



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12361/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 22 January 2021

Decision & Reasons Promulgated
On 16 February 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

P O E
(ANONYMITY DIRECTION CONFIRMED)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:

For the Appellant: Ms. C Philps, Counsel, instructed by Owens Stevens Solicitors.
For the Respondent: Mr. T Melvin, Senior Presenting Officer

Introduction

1. This is an appeal against the decision of Judge of the First-tier Tribunal Herlihy ('the Judge') sent to the parties on 9 March 2020 by which the appellant's appeal against the decision to refuse him leave to remain in this country on human rights (article 8) grounds was dismissed. The respondent seeks to deport the appellant to Jamaica.

2. Upper Tribunal Judge Allen granted permission to appeal on all grounds by means of a decision dated 11 June 2020.

Remote hearing

3. The hearing before me was a Skype for Business video conference hearing during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

Anonymity

4. The Judge issued an anonymity direction, and no request was made by either party for such direction to be set aside.
5. I observe that no reasons were given by the Judge for the making of the anonymity direction. Reasons are required when making such judicial direction.
6. I am mindful of Guidance Note 2013 No 1 concerned with the issuing of an anonymity direction and I observe that the starting point for consideration of such a direction in this Chamber of the Upper Tribunal, as in all courts and tribunals, is open justice. The principle of open justice is fundamental to the common law. The rationale for this is to protect the rights of the parties and also to maintain public confidence in the administration of justice. Revelation of the identity of the parties is an important part of open justice: *Re: Guardian News & Media Ltd* [2010] UKSC 1; [2010] 2 AC 697.
7. The appellant's circumstances are not, alone, such as to justify the overriding of article 10 rights. He has committed serious criminal offences which are a matter of public record.
8. Paragraph 18 of the Guidance Note confirms that the identity of children whether they are appellants or the children of an appellant (or otherwise concerned with the proceedings), will not normally be disclosed nor will their school, the names of their teacher or any social worker or health professional with whom they are concerned, unless there are good reasons in the interests of justice to do so. I note that the step of not naming a wife or children and the attendant step of there being no reference made to where the family reside, the ages of the children or what school they attend, is often a suitable alternative to the making of an anonymity direction.
9. However, I observe that the appellant relies upon the neuro-developmental difficulties affecting one of his children. The publication of such personal difficulties may be very distressing to the young person, a minor, if full details of his condition are made

known to his peers. In such circumstances, I am satisfied that this is a matter where the demands of open justice do not outweigh the article 8 rights of this young person. In order to protect the identity of the young person, it is appropriate to anonymise the names of the appellant and other close family members. I therefore confirm the anonymity direction issued by the Judge, which is detailed at the conclusion of this decision.

Background

10. The appellant is a national of Jamaica and is presently aged 36. He arrived in the United Kingdom in May 2002, seeking leave to enter as a visitor. This application was refused, but he was issued with temporary admission. He failed to attend the airport to return home as directed. He was subsequently treated as an absconder.
11. His first son, 'AA', was born in 2004 and is presently aged 16. He is a British citizen.
12. The appellant applied for leave to remain outside of the Immigration Rules ('the Rules') in October 2004. The respondent refused the application in August 2005 and a subsequent appeal (IJ Buckwell) was dismissed on 31 October 2005.
13. He was detained in 2006 and on 20 January 2007 he was removed to Jamaica.
14. In April 2009 the appellant applied for entry clearance to join his partner 'NN' in the United Kingdom. NN is the mother of AA. The application was successful, and he entered the United Kingdom in July 2009, enjoying leave to enter until 30 September 2011.
15. The appellant made an in-time application for leave to remain as the spouse of NN on 30 September 2011.

Criminal offence - 2011

16. In 2011 police officers undertook a number of test purchases of illegal drugs from a property. Consequent to such test purchases six men, including the appellant, were prosecuted for the supply of, or possession with intent to supply, crack cocaine and cannabis. A Crown Court Judge considered the defendants to be part of an organised criminal enterprise.
17. The appellant pleaded guilty to three counts of supplying a Class A drug (crack cocaine) and was sentenced to three years' imprisonment, concurrent on each count.
18. In sentencing the appellant, the sentencing judge gave credit for his guilty plea and noted that his role was to respond to the test purchase officer via an intermediary, *'in other words, the test purchase officers contacted a third party who in turn turned to you and you then made available the supply'*. The sentencing judge concluded that the appellant's role was not to the same extent as that held by his co-defendants.

