



IAC-FH-AR-V2

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

Appeal Number: DA/01911/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4th January, 2016**

**Decision & Reasons Promulgated
On 10th February 2016**

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GEORGE COLLINGTON LEMONIUS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr David Clark, Home Office Presenting Officer
For the Respondent: Mr K Alim (Counsel)

DETERMINATION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department to whom I shall refer throughout as “the claimant”. The respondent is a citizen of Jamaica born on 19th June, 1982.

Immigration History

2. The respondent was issued with an entry clearance visa by the British High Commission in Jamaica on 18th May, 1982. This visa was for settlement with his

mother who is settled in the United Kingdom. The respondent entered the United Kingdom on 23rd July, 1992 and was granted indefinite leave to remain.

3. On 7th March, 2002 the respondent's former girlfriend, [SB] gave birth to their son, [ML]. [ML]'s birth certificate indicated that their parents lived at separate addresses. On 22nd April, 2003 the respondent married [ZT]. She gave birth to their daughter in the United Kingdom on 29th October, 2003.
4. [ZT] was subsequently granted indefinite leave to remain on the basis of her marriage to the respondent. The respondent has since stated that following DNA tests he has discovered that he is not the father of the daughter [ZT] gave birth to in October 2003. On 20th October, 2004 [SB] gave birth to her second son [TL]. The respondent's name was entered as the father and the same two addresses recorded in [ML]'s birth certificate were recorded in [TL]'s birth certificate.

The Respondent's Conviction

5. On 22nd June, 2011 the respondent was convicted at Wood Green Crown Court of conspiracy to fraudulently evade a prohibition on the importation of a class A drug and conspiracy to supply controlled drugs. He was sentenced by the same court on 6th October, 2011 to two concurrent terms of five years' imprisonment. Following his conviction he was served with form ICD0350 AD on 14th October, 2014.
6. The claimant issued a deportation decision letter on 10th September, 2013 and in it noted that under Section 32(5) of the UK Borders Act, 2007, she must make a deportation order in respect of a foreign criminal who has been convicted in the United Kingdom of an offence and who has been sentenced to a period of at least twelve months, unless the foreign national falls within one of the exceptions set out in Section 33 of the Act. The Secretary of State did not accept the respondent's claims of enjoying a family life with his two sons and did not accept, therefore, that the claimant fell within one of the exceptions set out in Section 33 of the Act.
7. The claimant noted that the respondent had been convicted following a trial for his part in the importation of just under 600 grams of pure heroin with a street value of in excess of £100,000.

Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Adio sitting with Mrs Sheila Hewitt. At paragraph 58 of the panel's determination they said this:-

"We initially told the representatives that as the law had changed the present terminology under paragraph 398 [of Statement of Changes in Immigration Rules HC 395, as amended] is now very compelling circumstances. However, we have considered the Reasons for Refusal Letter and the date of decision and note that the law applicable at the date of the [claimant's] decision is as quoted in the Reasons for Refusal Letter. The [respondent] is therefore not affected by the subsequent change in law on 28th July, 2014 which states that the new threshold is *very compelling*

circumstances. We therefore have to consider applying paragraph 398 whether there are exceptional circumstances in the [respondent's] case to the extent that the public interest in deporting him will be outweighed by other factors."

9. The Tribunal went on to allow the respondent's appeal.
10. The claimant sought and was granted permission to appeal on the basis that the panel has misdirected itself by failing to take into account the changes to the legislation introduced on 28th July, 2014 which altered the wording of paragraph 398(c) from "exceptional circumstances" to "very exceptional circumstances". So that paragraph 398 now reads as follows:-

"**398** where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and paragraph

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they had been sentenced to a period of at least four years;
- (b) the deportation of a person from the UK is conducive to the public good and in the public interests because they have been convicted of an offence for which they have been convicted to a period of imprisonment of less than four years but at least twelve months; or
- (c) the deportation of a person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

The Secretary of State in assessing the claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are **very compelling circumstances** over and above those described in paragraphs 399 and 399A [my emphasis]."

