Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00462/2013

THE IMMIGRATION ACTS

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

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

NARROL CHADWICK LIVINGSTON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Shamin, Counsel
For the Respondent: Mr S Allan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 30 April 1990, is a national of Jamaica. He appeals against a panel of the First-tier Tribunal (First-tier Tribunal Judge Cockrill and Dr J O

de Barros, non-legal member) promulgated on 4 June 2013, following a hearing at Kingston Crown Court on 22 May 2013, whereby the panel dismissed his appeal against the respondent's decision, made on 26 February 2013, to make a deportation order against him by virtue of Section 32(5) of the UK Borders Act 2007.

2. The immigration background to this decision is set out in the panel's determination, and I summarise the account which was given there.

3. The appellant arrived in this country in December 2001, using his Jamaican passport and was granted six months' leave to enter as a visitor. His parents had come to this country the previous year as visitors. The appellant's mother later varied her leave to remain as a student. The appellant applied himself for permission to remain as a student, but that application was refused on 15 February 2003. Twelve days later he made an application for leave to remain as the dependant of his mother who, by that stage, had been granted leave to remain as a student. That application was also refused. His appeal against this decision was dismissed in September 2005, and the appellant was written to by the UK Border Agency, explaining that he was requested to leave without delay and that he would be liable to prosecution for an offence under the Immigration Act if he failed to do so.

4. In May 2006 a firm of solicitors made an application on the appellant's behalf that he should be allowed to remain outside the Rules by reference to Articles 3 and 8 of the ECHR. Subsequently, on 23 August 2009, the appellant was granted indefinite leave to remain. Thereafter, on 21 September 2011, the appellant was convicted at Kingston-upon-Thames Crown Court of three counts of robbery, for which on 9 November 2011 he was sentenced to terms of imprisonment of 40 months on each count to run concurrently. The appellant did not appeal against this sentence. In light of these convictions and the sentence imposed, on 29 October 2012 the appellant was notified formally of his liability for deportation under Section 32(5) of the UK Borders Act 2007.

5. The seriousness of the offences of which the appellant was convicted is apparent from the judge's sentencing remarks, which are contained within the file. The judge treated the three defendants the same, and regarded the offences, of street robbery, as having been committed by a gang. The judge noted that "This was extreme continued gratuitous violence, gratuitous after the event, extreme violence before it as well, no doubt to achieve the aim of obtaining property from these victims".

6. The judge also considered that

> "This was a planned robbery or robberies, these victims were clearly targeted and in the second count we have – and third count – we have clearly very vulnerable victims, and I can say that it was planned when I come to my sentencing remarks because of the disguises, the balaclava, the scarves, you were ready to conceal your identity in these robberies and I can be satisfied therefore of that particularly important aggravating feature".

7. Although each of the appellants had claimed to be less involved than the others, the judge considered that "you were a team, you take the consequences as a team". The judge also noted that a weapon had been used in one of the robberies, and also that a knife had been produced during that robbery. The robberies were also "of relatively high value", one of the items being "worth £1,000". A particularly aggravating feature of these robberies was that one of the victim's ventolin inhaler was taken and as the judge remarked,

> "To take somebody's ventolin inhaler you do really wonder what people, what level, people, are stooping to ... that sort of thing ... removed from a victim, medication which is needed for asthma and I would have thought that that's the one thing that you might be suffering from, having suffered the vicious attacks that you indeed inflicted on these victims".

The judge also noted that "there was gratuitous violence, the slap at the end on that girl in count 2, and the boot put in at the end on Mr Gupta".

8. It is clear that the offences of which this appellant was convicted were extremely serious.

9. The appellant was invited by the respondent to put forward any reasons as to why he should not be deported following his conviction on the three counts of robbery, the respondent having in mind Section 33 of the UK Borders Act 2007, by virtue of which the appellant could not be deported notwithstanding the provisions of Section 32 if his removal would be in breach of his rights under the ECHR.

10. Having considered the representations made by and on behalf of the appellant, on 26 February 2013 the respondent gave notice to the appellant of her decision that Section 32(5) of the UK Borders Act 2007 applied and that the respondent intended to deport him.

11. As already noted above, the appellant appealed against this decision, but his appeal was dismissed by the panel.

12. The respondent's letter giving notice of her decision was detailed and in it the respondent formally noted her obligation and duty to safeguard the interests of the appellant's daughter, Tianna Hall, under Section 55 of the Borders, Citizenship and Immigration Act 2009. It was also noted that the interests of that child must be a primary consideration when making the decision. These matters were considered by the panel. The panel also noted the respondent's belief that the relationship which the appellant had with his mother and siblings did not constitute family life, because (as noted at paragraph 10 of the determination) "there was nothing to suggest that there was any dependency over and above normal emotional ties between these adults".

