect K to relocate with her father to Jamaica or for her to remain here without her father".
37. With regard to the child E the judge accepted that he needed both parents and that Ms V should not be expected to care for E on her own. The judge accepted evidence that the child P had contact with his natural father from time to time although the claimant has become close to him. The judge found that it would be "unduly harsh" for E to live in Jamaica. The judge described E as a British citizen, like his mother, born and brought up in the United Kingdom with no ties of any kind to Jamaica. The judge came to the conclusion that it would be "unduly harsh" for E to remain in the UK without his father. The judge said the:

"... [claimant] is clearly part of that family unit and takes an active part in their care and upbringing".
38. At paragraph 19 of the determination the judge, like the respondent, accepted, that the claimant and Ms V enjoy a "genuine and subsisting relationship". The judge noted that Ms V is a British citizen who was born and raised in the United Kingdom and is without family ties in Jamaica. The judge accepted that the claimant's relationship with Ms V was formed at a time when the claimant was in the United Kingdom unlawfully as an overstayer and therefore when his immigration status was precarious. However he concluded that it would be:

"... unduly harsh for Ms V to live in the country to which the [claimant] is to be deported on the basis that I find that there are compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and that it would be unduly harsh for Ms V to remain in the UK without the [claimant] who is due to be deported."
39. At paragraph 20 of the Decision the judge clearly accepted the claimant's evidence that he had no family ties in Jamaica. The judge accepted that any relatives he had in Jamaica when he left there had now established themselves in the United States of America.
40. It was the claimant's case that if he was deported he would have to live on the streets.

41. The judge found that there would be “very significant difficulties” for the claimant’s partner in Jamaica. She is a British citizen and has always lived in the United Kingdom and had never been to Jamaica. At the time of writing she was pregnant. The judge said:

“I do not consider that it would be reasonable for the [claimant] and his partner together with all the children to relocate to Jamaica in the circumstances of this particular case. Equally I find that it would be unduly harsh for Ms V to remain in the UK without the [claimant] who is to be deported. If he were to be deported, Ms V would be left with K, E, P and the child that she is now expecting and to raise them all on her own.”
42. The judge then concluded at paragraph 21 of his determination that he did not consider it “reasonable” for Ms V to relocate to Jamaica with all of her children. He found that the requirements of paragraph 399 are met.
43. At paragraph 22 of his decision the judge indicated that if he was wrong in his finding about the requirements of paragraph 399 being satisfied he found exceptional circumstances in the case so that public interest in deporting the appellant because of his bad behaviour were outweighed by the need to respect the claimant’s private and family life.
44. The judge noted the “very serious offences” which were committed by the [claimant] and the time he had spent in prison as a consequence.
45. The judge also noted how the claimant had been reunited with his daughter after serving a custodial sentence and that he had kept out of trouble for some time before he heard the appeal. The judge noted that the claimant had completed his probation satisfactorily and was thought to pose a “low risk of serious harm to general members of the public” and that he had undertaken such courses as he could in prison.
46. The judge referred to the “severe impact upon his family unit” in the event of his being deported and made reference to the unborn child.
47. The judge also allowed the appeal on human rights grounds as well as under the Immigration Rules.
48. The Secretary of State’s grounds extend to four points. Three of them are described as misdirections of law by the Tribunal and the fourth as a failure by the Tribunal to give adequate reasons for a material finding.
49. The first alleged misdirection of law alleges a failure to follow the principle identified in **MA (prove destitution) Jamaica [2005] UKIAT 13** which, according to the grounds, obliged the Tribunal to give “no weight to the [claimant’s] allegation of affected destitution upon return”.
50. The failure to give an adequate reason for material findings is a variation of the same point and it contends that the factors identified by the judge “are not capable, separately or cumulatively, of amounting to adequately clear evidence of insurmountable difficulties or serious hardship”.

51. The grounds then contend it is a misdirection of law to allow the appeal under Article 8 of the European Convention on Human Rights because inadequate weight was given to the public interest in deportation of foreign criminals and finally it was described as a “material misdirection of law” to give weight to the claimant’s relationship with his partner formed when he was in the United Kingdom unlawfully.
52. In summary, Mr Smart submitted that the finding that the claimant would be living on the streets in Jamaica was not sustainable. The claimant had made no effort to explain why that would be the best he could do.
53. The judge had not looked properly at the insurmountable obstacle test in EX.2 when reaching his conclusions that it would be unduly harsh.
54. The appeal should not have been allowed outside the Rules, at least not for the reasons given. There was no indication of the extreme public interest in removing someone such as the claimant and clearly far too much weight was given to a relationship established when the claimant was in the United Kingdom without permission.
55. As well as hearing from Mrs Chaggar we had a Rule 24 reply drawn by Miss Rutherford of Counsel who represented in the First-tier Tribunal. We have considered all of these things.
56. We begin by noting the Secretary of State’s reliance on the decision **MA (prove destitution) Jamaica CG [2005] UKIAT 00013**. That was decided in January 2005 which, in the fast moving world of immigration appeals, gives it an almost antediluvian quality. It is therefore a little depressing to realise that it is still relevant. The point that we were making there was that before a witness could be taken seriously when she said that she would be living in destitution in the event of her return to her country of nationality she should lay a proper evidential foundation for that rather than simply assert how difficult it would be. For example in **MA** the appellant relied on her active involvement in a Church and Church based activities to support her claim to stay in the United Kingdom, but there are many Churches in Jamaica and Church membership would be a natural starting point for a person with Church connections in the United Kingdom who had to establish herself in Jamaica. If there was some reason why the Church could not be used to help the appellant ease herself into Jamaican society then they needed to be explained fully. Similarly in that case the appellant owned some land. It did not appear to be particularly valuable land but the appellant had not explained its worth. What the Tribunal was doing in **MA** was cautioning people against unsubstantiated assertions about their wealth or lack of it in the event of return. It is difficult to see the extent to which **MA** is intended to be binding. It has been designated “CG” but efforts to proscribe in every case that certain things have to be proven in a particular way are not generally a recipe for just decision making.