11. The Secretary of State also complained that the panel erred in their interpretation of "unduly harsh" and at paragraphs 59 to 65 failed to give adequate reasons why they believed that the removal of the respondent to have an "unduly harsh" impact on his children if they were to remain in the United Kingdom without him. The fact that the respondent's conviction was for five years meant that the Tribunal had to look at whether there were any very compelling circumstances over and above those described in paragraphs 399 and 399A which it had clearly not done.
12. In addressing me, Mr David Clark a Senior Home Office Presenting Officer on behalf of the claimant told me that the panel had simply applied the wrong law. *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 was relied on. The First-tier Tribunal heard the respondent's appeal on 9th September, 2015 and promulgated their determination on 5th October, 2015. The self-direction given by

the panel at paragraph 56 of its determination was simply incorrect and the wrong test had been applied. That, suggested Mr Clark infected the whole of the determination.

13. At paragraph 65 of the determination the panel refer to and take account of the fact that they regard the respondent as being reformed. That is not something that they should have concerned themselves with following the decision of the Court of Appeal in *Danso v SSHD* [2015] EWCA Civ 596 where, at paragraph 20 the court said:-

“20. ... It must be borne in mind, however, that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public’s revulsion at the offender’s conduct and the need to deter others from acting in a similar way. Fortunately, rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation.”

14. Mr Alim sought to rely on the Rule 24 response and suggested that there was no error of law. He reminded me that the respondent was father to [ML] who was now aged 13 years. One compelling feature of the appellant’s background is that he entered the United Kingdom in 1992 with leave. He urged me to find that there would be an exceptional and compelling impact on [ML] by the respondent’s removal. He also suggested that the Secretary of State had erred by failing to make any reference to the children’s champion when considering the best interests of the children. He said that the Secretary of State’s letter made no reference to the matter having been referred to the children’s champion. He urged me to remit the appeal to the First-tier Tribunal in the event that I found an error of law.

15. I am satisfied that the Tribunal did err by misdirecting itself at paragraph 56 of its determination and not giving effect to the change in paragraph 398 following the introduction of the Immigration Act 2014. I believe that that error on the part of the panel has infected the whole of the determination.

16. At paragraph 59 the Tribunal said this

“59. We now go ahead to discuss the exceptional circumstances. We find as a fact on the evidence before us that the [respondent] does not have any relationship with any partner in the United Kingdom. There is no satisfactory evidence before us on this even though the [respondent] says he has a relationship with someone called [S], however, [S] did not attend court and the only word we have is that of the [respondent]. We cannot accept that as satisfactory in such a situation particularly bearing in mind that it has to be exceptional circumstances that will outweigh the deportation of the [respondent]. Although there are some discrepancies with regard to some of the living arrangements between the [respondent] and his former partner [SB] we accept on the totality of the evidence before us that the [respondent] has been put down as the main carer for his first son [ML] from the time he moved into the Amber Project this is as far back as 2002. Furthermore a residence order under Section 8 of the Children’s Act 1989

