Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00578/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 August 2013	**On 10 September 2013**

Before

UPPER TRIBUNAL JUDGE KING TD

Between

ALFRED GARETH SUCKOO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Thomas of Counsel instructed by Spence & Horne Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica, born on 6 April 1974.

2. He came to the United Kingdom in 2002 and remained with leave in various capacities. In March 2006 he made a successful application for a certificate of approval for marriage and indeed married in accordance with that certificate.

3. On 16 July 2009 he was convicted for supplying class A controlled drugs, namely crack cocaine and heroin. In November 2009 he was sentenced to five years and five months' imprisonment with a release date of 2 April 2011.

4. By letter of 23 August 2012 the appellant was notified that he was the subject of deportation proceedings under Section 32(5) of the UK Borders Act 2007. He was notified of his right to appeal against that decision, which right was exercised.

5. Thus it was that his appeal came for hearing before Designated Judge Peart and Miss Endersby (Non Legal Member) on 18 December 2012. The basic nature of the appeal was that his removal from the United Kingdom would be in breach of his protected human rights under Article 8 of the ECHR. The appeal was allowed.

6. The respondent sought to appeal against that decision, essentially on the basis that the Tribunal failed to consider adequately the public interest in the removal of the appellant and had failed to provide adequate reasons for its findings in the proportionality assessment. Leave to appeal was granted on those grounds.

7. The matter came before me for hearing on 3 April 2013.

8. On that occasion I heard argument on the issue. The respondent's position was that this particular offence was so serious and revolting that the public interest was served by the removal of the appellant, notwithstanding the distress which such is undoubtedly going to cause to the family, and to Amira in particular. It was to be noted that thus was an offence of drug dealing preying upon vulnerable people by a person seeking to make money who was not himself the user of drugs. As was made clear in the sentencing remarks, some £5,500 was seized together with an array of electronic equipment. There were a number of individuals involved in the conspiracy although the sentencing judge could not determine as to hierarchy.

9. The difficulty with that particular determination of the Tribunal was that it focused more upon risk and rehabilitation than the need to deter and express revulsion. It did not as such recognise explicitly the significant public interest in securing removal.

10. I found that the Tribunal had not applied the proper balance. The greater the importance of removal, the stronger the reasons need to be as to why that would be disproportionate in the circumstances of the appellant.

11. In the circumstances therefore I found there to be a material error of law such that the decision should be set aside and re-made.

12. Thus it was that the matter came before me on 29 August 2013 for that re-hearing to be conducted. Ms Thomas, who represents the appellant, had represented him before me on the previous occasion. Mr Jarvis, who represented the respondent, had also been present on the previous hearing before me.

13. A preliminary issue arose as to whether or not it was necessary for further oral evidence to be given. Mr Jarvis invited me to find that it was unnecessary to do so in the light of the fact that he did not challenge much of the evidential material that had been placed before the Tribunal on a previous occasion. Ms Thomas invited me to say that it was always important to clarify certain matters and to expand upon them. She did not intend to call a great deal of oral evidence but was anxious that all matters were properly considered.

14. It seemed to me that in the interests of justice and given the importance of the decision to the lives of the appellant and to all his family, relevant oral evidence could properly be given.

15. Ms Thomas relied upon the material that had been previously before the court together with her skeleton argument.

16. The appellant gave evidence. He adopted his statement of 10 December 2010 with attachments.

17. He married on 24 June 2006 and Amira was born on 26 January 2009.

18. During 2008 he was unemployed and finding it difficult to get a job. As finances were limited he involved himself with drugs.

19. He was arrested on 16 July 2008 and remanded in custody. He was convicted in July 2009 and released from custody on licence in 2011. The licence expires at the end of this year. Thus it was that Amira was born whilst he was in custody, he was not able to be with her for the first two years of her life.

20. He finds it difficult not being able to work but spends his time at home, giving support to his wife and to Amira.

21. Whilst in prison he passed various certificates for plumbing and engineering. He worked as a Samaritan. It is his hope to finish his plumbing course at Southgate College by completing a City and Guilds course so to qualify. He would like to volunteer his services as a Samaritan.

22. The various City and Guilds certificates which he passed in prison are enclosed with his statement.

23. He said that he missed his family very much and now enjoys being with them. He spoke of the attachment of Amira to him. His wife is now pregnant and is experiencing difficulties in the course of that pregnancy.

