Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13452/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decisions and Reasons Promulgated**
On 18th June 2015 and 22nd July 2015	**On 14th August 2015**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

MARVIN OMAR HARVEY

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. K. Tait, legal representative, Camden Community Law Centre
For the Respondent: Ms J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Appellant, who was born on 19th March 1975, is a citizen of Jamaica. He entered the United Kingdom illegally on 7th January 2000. He married Patricia Doreen Lewis on 27th September 2003 and on 2nd May 2004 he applied for leave to remain as her husband. His application was refused on 7th January 2009 but he appealed and his appeal was allowed by Immigration Judge Stanford on 7th April 2009 on Article 8 grounds. On 17th February 2010 the Respondent granted him discretionary leave to remain until 17th February 2013. He applied to vary his discretionary leave to remain on 11th February 2013.

2. His application was refused on 28th February 2014 on the basis that on 2nd July 2003 he had been convicted on three counts of possessing a controlled drug with intent to supply and given three concurrent sentences of 12 months imprisonment and that on 24th March 2011 he had been convicted of possessing a controlled drug and sentenced to a fine or one day in prison. As a consequence, the Respondent said that she was satisfied that it would be undesirable for him to remain in the United Kingdom and found that he did not meet the suitability requirements contained in Appendix FM of the Immigration Rules for leave to remain as a partner. She also found that he was not entitled to leave to remain under paragraph 276ADE of the Immigration Rules and that his removal would not breach Article 8 of the European Convention on Human Rights.

3. His appeal against this decision was dismissed by First-tier Tribunal Judge Khan in a determination and reasons promulgated on 13th November 2014. Permission to appeal against this decision was granted by First-tier Tribunal Judge De Haney on 12th January 2015 and on 24th April 2015 Upper Tribunal Judge Latter and myself found that First-tier Tribunal Judge Khan's determination and reasons had contained errors of law, that it should be set aside in its entirety and that it should be heard *de novo* by the Upper Tribunal.

4. The *de novo* appeal came before me on 18th June 2015. I subsequently gave directions in order for the Appellant's son's mother to attend to give oral evidence and for further evidence to be obtained from his son's school. There was then a further hearing on 22nd July 2015.

Hearings

5. The Appellant and his wife gave extensive oral evidence at the hearing on 18th June 2015. The Appellant's son's mother attended the hearing on 22nd July 2015 and gave oral evidence. The Appellant's son's mother had not attended the first appeal hearing but confirmed at the second hearing that she was recovering from an operation to her foot on that day. The Appellant also produced a further letter from his son's school, dated 15th July 2015.

6. The Respondent accepted that the Appellant was in a genuine and subsisting marriage with his wife and that she was a British citizen, who was present and settled in the United Kingdom. However, in order to qualify for leave to remain under Section R-LTRP of Appendix FM of the Immigration Rules, the Appellant had to meet the suitability requirements of Section S-LTR of Appendix FM. In particular, paragraph S-LTR.1.1. states that an applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7 apply. Section S-LTR.1.4 also says that "the presence of the applicant in the UK is not conducive to the public good because they have been convicted of an offence for which they have been sentenced to imprisonment for less than 4 years but at least 12 months".

7. It was the Appellant's case that he did not understand that he had been convicted of any offences in 2003, as he had been held on remand and that at the hearing he was simply released, having been asked whether he wanted to do community service or have time served taken into account. Similarly he said that he did not

understand that he had been convicted on 24th March 2011, as the Judge had said that he should not have been brought to court and was released after spending the previous night in a police cell. However, on 17th June 2015 the Respondent provided the Upper Tribunal with a copy of the Appellant's PNC Record. This confirmed that on 24th December 2002 he pleaded guilty and was convicted of possessing a Class B drug, namely cannabis, on 19th November 2002 and fined £30. It also showed that on 2nd July 2003 he pleaded guilty and was convicted of a further offence of possessing a Class B drug, an offence of possessing a Class A drug, namely cocaine, with intent to supply and an offence of possessing a Class A drug, namely heroin with intent to supply. These offences were also said to have taken place on 19th November 2002. The record also showed that he was given sentences of 12 months imprisonment to run concurrently for these offences. As this is a record of proceedings in another court, I cannot go behind the evidence contained in it and find on a balance of probabilities that he was convicted and sentenced to 12 months imprisonment.