was made on 29th April, 2003 in which the [respondent] was granted a residence order that his child [ML] shall live with him. That has been the case ever since and the resident's order has not been revoked. We note the recommendations of the local authority in which they noted that it was the right order for [ML] because his father i.e. [the respondent] has demonstrated he is capable of meeting the child's needs and this would ensure that [ML] grows up with his father in the paternal family and not have to suffer the potential stigma of being in care. We note that despite the fact that the [respondent] went to prison and was sentenced to five years' imprisonment the residence order has not been revoked. We accept the evidence that [ML] stayed with the [respondent's] mother during the time the [respondent] was in prison and since he has been out of prison and out of immigration detention he has continued to be [ML]'s main carer. The evidence we have before us shows that [ML]'s mother plays very little if at all any significant part in [ML]'s life. Other than the evidence that [ML] went to spend a weekend with his mother due to the fact that he was missing his brother there is no other evidence before us that shows that [ML]'s mother is in regular contact with [ML]. This is the evidence which was given by the [respondent], the [respondent's] mother even though there was an element of discrepancy in her evidence but it was not significant overall on the evidence of [CS] whose evidence we found extremely helpful with regard to the care of the [respondent's] children. She has been very much involved in dropping the [respondent's] son at home after the holiday with her. Her own daughter also attends the same school with the [respondent's] son. She displayed knowledge of the [respondent] looking after [ML] and she has spent time with both children. She is the girlfriend of the [respondent's] brother. We accept her evidence as credible as set out under the hearing section. We do not find the discrepancies with regard to the gaps when the [respondent] and [SB] lived together or for how long they lived together with regards to the care of [ML] as it was quite clear that the overall evidence before us shows that the [respondent] is the key figure in the upbringing of his son [ML] without which he would not have been able to have any decent upbringing. The evidence before us which is confirmed by the [respondent's] mother and [CS] is that since the [respondent's] release a dramatic change in the behaviour of [ML] has been noted. The same applies to his brother [TL] the children look both calmer and happier and their behaviour has changed. The evidence from [CS] noted how [ML] was withdrawn when his father was in prison. With regard to [TL] he became aggressive and had to be removed from the main stream and put into a special needs school. There is a letter from a child and adolescent psychotherapist in doctoral training by the name of Ms Anne-Marie Wedd who states that she has been working with the [respondent's] 10 year old son [TL] for over three years and knows that the [respondent] is a very important person in his son's life and that [TL] spends weekends and holidays with the children and [TL] has visited his father when he was in prison. The professional noted that the [respondent] and his son have a close and loving relationship and she is in no doubt that should the [respondent] not be able to stay in the country the disruption of that relationship could have devastating consequences to the mental wellbeing of his son."

17. The panel went on at paragraph 60 to say:-

"With regard to [ML] there is a letter dated 3rd September 2015 confirming that the [respondent] is the first point of contact for [ML] and corresponds with the school in

regards to [ML]'s behaviour, attendance and academic progress and he also attends parents' evenings and meetings. It is noted that [ML] has an attendance of 99.5% for the last academic year. We therefore find that despite certain elements of discrepancies which exist in the evidence concerning the particular addresses where the [respondent] lived or at what time he lived with [SB] the fact remains that the impact of the [respondent] in his children's lives cannot be undermined in any way."

18. At paragraphs 64 and 65 are where the panel reached their conclusions in respect of finding "exceptional circumstances".

"64. We accept that the [respondent] has family life with [TL] as well as with [ML]. He is playing a key role in their lives without which it would be most devastating where the children would be by now. It is quite clear according to all the evidence before us that removing the [respondent] from the UK would bring about interference with the family life that he has with his two children but more so it is the negative impact that would be on both children's lives. When he went to prison one was withdrawn and the other was aggressive and one child had to go into special needs school and the [respondent] was working closely with the school as well as with professionals to ensure that the child gets back into mainstream education. As rightly pointed out by Mr Alim when one considers the impact the [respondent] has had on the lives of the children with him being in the country it is true to say that a negative effect would follow if he was out of the country. The mother's children has (sic) played very little part and next to nothing in the part of [ML]'s upbringing although she is currently the carer of [TL]. Having said that she herself has not made any attempt to reverse the residence order in regard to [ML]. Furthermore she recognises the impact that the [respondent] plays in the part of her two children as can be seen in a letter she has written on 28th November, 2013 in which she acknowledges that the [respondent] took on his responsibility of being a dad very serious (sic) doing most of the night feeds, bathing, changing of nappies for their first son [ML]. She had social workers in her life for personal reasons and she was put in a mother and baby unit when she failed and so the [respondent] became the one who passed the assessment. Again she acknowledges that the [respondent] played a part with looking after [TL]. [TL] was about 4 years old when the relationship broke down. She acknowledges that despite she and the [respondent] not being in a relationship that the [respondent] is a responsible dad and takes the roles very serious (sic). She also acknowledges that [TL]'s behaviour became so bad with the absence of his dad that he had to be dragged to school stating that he was going to kill himself and also he had behavioural problems and became erratic. Since the release of the [respondent] from prison [SB] acknowledged that [TL] is gradually improving. The evidence given by [SB] in a witness statement corroborates that of [CS] who identifies the role George has played in the children's lives. Mrs Campbell who is George's mother has also played a very supportive role when George was in prison but is becoming elderly and he has health problems and in any case can never fulfil the role George is fulfilling. The two children are growing to become teenagers and are still at a stage of their lives where the impact of their father who in the case of [ML]'s role is more crucial as the [respondent] is more or less playing the role of father and mother and in the case of [TL]'s role is ensuring that he is making a positive change.

