Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00451/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 May 2013	**On 8 August 2013**

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE O'CONNOR

Between

CHESTER SMITH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Lemer instructed by Owen Stevens Solicitors
For the Respondent: Mr S Allan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of the First-tier Tribunal (Judge C M Phillips and Mr D R Bremmer JP) dismissing his appeal against the respondent's decision to make an automatic deportation order by virtue of Section 32(5) of the UK Borders Act 2007 on the basis that he is a foreign criminal as there defined and his removal is conducive to the public good for the purposes of Section 3(5)(a) of the Immigration Act 1971.

2. The appellant is a Jamaican citizen born in 1974 and currently 39 years old. He has been in the United Kingdom lawfully until the present events since some time in 2002, initially as a student nurse. In February 2003 he married Tia Louise Ward, a British citizen and in January 2004 he was granted leave to remain as the spouse of a settled person. On 16 January 2006 he was granted indefinite leave to remain as the dependent spouse of his wife. He remains married to Tia Louise Ward and he now has a number of children both within and without the marriage.

3. So far as known (and as set out at paragraph 28 of the determination he is not entirely sure of the number himself) the appellant has four children with three women and stands as stepfather to a fifth child, his wife's son from a previous relationship. The appellant's four natural children mentioned in these proceedings are a daughter, J-R S, born in October 2006 to his wife; and three sons by different women, RS born in December 2003 from a relationship with SS, a British citizen; NT born in December 2005 from a relationship with ST; and TH, the son of SH born in October 2010. The existence of TH was not disclosed to the respondent or the appellant's wife until the First-tier Tribunal hearing. There may be others. The appellant has treated as a child of the family his wife's older son J, who has little contact with his natural father, and he stands in the relationship of stepfather to that child.

4. After examining in detail the complex web of relationships between the appellant, the mothers of his children and the children themselves, the First-tier Tribunal said this:

> "75. … There is evidence before us that was not before the respondent that tends to show that family life was not established prior to the appellant's incarceration. Against the background of the findings set out below, we find that the appellant has failed to discharge the onus of proof on him to show on a balance of probabilities that family life is established."

5. There was no such submission in the respondent's closing submissions and neither the respondent nor the appellant was given the opportunity to comment on the conclusion which the Tribunal appears to have reached of its own motion. The Secretary of State accepted throughout that family life existed at least between the appellant and his wife and their child J-R S. Family life is presumed to exist between parent and child and between husband and wife and should be viewed from the point of view of all family members as noted by Baroness Hale of Richmond in *Beoku-Betts [2008] UKHL 39* at paragraph 4:

> "4. … To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

6. On the facts found, the evidence of bonds of affection existing between the appellant, his wife, their child and his stepson undoubtedly amounts to family life and the First-tier Tribunal did not set out any cogent reason for finding to the contrary. The Tribunal's reasons are inadequate and appear to relate to the appellant's extramarital activities. The parties were not given the opportunity to comment on this novel proposition. We indicated to the parties that we were satisfied that there was an error of law in the determination, as set out in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982 at paragraphs 90.2 and 90.3:

> "2. A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence.
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> 3. A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to his decision on material issues, in such a way that the IAT was unable to understand why he reached that decision."

7. Two other errors of law were also posited by Mr Lemer, in addition to the principal error of reasoning on private and family life. The second error for which he contended was that the evidence before the Tribunal as to the impact of deportation on the children, which came exclusively from their mothers, had been misdescribed in paragraph 98 of the determination:

> "98. … There is no evidence before us that the appellant's presence is needed to prevent the children from being ill-treated, maintained financially, their health and development being impaired or their care other than safe and effective. Further offending in the United Kingdom by the appellant would be disrupted in the lives of his United Kingdom based children.
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> 99. It was not argued that the appellant has a strong private life based on strong social cultural ties with the United Kingdom. It was submitted that he does not have family ties with Jamaica although we find that he has. The ECO was urged on the basis of the impact that the appellant's removal will have upon the three British children that his Article 8 claim relies upon. We have considered proportionality on the basis that Article 8 is engaged by the appellant's private life including the fact that he has four or five United Kingdom based children by four or five different partners and a stepson.
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> 100. Although the skeleton argument states that the intention is that the appellant's exclusion should be permanent this is not what is set out in the refusal. Automatic deportation carries a minimum of ten years' exclusion. However it is noted in the refusal that the appellant is entitled to apply at any time in order to have his deportation revoked."

The statement at paragraph 98 does not as argued by Mr Lemer amount to a statement that there was no evidence of family life at all before the Tribunal and we are not satisfied that the determination contained an error of law in that respect.

8. The third error of law of which Mr Lemer sought to convince us was the Tribunal's examination of the submission in the skeleton argument that the appellant would be permanently excluded, whereas in fact, as the Tribunal pointed out, exclusion is for ten years and there is a power to apply to have the exclusion removed, albeit on the facts of this appeal it is unlikely that such an application would succeed. That error is not made out; it is accepted that the Tribunal was right that the exclusion would be for ten years, not for life, and was revocable in certain limited circumstances unlikely to apply to this appellant.

9. We therefore were not satisfied by the two subsidiary proposed errors of law but we do consider that the failure to treat the appellant, his wife and their children as having family and private life together was an error of law.

Materiality

10. The question is whether that error was material to the outcome of the appeal. The material facts in that respect as set out in the determination were these.

    (a) The appellant was convicted of a very serious offence on 21 April 2010 being part of a six-person conspiracy to apply a significant quantity of class A drugs, for which he received a sentence of six years imprisonment. It is not contended that that is not a serious offence within the meaning of Section 32.

