Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00414/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 October 2013	**On 4 November 2013**

Before

JUDGE OF THE UPPER TRIBUNAL TAYLOR
JUDGE OF THE UPPER TRIBUNAL POOLE

Between

CARLTON CRAIG MCLEOD
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Bello of Apex Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

Appeal History

1. The appellant is a male citizen of Jamaica born on 21/5/75. He entered the United Kingdom in December 1992 as a visitor and made subsequent applications for further leave to remain. On 6 June 2012 at Inner London Crown Court the appellant

was convicted of affray, possession of an offensive weapon in a public place and ABH and was sentenced to a total term of fifteen months imprisonment. For two of the offences he was sentenced to nine months in prison but for the third offence was sentenced to a period of six months imprisonment consecutive to the nine months sentences. On 15 February 2012 the respondent made a deportation order. The appellant appealed that decision.

2. On 15 July 2013 the appellant's appeal came before Judge of the First-tier Tribunal Brenells and Non Legal Member Mr Olszewski (the Panel). Mr Bellow represented the appellant as he now represents him in the Upper Tribunal. In a determination dated 24 July 2013 the Panel dismissed the appellant's appeal in respect of the Immigration Rules and also with regard to the appellant's "human rights appeal". During the course of the appeal before the Panel a number of witnesses attended and gave evidence. The Panel noted that the appellant had a total of seven children by various partners. The Panel came to the conclusion that the appellant had minimal contact with the majority of his children and that as a result the respondent's decision was not disproportionate in so far as Article 8 ECHR was concerned. As a result all aspects of the appeal were dismissed.

3. The appellant then sought leave to appeal. There are two substantive grounds seeking leave, first that the Panel had failed to make sustainable findings in respect of the Immigration Rules and second that the assessment of Article 8 and the best interests of the children were flawed.

4. The application for leave to appeal was considered by Judge of the First-tier Tribunal AD Baker. In a decision dated 13 August 2013 leave was granted. At paragraphs 3 and 4 of the decision granting leave Judge Baker said as follows:

> "3. It is arguable that the Panel may have made a material error of law in considering the best interests of the appellant's seven children at paragraphs 19-31 of the determination in that Section 55 of the Borders, Citizenship and Immigration Act 1999 was arguably not applied. Paragraphs 29-31 of the determination do not address the evidence which examination reveals was before the Panel as contended but not addressed, and also referred to at ground C of the original grounds of appeal, but paragraph 31 states that there is no evidence of that previous contact.
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> 4. Whilst the Panel noted the prohibition on contact since the index offence with four of the children, the omission of consideration of all other evidence before it as to previous contact with those children with whom he lived and with his other natural children in the United Kingdom arguably was material to the outcome of Article 8."

5. Hence the matter was listed before us.

The Hearing

6. At the commencement we indicated that no Rule 24 response had been forthcoming from the respondent. Mr Bello said that he had received one from the Home Office and Mr Walker was able to produce a copy of a letter dated 30 August 2013.

7. Mr Bello made two submissions. First he submitted that the Panel had erred in their considerations of paragraphs 398 and should have found that the appellant met the requirements set out in paragraph 399.

8. Second with respect to Article 8, there was consistent evidence before the Panel. There were photographs available and the birth certificates of all the children showing that the appellant was named as the father. The appellant wanted to participate in the lives of the children and there was a lot of witness evidence as to his continued interest in the children and their welfare. One of the children had written a letter on behalf of the appellant and there was evidence from that child's mother. There had been a lot of frequent contact and the child had stayed with the appellant. Even if it was one child out of seven that child's interests need to be considered.

9. Mr Bello emphasised that the appellant had made attempts to contact the children via his representatives as permitted by the restraining order that was in place and that it was not right to say that he had not made such attempts. Section 55 had not been considered by the Panel and there was sufficient evidence to enable the Panel to consider the aspects of that section.

10. Mr Walker referred to paragraph 23 of the determination. The Panel had considered all appropriate evidence and the appellant's contact with one of the children had only been very recent. There had been a full consideration of the best interests of the children.

11. Mr Bello very properly drew our attention to the fact that during the hearing before the Panel the respondent had successfully applied to amend the original decision notice to refer to paragraph 398(c) of the Immigration Rules. This was of course because the appellant had not been convicted of an offence and then been sentenced to a period of less than four years but at least twelve months. The fifteen months sentence imposed on the appellant was an aggregate of nine months and six months consecutive sentences.

12. At this stage we rose to consider the application and upon return indicated that we had found an error of law in the Panel's determination in respect of the first ground seeking leave but not with regard to the second ground. Neither representative wanted to make a further submission and we accordingly reserved our decision on the remaking of the decision under appeal.