24. He agreed with Mr Jarvis that when he had been dealing in drugs he had not been a drug user himself. He had operated from a different address so as not to involve his family. He said that his attitude to offending was quite different, he having experienced custody and having undertaken a number of courses. He has a better

appreciation how to deal with issues and wishes to manage his family situation much better in the future.

25. He agreed that he had family in Jamaica and had indeed worked in Jamaica prior to coming to the United Kingdom.

26. At present his wife does not work, she having given up employment in order to look after Amira and to provide some support for her mother. He spoke of the fact that his wife had a miscarriage in 2008 and was now five weeks into her second pregnancy.

27. The appellant's wife, Marsha Emanuel, also gave evidence. She adopted her statement of 12 December 2012.

28. She indicated that whilst the appellant was in prison it was a difficult time for her. She visited him as often as she could.

29. She had been employed with the NatWest Bank for a year dealing with customers over the telephone. She had a diploma in information technology and also a qualification in business studies. She gave up her job in order to look after her daughter but would wish to regain employment if she could. She indeed has an appointment at the Enfield Business Centre on 5 September to discuss an entrepreneurial project.

30. Prior to the birth of Amira she had had a miscarriage. Amira was born prematurely. Currently, she experiences hormonal difficulties in the pregnancy which requires her to have frequent blood tests at the hospital. Indeed she was admitted to hospital over the past weekend, having been admitted on Friday and released on Monday. It was a matter of concern.

31. She found it very difficult to cope as a virtual single mother with looking after Amira. In addition, her mother had health problems and this required her to go and visit her two or three times a week in order to do the cooking, make the beds and generally assist her mother. An additional complication now was that her brother, who lives with her mother, has been diagnosed with a form of psychosis. She has a sister who lives nearby who also provides assistance to her mother.

32. She spoke of the great bond that had been established between the appellant and Amira, such that Amira often clings to him and does not want to let him out of her sight. He plays constantly with her and is a constant companion in the home. She does not know how she would cope emotionally were he to be removed from the family. In reply to Mr Jarvis she said that if she got any indication that the appellant had returned to drug dealing she would divorce him and take away the children from him.

33. Marvia Edwards also gave evidence. She adopted her statement of 12 December 2012. She is the appellant's mother-in-law. Since 2007 she has been on incapacity benefit because she suffers from a fractured neck bone which presses upon nerves in

her neck and arm. Although it is possible for that condition to be corrected it involves surgery and there is a very considerable risk in that procedure. She is in constant pain and finds it difficult to operate her right arm. She lives in her own home with her son and depends significantly upon her two daughters who help her. Essentially, Marsha does all the cooking for her, putting the food cooked in bulk in suitable containers. She makes the bed, helps her dress on occasions and generally does the shopping.

34. She too spoke of the bond that exists between the appellant and Amira. She described the games that they play together and the response which she makes to her father. He plays with Amira for hours.

35. It is right to note that all three witnesses and Amira were present at one stage in the hearing room and I had the opportunity of observing the girl hugging both her mother and her father. There is no reason to doubt the nature of the affection that has been described.

36. Having heard evidence from Marsha Emanuel I formed the impression that she was a very straightforward person who had a realistic grasp of the family situation as was someone who was determined, with the appellant to improve that situation. She was also somebody clearly committed to helping her wider family, in particular her mother.

37. There were four defendants who fell to be sentenced for their part in the conspiracy to supply drugs. I note in particular the sentencing remarks of His Honour, Judge Sheridan, at the Wood Green Crown Court on 11 November 2009. One of the defendants was the launderer, three were the suppliers involved in the conspiracy. They were all from Jamaica, none were drug addicts. Thus this was an offence operated through greed for profit and easy money.

38. It was a conspiracy that had lasted a little over 60 days. The judge was unable to determine, with accuracy, the hierarchy, although his suspicions leant more towards the appellant as the control. Such a view was not reflected in the sentence as all were dealt with equally in terms of their role.

39. It would seem that the basis for the conspiracy was that there would be telephone contact made for the supply of drugs which were then supplied. Between 15 May 2008 and 16 July 2008 some 12,934 phone calls had been accepted by a particular sim card. It seemed to the Judge therefore that the conspirators were working on average a sixteen hour day, supplying class A drugs to the streets of London. So far as the launderer was concerned, £18,980 and £31,000 were recovered. So far as the appellant was concerned he was arrested at the address and headquarters of the conspiracy with cash of £5,500.24. Significantly, he had a piece of paper bearing the number which was used to ring to order drugs. One of the defendants had £1,100 in cash and a quantity of drugs and another had £3,859.63.