65. We have taken into account the submissions made by Ms Khan with regard to the public revulsion of the kind of crime the [respondent] has committed and the

fact that the deportation of the [respondent] would create a deterrence to other foreign criminals. However from them following suit however we have found exceptional circumstances in the impact of the [respondent] in the light of his two children the fact that he is the main carer and has a residence order in respect of his first son [ML]. With the absence of the [respondent] from this country we have no doubt that these children would be worse off and would rebel and go down the way of committing offences. It is quite evident that the impact of the [respondent] in [TL]'s life is such that once he went to prison he became aggressive and ended up in a special needs school. [ML] also became withdrawn and the damage limitation was done only because his grandmother was looking after him. His grandfather is aged and at his age [ML] needs the proper care of a father. We also weigh in the balance the fact that there is a letter from the National Probation Service stating that the [respondent] fully adhered to the National Standards Reporting Instructions and kept all of his probation appointments. He engaged proactively during all sessions and is determined to address his issues around his offending behaviour. It is noted that he maintains a good relationship with his extend family and most importantly is the concluding remarks of the supervising probation officer which notes that the [respondent] response to supervision is excellent and he is genuinely motivated to address his underlying issues from the past. He is described as polite, patient and respectful and above all his current risk of harm and re-offending has been reduced as low and he is no longer at risk for the wider society. We find that weighing the factor of the public interest on one side of the scale and the factors on the other side of the scale the impact of the absence of the [respondent] on his two children, the fact that the [respondent] is no longer a risk to the wider society, the fact that he had a good character before getting involved in the offence he was involved and found himself in a vulnerable position by using his own identity card points to the fact that the [respondent] is not one who readily commits criminal offences. Whilst we do not undermine the seriousness of the offence he committed the fact remains that this is a one-off offence and there is no indication that the [respondent] intends to commit such offence or any other criminality in the future. We therefore find based on the evidence given by the [respondent], [CS], the appellant's mother and all other supporting evidence with regard to his impact on the lives of his two children as well as the personal character of the [respondent] himself which has been totally reformed that there are exceptional circumstances in this case which outweigh the public interest. We therefore find, applying the Immigration Rules which is a complete code that the exceptional circumstances referred to under paragraph 398 of the Immigration Rules is such that it exists in the present case."

19. The panel appear not to have reminded themselves what was said at paragraph 24 of *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ, namely

"... 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."

Neither had the Tribunal appeared to have reminded themselves of what was said at paragraph 27 of *Lee v Secretary of State for the Home Department* [2014] EWCA Civ 348:

“The tragic consequence is that this family, short lived as it has been, will be broken up for ever because of this appellant’s bad behaviour. That is what deportation does ...”