8. The Appellant continues to assert that he was not convicted of possession with intent to supply and his legal representative asserted at the first hearing that a 12 month sentence was not commensurate with the sentencing guidelines for such offences. However, again I am not able to go behind the evidence provided in the PNC record, which derives from criminal proceedings which took place at Middlesex Guildhall Crown Court. As a consequence, taking the evidence of the Appellant's convictions into account, I find that the Respondent was correct to find that the Appellant did not meet the suitability requirements contained in Section S-LTR.1.4. of Appendix FM to the Immigration Rules.

9. The Respondent also asserted that the Appellant could not meet the suitability requirement contained in paragraph S-LTR.1.5. as he was a persistent offender. However, the Appellant's first offences were committed on 19th November 2002 and there is no record of him re-offending until 24th March 2011 when he was sentenced to one day in prison. Therefore, I find that paragraph S-LTR.1.5. does not apply to the facts of the Appellant's case.

10. In addition, the Respondent asserted that the Appellant's application was subject to a mandatory refusal under paragraph 322(1A) because he had made false representations or submitted false information (whether or not material to the application and whether or not to the applicant's knowledge) or material facts had not been disclosed, in relation to the application. The Appellant answered "No" to question 6.15 on his initial application for leave to remain as his wife's dependent, dated 2nd May 2004, even though he was asked "have you received a prison sentence in the UK or elsewhere?".

11. It was also the Appellant's case that when he applied for leave to remain in 2013 he did not mention that he had been in prison as he had not understood that he had been convicted, as opposed to being placed on remand. However, in his oral evidence he confirmed that he had been represented by a barrister in the criminal court and that he had explained the nature of the proceedings to him. I have also noted that he filled in his most recent application for leave only six days after his most recent conviction.

12. I have also taken into account the fact that in his application form he denied every having used an alias but in oral evidence admitted that he had used an alias when arrested and subsequently convicted in 2002 and 2003. As a consequence, I find that paragraph 322(1A) also served to deprive him of a right to leave to remain under the Immigration Rules.

13. Nevertheless the Appellant also relied on his rights under Article 8 of the European Convention on Human Rights. The need for two stage approach whereby Article 8 of the European Convention on Human Rights is considered if an appellant is not entitled to leave under the Immigration Rules is now well-established. (See, for example, the cases of *R (on the application of Onker Singh Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin) and *Iftikhar Ahmed v Secretary of State for the Home Department* [2014] EWHC 300 (Admin) and *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74.) Therefore, having found that the Appellant was not entitled to leave to remain under the Immigration Rules, I have moved on to consider whether these Rules have fully addressed any family or private life the Appellant may be enjoying in the United Kingdom and whether there are compelling circumstances not sufficiently recognised under the Rules to require the grant of leave to remain outside the Rules. When doing so I have reminded myself of the decision in *Beoku-Betts v Secretary of State for the Home Department* [20078 UKHL 39 and the need to take into account the effect of his removal on the family life rights of other family members with permission to remain in the United Kingdom.

14. I have also noted that at paragraph 135 of *The Queen on the application of MM & Others v Secretary of State for the Home Department* [2014] EWCA Civ 985 the Court of Appeal held that where the Immigration Rules do not contain a complete code for the application of Article 8 of the European Convention on Human Rights then the proportionality test in Article 8(2) will be more at large albeit guided by the *Huang* tests and UK and Strasbourg case law.

15. In addition I have reminded myself of paragraph 17 of *R v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 72 where the House of Lords found that, when considering Article 8 of the ECHR, a decision maker should consider:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private (or as the case may be) family life?
    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
    (3) If so, is such interference in accordance with the law?
    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

16. The Appellant has been living with his wife, who is a British citizen, since 2001 and continues to do so. The Respondent accepts that they have a genuine and subsisting relationship with each other.

17. The Appellant also has a son, who was born in 2010, after the Appellant had an affair with his son's mother. The Appellant's son is a British citizen. The Appellant is no longer in a relationship with his son's mother but he had regular contact with his son since his birth. The Appellant's son's mother confirmed this in her written statement and there were six photographs in the Appellant's supplementary bundle showing him with his son when he was a small baby. There were also further photographs of his son as a toddler and as he was growing up and he is with his father in three of them.)

18. In her oral evidence, the Appellant's son's mother explained that prior to her operation the Appellant would take her son to nursery, school or other places if she was not able to do so and that he was named as his next of kin at school. She also explained that he cooked for them when necessary but was not too good at cleaning. In addition, he explained that in reception class her son had been aggressive and, for example, had told his teacher that he would run her over in his sports car until the Appellant intervened and started to take him to school. In relation to the amount of time the Appellant spent with his son, I note that his son's mother made it clear that she could call the Appellant any time that she needed help and that he was not his babysitter but his father. Taking this and the totality of the evidence into account, I find that the Appellant is enjoying a family life with his son even though they do not cohabit.