Decision to deport - 2013

19. The respondent decided to the deport the appellant and a deportation order was signed on 30 January 2013. The appellant appealed against this decision and he was successful on appeal before the First-tier Tribunal (JFtT Moore and Mr. Ravenscroft) by a decision sent to the parties on 14 August 2013. The Tribunal was satisfied that the appellant genuinely regretted his association with a bad crowd and as to having been involved in criminal activity. The Tribunal considered the offence to be out-of-character and noted his family life with NN and AA.
20. The respondent revoked the deportation order and granted the appellant leave to remain until 27 May 2016.

Family life

21. Three further children were born to the appellant in 2014, 2015 and 2016. The mother of the elder two children is SS, a British citizen. The mother of the youngest child is CC, also a British citizen. All three children are British.
22. The appellant has never lived with SS and CC. At the time of the births between 2014 and 2016, the appellant resided with NN.
23. The appellant applied for leave to remain under the 10-year rule in May 2016.

Criminal offence - 2017

24. In March 2017, the appellant was found guilty by a jury in respect of:
 - i) one count of wounding with intent to do grievous bodily harm contrary to section 18 of the Offences Against the Person Act 1861 ('the 1861 Act')
 - ii) one count of possessing an offensive weapon in a public place, contrary to section 1 of the Prevention of Crime Act 1953
25. The jury was discharged from giving a verdict on an alternative count of unlawfully and maliciously wounding or inflicting grievous bodily harm, contrary to section 20 of the 1861 Act.
26. In sentencing the appellant to six years' imprisonment, the Crown Court Judge remarked, *inter alia*:

'You get no credit, as you've denied any guilt in its entirety. It's a little hard to believe that you fought this case, because you were shown the film of the incident when you were being questioned by the police in the police station. I can only believe that you were hoping that the complainant [Mr. X] would not come to court and give evidence against you, and that the case might collapse in that way.'

I have no doubt that but for his using the bike to defend himself, you would have stabbed him more seriously or with more serious consequences. And also I have no doubt that you got some associates of yours to come back with you to hit him again. What you had against him, I have absolutely no idea. But again, I have no doubt that you demonstrated your hostility to him on a previous occasion.

...

Knife carrying is rightly and increasingly condemned and regarded as very serious by the courts, and often calls for deterrent sentences. And the reason for that is that a knife can cause fatal injuries, depending on which part of the body it goes into. And very often, where the knife goes and what the knife does and what the consequences are for the victim is a matter of pure chance. I'm not going to repeat what was read out by way of the victim impact statement, but it does show how serious the consequences were for [Mr. X] as a result of this injury, quite apart from the disruption of his relationship with his child.'

27. The sentencing judge imposed an order upon the appellant restraining him from approaching or contacting Mr. X for an indefinite period.

Decision to deport - 2018

28. By a decision dated 29 May 2018 the respondent decided to deport the appellant, having refused human rights representations. A deportation order was signed the same day.

29. Though they separated prior to the appellant's conviction in 2017, NN and the appellant have reunited.

Hearing before the First-tier Tribunal

30. The appeal came before the Judge sitting at Taylor House on 29 January 2020. The appellant gave evidence as did NN, SS and two social workers, Ms. Johnson and Ms. Wilson.

31. By means of a detailed, carefully considered decision running to 64 paragraphs the Judge observed that, for the purpose of statute and the Rules, the appellant was sentenced to a term of imprisonment of over four years. She further observed the judgment of the Supreme Court in *Hesham Ali v. Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 W.L.R. 4799.

32. The Judge decided, *inter alia*:

- The appellant enjoys a genuine and subsisting relationship with all four of his children: [45] of the decision
- The best interests of the children are served by remaining in this country in the care of their mothers, who are their principal carers: [45]
- The appellant's strongest parental relationship subsists with AA: [46]

- AA's physical and emotional problems cannot entirely be attributed to the appellant's imprisonment: [47]
- However, it is very likely that the appellant's imprisonment contributed to the deterioration of AA's mental and physical health: [47]
- The appellant's relationships with his other children have been fractured by his imprisonment and by his never having lived with them in the family home: [50]
- It is not credible that the appellant would struggle to find employment upon return to Jamaica: [55].

33. The Judge concluded, *inter alia*:

'61. Although I find that the appellant's deportation will be detrimental to his children, and particularly his eldest son [AA] and [another child], and will be hard for [SS] who is struggling to bring up her family as a single parent, I cannot find that the consequences of separation of the appellant from his children and family gives rise to very compelling reasons over and above those in paragraphs 399 and 399A ... I fully accept that there is a risk that the appellant's deportation could have adverse effects upon his two sons and that opportunities to meet outside the United Kingdom might be very limited due to a lack of financial resources. The impact of separation on the appellant's children has to some extent been diminished by the appellant's absence from his children due to his two periods of imprisonment and the reduced role in the lives of his younger sons. I find that the separation of the appellant from his children does not indicate the serious degree of emotional harm that was found to exist in the case of JG. Notwithstanding the detrimental impact of the appellant's deportation on his children I do not find that the effects are very compelling so as to outweigh the very strong public interest in the appellant's deportation.'

