Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00549/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
13 November 2013	**25 November 2013**

Before

Lord Matthews
Sitting as a Judge of the Upper Tribunal
Upper Tribunal Judge Freeman

Between

LIVINGSTONE HOLMER MORRIS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Nwokeji
For the Respondent: Mr Avery, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 29 September 1971 and is a citizen of Jamaica. He arrived in the UK on 8 June 1996 when he was granted leave to enter as a visitor for six months. On 21 November 1996 he made an application for leave to remain as a student, which was refused on 29 April 1997.

2. Following his departure from the United Kingdom he returned on 24 June 2001 using a forged British passport. He was refused leave to enter and granted temporary admission. He applied for asylum on 19 July 2001 but

this was refused on 10 December 2001. He withdrew an appeal against the refusal. He applied for leave to remain as the spouse of a British citizen on 21 June 2002 but this was refused on 24 July 2002. On 22 November 2002 he submitted a human rights claim which was refused on 30 October 2003.

3. The appellant was removed from the United Kingdom on 4 December 2003. He applied for entry clearance as a spouse on 16 December 2003 but this was refused on 16 February 2004. He re-applied for entry clearance as a spouse on 27 April 2004 and this was refused on 4 May 2004. He lodged an appeal, which was allowed on 18 March 2005. He was granted entry clearance as a spouse on 18 March 2005 and re-entered the United Kingdom after that date.

4. The appellant was arrested on 12 October 2005 and on 4 November 2005 was convicted of being concerned in the supply of crack cocaine and possessing a quantity of crack cocaine with intent to supply. Those offences resulted in a sentence of six years' imprisonment on each count, to run concurrently. The sentences were imposed on 2 December 2005. An appeal against these sentences was dismissed on 22 February 2006.

5. On 28 November 2007 the appellant was notified of the respondent's decision, dated 26 November of that year, to make a deportation order. He appealed that decision on 3 December 2007 but this was dismissed on 28 July 2008. He applied for judicial review on 6 August 2008 but this was refused and he became appeal rights exhausted on 22 August 2008.

6. On 8 September 2008 the deportation order was signed. The appellant applied out-of-time for judicial review but this was refused on 7 October 2008 and he was deported on 29 October 2008.

7. On 18 January 2012 he applied through solicitors for revocation of the deportation order and certain further correspondence was sent on his behalf on 28 June 2012. On 11 February 2013 the respondent decided to refuse the application for revocation.

8. He appealed against that decision, which had been considered under paragraph 390 and 391 of the Immigration Rules. The appeal was on the basis that the decision to refuse to revoke the deportation order placed the United Kingdom in breach of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, with particular reference to Article 8 thereof.

9. The appeal was heard on 5 September 2013 when the First-tier Tribunal considered both written and oral evidence and submissions made for the appellant and respondent. It was refused in a determination promulgated on 13 September 2013.

10. The decision of the First-tier Tribunal is itself now under appeal. The grounds are that the First-tier Tribunal's reasons for finding that the marriage between the appellant and his spouse is not genuine on the part

of the appellant are inadequately reasoned. It is also submitted that the panel failed properly to consider the substantial ties which the appellant's spouse has in the United Kingdom and failed to take into account the principles derived from the cases of VW (Uganda) v Secretary of State for the Home Department and EB (Kosovo) v Secretary of State for the Home Department. It is also submitted that the panel failed to direct itself to the relevant authorities on deportation and the circumstances in which relocation would be appropriate. The panel adopted the findings of the previous Tribunal and failed to consider afresh, or at all, the issues of the panel's low risk of re-conviction and his re-categorisation in prison coupled with the lapse of time since the offences were committed in 2005. It is said that the panel failed to evaluate these factors cumulatively including the appellant's contention that he had obtained work in Jamaica and demonstrated an ability to maintain a law abiding lifestyle.

