



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

Appeal Number: DA/01705/2013

THE IMMIGRATION ACTS

**Heard at Stoke
on 12th May 2014**

**Determination
Promulgated
On 24th July 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O' B E D

(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr McVeety – Senior Home Office Presenting Officer.
For the Respondent: Mr M Bradshaw instructed by Wilsons Solicitors LLP.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge Landes promulgated on 12th March 2014 following a hearing at Stoke.
2. The Respondent, O'BED, was born in 1983 and is a Jamaican citizen. He entered the United Kingdom in December 1997 aged 14 and received six months leave as a visitor although made no further attempt to regularise his status. He was arrested in May 2000 and subsequently left the country in June of that year although returned on 1 July 2001 aged 18 and was granted six months leave to enter as a

visitor, which was subsequently extended as both a visitor and student until 31 October 2006.

3. The Respondent is subject to a deportation order made under the automatic deportation provisions of UK Borders Act 2007 as a result of his conviction after trial of an offence of violent disorder. On 29th April 2009 he was sentenced to 30 months imprisonment. Appeal against conviction and sentence was dismissed. The deportation order was signed on 24th March 2010 and his appeal against the order dismissed.
4. On 18th May 2011 an injunction was granted preventing his removal following a judicial review application, which was treated as an application to revoke the deportation order. On 4th October 2011 the decision was made to refuse to revoke the order and an appeal against the decision dismissed on 22nd December 2011. The respondent became appeal rights exhausted on 15th November 2012.
5. On 16th October 2012 the Respondent obtained a contact order in respect his child M allowing monthly contact at the Immigration Removal Centre and such other contact as the parties agreed. On 1st February 2013 contact orders in respect of the Respondents other two children, S and A, were made.
6. On 31st January 2013 the Respondent applied to revoke the deportation order which was refused on 6th August 2013 and it is the appeal against this decision which came before Judge Landes.
7. Having reviewed the evidence, including the findings of the two previous First-tier Tribunals the Judge sets out her reasons from paragraph 30 of the determination. The Judge notes that the Respondent does not fall within paragraphs 399 or 399A of the Immigration Rules and so it was necessary to consider whether there are any exceptional circumstances such as to make the Respondent's removal disproportionate.
8. The Judge considers the matter by reference to the Razgar guidelines and specifically notes in paragraph 30 that the adverse credibility findings of the two previous panels could not be explained away by the Respondent's learning disability. The Judge accepted that the Respondent does have a genuine relationship with S, A, and with M [42 and 44].
9. The Judge was satisfied there was family life between the Respondent and all three children [45] and thereafter moved on to consider the proportionality of the decision.
10. The Judge notes the trial and seriousness of the offence [50] and the fact that until he completed his witness statement for that appeal the Respondent had maintained his innocence, despite conviction by a

jury, although it was noted he was not very forthcoming in evidence about the reasons for what had happened [52]. The Respondent was noted to have been in the United Kingdom for over 12 1/2 years prior to the commitment of the offence although it was also noted that together with almost 4 years spent in prison and immigration detention, the Respondent has had no leave to remain since May 2007 [53].

11. The Judge notes the offence was committed 8 1/2 years ago and that the only offending since was a driving offence the following year [54].
12. The Judge found the Respondent's relationship with B has the potential to amount to family life but did not yet meet the required 'test' as the couple are not living together and she has not met the Respondent's children [63]. The Judge also notes a history of consistency in relationships together with issues relating to the ability of the Respondent to adapt to living in Jamaica. It is noted the Respondent suffers from epilepsy and that medical evidence was available and considered.
13. The conclusions are set out from paragraph 75 of the determination. The Judge reminds herself that the best interests of the children are the starting point and thereafter finds that the Respondent should be allowed to remain in the United Kingdom as a result of the relationship he and the children now have and the potential for it to continue. The Judge found a low risk of the Respondent re-offending, comments upon the difficulties the Respondent will face re-establishing himself in Jamaica, and the likely need for continued support. The Judge also noted the medical evidence which asserts that the Respondent's disability means he has a social age of someone in their mid teens. He has become close to and dependent on his mother since he has been released from detention.
14. The Judge refers to the need to consider changes in circumstances before stating in paragraphs 81 and 82 of the determination:

81. The two significant changes in circumstance/material not previously available are I find the developed relationship between the appellant and his children and the fact that there is now up-to-date evidence which was not previously available that the appellant is not simply dyslexic, he has a learning disability which will give him a difficulty I have described, a difficulty far beyond the usual in re-establishing his private life in Jamaica without support. I do not find the relationship between the appellant and [B] to be significant in this sense other than if it continues she is likely to be a positive influence on his behaviour; I found the relationship not to amount to family life and in any

event to have begun at a time when both parties knew it might well not be able to continue.