Grounds of Appeal

34. Grounds of appeal were authored by Ms. Francis, Counsel, who appeared before the First-tier Tribunal on behalf of the appellant, and can be summarised as follows:

- (1) An application for an adjournment to secure further evidence concerning AA was refused by the Judge but is not recorded in the Judge's decision.
- (2) Having refused the adjournment request on the basis that AA's mental health was not material to her decision, the Judge considered the child's health at [46] of her decision
- (3) The Judge erred in concluding that AA's circumstances are less severe than those present in Secretary of State for the Home Department v. JG (Jamaica) [2019] EWCA Civ 982.
- (4) The Judge erred by failing to conduct an individualised assessment of the appellant's children as required.

35. In granting permission to appeal, UTJ Allen reasoned:

‘On balance it is arguable that there is merit to the procedural error issue set out in the grounds. All the grounds may be argued, though the above appears to be the essential point.’

36. The respondent filed a rule 24 response authored by Mr. Tufan, dated 9 September 2020. Accompanying the response was a copy of a file note authored by Ms. Darkwah, a Presenting Officer, who represented the respondent before the First-tier Tribunal.
37. A response to directions, dated 3 December 2020, also authored Mr. Tufan, was filed with the Tribunal.
38. The appellant’s legal representatives made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, dated 1 September 2020, for the Tribunal to consider evidence that was not before the First-tier Tribunal. Unfortunately, a casual approach was adopted to the application, with a failure to abide by rule 15(2A)(a)(ii) which requires an explanation as to why such evidence was not submitted to the First-tier Tribunal.
39. A further concern as to the approach adopted by the legal representatives is exemplified by Ms. Philips candid confirmation that the evidence provided did not detail the subsequent decision of the Child and Adolescent Mental Health Services (CAMHS) not to proceed with its proposed intervention. She could only assert, being unable to present corroborative evidence on the point, that CAMHS had taken such step because an intervention was proposed by another organisation, First Steps.
40. Despite the failings in the rule 15(2A) application, Mr. Melvin took no point on behalf of the respondent, no doubt understanding the importance of the Tribunal having sight of Ms. Francis’ witness statement dated 29 August 2020, her contemporaneous note of proceedings and the medical evidence she had sought to secure by means of her adjournment application.

Decision on Error of Law

41. For the reasons given below I have decided that the decision of the Judge should be set aside on procedural fairness grounds, the Judge having been under a duty to act fairly. However, for the benefit of the parties I observe that my consideration was finely balanced and ultimately it was one particular factor that led to my considering that I am required to set aside the decision on this ground of challenge.
42. I have had the opportunity to consider the very detailed record of proceedings compiled by the Judge. I am satisfied that in most respects she took a very careful note of proceedings. However, the record is silent as to the adjournment request.
43. I have been provided with a note from Ms. Darkwah. It is a short document running to just under two pages, which is not a criticism of Ms. Darkwah as it appears to be a file note authored after the hearing. There is no mention of the adjournment request.

44. Ms. Francis confirms by her witness statement that an accompanying typed attendance note was prepared at the hearing and the only subsequent alterations were to amend typographical errors and to remove privileged instructions. Such amendments were appropriate in the circumstances.
45. Counsel's typed note of the hearing confirms that NN was asked a number of questions in examination-in-chief before detailed cross-examination was undertaken. The Judge then asked several questions by means of clarification including questions concerned with AA's medical treatment. Ms. Francis then undertook reasonably lengthy re-examination, during the course of which an adjournment request was made. The relevant passages of the typed note are:
- '187. J - in answer to the question - evidence does not exist - assessment ongoing - got the witnesses [Sic] evidence, which is evidence - do not see it as an issue - cannot produce evidence - not psych or psychologist.
188. RF - [submissions made in support of an adjournment: [NN] referring to evidence in her possession and soon to be in her possession, should be given an opportunity to provide that evidence - will have a bearing on J determination - key to question of [child's] health and impact]
189. J - can draw inferences - more likely than not is it - looking at timing of evidence - this has had an impact on son's health - evidence not necessary - no adjournment.'
46. Mr. Melvin accepted the reliability of counsel's typed note.
47. I find that the failure to record in the decision and reasons authored by the Judge both the adjournment application and the subsequent decision made in respect of it constitutes an error of law. However, such error need not be material, particularly in circumstances where oral reasons were given at the hearing, and so I proceed to consider both the oral reasons and the subsequent approach adopted by the Judge in her decision.
48. I am satisfied that the oral reasons given by the Judge, as recorded by Ms. Francis, were reasonable in the circumstances. The evidence Ms. Francis sought to secure by means of the adjournment concerned proposed interventions identified by Dr Charlesworth and Dr Sinclair, clinical psychologists at First Steps. Such evidence consists of Dr Charlesworth's letter, dated 2 October 2019, and Dr Sinclair's letter dated 24 October 2019. They both predate the hearing before the Judge on 29 January 2020. By her oral reasoning the judge accepted that she could draw inferences from NN's evidence that there had been a medical impact on AA's mental health and so it was not necessary to secure evidence to that effect. Such reasons were reasonable in the circumstances.
49. The difficulty that arises in this matter flows from a subsequent finding of fact made by the Judge at [46] her decision:
- '46. ... I did not find there was any evidence that [AA] was receiving any mental health treatment or that there was objective evidence of the diagnosis of

