Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001656
PA/10062/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 August 2023	**On 13 December 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

KENNETH WILSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B. Supiya, appearing as McKenzie friend
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica, born in 1976. On 1 August 2018 the respondent made a decision to refuse his protection and human rights claim, made in the context of a decision to make a deportation order, which was itself made on 26 June 2014, because of the appellants' criminal offending.

2. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Cameron on 26 July 2021, following which his appeal was dismissed in a decision promulgated on 19 January 2022.

3. Permission to appeal was granted by a judge of the First-tier Tribunal ("FtT"). The grant of permission amongst other things states that:

> "I note that the decision was promulgated some six months after the appeal was heard; such a delay is of concern to me."

4. As regards the above statement, we note that the grounds of appeal do not raise the issue of delay, but we nevertheless consider it given that it is part of the grant of permission to appeal.

5. The judge granting permission also identifies arguable errors of law in relation to the best interests of the appellant's children and in terms of the 'unduly harsh' test.

Judge Cameron's decision

6. Judge Cameron summarised the basis of the respondent's decision dated 1 August 2018 which itself has a summary of the appellant's protection and human rights claim.

7. Judge Cameron referred to the appellant's conviction on 14 January 2014 for six offences of theft (of mobile phones) from the person for which he received a total sentence of 17 months' imprisonment.

8. He heard oral evidence from the appellant, from his partner and from one of their children, T.

9. Under the subheading "Findings of Fact and Credibility" Judge Cameron set out the applicable legislative regime and referred to a number of authorities. He referred at para 34 to the appellant's claim that he is not able to return to Jamaica as he fears for his life from criminal gangs, and that he was targeted by the 'One Order Gang' in 2001 and 2002. He also made reference to the appellant's claim that he was beaten and stabbed, and that in 2002 he was kidnapped and tortured by the gang.

10. At para 37 Judge Cameron referred to medical evidence which showed that in 2017 the appellant had a number of scars which he said are consistent with the injuries that the appellant claimed to have received in 2017.

11. At paras 38 and 39 he noted that it did not appear to be in dispute that the appellant did not raise any claimed fear of return until February 2017, having come to the UK in November 2002 and married on 20 April 2003. Again, at para 39 Judge Cameron referred to a claim made in a letter from the appellant in March 2017 that his cousin was murdered by gang members.

12. In relation to the appellant's claim that a friend was killed by the gang members, Judge Cameron said that he was not satisfied to the lower standard that the evidence provided by the appellant indicates that his cousin's or his friend's deaths were related to the appellant (paras 40 and 47), rather than their own involvement with the gang

or other factors. He explained this conclusion with reference to the background evidence of gang culture in Jamaica.

13. Judge Cameron noted that the appellant has not been in Jamaica since 2002 and did not raise a fear of return until 2017, notwithstanding that he had a number of applications prior to the present one, including a "court hearing" on 10 June 2016. Judge Cameron said that it was surprising that the appellant did not raise the issue of his fear of return at that hearing which was also concerned with his deportation. He made an adverse credibility finding in terms of s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") given the late claim of a fear of return, 15 years after arriving in the UK.

14. At paras 44-47 Judge Cameron referred again to the appellant's scars and reports that he suffered PTSD as a result of the trauma he claims to have suffered in Jamaica. He added, however, that those reports of trauma are only based on what the appellant told the doctor and are recent, being from 2017. He found that there was nothing inherently incredible in the appellant's claim to have been subjected to threats in 2001 and 2002 and the medical evidence provided some support for that aspect of the claim.

15. At para 48 he concluded that the appellant had not shown that there was continuing interest in him, having left Jamaica in 2002. He noted that the reason the appellant said that he had been subject to adverse attention by them at that time was because he did not wish to join them or do what they were asking.

16. At para 50 Judge Cameron expressed very briefly the conclusion that the appellant could in the alternative move to a different area, but reiterated his primary finding that there would be no interest in him by the gang on his return. He therefore rejected the asylum and humanitarian protection aspect of the appeal.

17. As regards the Article 8 aspect of the appeal, with reference to his relationship with his wife and children, Judge Cameron referred to an earlier hearing before First-tier Tribunal Judge O'Garro whose decision was promulgated on 11 July 2016. She had found that the appellant had a genuine and subsisting relationship with his partner and with his children, including those with whom he did not live. He noted, however, that Judge O'Garro did not find that it would be unduly harsh for them if the appellant was removed.