82. Not without some hesitation when all the factors I have referred to are taken together I am not satisfied that the decision is proportionate bearing in mind the two significant changes I have outlined at paragraph 81 above. It is the combination of effect on family and private life that make the decision disproportionate and therefore a breach of Article 8 ECHR; the effect on the children's family life with the appellant now he has re-established a relationship with them and the effect on the appellant himself in re-establishing a private life in Jamaica without the support of a close relative, which I find to be disproportionately harsh given his disability and which itself will make maintaining any sort of contact with his children difficult if as I consider likely, he is not able to achieve a settled lifestyle and routine in Jamaica. The combination of effects I have referred to must be seen against the background of an offence which although serious was committed a long time ago and the long time before the original deportation order was made, is an isolated incident and although there still remains some potential for the appellant to cause harm this is unlikely unless his circumstances change and he is no longer supported by his mother or in a supportive relationship such as the one with [B]. There is a strong public interest in the appellant's deportation given the fact he committed a serious offence of course regardless of the risk of reoffending but I find a combination of factors I have described to be such as to amount to compelling reasons which outweighed the public interest in the appellant's deportation. I take full account of the respondent's view of the states obligation under Article 8 ECHR as expressed in immigration rules but I still consider for the reasons I have described bearing in mind the particular combination of factors, that the decision breaches Article 8 ECHR.

15. The Secretary of State sought permission to appeal alleging a material misdirection in law. It is said the Judge's findings on the subject of exceptional circumstances in paragraph 76 and 78 of the determination leading to the conclusion that the relationship with the children and learning difficulties are the factors that engage Article 8, such as to allow the Respondent to remain is infected by material legal error. The grounds of challenge assert that such factors in isolation or taken holistically do not amount to a claim that is 'very strong' as per Article 8.
16. A number of other issues have been raised and permission was granted on 28th March 2014 with particular reference to Ground G which submits the Judge failed to engage adequately with deportation

as a multi dimensional step, failed to consider deportation as a deterrent, an expression of societal abhorrence, and the means of maintaining public confidence in the system of immigration control, which do not appear to have been considered by the Judge, whose focus was on the future risk of reoffending which is said to be too limited in scope.

Error of law

17. This is an appeal against a refusal to revoke the deportation order made on 24th March 2010. Paragraph 390 of the Immigration Rules in force at the date of decision provides that an application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
 - (i) the grounds on which the order was made;
 - (ii) any representations made in support of revocation;
 - (iii) the interests of the community, including the maintenance of an effective immigration control;
 - (iv) the interests of the applicant, including any compassionate circumstances.
18. 390A provided that where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
19. The Judge notes in the determination that the deportation order was made as a result of the Respondent being convicted of a serious offence which was considered to be one of the reasons why the two previous appeals against the order and refusal to revoke failed. The facts of the offence are that on 22nd October 2005 there was large-scale disorder within the Handsworth and Lozells areas of Birmingham involving members of both the Black and Asian communities targeting each other and undertaking acts of serious violence. Whilst this was occurring the Respondent approached the Newtown Fish Bar together with approximately fourteen other males who it is said were armed with sticks or wood, and who caused damage to the property, and threatened the two brothers who were within their business premises. The Respondent denied his involvement claiming he was elsewhere but was convicted by a jury. In the pre-sentencing report it is noted that the evidence contained within the Crown Prosecution Service documentation suggests that the Respondent, together with a group of associates, took advantage of the breakdown in law and order on the night in question in order to advance a grudge held by the Respondent and one named individual against the victims.
20. The Judge accepted that the respondent was unable to succeed by reference to the Immigration Rules, 399 or 399A, which set out the

Secretary of State's and Parliament's view of the way in which Article 8 should be interpreted, and reminded herself that it was therefore only in exceptional circumstances that the appeal could succeed on Article 8 grounds.

21. There are a number of relevant cases, not all of which were considered by the Judge, including MF (Nigeria) [2013] EWCA Civ 1192 in which the Master of the Rolls indicated that where the “new rules” in force from 9 July 2012 apply in a deportation case, the “first step that has to be undertaken is to decide whether deportation would be contrary to an individual’s article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8” (paragraph 35). Paragraphs 399 and 399A can be thought of as setting out the exceptions to deportation (paragraph 14).