emotional stress disorder but I see no reason to doubt the claim that he was receiving counselling at school.'

50. I observe the reference by Dr Charlesworth in her letter of 2 October 2019 that a proposed intervention was for AA to attend an 'Understanding and Managing Emotions Workshop' to help him understand his feelings and to learn about practical strategies that help young people cope with difficult emotions. I further note Dr Sinclair's reference to AA having been referred to First Steps to help put in place strategies to understand and manage emotions in circumstances where he was using food to regulate them.
51. I observe that the application to adjourn was not expressly refused on the ground that further delay would prejudice the respondent. Rather, it was refused following confirmation that there was no requirement to adjourn to permit the securing of further evidence because a positive inference would be drawn from the evidence of NN on the issue of her son's treatment. In such circumstances I am satisfied that there was procedural unfairness by the Judge refusing the adjournment on a stated basis and then proceeding to make a contrary finding of fact that AA was not receiving mental health treatment. Whilst the evidence presented to this Tribunal may possibly be insufficient to establish that AA had received mental health treatment; it is of sufficient substance to permit an appropriate submission before a fact-finding judge that it is capable of so establishing. Consequently, I find that there is a material irregularity arising from the failure to record the adjournment request and the attendant decision, coupled with the subsequent unfair approach adopted towards whether AA had received mental health treatment. Such unfairness requires the decision to be set aside.
52. In the circumstances I am not required to consider the remaining grounds.

Remaking the Decision

53. Both parties indicated that if procedural unfairness were established, and findings of fact were required to be remade in their entirety, this was a matter that should properly be remitted to the First-tier Tribunal.
54. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and the Upper Tribunal concerning the disposal of appeals in this Tribunal, in particular paragraph 7.2, and conclude that the effect of the material error of law has been to deprive the appellant of a fair hearing before the First-tier Tribunal. Consequently, I set aside the decision and remit it back to the First-tier Tribunal at Taylor House.

Postscript

55. I observe that the index offence was captured by CCTV footage, which was seen by both a jury and a Crown Court Judge. The latter was clear in his sentencing remarks as to the events established by such footage.

56. I further note that the CPS papers were subsequently considered by the appellant's probation officer.

57. By means of their report, dated 12 August 2019, Ms. Johnson and Ms. Wilson detail the limited documentary information provided to them. They confirm at §3.0 that they had sight of previous representations authored on behalf of the appellant dated 26 May 2016, a number of medical appointment letters and school reports concerned with AA.

58. They detail the appellant's assertions as to events leading up to the stabbing of Mr. X, as presented at a prison visit, including:

'59. ... [The appellant] said that he had never spoken to [Mr. X] and so did not know anything about him ...

...

61. On the day of the incident, [the appellant] said that he was in the market buying fruits, when [Mr. X] rode up to him on his bike. [Mr. X] asked [the appellant] if he knew how long that he had been looking for him to kill him and that was what triggered the whole incident.'

59. I observe that the jury rejected the appellant's account of self-defence, finding that the prosecution had established its case to the criminal standard, namely beyond reasonable doubt.

60. I note that within the appellant's bundle served upon the First-tier Tribunal is a copy of the appellant's OASys (Offender Assessment System) assessment prepared by his offender manager on 4 July 2019, some 6 months before the First-tier Tribunal hearing. I further note that OASys assessments are undertaken by probation officers trained in conducting them.

61. At page 3 of the assessment [page 74 of the appellant's bundle], there is confirmation of the papers available to the assessor at the time of the assessment, which include the CPS papers.

