



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00578/2012

THE IMMIGRATION ACTS

Heard at : Field House
On : 14 April 2016

Determination Promulgated
On 25 April 2016

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ALFRED GARETH SUCKOO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Harris, instructed by Dotcom Solicitors

For the Respondent: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Following the judgment of the Court of Appeal issued on 1 February 2016 setting aside a previous decision of the Upper Tribunal allowing the appellant's appeal against the

respondent's decision to deport him from the United Kingdom, this case has been remitted to the Upper Tribunal for the decision in the appellant's appeal to be re-made.

2. The appellant is a national of Jamaica, born on 16 April 1974. He first entered the United Kingdom in December 2002 as a visitor and was subsequently given further periods of leave to remain as a student until 30 September 2006. Following his marriage to Marsha Shrien Emanuel, a British citizen, on 24 June 2006, he was given further leave to remain as a spouse until 15 September 2008. Subsequent to that he became an overstayer and did not apply for further leave. However prior to the expiry of his leave he was arrested for the offences for which he was later convicted.

3. On 16 July 2009 he was convicted of being concerned in supplying a Class A controlled drug, namely heroin, and conspiring/supplying a Class A controlled drug, namely crack cocaine and heroin. On 11 November 2009 he was sentenced to 5 years and 5 months' imprisonment. He was released from prison on licence in April 2011.

4. On 2 February 2010 the appellant was served with a notice of liability to automatic deportation and on 22 August 2012 a deportation order was issued against him pursuant to section 32(5) of the UK Borders Act 2007. The following day a decision was made that section 32(5) of the UK Borders Act 2007 applied. The appellant appealed against that decision.

5. The appeal was heard by a panel in the First-tier Tribunal on 18 December 2012 and was allowed on Article 8 grounds. Following an appeal by the Secretary of State against the Tribunal's decision, Upper Tribunal Judge King set aside the decision, on the basis that the Tribunal had failed to give due weight to the public interest in deporting foreign criminals. Judge King then re-made the decision himself at a hearing on 29 August 2013. He allowed the appeal again on Article 8 grounds. The Secretary of State then appealed to the Court of Appeal, following a grant of permission on 13 May 2014, and the appeal was heard before Lord Justice McFarlane, Lord Justice Vos and Lord Justice Simon on 20 January 2016. The three Lord Justices allowed the Secretary of State's appeal in a judgment dated 1 February 2016 ([2016] EWCA Civ 39) and remitted the case back to the Upper Tribunal.

6. In order to understand the scope of the appeal before me, it is necessary to set out in some detail the findings made by Upper Tribunal Judge King and the findings subsequently made by the Court of Appeal in setting aside his decision.

Upper Tribunal Judge King's decision

7. At the time of the hearing before Judge King, the appellant and his wife had one child, a daughter Amira who was four years of age, born on 26 January 2009, and his wife was pregnant. The judge heard oral evidence from the appellant, his wife and his mother-in-law. The appellant explained how he became involved with drugs due to his limited finances at a time when he was unemployed. He was arrested on 16 July 2008 and was in custody at the time Amira was born and was not with her for the first two years of her life.

He was not working but spent his time at home giving support to his wife and daughter. He obtained several certificates whilst in prison, for plumbing and engineering and worked as a Samaritan. The appellant's wife, Marsha Emanuel, in her evidence, explained that she had previously been working but had given up her job in order to look after her daughter. She had previously had a miscarriage in 2008 and Amira had been born prematurely. She was having difficulties in her pregnancy and found it difficult to cope as a virtual single mother, also assisting her mother who had health problems. Her brother, who lived with her mother, had been diagnosed with a form of psychosis. The appellant's mother-in-law, Marvia Edwards, explained that she suffered from a fractured neck bone which pressed upon nerves in her neck and arm and was in constant pain and depended upon Marsha and her other daughter for assistance. The witnesses also gave evidence of the close bond between the appellant and his daughter Amira. Judge King went on to consider the nature of the appellant's offence, which involved the supply of drugs and which operated from greed. He noted that the appellant had been assessed in an OASys report as a low risk of re-offending. He had not re-offended since being released.

8. Judge King then identified that the focus was on paragraph 398 of the immigration rules but noted that it was not argued that there were any exceptional circumstances. He then went on to consider Article 8 outside the rules. He noted that considerations in Zambrano and Sanade "come into play". He found that there was a marked dynamic of dependency within the family unit and that that was linked to the emotional and physical need for the appellant being present and for the support he gave to the family. He found that the presence of the appellant brought stability to the family and he found that the removal of the appellant would be disproportionate and in breach of Article 8.