22. In Kabia (MF: para 298 - “exceptional circumstances”) [2013] UKUT 00569 (IAC) it was held that (i) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 at para 43**; (ii) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in **MF (Article 8 - New Rules) Nigeria [2012] UKUT 393 (IAC)** as the second step in a two-stage process is the same one that, properly executed, will return the same answer; (iii) The new rules speak of “exceptional circumstances” but, as has been made clear by the Court of Appeal in **MF (Nigeria)**, exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, “exceptional” means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate”.

23. In the recent case of McLarty (Deportation- balance) [2014] UKUT 00315 it was held that there can be little doubt that in enacting the UK Borders Act 2007 Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases (**SS (Nigeria) v SSHD [2013] EWCA Civ 550**). The weight to be attached to that object will, however, include a variable component, which reflects the criminality in issue. Nevertheless, Parliament has tilted the scales strongly in favour of deportation and for them to

return to the level and then swing in favour of a criminal opposing deportation there must be compelling reasons, which must be exceptional; (ii) What amounts to compelling reasons or exceptional circumstances is very much fact dependent but must necessarily be seen in the context of the articulated will of Parliament in favour of deportation; (iii) Where the facts surrounding an individual who has committed a crime are said to be “exceptional” or “compelling”, these are factors to be placed in the weighing scale, in order to be weighed against the public interest; (iv) In some other instances, the phrase “exceptional” or “compelling” has been used to describe the end result: namely, that the position of the individual is “exceptional” or “compelling” because, having weighed the unusual facts against the (powerful) public interest, the former outweighs the latter. In this sense “exceptional” or “compelling” is the end result of the proportionality weighing process.

24. Following discussion it was accepted the Judge had probably erred in law. I find this to be the case as a reading of the determination does not indicate that the above approach was followed when the conclusions regarding exceptional compelling circumstances were being weighed against the public interest, although Mr Bradshaw thereafter submitted that the issue in this appeal was whether any error was material to the decision to allow the appeal.
25. It was submitted on the Respondent's behalf that the Judge's finding that his circumstances met the required test for exceptional circumstances as set out in the Immigration Rules is sustainable. The Judge considered the fact that the three children with whom the Respondent has a relationship will be affected by the decision. There was evidence of ongoing contact which was not the situation previously and an independent social workers report prepared by Christine Brown. It was also submitted the Judge considered the issue of the willingness and ability of the Respondent to be involved in his children's upbringing as evidenced by the private law children's proceedings. It is accepted there were difficulties in relation to the Respondent's lifestyle and his personal problems, but it was relevant that if he is deported contact will lessen and he will face a ten year prohibition from re-entering the United Kingdom.
26. Mr Bradshaw submitted that the impact upon the children is based upon the conclusions to be found in paragraph 4.5 of the report of Christian Brown in which it is alleged that if S and A are separated from their father there would be "untold emotional damage in both the short and longer term creating and introducing a mistrust in the children's relationship with their mother and possibly other close relatives as they respond with the distress that will follow their father's removal and will akin to the loss of their father through death...". It is also submitted that the two elements identified by the

Judge in paragraph 81 are relevant and the best interests of the children all persuasive.

27. On behalf of the Secretary of State it was submitted by Mr McVeety that this is the third appeal against the obligation of the Secretary of State to remove the Respondent from the United Kingdom. Mr McVeety also referred to the findings in the previous determinations and reference in the reasons for refusal letter that the Respondent would do anything in his power to remain in the United Kingdom.
28. I accept that two issues that do not appear to have been adequately considered by the Judge when looking at the best interests of the children are that the Respondent is not their primary carer and the impact of his history, which indicates that he has been 'in and out' of any potential family life. The previous tribunals found the Respondent has a cavalier attitude to women and children and what was considered to be a lack of commitment for family members, his obligations, or personal responsibility.
29. I find there is history indicating a lack of commitment in the Respondent towards his children and partners previously. I accept he is not the primary carer of the children that there was only evidence of sporadic contact recorded in the 2011 determination.
30. I find it is a relevant factor that the Respondent has no leave to remain in the United Kingdom as he has not made any valid application for leave and that the private and family life he seeks to rely upon as a means of avoiding deportation is based upon relationships formed at a time when no leave existed, as noted by the Judge.
31. There is merit in the Secretary of State's argument that allowing the Respondent to remain when he has no leave, has undertaken serious criminal acts, and is the subject of a deportation order, would mean such issues being overridden purely to permit ongoing contact, although I also accept that in certain circumstances this is proportionate.
32. The comments regarding difficulties re-settling in Jamaica are noted but it has not been established that any economic or other impact of relocating to Jamaica upon the Respondent is sufficient to satisfy the test of exceptionality.
33. It was accepted by both advocates that this is a challenging case, as recorded by the Judge, who only allowed the appeal "with hesitation".
34. The Court of Appeal have made it clear that the Upper Tribunal should not interfere with decisions of the First-tier Tribunal unless there is clear evidence of legal error material to the decision under challenge.