    (b) During his time in prison, the appellant was punished for one offence, where he was found with a mobile phone which he claimed to be keeping for a friend ; he accepted his punishment. Whilst in prison (with one lapse) he had been well behaved and taken advantage of the educational opportunities, obtaining further qualifications as set out in certificates provided.

    (c) The appellant is not himself a drug user, his supply of drugs was simply a business venture. He has been here for over ten years. In addition to whatever he made from his drug selling activity, the appellant worked in the United Kingdom, buying old cars and fixing them up to sell, and before that he had a catering business.

    (d) The details of his relationships with his two known sons outside the marriage are set out at paragraph 16 of the determination and it appears that his wife has accepted those children, just as he accepted her older child Jaydon. It was his wife who brought the known children to visit him in prison, including those from his other relationships.

    (e) The appellant supported his known children financially and was named as a contact on their school records, including those born outside marriage, with the exception of the child TH, whose existence was revealed at the hearing. The appellant had financial resources in the United Kingdom which he could not explain, and neither could his wife.

(f) The appellant worked in Jamaica until he was almost 30 years old, first as a bus conductor and then as an upholsterer, living with an uncle. He has returned there several times since arriving in the United Kingdom in 2001. He took his stepson Jaydon to visit Jamaica, when Jaydon was about 4 or 5.

(g) The appellant claimed to be unsure whether he still had family in Jamaica but given the overwhelming, unchallenged negative credibility findings by the First-tier Tribunal, that Tribunal placed no weight on that and found that he did still have both links and probably family in Jamaica. We consider that they were entitled to draw that conclusion.

11. The offence, although a first offence, was a very serious one. Our attention was drawn to the recent decision of the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 in which Lord Justice Laws, Lady Justice Black and Mr Justice Mann reviewed the proper balance between proportionality and the public interest in deportation cases involving children. Lord Justice Laws giving the lead judgment, said this at paragraphs 46-47:

> "46. Thus while the authorities demonstrate that there is no rule of exceptionality, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. This antithesis, in my judgment, catches in the present context the essence of the proportionality test required by Article 8(2).
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> (3) SUMMARY
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> 47. It is worth drawing these general considerations together. (1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force. (2) In a child case the right in question (the child's best interests) is always a consideration of substantial importance. (3) Article 8 contains no rule of "exceptionality", but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. (4) Upon the question whether the principle of minimal interference is fulfilled, the primary decision-maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation. This approach strikes two balances: the balance between public interest and private right, the search for which "is inherent in the whole of the [ECHR]..." (see, amongst many statements to the same effect, *Sporrong v Sweden* (1982) 5 EHRR 85, paragraph 69); and the constitutional balance between judicial power and the power of elected government, and in particular the power of the legislature."

Turning to the question of the deportation of foreign criminals and noting that the source of the policy is primary legislation, Lord Justice Laws stated at paragraph 48 that:

> "48. With these considerations in mind I may turn to the particular case of the deportation of foreign criminals under the 2007 Act. *Where such potential deportees*

have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals. …" [*Emphasis added*]

He then set out various recent cases in which he considered that that balance had not been properly struck continuing at paragraph 53:

"53. The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. *Sedley LJ was with respect right to state that "[in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases"….*

55. …Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals." [*Emphasis added*]

12. Lady Justice Black and Mr Justice Mann both concurred with what Mr Justice Mann described as that "masterful analysis" by Lord Justice Laws. Mr Justice Mann added the following useful guidance:

"62. In this appeal counsel for the appellant placed considerable emphasis on the need for the Tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, are likely to be extremely rare. *In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned.* The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. *The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so."* [*Emphasis added*]

13. What we draw from *SS (Nigeria)* is that very great weight should be placed on the statutory provision for the automatic deportation of foreign criminals, and the public interest, where a serious drugs offence has been committed resulting in a long sentence, and secondly, that as pointed out by Lord Justice Mann, it is for the

appellant to draw to the attention of first of all the decision maker and later the Tribunals, any circumstances which he considers to have sufficient countervailing weight to make his removal disproportionate.

Discussion

14. The facts in the case of *SS (Nigeria)* are not dissimilar to those in the present case, in that there was a child in the United Kingdom who lived with its mother and was not to be expected to return to the appellant's country of origin. The appellant SS was convicted of peddling class A drugs and the Upper Tribunal found that he had the potential to present a real risk to members of the public and society in general, due to the effect of those drugs. He appeared to have been selling drugs on the street while he had a very young son at home. It is right to note that SS was not in the United Kingdom lawfully as the present appellant had been and that on the other hand he had fewer children than this appellant appears to have. There is nothing else in the factual matrix which materially separates the position of SS from that of the present appellant.

15. The Tribunal in the present appeal erred in failing to treat the appellant's relationship with his wife and at least some of his children as family life. However it directed itself to the *Razgar* test and considered the rather limited evidence before it relating to each of the children, their relationships with their mothers and their relationships with the appellant. On the basis of that evidence, even had the Tribunal directed itself correctly as to the family life element, we consider that the it was open to the First-tier Tribunal to conclude, as it did, that in relation to an offence of this seriousness, the public interest as set out in statutory form in Sections 32 and 33 of the 2007 Act, was more than sufficient to outweigh the various personal relationships which the appellant had in the United Kingdom and in particular those with his family members.

16. The Tribunal found as a fact, and was entitled so to find, that the appellant still had social and cultural links to Jamaica, as indeed do some of his family members and some of the mothers of his children and that the public interest outweighed all of his social and family links in the United Kingdom to such an extent that his removal to Jamaica was not disproportionate. Despite the error of law that we have set out, we do not consider in the light of *SS (Nigeria)* that another Tribunal could or would come to any other decision than that which was reached by the present Tribunal and accordingly the error is not material to the outcome of the appeal and we uphold the original determination.

Conclusions

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

Signed Date

Upper Tribunal Judge Gleeson