11. Permission to appeal was granted on the basis that it was arguable that the Tribunal had given inadequately reasoned findings on the subsisting nature of the appellant's marriage and that the principles set in VW (Uganda) and EB (Kosovo) had not been considered.

12. Before us Mr Nwokeji indicated that he would argue both grounds of appeal. In view of the discrete nature of the challenge to the findings of the First-tier Tribunal we do not consider it necessary to set out their detailed findings in full. The nub of the challenge is that the panel's decision that the marriage is not genuine from the appellant's point of view was perverse and in the teeth of the evidence.

13. We were referred in particular to paragraphs 44 and 45 of the determination, which are in the following terms:

> "44. There is scant evidence of contact between the appellant and his wife. This is despite their being very familiar with the need for such evidence to support applications for entry clearance arising from their marriage. The appellant and his wife were also put on notice by the respondent in the reasons for refusal letter that the lack of documentary evidence of contact had been noted and that this called into question the extent of contact between them. The lack of documentary evidence of contact concerns us. Even if the appellant is in receipt of low earnings, in the five years he has been absent from the United Kingdom, we would expect him to be able to send at least one or two letters or cards to his wife in the United Kingdom. More particularly, we would expect the appellant's wife to send such correspondence to her husband in Jamaica, for example to celebrate birthdays and anniversaries. These could have been returned to the appellant's wife for her to bring to the hearing. No such documentary evidence has been provided in support of the appeal.
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> 45. The appellant's wife told us that she had sent money on several occasions to the appellant in Jamaica yet she has not produced any documentary evidence of such remittances. Bearing in mind her experience of being a sponsor for the appellant in his applications for entry clearance as her husband, we would expect her to be aware of the importance of such evidence to demonstrate a genuine and

> subsisting relationship with the appellant. She is an educated woman and we would expect her to appreciate that such documentary evidence would be useful and supportive of her husband's claim to have a subsisting marriage. When she was asked about the lack of documents, she said merely that such evidence was held by Western Union, but did not provide an explanation as to why it had not bee provided for the hearing."

14. The evidence showed that the parties had married on 23 March 2002 and before his deportation the appellant had served three years in prison for his drug offences.

15. Mr Nwokeji submitted that the panel had failed to consider the fact that the marriage had lasted eleven years. Moreover there was evidence that the wife had visited Jamaica regularly and a number of witnesses including his wife, his sister-in-law Angela Pitt, his brother Carlos Morris and his sister Cherie White had given evidence to the effect that the marriage was subsisting. At paragraph 48 the panel accepted that the appellant's wife had visited him in Jamaica on a number of occasions and that these visits were an indicator of her wish to maintain her relationship with the appellant but pointed out that their concern was the appellant's perception of the relationship and his intentions in that regard. They gave little weight to the evidence of the appellant's brother who admitted that he had not been aware that the appellant had used deception in the past in his dealings with the respondent.

16. Mr Nwokeji drew our attention to paragraph 50 of the determination. That referred to evidence from the appellant's wife that her grandchildren had a good relationship with the appellant, that they called him Grandpa and that they spoke to him on the telephone. She admitted however that the appellant and the two younger grandchildren had not met. The panel accepted that the two older children, now aged 14 and 11 had some memories of the appellant and that all the grandchildren spoke to him on the telephone but pointed out that the appellant had been in prison for three years prior to his deportation in October 2008 and they found that the appellant's relationship with him had developed largely through telephone contact. They found that he had no responsibility for or involvement in the upbringing of any of the grandchildren and that their wellbeing and welfare was unaffected by his exclusion from the United Kingdom.

17. Mr Nwokeji however submitted that the acceptance that there was regular telephone contact between the appellant and his grandchildren meant that the First-tier Tribunal's findings were perverse.

18. When the findings are read it is plain that the panel accepted that the appellant's wife would maintain her relationship with him. They were not satisfied that this was reciprocated and referred on a number of occasions to the appellant's being deceptive. We asked Mr Nwokeji what gave rise to this suggestion of deception and he said that it was the evidence about his original crimes and his immigration history. He submitted that the panel had effectively taken no account of the history of the marriage at all.