20. I believe that the Tribunal also erred at paragraphs 66 and 67 of the determination. At paragraph 66 they noted that they were required to take account of Section 117C(6) of the Immigration Act 2014. This requires that in the case of a foreign criminal who has been sentenced to a period of imprisonment for at least four years, the public interest requires deportation unless there are **very compelling circumstances** over and above those described in Exceptions 1 and 2.
21. The Tribunal were concerned at paragraph 56 of the determination to point out that the change in the law which changed the threshold to “very compelling circumstances” did not apply to this appeal. They went on, therefore, throughout their determination to consider exceptional circumstances and at no time did they consider whether there were any very compelling circumstances. However, almost as an aside, the Tribunal said at paragraph 67 that they find no difference in their analysis in the application of the proportionality test under the Immigration Rules and under the Immigration Act 2014. The problem with that finding is that nowhere do they remind themselves that “very compelling circumstances” is a very much higher test than “exceptional circumstances”. What they say at paragraph 67 is simply wrong.
22. The judge’s sentencing remarks are set out in paragraph 28 of the claimant’s decision that Section 32(5) of the UK Borders Act 2007 applies taken on 10th September, 2013. The judge said:-

“It is a tragedy to see you before the court to be sentenced today. You are 29, a family man of hitherto good character. You were convicted following a trial of your part in the importation of just under 600 grams of pure heroin with a street value of easily over £100,000.

Having heard the evidence I am quite satisfied that your co-defendant Mr Khan was the prime mover in this offence liaising with others abroad to arrange the importation of drugs, you are his friend there is evidence of telephone traffic between him and those shipping the drugs and between him and you in the run up to the delivery. It is also clear that you were a channel through which £1,500 to purchase the drugs was paid to Pakistan, an unsophisticated attempt because you used your own driving licence, when he was arrested you were in contact with others involved in the conspiracy before in due course you were arrested.

By their verdict the jury rejected your explanations that you did not know that this was a drug deal, nevertheless I am satisfied that your role was significantly less than Mr Khan. You were involved. You assisted in the transfer of funds but beyond that there is no evidence of any greater criminality on your part.

In coming to the sentence that I do, I therefore adopt this approach, I bear in mind that this is an offence of importation of heroin, it is approaching 600 grams. The case of *Arama* suggests that the starting point should be a sentence of somewhere in the region of ten years or more.

In dealing with you I have to have regard to the fact that there is a possibility albeit a slim one that in due course I will conclude that Mr Khan thought that he was involved

in cannabis and not heroin. Justice required me to give you the benefit of that doubt. That issue has not been resolved because Mr Khan has voluntarily absented himself, that is no fault of yours. Accordingly, I proceed to sentence you on the basis that although you were involved in the importation of heroin you thought you were importing cannabis. That fact that you paid only £1,500 for the drugs is evidence which would support that view. To adopt an analogy you were in this episode a lieutenant and not a general and I accept the submission that you came into this enterprise towards the end ...”

23. Controlled drugs, be they heroin, cocaine or cannabis are responsible for causing misery to countless lives, the break up of families and on occasions premature death. It is the curse of modern society and those who seek to import controlled drugs for the purpose of supplying to others do so purely for greed. It is an evil business.
24. I accept that if the respondent is deported it may very well mean the end of the family life that he enjoys with [ML] and [TL] and the family life that they enjoy with him. The impact on them will be very great. I do not under estimate it. I also bear in mind that were the respondent to be deported he will not be permitted to re-enter the United Kingdom for at least ten years and in view of his conviction may never be permitted to re-enter the United Kingdom. The effect of the respondent’s removal will, therefore, be to end family life that he enjoys with his sons and which they enjoy with him although it will of course be possible for them, should they choose, to visit him. I bear in mind what the Court of Appeal said in both *LC (China)* and *Lee*. I find that there are no very compelling circumstances over and above those described in paragraphs 399 and 399A which outweigh the public interest in deportation in this appeal.
25. The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. My decision is that the appeal of the respondent be dismissed.

No anonymity direction is made.

Upper Tribunal Judge Chalkley