19. As a consequence, I find that the Appellant's removal will potentially breach the Appellant's right to continue a family life with his wife and son and that this interference will be of such gravity to engage Article 8(1) for the purposes of the first two sub-graphs of paragraph 17 of *Razgar.*

20. In relation to sub-paragraph (3) of *Razgar* I have taken into account the fact that the Appellant is not entitled to leave to remain in the United Kingdom under the Immigration Rules in order to continue to enjoy his family life here and, therefore, his removal would be lawful under these Rules. I have also noted that for the purposes of sub-paragraph (4) European case law and Section 117B of the Nationality, Immigration and Asylum Act 2002 the maintenance of effective immigration control is in the public interest.

21. For the purposes of sub-paragraph (5) of *Razgar* and the proportionality of any removal, I have taken into account the serious nature of any conviction for a drug offence and particularly ones which involved the possession of cocaine and heroin with intent to supply, even if the sentence was relatively short. I have also taken into account the fact that the Appellant continued to deny possession with intent to supply in his oral evidence and did not explicitly recognise the possible adverse consequences of his offences.

22. The Appellant also sought to minimise his use of the alias of Dennis Hayden in 2003 and said in his oral evidence that he only used this name once when he was arrested by the police in 2002. However, the PNC record indicates that he used this name throughout the proceedings in 2002 and 2003.

23. In relation to the Appellant's relationship with his wife, I have taken into account the fact that they have been married and living together in the United Kingdom since 2003. The Appellant's wife is also a qualifying partner for the purposes of Section 117D, as she is a British citizen. However, Section 117B(4) of the Nationality, Immigration and Asylum Act 2002 states that little weight should be given to a relationship established at a time when a person is in the United Kingdom unlawfully. The Appellant entered the United Kingdom illegally on 7th January 2000 and did not seek to regularise his immigration status at that time and was in the United Kingdom illegally when he met and married his wife. He did apply for leave to remain as her partner on 2nd May 2004 but was not granted discretionary leave to remain for this purpose until 17th February 2010. Since that time he has had discretionary leave to remain here as a partner.

24. When considering the public interest in the potential removal of the Appellant for the purposes of Section 117B(2), I have taken into account the fact that the Appellant is an English speaker and is, therefore, likely to be less of a burden on the taxpayer and will be better able to integrate into society. However, I note that this cannot be a determinative factor.

25. Section 117B(3) also states that it is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that the Appellant is financially independent because he will be less of a burden on the taxpayer and will be better able to integrate into society. The Respondent has not asserted that the Appellant has been relying on benefits to which he is not entitled. But in oral evidence both he and his wife confirmed that they were not working and had not been working for many years. His wife explained that they were in part support by members of her family.

26. Furthermore, the Appellant's wife's son is now 25 years old and is no longer living with her and dependent upon her. She said that she has regular contact with him and her grand-daughter but there is nothing to indicate that her grand-daughter's parents could not adequately parent her if the Appellant's wife was living with him in Jamaica. She asserted that she could not move to Jamaica as she was settled here and her family were here but in *The Queen on the application of Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440 the Court of Appeal held that being a British citizen, who had lived here all his life and had a job here did not give rise to an insurmountable obstacle to moving with a partner to live abroad. This is not necessarily the determinative test in assessing their Article 8 rights but as the Appellant's immigration status in the United Kingdom has been precarious it is one to which I must give significant weight.

27. It was also the Appellant's wife's oral evidence that the Appellant's mother and sister were still living in Jamaica and that they were in regular contact with them. When asked about their situation, the Appellant's wife replied that it was "generally good". The Appellant had also said that he had to leave Jamaica because he feared for his life but when asked why he had not claimed asylum he just said that he had not understood how to do so and has not since made any such application. Taking this and the totality of the evidence into account I find that it would not be a disproportionate breach of the Appellant's family life with his wife for him to be removed from the United Kingdom.

28. However, I must also consider the family life which the Appellant enjoys with his son and when doing so take into account that his welfare should be a primary consideration in any proportionality assessment. It is very clear from the evidence that his son enjoys a very close relationship with him and that he is used to his father seeing him and taking him to school on a very regular basis. It is also clear that his mother may struggle emotionally if the Appellant were not there to assist with his son. Therefore, I find that it would not be in his son's best interests to be separated from his father.

