



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02381/2017

THE IMMIGRATION ACTS

Heard at: Manchester
On: 8th February 2018

Decision & Reasons Promulgated
On 13th February 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

CLM
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: -

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Jamaica born in 1967. He appeals with permission¹ against the decision of the First-tier Tribunal (Judge Lea) to dismiss his appeal against decisions to refuse him international protection and to refuse

¹ Permission was granted, on limited grounds, by First-tier Tribunal Judge Froom on the 21st August 2017

to grant him leave to remain on human rights grounds. The Respondent made those decisions in response to representations from the Appellant about why he should not be deported.

Anonymity

2. The Appellant is a foreign criminal and as such there is no reason why he should benefit from an order protecting his identity. This case however turns on the presence in the United Kingdom of the Appellant's three British children. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I am concerned that identification of the Appellant could lead to identification of his children and this would be contrary to their best interests. I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Background and Matters in Issue

3. The pertinent chronology is as follows:

1997	The Appellant claims that he was refused entry on arrival but he was landed and granted temporary admission for one day. He failed to report to the airport and remained in the United Kingdom without leave.
29.6.11	The Appellant is apprehended during a police road stop. He gives a false identity and claims to be a national of the Bahamas. He is detained.
13.7.11	The Appellant claims asylum asserting that he had suffered serious harm in Jamaica for reasons of his membership of a particular social group, namely gay men.
18.2.13	The Respondent refuses asylum on credibility grounds, but additionally on the basis that the Appellant could avail himself

of the protection of the Bahamas, since on his own evidence he appears to be a dual national.

- 20.6.13 The Respondent withdraws her decision to refuse asylum.
- 13.5.14 The Appellant is convicted at Manchester Crown Court of five separate offences. For two of those offences he is sentenced to a total consecutive sentence of 54 months in prison:
- Possession with intent to supply cocaine - 12 months
 Possession with intent to supply heroin - 42 months
- The remaining three sentences were to served concurrently:
- Assault with intent to resist arrest - 6 months
 Possessing false identity document - 6 months
 Possession with intent to supply cocaine - 12 months
- 24.6.14 The Respondent informs the Appellant of his liability to automatic deportation and issues a 'one-stop warning'.
- 4.9.14 The Appellant asserts that he should not be deported because he requires international protection (refugee grounds) and because he has a partner and children in the UK (human rights grounds).
- 30.12.15 The Respondent notifies the Appellant that she has decided to make a deportation order.
- The Appellant is interviewed and makes further representations.
- 20.2.17 The Deportation Order is signed.
- 21.2.17 'Reasons for refusal' letter served

4. There were two planks of the Appellant's appeal to the First-tier Tribunal.
5. First, he contended that his removal would be contrary to the Refugee Convention because he faced a real risk of persecution in Jamaica for reasons of his sexuality. He maintained that he is gay/bisexual, and/or perceived as such in Jamaica, that he has suffered persecution because of this in the past and that he would do so again. His status as a "serial criminal" prevented him from recognition as a refugee but he sought to rebut the presumption in s72 of the

Nationality Immigration and Asylum Act 2002 that he remains a danger to the community in the UK. Alternatively, he relied on Article 3 ECHR.

6. In respect of the second limb of the case the Appellant submitted that he had a genuine and subsisting parental relationship with his children in the UK and that his removal would have such an adverse impact upon them so as to violate the UK's obligations under Article 8 of the ECHR. By virtue of paragraphs 398-399 of the Immigration Rules the Appellant was here required to show not only that the impact on the children would be "unduly harsh", but because of his length of sentence, that there were in his case "exceptional circumstances over and above" that already high test. In granting permission Judge Froom considered it arguable that the Tribunal had erred in its approach to this limb: "[The Judge] has not made the necessary findings. This is arguably a serious error. It may be that the outcome would be the same were the Tribunal to apply the correct approach in view of the length of the appellant's sentence, but the appellant is entitled to have his case assessed on the correct statutory basis".
7. Before me Mr Diwnycz conceded that Judge Froom was right. The determination contains no structured findings on a) the best interest of the Appellant's children b) whether it would be unduly harsh to expect those children to live without their father in the UK and c) whether there are compelling features of the case over and above there being an unduly harsh impact on the children. Given that those were the key findings that the Judge was required to make it follows that the determination is defective.
8. This Appellant undoubtedly faces a high hurdle in establishing his case under Article 8. The weight of the public interest, where he has received a custodial sentence in excess of four years, is substantial indeed; it adds to the already great weight to be attached to removing persons with no right to remain under the Immigration Rules. I am however satisfied that the Secretary of State for the Home Department's concession is properly made. As Judge Froom puts it, the Appellant is entitled to have his case assessed on the correct statutory basis. I am further satisfied that the determination contains unclear and contradictory findings in respect of the first limb of the Appellant's case, in particular in respect of whether he is gay/bisexual. The determination rejects this contention at [§38], then at [§39] rejects the evidence that the Appellant is now in a stable heterosexual relationship because of the evidence that he is bisexual. As Mr Diwnycz put it, that is arguably eating cake, and having it at the same time. The parties were therefore in agreement that the matter be remitted to the First-tier Tribunal for hearing *de novo*.

Decisions and Directions

9. The decision of the First-tier Tribunal contains errors of law such that the decision must be set aside.
10. The matter is remitted to the First-tier Tribunal.
11. There is an order for anonymity.

Upper Tribunal Judge Bruce
8th February 2018