



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11308/2018**

THE IMMIGRATION ACTS

**Heard at Field House
On 5 February 2020**

**Decision Promulgated
On 9 March 2020**

Before

**THE HON. MRS JUSTICE MCGOWAN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEBEDE**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROJAY [H]

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: Mr M Karnik, instructed by Citywide Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr [H]’s appeal against a decision to refuse his human rights claim and to deport him from the UK.

2. For the purposes of this decision, we shall refer to the Secretary of State as the respondent and Mr [H] as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a national of Jamaica born on 24 August 1997. He arrived in the UK on 29 June 2001, at the age of three years, to join his mother who had previously arrived on 19 December 1998 as a visitor and had overstayed. He was given six months leave to enter as a visitor, until 28 December 2001, and he then also overstayed his visa. Following an application made on 16 February 2004 the appellant's mother was granted indefinite leave to remain, with the appellant being granted the same as her dependant, on 6 February 2009.

4. From 20 May 2014 the appellant received various cautions and convictions for possession, and possession with intent to supply, class B (cannabis) and class A drugs, culminating in convictions in 2016 for possession of a controlled drug with intent to supply – class A, crack cocaine, for which he was sentenced on 18 November 2016 to 42 months' imprisonment in a young offenders institution and possession of a controlled drug with intent to supply – class A, heroin, for which he was sentenced on the same day to 24 months' imprisonment in a young offenders institution, to run concurrently. In addition, on 6 February 2017 the appellant was sentenced to three months' imprisonment in a young offenders institution, to run concurrently, for possession of a knife/ sharp pointed article in a public place and on 3 December 2018 he was sentenced to six months' to run concurrently for possessing an item without written authority in prison (a mobile phone).

5. Following the sentencing on 18 November 2016, the respondent made a decision, on 30 November 2016, to deport the appellant and invited him to make representations in a section 120 notice which he did, in a human rights claim. The respondent then made a Deportation Order under section 32(5) of the UK Borders Act 2007 on 13 April 2017 and on 24 April 2017 made a decision to refuse the appellant's human rights claim. The claim was initially certified under section 94B of the Nationality, Immigration and Asylum Act 2002, but following the Supreme Court judgment in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 the certification was withdrawn and the appellant was given an in-country right of appeal.

6. In refusing the appellant's human rights claim, in the decision of 24 April 2017, the respondent noted that he had not submitted any evidence of a relationship with a settled person and concluded that he could not, therefore, benefit from the exception to deportation on family life grounds. The respondent considered that, with regard to the appellant's private life, he could not meet the requirements of paragraph 399A as he had not been lawfully resident in the UK for most of his life, he was not socially and culturally integrated in the UK and there were no very significant obstacles to his integration in Jamaica. The respondent considered that there were no very compelling circumstances outweighing the public interest in the appellant's deportation and that his deportation would accordingly not be in breach of Article 8.

7. The appellant's appeal against that decision came before the First-tier Tribunal on 17 June 2019. The appeal was heard by First-tier Tribunal Judge

Henderson, who heard evidence from six witnesses, namely the appellant, his partner, his mother, his friend and his friend's mother and his former teacher. She noted and accepted the evidence that the appellant had been with his partner for six years, since 2013, having met at school, that they had a daughter together in August 2016 and that they had never lived together but intended to do so in the future. In the absence of any supporting evidence the judge was unable to accept the claim that the appellant's partner and child were British. Although she accepted that they had a genuine and subsisting relationship, she did not accept that it would be unduly harsh for them to live in the UK without the appellant, given that they had never lived together and that the appellant's relationship with his daughter had only really developed in the last three months since he was released from prison. With regard to paragraph 399A, the judge accepted that the appellant had no significant connections with Jamaica, having only one relative, an elderly and frail grandmother there, and a step-father who had applied for settlement in the UK.

8. The judge found that the appellant had been lawfully resident in the UK since obtaining ILR in 2009, which was 10 years ago. She did not accept that the test for 'most of his life' should be applied in a strictly arithmetic way and she accepted that the appellant, who was 21, had been lawfully in the UK for most of his life. The judge also accepted that the appellant was socially and culturally integrated in the UK and found that he had been rehabilitated and would not re-offend, and she concluded, with regard to the guidance in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813, that there were very significant obstacles to his integration in Jamaica. The judge did not find there to be very compelling circumstances over and above those in paragraph 399A but she allowed the appeal on Article 8 grounds, on the basis that the exception to deportation in paragraph 399A and section 117C(4) of the Nationality, Immigration and Asylum Act 2002 applied.