The Judge was right to record that this case has factors which made it less clear than others although it is important to note that when considering whether there are exceptional circumstances the correct test is whether the decision will result in unjustifiably harsh consequences to the Respondent or family members.

35. The fact the Respondent's true presentation may have been identified in the medical evidence considered by the Judge is a factor that she took into account and although it is accepted that he may face difficulty settling in Jamaica which may lead to an unsettled lifestyle, the evidence does not show that harsh consequences will arise for him as an individual per se. He has received support from his mother in the United Kingdom and the evidence does not substantiate a claim he will not be able to receive some support in Jamaica, if required, or that the absence of such support makes the decision disproportionate.
36. The key to this appeal, as in many cases of this nature, is the needs of the children. There are three children and the Respondent splits his time between two family units. The report of Christian Brown was noted by the Judge but Ms Brown has been subject of adverse comment previously regarding the lack of objectivity in her reports. The wording of paragraph 4.5 is in fact very similar to those in previous reports seen by this tribunal in other cases in which she has been instructed.
37. It is accepted that a child in a settled relationship with both parents, even if the relationship is limited to contact, is likely to suffer an adverse reaction if such contact is lost as a result of a parent being deported. To suggest this will result in "untold emotional damage" with no suggestion that this could be managed with appropriate care/assistance appears somewhat extreme. The evidence provided related to the Respondent's medical condition and there is insufficient medical/psychological evidence available to support the assertion that such harm will be caused to the children if the Respondent was to be deported. This is an appeal in which the primary needs of the children are met by their mothers, in relation to which there is insufficient evidence of harsh consequences when their father was in prison, and insufficient evidence of harsh consequences of the nature of those outlined by Christian Brown if he was to be removed.
38. It is accepted that the ideal situation for children is to be brought up within an environment including supportive parents but this is not the reality of modern life within the United Kingdom. If the Respondent was to be removed the children will remain living with their primary carers as they do now. Contact will change from direct to indirect contact and so it is not a case of all contact being automatically lost with their father. In families where such contact is lost the important thing in a child's life is to maintain the day-to-day routine as a child can then continue his or her lifestyle and on the whole is able to adapt

to even a fundamental change in their family situation, as may occur with a deportation order. As said by the Court of Appeal in Lee, that is the effect of deportation.

39. The term "unjustifiably" indicates that the consequences, harsh or otherwise, need to be weighed against the reason why the individual concerned is to be removed. I accept the submission on behalf of the Secretary of State that there is a finding that the Respondent has done all in his power to avoid removal from the United Kingdom which must be relevant in relation to the weight to be placed upon his claims. The fact he has no leave to remain is a relevant factor as it reduces the weight to be placed upon any family or private life he seeks to rely upon, although I accept the needs of the children are of primary importance and that children should not be punished for the actions of their parents.
40. The deportation order is an automatic deportation made as a result of a serious offence. I find that the Judge has materially erred in law in her assessment of the material and that the grounds asserting misdirection or in relation to the correct application of the applicable legal test have merit.
41. I set the determination aside. There is no challenge to the Judge's factual findings. I remake the decision by dismissing the appeal as notwithstanding the fact that it is in the best interests of the children for their father to remain in the United Kingdom, when weighing this as one of the factors to be taken into account as part of any balancing exercise, I do not find it has been established that any unjustifiable harsh consequences will arise such as to make the decision disproportionate. This is an automatic deportation order made following the commission of a very serious offence. Involvement in public disorder of the sort seen in Birmingham and London in recent years or using such large-scale public disorder as a cover to undertake an attack for the purposes of seeking revenge upon two named individuals, especially as a member of a group of fourteen assailants, more than justifies the Respondent's removal. As submitted in the grounds there is a strong deterrent element in this appeal to discourage others from thinking that such crimes of violence will not be dealt with appropriately in a way that reflects the public's revulsion of such activities.
42. I find the Secretary of State has discharged the burden of proof upon her to the required standard to show that the decision is proportionate, especially in light of the failure of the Respondent to satisfy me that is able to succeed under any provision of the Immigration Rules.

Decision

43. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

44. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to protect the identity of the children.

Signed.....
Upper Tribunal Judge Hanson

Dated the 21st July 2014