Reasons

13. We find the Panel made no error of law in their consideration of the Article 8 aspects of the appellant's appeal. The appellant's case in respect of Article 8 as rehearsed before the Panel was by reason of the existence of seven children that he has fathered during his time in the United Kingdom. Four of those children are as a result of his relationship with Ms T Grazette. That lady was the victim of the assault for which the appellant was sentenced. As a result of those Crown Court proceedings the sentencing judge made a restraining order preventing him from contacting Ms Grazette. There was no evidence before the Panel that the appellant had sought to arrange contact with the children via Ms Grazette's solicitors. One of the seven children is now an adult and there was evidence before the Panel regarding another child, Jahshan. He wrote a letter indicating that it had been hard to grow up without a male role model and he thought his father deserved a second chance. He said that he loved his father (as did the other children). There was supporting evidence before the Panel from a number of witnesses. The Panel took all this evidence quite properly into account and then followed the five step approach recommended in the case of Razgar before reaching clear conclusions that the respondent's decision was a proportionate response. Section 55 of the Borders Citizenship and Immigration Act 2009 was not directly mentioned but it is quite clear from a reading of the determination from paragraph 21 onwards that the Panel took full account of the best interests of the children and took specific note of historic contact that the appellant had had with those children, including the child Jahshan.

14. We therefore take the view that the Panel were entitled to reach the conclusions that they did with regard to the appeal under Article 8 and no error of law is contained in the determination.

15. Dealing now with ground one it will be necessary for us to consider the contents of paragraphs 398 and 399 of the Rules. These Rules provide 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
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> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
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> (b) the deportation of the person from the UK is conducive to the public good 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
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> (c) the deportation of the person from the UK is conducive to the public good 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, it will

only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

Note: Paragraph 398 inserted from 9 July 2012 with savings for applications made before that date (HC 194).

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 not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

Note: Paragraph 399 inserted from 9 July 2012 with savings for applications made before that date (HC 194).

16. As indicated above the respondent had successfully amended the decision notice to refer to paragraph 398(c). Sub-paragraph (a) and (b) clearly did not apply because of the sentence imposed upon the appellant.

17. At paragraph 17 of the Panel's determination the following was set out:

> "17. The Record of Convictions shows a first conviction in June 2000 for offences which took place in November 1999, a Caution in 2003 but otherwise a clean record from 1999 to November 2008, and finally the offences in January 2012 which resulted in the making of the Deportation Order. Whilst the latest offences are far more serious than the earlier two, and the matter for which he was cautioned, because of the long intervals between the offences and because he was been convicted on just three occasions over a period of 12 years, we do not accept that the Appellant is a "persistent offend". Paragraph 398(a) does not therefore apply because the Appellant's sentence

> did not exceed four years. Paragraph 398(b) does not apply because the Appellant's sentence did not exceed twelve months, and Paragraph 398(c) does not apply because the appellant is not a persistent offender. Paragraph 399 does not apply because paragraphs 398(b) and 398(c) do not apply."

18. The Panel concluded that (c) did not apply because, in their view, the appellant's offending had not caused serious harm and neither was he a persistent offender. However the wording of sub-paragraph (c) clearly shows that it is for the Secretary of State to form a view and not the Panel. The Secretary of State did form that view. It was not a matter for the Panel. As a result the Panel should then have completed the exercise by referring to paragraph 399.

19. The effect of paragraph 399 is that deportation can be avoided if the circumstances of that paragraph are satisfied. In this particular case sub-paragraph (a) of 399 is relevant by reason of the appellant's seven children. Sub-paragraph (b) is not applicable because there is no evidence of any genuine and subsisting relationship with a partner.

20. In remaking the decision we clearly have to apply the facts as we find them to the requirements of 399(a). The children in question are British citizens and it may well be accepted that it would not be reasonable to expect any of the children to leave the United Kingdom to enable them to accompany the appellant. However, on the evidence, the appellant has not established that he has a "genuine and subsisting parental relationship" with any of the children. Moreover 339(a) requires that there is no other family member who is able to care for the child(ren) in the United Kingdom. Clearly from the evidence available the children have mothers who are in the United Kingdom and currently provide care for the children. For that reason paragraph 399 cannot apply so as to assist the appellant in his appeal. The decision of the Secretary of State (as amended before the original Panel) is therefore in accordance with the law and the appellant's appeal under the Rules must be dismissed.

Decision

21. The Panel's decision in respect of Article 8 does not contain an error of law and must stand.

22. The Panel's decision in respect of the appeal "under the Rules" does contain an error of law and is set aside.

23. We remake that decision dismissing the appellant's appeal.

24. No anonymity order is made before the First-tier Tribunal. No application has been made before us and accordingly we do not make any direction in respect of anonymity.

Signed

N Poole
Judge of the Upper Tribunal

Date: 4th November 2013