9. Permission to appeal to the Upper Tribunal was sought by the Secretary of State, on the grounds that the judge's finding on 399A(a) did not meet the criteria which the Court of Appeal considered applicable in Secretary of State for the Home Department v SC (Jamaica) [2017] EWCA Civ 2112, namely that he had lived in the UK for "most of his life", and that the judge had failed to refer to the case of Mwesezi v The Secretary of State for the Home Department [2018] EWCA Civ 1104 when considering very significant obstacles to integration under paragraph 399A(c) and had failed to identify anything that would amount to very significant obstacles to integration.

10. On 16 August 2019 Resident Judge Appleyard issued a notice of intention to set aside the judge's decision under Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in relation to the finding on "most of his life" under paragraph 399A(a). However, following representations made on behalf of the appellant objecting to such a course, he granted permission on that and all other grounds on 26 November 2019.

11. The matter then came before ourselves for a panel hearing and both representatives made submissions, relying upon their skeleton arguments.

Hearing and submissions

12. Mr Lindsay submitted that the judge had erred in her assessment of paragraph 399A(a) and had wrongly found that the test should not be applied in an arithmetic way, when there was legal authority to say that it should be. He submitted that, as a matter of public policy, the relevant date to consider the length of lawful residence was the date of the hearing and at that time the appellant had not spent more than half of his life lawfully in the UK. The judge therefore made a material misdirection and erred in law. Mr Lindsay submitted that the main substance of the grounds, however, was the challenge to the judge's findings on 'very significant obstacles to integration'. The judge's finding at [57], that there were "no familial or cultural links", was perverse, given her previous finding that the appellant had a grandmother and step-father in Jamaica. The judge ought to have found that the appellant could establish a private life in Jamaica, as he was in good health and was capable of working.

13. Mr Karnik produced a spreadsheet showing the appellant's length of residence in the UK against the period of half of his life, whereby his length of residence fell short of half of his life by three days at the date the judge's decision was promulgated, but exceeded half of his life by four days at the time the Secretary of State made her application for permission. He submitted that the matter had now become academic and it was not relevant for the Secretary of State to pursue it. He relied on the case of SM (Pakistan) [2014] UKUT 64 in relation to matters which had become academic and submitted that this ground of appeal should never have been brought. As for the judge's finding that there were very significant obstacles to the appellant's integration in Jamaica, her decision was thorough and comprehensive and made proper references to relevant authorities. She had not contradicted herself or made inconsistent findings and had properly applied the test in Kamara. The Secretary of State had failed to show that the judge's findings met the high test of showing perversity.

The legislative framework

14. The relevant immigration rules are as follows:

"Deportation and Article 8

A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

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

- (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 have been sentenced to a period of imprisonment of at least 4 years;
- (b) 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 have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the 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 that 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.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.”

Consideration and findings

15. We find significant merit in the submission made by Mr Karnik and in the appellant’s Rule 24 response, that the Secretary of State’s challenge to the judge’s finding on “most of his life” is now academic.

16. We agree entirely with Mr Lindsay that the relevant date to consider the appellant's length of residence in the UK in relation to his age was the date of the hearing. The rules themselves do not provide for a date for the relevant calculation, as is the case with paragraph 276ADE(1) in non-deportation cases, where the date of the application is specified as the relevant time-line. It can therefore only be the case that, since this is a human rights appeal, the relevant date is the date of the hearing. We also agree with Mr Lindsay that, in considering the appellant's age and length of residence at the date of the hearing, the judge was wrong to dismiss the concept of an arithmetic application of the rule, since this was contrary to legal authority. We refer in particular to the case of SC (Jamaica), where the Court of Appeal held at [53] that:

"The starting point for the temporal question is the decision of this court in *AS (Iran) v Secretary of State for the Home Department* [2017] EWCA Civ 1284 per Moylan LJ at [39] where it was concluded that 'most of his life' is a quantitative not a qualitative concept. Everyone agrees that 'most' must connote more than half but no-one was able to characterise with any prospect of certainty or consistency just how much more than half that would be if the tribunal is to be expected to engage in an evaluation that is quantitative. Having regard to the difficulties that would be created by any other formulation, I have concluded that the plain meaning of 'most of his life' for this purpose has to be 'more than half'."