19. While it might be said that he had committed a very serious offence and that the deportation should not on that account be revoked Mr Nwokeji submitted that the evidence disclosed that the appellant had now been re-habilitated. Any question of a certificate of good conduct could be dealt with in an application for entry clearance.

Submissions for the Respondent

20. Mr Avery submitted that the sentences imposed showed that the offences were serious enough to outweigh any Article 8 considerations. There also had to be factored in the appellant's history of deception in dealing with the immigration authorities. He referred to the findings of the Tribunal in 2008 which refused his appeal against the deportation order, and paragraph 101 of its determination, where having set out a number of matters which affected credibility of the appellant, the panel said the following:

> "101…. In short we are not satisfied that this appellant has the intention of living permanently with his wife as husband and wife. We consider it much more likely that the marriage was a further cynical attempt to remain in the UK."

21. The panel whose determination is currently under appeal made reference to that 2008 determination. They directed themselves appropriately in relation to Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) [2002] UKIAT 702* and their scepticism about the appellant's intentions was based on that starting-point.

22. Mr Avery submitted that the panel took full account of the visits to Jamaica on the part of the appellant's spouse and found that her intentions were genuine. The appellant's intentions were the problem. Of necessity he did not give evidence before the panel in September 2013 but at paragraph 55 they said the following:

> "55. We also bear in mind the interests of the appellant himself. We are in no doubt that the appellant, were the deportation order to be revoked, would apply for entry clearance and that, were it granted, he would enjoy a better quality of life in the United Kingdom; he is living in impoverished circumstances in Jamaica and most of his family live in the United Kingdom. The panel found in 2008 that the appellant was then a person who was "well used to using deception in order to assist his case". We are not satisfied that the evidence we have heard is sufficient to undermine that finding even now: the appellant has produced no independent evidence as to his honesty in Jamaica. He has produced two letters from a former and current employer. The letter from Tyrone Napier does not contain a statement of truth. It is a brief letter and takes the form of an employment reference rather than a statement of evidence to this tribunal: it refers to the writer recommending the appellant as a company "participant". We are not satisfied that it was written for these proceedings or in the knowledge that the issue of the appellant's honesty is at issue. We give this letter little evidential weight. As regards the second letter from the

> appellant's current employer, this is not signed and there is no evidence as to how it was received in the UK. Furthermore, for the reasons set out above, its content is not consistent with the evidence of the appellant himself. We therefore give this second letter no evidential weight at all."

23. The panel had earlier pointed out discrepancies in the evidence about the appellant's employment during the five years or so that he had been in Jamaica. They had also made remarks about the lack of evidence of contact. They pointed out in addition that there was no confirmation that he was now a law abiding citizen. They bore in mind that he had made a false asylum claim in 2001, claiming that he was gay. He had used false documents both in Jamaica and in the UK and had been convicted of serious offences involving Class A drugs. He had a long-standing history of using deception in his dealings with authority both in this country and in Jamaica. He must have deceived his wife when he was involved with drugs in the United Kingdom. Furthermore the previous panel had found that he had given false information to the Sentencing Judge to the effect that he was in debt as the result of drug use. The First-tier Tribunal found, in paragraph 54 of the determination, that: "… We see no reason, on the limited evidence before us, to interfere with the findings of the panel as regards the nature and impact of the appellant's offences and the risk of re-offending." At paragraph 57 they said the following:

> "57. In summary, having reviewed all the appellant's evidence, we are not satisfied that he has demonstrated that he is remorseful as regards his former criminal activity. We do accept that he regrets his conviction. Nor are we satisfied that he is no longer a person who uses deception with those in authority; he has not evidenced any dealings with authority since his return to Jamaica: for example, there is no documentary evidence that he pays income tax on his earnings. We are not persuaded that the appellant is a reformed man. Nor are we persuaded, because of the appellant's history of deception, that Mrs Morris' feelings for her husband are reciprocated such that the marriage could be described as genuine and subsisting and that the parties intend to live together as husband and wife permanently. Rather, we see no reason to interfere with the findings of the former panel that the appellant is a man whose evidence is unreliable."