18. At para 55 Judge Cameron said that it was clear from the evidence (including the oral evidence) that there is a good relationship between the appellant, his partner and their daughter T who gave evidence.

19. He referred at paras 56-58 to the appellant's offending, including other offences than the six theft offences, noting that the sentencing judge assessed his culpability as "really quite high".

20. At para 60 he noted that the appellant had been given the opportunity to reform when he was given a suspended sentence but he had continued to offend. He accepted, however, that he had not offended since his release from prison. He noted that the appellant had come to the UK in 2002 as a visitor when he was about 26 years old and he had, therefore, spent his formative years in Jamaica. He accepted that having been granted indefinite leave to remain ("ILR") in August 2007 the time spent in the UK had been mostly lawful (in terms of leave), although he had committed serious offences.

21. He again referred at para 62 to the appellant's subsisting relationship with his partner and children, even though a number of them do not live with him.

22. As regards the unduly harsh test, Judge Cameron referred at para 67 to a report from a child and adolescent psychiatrist dated 30 January 2018 in relation to his child TL in relation to behavioural problems at home and at school and what is said about the appellant's positive influence and support.

23. He also referred to an independent social worker's report in relation to the appellant's partner and T, and the conclusion that the appellant's deportation would have a detrimental emotional and physical impact on T and on his partner. He also said, however, that there was no further updating evidence and T is now 16 years of age, albeit that he accepted the evidence that they are very close.

24. Nevertheless, at para 70 he noted that the children live with their respective mothers and they would continue to do so and receive support from other family members. He concluded that "There is no doubt that the appellant's removal would result in potentially harsh consequences" particularly for T, and to a lesser extent the other children, by their not being able to see him on a regular basis.

25. Similarly, he found that the effect on his partner would "also undoubtedly cause problems" given that their relationship could not continue as before. Judge Cameron accepted that they have been married since 2003 and noted his partner's oral evidence that she would be devastated by his removal as she did not feel that she could go to Jamaica. However, he said that she would have "the assistance" of other family and children. Although she was currently unemployed, he noted that she had been employed until recently until made redundant.

26. At para 74 Judge Cameron accepted that the appellant's removal would have "harsh consequences" for the family, as they would not be able to spend the time with the appellant that they currently do.

He found, however, that the degree of harshness did not go beyond what would necessarily be involved for any partner or child in these circumstances, "when consideration is given to the fact that the appellant has committed offences and has therefore caused the situation to arise by his own actions".

27. In the following paragraph Judge Cameron referred to the public interest and repeated his conclusion that the consequences of the appellant's deportation would not be unduly harsh for the appellant's partner or his children."

28. He went on to conclude that there were no very compelling circumstances over and above the exceptions such as to mean that the deportation decision was disproportionate.

The grounds of appeal and submissions

29. The grounds of appeal were drafted by Mr Supiya, who confirmed to us at the start of the hearing that he has no legal qualifications. We note that he also appeared before Judge Cameron.

30. The grounds can be summarised as follows. What is described as ground 1 alleges a failure to consider the appellant's evidence. It contends that having accepted core aspects of the appellant's account of events in Jamaica, that is his kidnap and torture, and the gang culture there, he ignored the case of one Delroy Edwards whose circumstances, the grounds say, were not materially different from the appellant's and who was killed on return to Jamaica after his asylum claim was rejected.

31. This ground also argues that Judge Cameron failed to refer to, or take into account, the evidence of Constable Leonard Jennings of the Jamaica Constabulary, or the evidence of two aunts, Icilda and Melvina Pearson, all of whom warned of the threat to the appellant being 'live'.

32. Similarly, it is argued that Judge Cameron failed to consider the submissions in the skeleton argument at paras 19 and 20 which referred to several other murdered deportees, as well as other evidence of warnings from senior individuals, and other background evidence of the murder of deportees.

33. Under the subheading "A breach of natural justice", which we shall call ground 2, it is said that the adverse credibility finding made by Judge Cameron at para 43 (s.8 of the 2004 Act: late asylum claim), is against the weight of the evidence, in that the appellant was "completely unaware" of the asylum process when he first arrived in the UK and regularised his stay by marrying. It is argued that the appellant only mentioned his fear of return on 20 February 2017 on being interviewed by the Home Office.

34. The grounds then refer to the length of time that the appellant has been in the UK and the fact of no reoffending, and his relationships with his family. It is argued that Judge Cameron's decision does not identify which of the parties' submissions were accepted or rejected.