17. Accordingly, we concur with Mr Lindsay that the judge erred in law in her approach when assessing whether the requirements in paragraph 399A(a) had been met and she erred by finding that the appellant had been lawfully resident in the UK for most of his life. However, we do not consider that to be a reason to set aside the judge's decision given that an assessment at the current time would conclude that the appellant has now spent more than half his life in the UK and that he had done so by 29 July 2019 when the Secretary of State made her application for permission. That was according to the calculations undertaken by Mr Karnik, which Mr Lindsay did not dispute. We agree with the inclusion in that calculation of the period spent by the appellant in the UK initially as a visitor, and the exclusion of the period spent between the expiry of his leave on that basis and the grant of ILR, since both are consistent with the findings of the Court of Appeal in CI (Nigeria) v The Secretary of State for the Home Department [2019] EWCA Civ 2027 at [51] and [54]. Alternatively, if we were to set aside the judge's decision in that respect, we would have to re-make it by concluding that the requirements in paragraph 399A(a) are now met for the same reasons.

18. No doubt it is for this reason that Mr Lindsay submitted that the main substance of the challenge in the grounds was to the judge's decision on 'very significant obstacles to integration' in Jamaica. We do not, however, find that this ground of challenge has been made out. We note that, as Mr Karnik pointed out, the submissions made by Mr Lindsay took a different approach to the challenge as set out in the grounds of appeal. Mr Lindsay did not make any specific challenge, in his submissions, to the judge's reliance on Kamara and her lack of reference to the case of Mwesezi v The Secretary of State for the

Home Department [2018] EWCA Civ 1104, which was the main focus of the challenge in the grounds of appeal. In any event the decision in Mwesezi clearly did not detract from the principles and guidance in Kamara in any way. That is apparent from [26] of Mwesezi which makes it clear that the decision in that case was specific on its facts and, from [25], that the issue of ‘very significant obstacles’ was not in fact part of the challenge before the Upper Tribunal.

19. Mr Lindsay’s submission was that the judge had made inconsistent, conflicting and perverse findings: specifically that her finding, at [57], that the appellant “*has no familial or cultural links with Jamaica*”, was inconsistent with her findings at [40] and [41] that he had a grandmother and step-father in Jamaica. However, the judge’s finding at [57] was plainly not made in ignorance of the evidence she had just summarised and it is clear to us that she in fact intended to say that the appellant had no *substantial* familial links, given that she was referring back, in that paragraph, to the finding previously made in that regard, which appears in her summary at [43], that the appellant “*has no substantial family connections there*”. We agree with Mr Karnik that the judge’s decision was made on the basis of a full and careful assessment of all the evidence, of which there was a substantial amount, from six witnesses. We also agree with Mr Karnik that the judge properly considered the evidence in the context of the principles and guidance set out in Kamara and that it is relevant that the respondent’s representative, when specifically invited to comment upon the applicability of the principles in Kamara, had no submissions to make in response to the judge’s observations, as recorded at [58] and [59]. We concur with Mr Karnik that the judge was entitled to take into account such a lack of challenge on behalf of the respondent when making her decision.

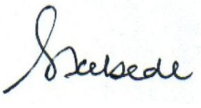
20. Accordingly, whilst the Secretary of State asserts that the judge’s findings on the matter of ‘very significant obstacles’ were unsustainable, we consider that that assertion is essentially nothing more than a disagreement. Certainly, we find nothing approaching the threshold of perversity in the judge’s findings. The judge’s conclusion was based upon a comprehensive assessment of the evidence and a full appreciation and application of the relevant legal principles and caselaw and was, we conclude, properly open to her on the basis of that evidence. We find no errors in the judge’s approach to the issue of ‘very significant obstacles’.

21. For all of these reasons we find no merit in the grounds of appeal. The judge was fully and properly entitled to conclude that the appellant met the requirements in paragraph 399A and section 117C(4) and benefited from the private life exception to deportation. She was entitled to allow the appeal on the basis that she did. We find no errors of law in the judge’s decision and we uphold the decision.

DECISION

22. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. We do not set aside the decision. The Secretary of

State's appeal is accordingly dismissed. The decision of the First-tier Tribunal, to allow Mr [H]'s appeal, stands.

Signed 
Upper Tribunal Judge Kebede
2020

Dated: 26 February