13. The panel considered the strength of the relationship which the appellant had with his daughter, who had been conceived when her mother was only 15, but having considered the evidence, found that

> "the reality of the situation is that these two have not maintained a relationship as a couple which is how it was presented to us. We think that they have in effect parted and that really what the evidence was designed to do before us was to try to show a firm and more secure relationship than was truly the case." [41]

14. With regard to the relationship between the appellant and his mother and brother, the panel found (at paragraph 43) that "we do accept entirely the proposition made by the respondent in the circumstances that ... the appellant has not shown anything that goes beyond normal emotional ties in connection with those relationships". The panel found that the appellant "has not demonstrated the sort of genuine and subsisting relationship either with Tianna or, indeed, Jody Hall, that certainly his mother would wish us to accept". The panel noted that the appellant, while in this country a long time, had not remained here with leave, nor was it persuaded that the appellant "has turned over a new leaf in the way that it is presented to us" (at paragraph 43).

15. Having set out all the factors in some detail, the panel concluded that the removal of this appellant was not disproportionate, and was accordingly not in breach of his Article 8 rights. With regard to the appellant's relationship with his daughter, such as it was found to be, the panel concluded as follows:

> "We are acutely mindful of Section 55 of the 2009 Act but consider that this young child's best interests will be served by remaining with her mother in this country and getting the support that quite patently she does from her grandparents and by seeing aunts and cousins. We reiterate that really the role played by her father has become a peripheral one and frankly not a good one. It is hardly desirable that a child should start off seeing her father in prison, that is not an influence which in our judgment is likely to promote her welfare."

Grounds of Appeal

16. The first ground relied on is that the panel did not give adequate consideration to the Article 8 rights of the appellant's brother, who is mentally and physically disabled, which it should have done following *Beoku-Betts* [2008] UKHL 0039.

17. It is also said that the panel failed to state the standard of proof applicable when considering the appellant's relationship with his daughter and his daughter's mother. It is suggested that it applied a test higher than a test based on the balance of probabilities.

18. It is also said that the panel failed to have regard to paragraph 364 of the Rules which provides that "in considering whether deportation is a right course on the merits, the public interest will be balanced against any compassionate circumstances of the case". It is then said that the appellant has a genuine and subsisting love relationship with Jody Hall and family life with Tianna. The Tribunal ought to have accepted the

evidence presented to it in that regard. It is also asserted that the panel ought to have had regard to the other factors, such as the appellant's length of residence in the UK and the strength of his connections with this country. Also, it is suggested that he is generally a person of good character, but brought up by a single parent "under very difficult and challenging circumstances at home".

19. It is said that the panel did not have proper regard to the compassionate circumstances in his case and had applied too high a standard of proof when considering the written and oral statements made on his behalf by family members. It is said, at paragraph 22 of the grounds, that it is hoped that "the Tribunal would take the view that given the particular exceptional circumstances in this application, to refuse my appeal again would not be in the best interest of maintaining a fair and effective immigration control".

The Hearing

20. I heard submissions on behalf of both parties. As my notes of these submissions, which I made contemporaneously, and in which I attempted to record everything which was said to me, are contained within my Record of Proceedings, I shall not set out below everything which was said to me in the course of the hearing. I have, however, had regard to everything which was said, as well as to all the documents contained within the file, whether or not the same is set out specifically below.

21. On behalf of the appellant, Mr Shamin produced a skeleton argument, but as I noted at the time, this skeleton argument did not identify what error of law in the panel's determination was relied upon. Effectively, the skeleton argument merely set out what was said to be the appellant's Article 8 claim. Under "Issues", the appellant's case was put as follows:

> "The main issue in this case is, whether the appellant has an established family life and private life in the UK and that his deportation under Section 32(5) of the UKB Act 2007 would amount to a breach of the UK's obligation under the Convention.
>
> The other issue is, whether in deporting the appellant the right of EAA citizens is likely to be compromised."

22. As the Tribunal pointed out to Mr Shamin, that was not the primary issue. The primary issue was whether or not in reaching its decision, the panel had made a material error of law.

23. Mr Shamin submitted that basically Article 8 had not been fully considered by the panel, and in particular the panel had not considered the appellant's family and private life. It was disproportionate to deport him at this stage when he was quite in touch with his daughter.

24. When it was pointed out to him by the Tribunal that the panel had made findings with regard to this, Mr Shamin said that at paragraph 40 of its determination the panel had said that Ms Hall was the person with whom the appellant's daughter primarily lived, and that "for reasons that have not been expanded upon before us ... [Ms Hall] had some obvious grave disagreement with her mother and was thrown out of her mother's home". This was irrelevant because the fact was that the appellant's daughter had been living with her mother, whether in the home of her maternal grandmother or elsewhere, and Ms Hall was the appellant's partner.