62. The details of the offence are detailed in the 'analysis of offences' section at page 7 of the assessment [page 78 of bundle]:

'[The appellant] appeared at [Crown Court] on [date in March 2017] where he was sentenced to a 72 month custodial sentence for wounding.

The brief offence details are as follows:

[In April 2016 the appellant] was seen on CCTV to have bumped into the victim [Mr. X], both of whom were on bikes. [The appellant] is then seen to jump off his bike and start attacking [Mr. X] in which is noted to be an over arm stabbing motion. [Mr. X] is seen to hold his bike up to protect himself from the assault. [The appellant] is then seen to cycle off and return moments later with 4 other males in tow, one of whom is seen to punch [Mr. X] before he manages to escape.'

63. Despite what was identified by the sentencing judge as clear CCTV evidence as to the crime, the appellant informed the assessor in the OASys interview that he acted in self-defence, at [page 8 of report, page 79 of bundle]:

'On discussion with [the appellant] he stated that the version of events in the CPS documents were false and that [Mr. X] said to him that he was actually there to kill him. At this, [the appellant] reports to have acted in self-defence, hit him twice and ran off. He went on to say that he had cycled off and bumped into old friends who he told what had happened. It is reported that these friends have then sought [Mr. X] and that [the appellant] had chased them after them to stop them from doing anything further.

If [the appellant's] version of events are [sic] to be believed then the motivating factor in this offence was self-preservation. However, his account and that of [Mr. X] and the CPS documents differ greatly. After reading the CPS documents, I am struggling to see any motivation behind the attack and cannot see any catalyst. It is my assessment that there must have been a personal issues [sic] between [the appellant] and the victim, which has escalated to the offence.'

64. The assessment further details the appellant's assertion in interview that he was never in possession of a knife and did not stab Mr. X [page 9 of report, page 80 of bundle]. The assessor further details, at [page 22 of report, page 93 of bundle]:

'[The appellant denies the offence and stated that he was acting in self-defence. He added that he punched him twice and ran off, adding that he never had a knife on him. [The appellant] added that he thinks the victim started the confrontation to get some compensation. If [the appellant's] story is to be believed then is [sic] shows some issues around problem solving and impulsive behaviour, in that he felt threatened so attacked, rather than trying to remove himself from the situation.

However, [the appellant's] story does not add up with the injuries the victim received, including a gash on his arm. It is my assessment that this offence shows a lack of impulse control as well as temper control ...'

65. The Judge notes the following as to the social workers' oral evidence before her at the hearing in January 2020:

'35. In cross-examination the witnesses confirmed they had seen the decision letter of the respondent and the Judge's sentencing remarks and PNC records. It was put to them that the appellant's criminality escalated since the first offence. They both expressed the view that when they had initially seen the papers they asked why anyone would want the appellant around their children but when they visited the appellant and looked at his antecedents and the extenuating circumstances around the offence (which were referred to in the report) and met his mother, they found her story to be consistent with what was going on with his sister and discovered that the appellant was a gentle character around his children ...'

66. I observe that the social workers identify at §126 of their report that the appellant is truly remorseful, though this sits ill-at-ease with his stated position as to the circumstances of the wounding offence.

67. I further observe that the assessor was informed by the appellant in interview that he had met Mr. X on two occasions prior to the offence [page 7 of report, page 78 of bundle]. On its face, such evidence is inconsistent with his later informing the social workers that he had never spoken to Mr. X.
68. It may be said that the social workers exhibit a lack of critical analysis in respect of the information provided to them, and there is no outward concern raised as to the appellant's veracity.
69. Whilst their professional opinion may ultimately be found by a Judge to be appropriate, the appellant should properly expect the social workers to be required to address their approach to the information provided to them, and their uncritical assessment of it.
70. I further observe the conclusion of the social workers' report:
- 'We ask in light of the above that you exercise discretion and grant [the appellant] one last chance to prove that he can be law-abiding and remain in the this [sic] country for the sake and wellbeing of his blended family and rekindle the life they had here prior to his loss of liberty.'
71. It is not appropriate that independent social workers adopt the role of advocates on behalf of an appellant.

Notice of Decision

72. The decision of the First-tier Tribunal involved the making of an error of law on a point of law and I set aside the Judge's decision promulgated on 9 March 2020 pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.
73. This matter is remitted to the First-tier Tribunal at Taylor House for a fresh hearing, before any Judge other than Judge Herlihy. No findings of fact are preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

74. Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant and members of his family. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed: *D O'Callaghan*

Upper Tribunal Judge O'Callaghan

Date: 4 February 2021