29. I remind myself of the findings I made above in relation to other sub-sections of Section 117B of the Nationality, Immigration and Asylum Act 2002 but note that the Appellant's son is a British citizen and that Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 states that where a person is not liable to deportation, the public interest does not require his removal if he can show that he is in a genuine and subsisting parental relationship with a qualifying child and it is not reasonable to expect the child to leave the United Kingdom.

30. The Appellant has committed offences in the United Kingdom but the letters, dated 30th January 2014 and 27th March 2014, confirm that having taken his convictions into account the Criminal Casework Directorate decided not to deport the Appellant to Jamaica in all the circumstances of his case. The questionnaire previously submitted to the Directorate had disclosed that the Appellant had a young British son in the United Kingdom and also that he had a British wife here and that she was not the mother of his son.

31. The Appellant now relies on the fact that he is named on his son's birth certificate. I accept that he was only added to his birth certificate on 1st May 2015 and that this was five years after his actual date of birth. In her witness statement his son's mother said that the Appellant had not come with her to register the birth in 2010 as he was busy but she also said that they had always intended to amend the birth certificate but delayed and never got round to it.

32. She also gave evidence at the second hearing and explained that the Appellant likes to drag his feet about taking action and she had to keep reminding him. It was also clear that it was her and not the Appellant who was more motivated in getting his name on the birth certificate. She candidly explained that she did not have anyone named as her father on her own birth certificate and was very keen that her son would have a father on his. Therefore, it would appear that the Appellant had not rushed to get his name on his son's birth certificate as a device to obtain leave to remain here.

33. In her recent statement, the Appellant's son's mother also said that the Appellant has never neglected his son and that he is a supportive father, who is involved in every aspect of his life and welfare. In her oral evidence, she was more expansive and said that she and the Appellant were a "good team" who worked together for her son's benefit. She later said that the Appellant was the first person she would call if her son hurt himself. I have also taken into account the fact that in a letter written to the Criminal Casework Directorate, dated 16th October 2013, the Appellant asserted that he saw his son most weekends and that as he got older

their relationship became stronger. He also said that he took him to the park and swimming and that they played football together.

34. In addition, there was also a letter from [ ] School, dated 9th June 2015, that confirms that it was aware the Appellant is his son's father. There was also a second letter, dated 15th July 2015, which confirmed that the Appellant regularly brought his son to school and also collected him from school, attended parent/teacher consultations and accompanied his son on class trips. Taking all of this evidence into account I find on a balance of probabilities that the Appellant does have a genuine and subsisting relationship with his son in the United Kingdom.

35. I have, therefore, considered whether it would be reasonable for his son to leave the United Kingdom and return to Jamaica with him. When doing so I have taken into account the fact that the Appellant is not in a relationship with his son's mother and is in a genuine and subsisting relationship with his wife to whom he has been married since 2003.

36. In addition, his son's mother was born and brought up here and in oral evidence she indicated that she had a large family here and no connection with Jamaica. She also made it very clear in her oral evidence that she was very afraid of living in an area where violence was prevalent and for that reason did not even like living in Queens Park in London and would certainly not risk taking her son to live in Jamaica. It is also clear from her evidence that even though the Appellant plays a significant part in his son's life, he lives with his mother and she is his main carer. Therefore, there was no realistic possibility of him travelling to Jamaica without his mother.

37. In addition, the Appellant does not have a profession or trade or much work experience and therefore it is not reasonable to expect that he would be able to support his son and his mother, even if she were to consent to take her son there. In addition, there was nothing to suggest that the Appellant's son's mother would be able to enter and remain in Jamaica or obtain any employment there in order to support her son herself.

38. As a consequence I find on a balance of probabilities that it would not be reasonable for the Appellant's son live in Jamaica with the Appellant and that, therefore, if the Appellant were to be removed to Jamaica, this would amount to a disproportionate breach of both of their family life rights as protected by Article 8 of the European Convention on Human Rights. I also note that the Appellant and his son's mother are not in a financial position to even facilitate visits to Jamaica and, given his son's age, any attempt to maintain a family life by electronic means would be very difficult.

39. As a consequence, I find that the Appellant's removal to Jamaica would amount to a disproportionate breach of the family life which he enjoys with his son.

Conclusion

1. The Appellant's *de novo* appeal is allowed.

Date 12th August 2015

Upper Tribunal Judge Finch