35. We invited Ms Ahmed to make her oral submissions first in order to assist the appellant with the presentation of his case.

36. Ms Ahmed relied on the 'rule 24' response to the grounds of appeal. She submitted that it is clear from para 3 that Judge Cameron did take into account all of the evidence (para 3 setting out in detail the evidence, including witness statements). We were taken to various paragraphs of Judge Cameron's decision in support of the submission that he was entitled to find that the deaths of the other persons in Jamaica, a friend and cousin of the appellant, were not linked to him.

37. Ms Ahmed submitted that Judge Cameron at para 43 rejected the appellant's explanation for the late asylum claim, namely that he did not know about asylum at the time. He had considered the evidence as a whole and had made some positive findings.

38. Ms Ahmed very properly drew our attention to *HA (Iraq) v Secretary of State for the Home Department (Rev 1)* [2020] EWCA Civ 1176, and in the light what is said there about the meaning of 'unduly harsh' she accepted that Judge Cameron did err in law at para 74 in taking into account the seriousness of the appellant's offending when he considered the issue of whether his removal would be unduly harsh on his partner or his children. However, it was submitted that that error of law was not material. At para 70 he made reference to T. She was aged 16 at the date of that hearing which was in 2021. If the error of law relates to her only, she is now 18 and no longer a child Ms Ahmed pointed out.

39. As regards delay, which is not pleaded in the grounds, it was submitted that there was no 'negligence' in the decision, which can sometimes otherwise be seen. In this case the delay cannot be seen to have led to error. Furthermore, it was submitted that only protection-based appeals fall with the *Robinson* obvious principle. Ms Ahmed relied on *Durueke (PTA: AZ applied, proper approach)* [2019] UKUT 00197 (IAC), although she very fairly referred us to *AZ (error of law: jurisdiction; PTA practice)* Iran [2018] UKUT 00245 (IAC), in particular what that decision says about granting permission on a point which the permission judge considers has a strong prospect of success.

40. Mr Supiya, assisting the appellant, referred to the delay in the decision by Judge Cameron. He reminded us of the appellant's case in relation to a fear of return to Jamaica, including his claim that there was another person detained at Brook House who recognised the appellant and referred to the events of the past, and the written evidence of others that was before Judge Cameron, about that risk.

41. Mr Supiya referred to the small size of Jamaica and said that there would be nowhere for the appellant to hide. He suggested that the family could not visit him in Jamaica, being a place where the appellant was himself unsafe, and their relationship would be ended forever. He added that it would be unduly harsh for T, his partner and the other children, to live with the fear that the appellant could be kidnapped and tortured again.

Assessment and conclusions

42. Aside from the criminal offences to which we have referred so far in this decision, and which were considered by Judge Cameron, we note from the decision of Judge O'Garro from July 2016 that the appellant has other convictions going back to 2007, although apart from her decision it is not immediately apparent from the documentary evidence before us that there is any reference to those other convictions in those documents. That further offending background did not feature in the appeal before Judge Cameron and we have not taken it into account in our considerations. Whether it is of relevance in any future appeal is not a matter for us to decide.

43. We also note that in the respondent's decision dated 1 August 2018 which is the decision under appeal, it was decided that the appellant should be excluded from humanitarian protection pursuant to paragraphs 339C-D of the immigration rules. It is not apparent from Judge Cameron's decision that this was a matter in issue before him. Although he referred to the respondent's decision including a decision excluding the appellant from humanitarian protection, he did not consider the matter further, and indeed purported to dismiss the appeal on humanitarian protection grounds, rather than to conclude that the appellant was excluded from humanitarian protection.

44. Again, however, this was not a matter raised at the hearing before us and we do not, therefore, consider it further.

45. We consider the issues arising in the order in which we find to be the most logical, starting with the complaint about Judge Cameron's assessment of asylum and its related human rights aspect of the appeal.

46. We do not consider that Judge Cameron can be faulted for his finding that the appellant had not given a satisfactory explanation for the delay in asserting a fear of return and the consequent delay in claiming asylum. He took into account s8 of the 2004 Act, as he was required to do. At para 43 he specifically referred to and rejected the appellant's explanation that he did not know about claiming asylum, pointing out that asylum was something often referred to in the national news.