25. The panel also said that although the appellant said he had played some part in decisions regarding his daughter, that was not borne out by other evidence, but the appellant's partner said the decisions were made jointly between her and the appellant, for example which nursery she should go to and what arrangements should be made for her birthday.

26. At paragraph 39, the panel had said that paragraph 399 of the Immigration Rules would not have had any application because of the appellant's daughter's age, and it was not reasonable to expect her to leave with her father. However, the impact on her would be severe, and she would no longer have day to day contact with her father. Also, Ms Hall was a British citizen and could not be expected to leave.

27. When it was pointed out by the Tribunal that the panel had not suggested that Ms Hall should leave with the appellant, Mr Shamin said that this was an error of law. When asked what he was saying was an error of law, he said the whole of paragraph 40 was an error of law. It started with the stance taken that the appellant had not shown that he had a genuine and subsisting relationship with his daughter.

28. When the Tribunal pointed out to Mr Shamin that that was the respondent's case, Mr Shamin said that this was an application for the revocation of a deportation order. What the appellant was saying was that he had a private and family life in the UK and had come to the UK at the very tender age of 12.

29. When asked again by the Tribunal what he was saying was the error of law which the panel had made, Mr Shamin said that it had not taken the appellant's Article 8 rights into consideration. The Article 8 rights had not been considered in the manner the law states it should be. That was the error of law. The appellant's family life with his partner was strong and subsisting, he had a strong and genuine relationship with his daughter and he had a private life with his mother, brother and sister. Mr Shamin said private instead of family because he was of an age where he could not say he was dependent on them, but he could qualify as having a private life. Sending him back to Jamaica where he had nobody and knew no one would be detrimental to him and his family. These were his submissions.

30. On behalf of the respondent, Mr Allan considered that all he could draw from the submissions just made on behalf of the appellant was that it was said that the panel had not considered the appellant's Article 8 rights, but the panel patently had done so. That was the entirety of what the panel's decision was about. In those

circumstances Mr Allan considered that it might be more helpful to the Tribunal if instead of responding to the submissions made orally by Mr Shamin, he responded to the grounds.

31. The first point in the grounds was that it was suggested at paragraph 2 that there could be further medical evidence available supporting the assertions which had been made relating to the appellant's mother and brother. There were two things which should be noted in this regard. First, nothing had been adduced before the panel, and so any further evidence could not go to an error of law, and secondly, in any event, no further medical evidence was even provided for this hearing. The alleged error set out at paragraph 2 of the grounds was that because of the vulnerable nature of the appellant's brother's condition, the panel had erred in its consideration of the relationship between the appellant and his brother and mother. In fact, however, that was considered within the determination. The panel was clearly aware of the situation but at paragraph 43 it found that the appellant did not have a relationship either with his mother or his vulnerable siblings which would constitute family life. It found that this relationship did not go beyond normal emotional ties.

32. Although it was suggested in the grounds that the panel ignored the position of the appellant's brother, we did not know what evidence had been put before the panel with regard to the appellant's brother. However, at the end of paragraph 41 the panel refers to evidence being designed to show that the relationship between the appellant and Ms Hall was more secure than it was. Also, at paragraph 28, the panel refers to evidence given by the appellant's mother that the appellant's brother, Santar, "had become very aggressive since the appellant had gone into prison", so it was clear that the panel did have in mind his condition.

33. The summary of the appellant's evidence, which was not challenged in the grounds, did not indicate that the appellant had been relying upon his relationship with his brother. Rather, it appeared from the panel's summary of the evidence that the evidence given on behalf of the appellant had been to the effect that he intended to leave the family home, in which his mother and brother lived, in order to live with Ms Hall. In other words, the appellant was now saying that the panel should have taken into account the relationship with his mother and brother whereas his evidence had been that he was no longer going to live with them.

34. The evidence as to this relationship was accordingly very limited, and anticipated a breakdown of that relationship as it stood in any event.

35. One other discrete point in that ground was that the panel should have considered specifically Santar's rights. It is suggested that Section 55 applied. However, Santar was not a minor, although it was accepted that if and to the extent that family life was established between the appellant and his brother, his interests would have needed to be considered. However, the panel considered the evidence very carefully and fully before making its findings.

36. In paragraph 3 of the grounds, two errors were asserted. These were first, that the panel failed to state the standard of proof applied. While it would be an error of law if the panel applied an incorrect standard, it is not and could not be suggested that in fact it did not apply the balance of probabilities. Secondly, it was said that when at paragraph 40 the panel recorded that the appellant's daughter would come to his mother's house and he would see her there, this ignored the fact that he lived there. In fact, this misread what was said at paragraph 40, because it is specifically recorded that the appellant was "physically present" when Tianna "was being moved from place to place" while he was living with his mother. Accordingly, when Tianna was staying with her grandmother, the appellant would then see her.