Judgment of the Court of Appeal

9. Before the Court of Appeal it was argued on behalf of the Secretary of State that Judge King, having referred to SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, had failed to apply the principles set out in the case and had, furthermore, adopted the "two-fold process" in relation to Article 8 which was wrong in law. Lord Justice Simon, giving his judgment, referred to various relevant authorities including LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310 and The Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636 which made clear that there was no two-stage assessment, and concluded that Judge King's approach was erroneous and that he had failed to assess Convention rights "through the lens of the new rules". He had failed to consider whether there were "very compelling circumstances" under paragraph 398 which were over and above those in paragraph 399 and were over and above the fact that it would be 'unduly harsh for the child to remain in the UK without the person to be deported'. Lord Justice Simon also found that Judge King had embarked on an analysis of the appellant's offending which was not open to him, wrongly finding the offending not to be historic and of "short duration".

10. At [44] of the judgment, Lord Justice Simon said: "*In my judgment, this was not, on the Upper Tribunal's present findings, a case in which the article 8 rights of the Respondent and his*

close family were compelling. The Upper Tribunal's failure to look at the case through the lens of Rule 398 led it to adopt an insufficiently rigorous approach to article 8, and the decision it reached cannot be said to be the only decision open to a rational tribunal on the evidence before it. It follows that the error of law was material."

11. Lord Justice Simon commented further that the Upper Tribunal had allowed itself to be drawn into a highly subjective view of the family dynamics and he referred in particular to Judge King's observations about the closeness of the family. He said that such observations should not have carried any weight and, further, that he was far from persuaded that the Zambrano point bore the significance that the appellant submitted that it did, although he made no further comment on the latter point since full arguments had not been heard in that regard. He then allowed the appeal and remitted the case to the Upper Tribunal *"for a decision to be made in the light of this judgment and the other judgments to which I have referred"*.

Appeal in the Upper Tribunal

12. The appeal then came before me on 14 April 2016.

13. Ms Harris requested an adjournment of the proceedings on the following grounds. She submitted that her instructing solicitors had only received the notice of hearing on 11 April 2016, having put themselves on record as representatives on 3 March 2016 and, having received no reply from the Tribunal, then contacted the Tribunal again on 8 April 2016. There had been no case management review hearing for the case since the remittal from the Court of Appeal. There was no evidence before the Tribunal post-dating December 2012 and she had no idea of any change in circumstances since the last hearing. Furthermore, she was in professional difficulties as she had only received the papers the previous evening. Ms Brocklesby-Weller opposed the adjournment request, submitting that if the factual matrix remained the same, it was just a matter of applying that to the immigration rules.

14. I gave Ms Harris some time to take instructions from the appellant and his wife and mother-in-law who had just arrived and to find out whether the appellant's circumstances were the same or whether there were changes which would require further evidence. Having taken instructions, Ms Harris renewed the adjournment request on the basis that circumstances had moved on. She explained that the appellant's brother-in-law had been diagnosed in June 2013 with psychosis and anxiety and had had several episodes, in May and September last year and February of this year. He was 17 years of age and was on medication and unpredictable. The appellant's mother-in-law relied on his wife for assistance in such circumstances and she would have to go to her house and leave the children with him. As regards his wife's pregnancy at the time of the hearing before Upper Tribunal Judge King, she had lost that child in a miscarriage and had since had a son, born on 17 June 2015.

15. Ms Brocklesby-Weller again opposed the adjournment request, submitting that the appellant's brother-in-law's psychosis had been mentioned previously, to Upper Tribunal

Judge King in August 2013, and therefore she was prepared to accept his condition and had no objection to oral evidence being given as to the effect that had on the family.

16. I did not agree to adjourn the proceedings but saw no reason why the hearing could not proceed with oral evidence and on the understanding that the appellant's brother-in-law's condition was not challenged. Whilst I sympathised with Ms Harris' position, having only recently been instructed, I noted that there was nothing on the Tribunal file to indicate that her instructing solicitors had put themselves on record in March 2016. Their letter of 8 April 2016, if anything, indicated that that was their first contact with the Tribunal and that also appeared to be the case from email correspondence on file. I also noted that Dotcom Solicitors were the legal representatives in the Court of Appeal proceedings and would therefore have been familiar with the case and aware of the appellant's circumstances as recently as February 2016. There was no reason, in such circumstances, why they had not been able to prepare themselves fully and provide the Tribunal with relevant evidence in time for the hearing. Indeed I note that they were criticised by the Court of Appeal for their lack of preparation for that appeal. I advised Ms Harris that I would ensure that she had as much time as needed to prepare.