47. Although Judge Cameron did not refer to the other part of the appellant's explanation given in his witness statements of 3 July 2019

and 8 February2020 for his late claim, namely that he was granted ILR in 2007 because of his marriage, we do not consider this omission to be significant. Judge Cameron was entitled to take into account that the appellant did not mention any fear of return in the course of the appeal that was heard by Judge O'Garro on 10 June 2016 or in his other immigration applications.

48. Similarly, we do not consider that there is any merit in the contention in the grounds that Judge Cameron's decision does not identify which of the parties' submissions were accepted or rejected.

49. We do, however, consider that there is merit in the contention that Judge Cameron's assessment of risk on return fails to take into account all the evidence before him. He accepted the appellant's account of his kidnapping and torture in Jamaica but found that there was no risk on return because those events happened so long ago, and he found that the evidence did not support the claim that there was any evidence of continuing interest in the appellant.

50. He did refer at para 47 to the evidence of "Shameka McKenzie" (which we believe is actually a reference to Shameka Jennings and her witness statement dated 11 June 2019), who refers to the death in 2017 of one Mark Jennings, and that that was said at the time to be related to the appellant.

51. However, there is other specific written evidence that Judge Cameron did not refer to in his findings, namely that from one Constable Leonard Jennings said to be from the Jamaica Constabulary, and that of two persons said to be the appellant's aunts in Jamaica, Icilda and Melvina Pearson, all of whom warned of the continuing threat to the appellant.

52. Ms Ahmed argued that Judge Cameron had in fact taken into account all of the evidence, having set it out at para 3, and submitted that a judge does not need to refer to or deal with every piece of evidence. However, in our view there is a significant difference between identifying the evidence in the introductory paragraphs of a judgment and the assessment of that evidence in the 'reasons' part of a judgment, particularly where, as in this case, that evidence is potentially significant.

53. We do consider that Judge Cameron's failure to evaluate, or to demonstrate evaluation of, that evidence amounts to an error of law.

54. Even if we found that Judge Cameron had sufficiently considered the question of internal relocation as an alternative basis for dismissing the asylum aspect of the appeal, a consideration of internal relocation must be based on a proper evaluation of risk in the home area, and does need to be so based on the facts of this case.

55. Accordingly, we conclude that Judge Cameron's decision on the protection and related human rights aspect of the appeal (Article 2 and 3) cannot stand.

56. In the circumstances, we do not need to give very detailed consideration to the issue of what *appears to* be the delay between the hearing and the promulgation of Judge Cameron's decision. Although permission was not sought on the point, it was a matter which featured in the actual grant of permission. It is, therefore, a matter that is before us to consider.

57. We have considered the decision of the Court of Appeal in *SS (Sri Lanka), R (On the Application Of) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391 in which the authorities on excessive delay in delivering judgment are considered. It must be shown that there is a nexus between the delay and the safety of the decision. In the instant appeal, looking at Judge Cameron's credibility findings, we do not consider that such a nexus is apparent.

58. In the light of our conclusion that Judge Cameron's decision on the protection aspect of the appeal cannot stand, because of the error of law which we have identified, it is inevitable that his decision in relation to Article 8 must also be set aside. An assessment of Article 8 must be informed by findings in relation to the protection appeal that is made on a sound footing.

59. We do in any event find that the Judge Cameron erred in law in his assessment of Article 8, as was acknowledged by Ms Ahmed, although she did not necessarily accept that that error was material. The error of law is in Judge Cameron at para 74 taking into account the seriousness of the appellant's offending when considering whether his removal would be unduly harsh on his partner or other minor family members. Our finding an error of law in this respect reflects the analysis of the 'unduly harsh' consideration in *HA (Iraq) v Secretary of State for the Home Department (Rev 1)* [2020] EWCA Civ 1176, at para 43 *et seq*.

60. We are not persuaded that this error of law is not material on the basis that it only relates to T who is now 18. Judge Cameron's conclusion in para 74 is not obviously confined to T.

61. Although it would have been better if Judge Cameron had made express reference to the best interests of the children, we are satisfied that his findings contain an implicit assessment of that issue within the context of the evidence put before him.

62. Nevertheless, for the reasons given above, we are satisfied that Judge Cameron's decision as a whole must be set aside for error of law.

63. Having considered the Senior President's Practice Statement at paragraph 7.2, we consider that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a *de novo* hearing,

with no findings of fact preserved. Because that will be a wholly fresh hearing, all findings, both for and against the appellant, will have to be considered anew.

Decision

64. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than Judge Cameron, with no findings of fact preserved.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek

1/12/2023