24. Mr Avery pointed out that the panel in 2005 had actually heard the appellant.

25. If there was no genuine relationship then the cases of VW and EB did not come into the equation.

26. In reply Mr Nwokeji submitted that the panel should have examined closely the circumstances of the case in 2013. There was sufficient evidence before them that the marriage was subsisting and it was open to them to accept that there was a genuine marriage.

Findings

27. We agree with Mr Nwokeji that there was sufficient evidence before the Tribunal to entitle them to find that the marriage was subsisting. On the other hand it is plain that there was sufficient evidence to entitle them to find that the appellant did not share his spouse's feelings about the marriage. In this regard they were entitled not only to have regard to the evidence which was laid before them but also the findings of the Tribunal in 2008. As we have indicated, they directed themselves appropriately as to Devaseelan in this regard. The determination of that Tribunal was promulgated on 28 July 2008. It set out the immigration history of the appellant and referred to his conviction. It then set out the contents of the decision letter giving reasons for the making of the deportation order. There was a full narration of the evidence laid and submissions made. Having considered all these matters they pointed out that they accepted that the appellant was engaged in commercial dealing in crack cocaine but on a modest scale. They noted that the appellant gave false information to the judge in that he claimed he was in debt as a result of drug use. He claimed that that was something he was told to say by his legal representatives but the panel did not accept that. They noted that on two previous occasions he had attempted to enter the UK using a false passport. On one of those occasions he was successful. He had put forward a wholly false claim for asylum on the basis that he was homosexual. Again he claimed that he was put up to that by his legal advisers, which the panel did not accept. In relation to the committing of the offences, he claimed that he did not think he was entitled to work when he returned to the UK after his successful appeal in about August 2005. His wife's evidence was that he had told her that on the days that he was supplying crack cocaine he was out looking for work in a factory. Either he was lying to his wife or to the Tribunal or to both. They did not accept that there was a low risk of re-conviction and considered that he was a man who was prepared to use lies and deceptions to obtain what he wanted. He gave evidence that the relationship with his wife only became serious after he was caught coming into the country with the forged passport. That was in 2001. His evidence was that they started living together after they got married in 2002 and after that they spent two weeks together in Jamaica on three occasions. His wife's evidence was that they started living as a couple in May 2000. The panel noted evidence from the appellant and his spouse that they were advised to get married in order to assist his attempt to remain in the country in 2002. His spouse, his sponsor, was more than willing to get married apart from that. It was noted that the appellant had tried many ways of getting into and remaining in the country. Within a very short period of returning to the UK the appellant was involved in serious crime which would inevitably, if detected, have led to the separation from his partner and, as the panel felt sure he must have known, likely deportation. This did not show any commitment to the marriage.

28. When those earlier findings are factored into the equation as well as the matters referred to in the determination currently under appeal it appears to us that the panel was fully entitled to take the view that the marriage was not a genuine one so far as the appellant was concerned. We can detect no error of law in the approach which led to that conclusion.

29. We heard no detailed submissions on the application of EB and VW but given our opinion that there is no error of law in the First-tier Tribunal's determination and to the nature of the marriage it does not seem to us that these cases are relevant. Article 8 is not engaged in that there is no genuine family life with which the decision can interfere. The First-tier Tribunal found at paragraph 63 that the appellant had no private life in the United Kingdom and there is no challenge to that finding.

Conclusions

30. Since we can detect no error of law in the determination of the First-tier Tribunal it follows that the appeal must be dismissed.

LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)
Date: 20 November 2013