17. The appeal then proceeded and I heard oral evidence from the appellant, his wife and his mother-in-law. All three explained about the appellant's brother-in-law's condition, that his episodes were unpredictable, that something would trigger his anxiety and depression and that that would lead to an episode where he would have delusional ideas, believing himself to be a superhero and to be able to fly. He would run out of the house into the street. The appellant explained that his mother-in-law, with whom his brother-in-law lived, could not cope with him during the episodes as he was a tall, well-built and strong boy. She would call them and his wife would go from their home in Enfield to her mother's house in Stevenage and would leave the children with him. They did not want the children exposed to his brother-in-law's behaviour when he had an episode. The episodes happened every three to four months. His brother-in-law received support from a government organisation called CAMHS, which gave him counselling and monitored his medication. The appellant said that his wife worked 16 hours a week and he looked after the baby when she was at work. She had a sister who provided some support to their mother but she worked full-time. There was also a problem with their baby as his neck muscles in one side were weak and he had something wrong with his left leg. He was being seen by a physiotherapist and doctor.

18. The appellant's wife, Marsha Edwards, explained that their son had a foot inversion whereby his left foot went to one side and he could not stand or crawl properly. He also had a weak muscle in his neck and his head went to one side, but the doctor had said that it should hopefully correct itself with physiotherapy and exercise. With regard to her brother, a male presence was needed as he was big and strong. The appellant was able to calm him down as sometimes her brother did not want her and would only calm down with her husband. CAMHS provided assistance but they were often short of beds. Her brother attended a normal school and was in the sixth form.

19. The appellant's mother-in-law, Marvia Edwards, explained that she had several medical conditions affecting her arm and neck and back, which meant that she could not bend easily and was often in pain. Her daughters helped her a lot. She found it hard to cope alone with her son as he was very big and strong and would throw things around and break things when he had an episode. CAMHS provided help but often had no beds and so she would have to call on her daughter and the appellant to help her. The appellant was the one who would run after him and calm him down. He had been hospitalised three times and sectioned once. At such times a nurse would come to give him medication. Her son saw the doctor every two months and a psychiatrist every week. His episodes were unpredictable. He was able to look after himself on a daily basis usually and would go to school, but then he would do something like leaving the fridge door open when he made something to eat and sometimes she would find the floor all wet.

20. I heard submissions from both parties. Ms Brocklesby-Weller relied on the case of BL (Jamaica) v The Secretary of State for the Home Department [2016] EWCA Civ 357 which had a similar factual matrix, as well as LC (China) involving British children and the case of PF (Nigeria) v The Secretary of State for the Home Department [2015] EWCA Civ 251. She submitted that the interests of the appellant's children did not outweigh the public interest. His brother-in-law had the support of government agencies as well as family members who were able to assist his mother-in-law. His mother-in-law was the primary carer and the appellant's departure would not have a compelling impact. There was nothing to tip the scales in the appellant's favour.

21. Ms Harris submitted that all matters should be considered cumulatively in assessing whether compelling circumstances existed. The appellant's role in caring for his children and his helping with his brother-in-law took his case further than it was before Upper Tribunal Judge King. There would be consequences if the appellant was not there as his wife would not be able to go to help her mother so easily. The public services were stretched thinly and could not always assist. The appellant's wife would not be able to continue working if he was not here. The appellant was a low risk of re-offending and had completed his rehabilitation. This was now an exceptional case.

Consideration and Findings

22. It is for the appellant to show that there are very compelling circumstances, over and above those in paragraph 399 and 399A, outweighing the public interest in his deportation, for the purposes of paragraph 398 of the immigration rules. Having been sentenced to a term of imprisonment of over four years, there is no dispute that he cannot benefit from the exceptions to deportation in paragraphs 399 and 399A.

23. When the appellant's appeal came before Upper Tribunal Judge King, paragraph 398 was expressed in terms of "exceptional circumstances" outweighing the public interest in deportation rather than the current version of "very compelling circumstances over and above those described in paragraphs 399 and 399A". On the facts and circumstances before Upper Tribunal Judge King it was not argued that there were such exceptional circumstances. That is recorded at [58] of his decision. The Court of Appeal found at [44]

of their judgment, on those same facts and circumstances, that *“this was not, on the Upper Tribunal’s present findings, a case in which the article 8 rights of the Respondent and his close family were compelling”*.

24. Accordingly, in order for the appellant now to succeed in his appeal, he has to show that the change in his circumstances since the hearing before Judge King takes his case into the realms of “very compelling circumstances”. Clearly, even when considering all matters cumulatively, he is unable to do so.