37. At paragraph 5, it was said that the appellant's age had not been taken into account. However, specific reference was made to the age of the appellant and Ms Hall when they became parents in determining whether there was a subsisting relationship. At paragraph 40 the panel says in terms that Ms Hall was 15 when Tianna was conceived. There is perhaps a further discrete point which could be taken, which was that this on its own disclosed that the appellant had committed an offence under Section 9 of the Sexual Offences Act.

38. With regard to what is asserted at paragraph 6 of the grounds, the panel did take account of the appellant's length of residence in the UK and regarding paragraph 7, the panel also took account of the strength of his connections with the UK and with Jamaica. With regard to paragraph 8, the panel also considered his personal history.

39. Quite clearly, the panel had shown in its determination that it had taken into account everything which it ought to have taken into account.

40. At paragraph 10 it was said that paragraph 353B of the Rules had not been correctly applied. These grounds might have been drafted before this Tribunal's determination in *Khanum* [2013] UKUT, in which this Tribunal had found that paragraph 353B was not judicially reviewable and was at the respondent's discretion.

41. Although at paragraph 12 it was said that the panel applied a higher test than the balance of probabilities, it was not said where it did so, and there is no reference within the grounds to where the balance had not been applied correctly. Any reasonable reading of the determination would indicate that the panel had applied the law properly.

42. With regard to the argument in paragraph 13, this appeared to amount to no more than a disagreement with the findings, and simply asserted that the Tribunal should have applied weight differently to the various factors when conducting the proportionality test. For example, the suggestion in the grounds that the appellant poses "no further threat to society" appeared merely to amount to a fresh submission, rather than an attempt to identify any error of law in the panel's determination.

43. The rest of the arguments in the grounds (such as at paragraphs 23 and 28) similarly did not amount to more than a re-statement of the arguments rejected by the panel and a challenge to the weight the panel gave to the various factors.

44. On behalf of the appellant, Mr Shamin said that he had nothing to say in reply; he had said all he wanted to say.

Discussion

45. I have recorded in some detail the way in which the appellant's case, such as it is, has been argued, both orally before me and in the grounds, but in my judgment these submissions have absolutely no merit. It is clear from the Court of Appeal decision in *MF (Nigeria)* [2013] EWCA Civ 1192, that when considering a deportation decision under Section 32(5) of the UK Borders Act 2007, the Tribunal must first have regard to paragraphs 398, 399 and 399A of the Immigration Rules, but must also consider whether the weight to be given to "other factors" in the circumstances of any particular case is such that deportation would still be disproportionate under Article 8. However, in line with previous Court of Appeal decisions in *Richards* and *SS (Nigeria)* the Court of Appeal recognised in *MF (Nigeria)* that "the Rules expressly contemplate a weighing of the public interest in deportation against 'other factors' " (at paragraph 39) and that, in cases of a "foreign prisoner" (which is what this appellant is) where paragraphs 399 and 399A do not apply, "very compelling reasons will be required to outweigh the public interest in deportation".

46. In this case, the panel considered first whether or not this appellant could succeed under paragraphs 398 and 399 of the Rules, and having decided that he could not, nonetheless considered very carefully whether other factors could be given such weight as to make his removal disproportionate nonetheless. The reasons the panel gave for finding that the removal of this appellant would be proportionate are compelling and were open to it. The offences of which the appellant was convicted, in circumstances where one of the victim's ventolin inhaler was taken, apparently gratuitously, and in which considerable violence was shown to the victims, were extremely serious and would rightly cause revulsion amongst the public generally. It is also important to recognise that one of the purposes of deporting foreign criminals such as this appellant is to deter others who must appreciate that one of the consequences of committing serious offences is that it is likely that they will be deported.

47. The panel considered very carefully whether the appellant's circumstances were such that notwithstanding the seriousness of his offending his removal would still be disproportionate, but decided it would not. The panel was entitled to find that his relationship with his mother and brother did not, in the circumstances of this case, amount to "family life", but given that in any event it was his case that he would not be living with them anyway, it is hard to see how this argument could help him anyway. Having considered the determination very carefully indeed, in light of the

grounds and submissions, I have been unable to identify any even arguable error of law.

48. Furthermore, given the extremely serious nature of the appellant's offences, and that this Tribunal considers his Article 8 arguments to be very weak, any error in the panel's determination (and I cannot find any) would in any event be immaterial, as it is clear from all the factors which were considered by the panel, and which are also now before this Tribunal, that the public interest in deporting this appellant outweighs any interference in his Article 8 rights which would thereby be occasioned by a very wide margin indeed.

49. It follows that this appeal must be dismissed, and I will so order.

Decision

There being no error of law in the determination of the First-tier Tribunal, this appeal is dismissed.

Signed: Date: 8 November 2013

Upper Tribunal Judge Craig