57. Nevertheless there are transferable observations here. We are not told, for example, if the claimant has accumulated any capital during his stay in the United Kingdom, if he has any trades that would make him employable in Jamaica or if he has any contacts outside the family which could conceivably assist him.
58. After considerable hesitation we are persuaded that the First-tier Tribunal was wrong as a matter of law to conclude so easily that the claimant would be living on the streets in the event of return. The claim does not appear to be supported by more than bare assertions. There were avenues of enquiry that were not explored and this, we find, make the finding unsound.
59. We do consider this to be a point of some importance. There are probably very few countries in the world where life is agreeable for people with no contacts or means of support and in poor countries without a system of state support comparable to that to be found in Western Europe life can be extremely bleak. However, there are many countries in the world where some people are very poor but those at the affluent end of society have little about which to complain. A person who is being returned by way of deportation should not be assumed to be in any category but should accept the responsibility of proving rather than merely asserting how he would establish himself.
60. We accept as well that the relationship with the qualifying partner and the private life has been given weight that is not consistent with the statutory obligation to give it "little weight". We note the contention in Ms Rutherford's submission that there should be some weight. Here it has been given sufficient weight, at least on one reading of the determination, to outweigh the public interest in deporting a foreign criminal. We do not think it is right. It is certainly not explained sufficiently.
61. However there are three children who had to be considered here. The claimant has established a new family. We accept that one of the children in that family is a child of another man who he sees from time to time. Notwithstanding all that we have said above about different degrees of affluence existing in Jamaica and other societies, it would be extraordinary if it is in the best interests of any of these children to leave the country of which they are nationals for an uncertain life in Jamaica. It would be particularly unacceptable for the child who has a father in the United Kingdom to be removed. It is the long experience of the courts from having to deal with the consequences of many failed relationships that some contact with both parents is generally desirable for the long term happiness of children. It seems to us quite clear that there really is no mileage in any suggestion that P should be removed from the United Kingdom where he has contact with his father. A practical consequence of this finding is that P's mother cannot be expected to remove and, we find, it follows that none of the children can be expected to remove.




62. The child E is small. He has not established any significant private and family life outside the home. Even if removal is not in his best interests, provided that his mother went with him, we incline to the view that he could be expected to remove although we would have preferred to have seen evidence about his likely living conditions in Jamaica. The slender evidence before us suggests that they would be hard at least initially. It is reasonable to assume that at least for a time the claimant would have no work and things would be difficult.
63. However the rights of each of the children have to be considered.
64. We note the order of District Judge Hearne on 28 August 2013 permitting the claimant to disclose to the Secretary of State the reports in the case before the family courts. Significantly the residence order was made to the claimant and Ms V. The court must have been satisfied that it was in the best interests of K to live with her father and her step mother. The reports disclosed by the Secretary of State clearly show that K's aunt and uncle who cared for her when her father was in custody are worthy people who have played an important part in her life but there really can be no doubt that the best interests of K are to remain with her father and her father's present partner and her little brother, her step brother and the other child who has probably by been born by now to her father and step mother.
65. We do remind ourselves of the very unpromising start to life that K has experienced. Her mother walked out on her. No doubt her mother had her reasons. It appears that she was a drug addict and people in that unhappy state do not always behave sensibly. Nevertheless that must have been a great jolt for K. Similarly her father's imprisonment hit her hard. Her father went to prison because he chose to commit serious offences. No one is suggesting that he is entitled to any sympathy on that account but his absence hurt the child. Happily she was looked after by relatives but has now gone back into a family with her father and her father's partner. The idea of being removed again, this time to Jamaica, is very concerning. It is very hard to think that that in the best interests of society. It is certainly not in the best interests of the child. This was perfectly obvious to the First-tier Tribunal Judge and is the reason for the decision being made in the way that it was, even if it was not necessarily expressed entirely aptly.
66. We remind ourselves of the Rules. Paragraph 398 applies when human rights are raised in the case of a deportation following a sentence of less than four years' imprisonment. Paragraph 399 applies where paragraph 398(e) applies [it does in this case] and there is a genuine and subsisting parent relationship with a child under 18 who is in the UK and is a British citizen [these conditions are satisfied here] and it would be unduly harsh for the child to live in Jamaica and unduly harsh for the child to remain in the UK without the person who is to be deported. The answer to both of these requirements is very positively in the affirmative.

67. It is not really a question of lifestyle and conditions in Jamaica although we accept the findings of the Tribunal that it would at least initially be a very lonely life for the claimant. The point is that it would be breaking up a family in the case of a young person whose family has already been broken. We also note the claimant's daughter's age. It really is not the time to remove her from a mother figure.
68. It follows that although we accept the First-tier Tribunal has made some findings that it ought not to have made and it has not always applied the law correctly, in the bit that really matters, which is the operation of paragraphs 398 and 399 of HC 395 in the case of a child K, the law has been applied correctly and a rational decision reached that is open to the Tribunal.
69. It follows that although we find some points have been decided incorrectly the errors are not material. Proper reasons have been given for allowing the appeal in accordance with the Rules and that is all that matters.

Decision

70. The Secretary of State's appeal against the decision of the First-tier Tribunal is dismissed.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal



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Dated 23 July 2015