25. With regard to the appellant’s family, I accept, as did Judge King, that it is a close unit and that the appellant has a close relationship with his children. He now has a son as well as his daughter Amira and clearly he plays an important role in both children’s lives, with his wife working 16 hours a week. There can be no doubt that it is in the children’s best interests for the appellant to remain in the UK and that the family remain together as a unit. However, whilst the children’s best interests are a primary consideration, they are not decisive and must be weighed against the strong public interest in deporting foreign criminals.

26. The appellant’s children are both young, with the eldest, Amira, being only seven years of age. Without overlooking the significance of the fact they were both born in the UK and that residence of seven years as a child is a significant landmark, it is still the case that they are both young enough to adapt to a new environment. There is nothing to indicate that the appellant’s son’s medical condition is serious. It has not been diagnosed and the evidence is that it is currently hoped that the problem will rectify itself with physiotherapy. The fact that the children are British citizens, and are entitled to the enjoyment of the rights that flow from their citizenship, does not mean that they cannot accompany the appellant to Jamaica. That is the choice of the family. They are not being required to leave the UK if the appellant is deported but are able to remain here with their mother in the UK. It would clearly be difficult for the appellant’s wife to relocate to Jamaica as she has her close family ties here and provides considerable assistance to her mother and brother. She is a British citizen and her life is in the UK. However she has a sister here who is able to provide support to her mother and brother. Her brother is also receiving assistance from government agencies. For all of these reasons, whilst accepting the difficulties that would arise from the family relocating to Jamaica with the appellant I do not consider that it would be “unduly harsh” to expect them to do so in the circumstances.

27. In any event, the focus of the case was on the situation of the appellant’s wife and children remaining in the UK whilst the appellant returned to Jamaica. The deportation of appellants involving the separation of a family including a British spouse and children has been the subject of recent case law where particular emphasis has been placed on the recognition of the significant weight to be attached to the public interest in deporting foreign criminals, particularly in cases where there has been a sentence of more than four years imprisonment.

28. In LC (China) the Court of Appeal held at [23]:

“It follows that neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation. The appellant's children will not be forced to leave the UK since, if she chooses to do so, their mother is free to remain with them in this country.”

29. In the case of BL, the Court of Appeal considered a case in which the circumstances were similar to those of the appellant's insofar as it concerned a similar criminal offence, a family including a British partner and children and a close family unit in which the appellant played an important role. Reliance was placed by the appellant, in that case, on the family's inability to cope without him. So, too, in this case it is submitted that the appellant's presence is required to provide support to his wife in looking after the children whilst she is at work and when she is called to assist her mother when her brother has a psychotic episode, and is required to assist directly in calming down her brother. Whilst it is the case that the appellant's wife had to cope with the family when he was in prison, I accept that at that time she had only one child and that her brother had not yet been diagnosed with psychosis. I also accept that the appellant's absence will be very difficult for his wife, both emotionally and in coping physically with the demands of her children, her mother and her brother. However, it is her mother who is the main carer of her brother and her mother has the assistance of her sister. Her brother is in any event able to cope on a daily basis for the most part, attending school and looking after himself, with his episodes occurring only once every few months. He has a network of support, from his doctor and psychiatrist and from CAMHS. Although the support offered by CAMHS is not without its limits, it is nevertheless there. The information provided to me from Ms Brocklesby-Weller about CAMHS also mentions that once a child reaches the upper age limit and still needs support, they will be referred to other appropriate services for adults. The Court of Appeal emphasised in BL that the role which government agencies play in providing assistance has to be given weight. The Court said at [53]:

“The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant.”

30. Accordingly I do not accept that it would be unduly harsh for the appellant's wife and children to remain in the UK without him following his deportation. However even if it was, and even taking into account the passage of time since the offending and the low risk of re-offending, which the Court of Appeal in any event considered at [43], and taking account of the public interest considerations in section 117B and 117C of the Nationality, Immigration and Asylum Act 2002, it cannot be said that the circumstances over and above that fact are “very compelling circumstances” so as to outweigh the public interest in the appellant's deportation, when considering the nature of his offence and the length of his sentence. The appellant has family members remaining in Jamaica. He has worked in Jamaica and spent his formative years there, having left at the age of 28 years. He will therefore be able to reintegrate into life in that country. His wife and children will be able to visit him there or can elect to relocate there as a family. Should circumstances with his family become more compelling it will be open to him to apply for the deportation order to be revoked so that he can re-join his family.

31. I find, accordingly, that the appellant has failed to establish that he falls within the exceptions set out at section 33 of the UK Borders Act 2007 and his appeal must be dismissed under the immigration rules and on human rights grounds.

DECISION

32. I re-make the decision by dismissing the appellant's appeal on all grounds.

Signed 

Upper Tribunal Judge Kebede