40. The appellant was sentenced, upon a late guilty plea, to five years and five months.

41. According to the OASys Report the appellant is at low risk of re-offending. The report indicates that he has taken responsibility for his crime and has undergone training and work in the course of his imprisonment.

42. Clearly, the report recognises that financial difficulties, unemployment and relationship breakdown are all factors which may serve to increase risk. Employment, supervision and increasing victim empathy may serve to reduce it.

43. The report indicates that the objective of improving thinking skills has been fully achieved, as indeed has that of enhanced thinking skills. That objective being an increased understanding of likely consequences for self or others of offending, the appellant being supervised by weekly appointments.

44. The appellant insisted in response to Mr Jarvis's question that he has become very much aware of the errors of his actions and of the effect that drugs have on other people. In that connection I note the statement of 10 December 2012, which says that as a result of his limited finances he was forced to seek alternative means. No one of course forces another to supply drugs. That remark raises the question as to whether or not the appellant has fully embraced the nature of his activities. As Mr Jarvis indicates, there is perhaps a degree of artificiality in assessing risk at a time when the appellant is both seeking to remain in the United Kingdom and is under supervision for his offending. Nevertheless, in fairness to the appellant, he has been away from custody for some two years and has not re-offended.

45. I take account of the most recent documents that were presented for my attention, in particular a letter from Darren Malcolm, a family friend, speaking of him as being a good father and a devout husband. Some letters and documents from the Barnet and Chase Farm Hospital support the contention that there is another baby on the way, of five weeks' gestation. It is clear that the appellant's wife is unwell and as advised remains close to hospital; they relate to her admission on 23 August 2013 and discharge on 26 August 2013.

46. Mr Jarvis invited my attention to the decision of the Court of Appeal in **RU (Bangladesh) [2011] EWCA Civ 65**. Paragraph 33 of that judgement highlighted the important facets of the public interest as identified in **OH (Serbia)**. Those facets identified in deportation cases involving non-British citizens were:-

    (a) the risk of offending by the person concerned;

    (b) the need to deter foreign nationals from committing serious crimes by leading to understand that whatever the other circumstances, one consequence of them may well be deportation; and

    (c) the role of deportation as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

47. Mr Jarvis invited my attention to his bundle prepared to assist the court.

48. In effect Mr Jarvis makes two main points. The first is that the presence of a child is an important factor which requires a nuanced approach but which does not of itself serve to defeat deportation.

49. In that connection my attention was drawn to **MK (best interests of child) India [2011] UKUT 00475 (IAC)**. The Tribunal at paragraph 21 commented that in deciding the best interests of the child, consideration was not to be approached as a simplistic or reductionist exercise. The best interests of the child required a broad-ranging enquiry, encompassing multifarious factors, including the child's need for security, continuity of care and affection and the opportunity to form long-term attachments based on mutual trust and respect. The best interests of the child were rarely determined by a single overriding factor.

50. In that connection he invited my attention to the fact that for the first two years of her life she had not had the relationship with the appellant and that such a relationship that now exists is relatively short. She is only 4 years of age. There is no reason to believe that she could not adapt to the absence of her father. Significantly, submits Mr Jarvis, she does not know that her father was a drug dealer. The question must always arise as to whether it is in the interests of a child to have a person such as that as their role model and guide.

51. Perhaps of more significance is the decision of the Court of Appeal in the case **SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550**, in particular judgment by Lord Justice Laws. My attention was drawn to what Lord Justice Laws had to say at paragraphs 43 and 44 of the judgment:-

> "43. I will next describe two characteristics, one positive, the other negative, which the learning shows apply in Article 8 cases involving children. The first is that the interests of the child or children are a primary consideration. The second (which applies to all removal cases, whether or not there are children) is that there is no rule of 'exceptionality': that is, there is no class of case where the law stipulates that an exceptional Article 8 case must be shown in some situations but need not be in others.
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> 44. These two characteristics are vouchsafed by authority of the House of Lords and the Supreme Court. With great respect they are capable, if not carefully understood, of investing child cases with a uniform prevailing force which yields no or little space to the context in hand. As for the first characteristic, the key phrase is of course 'a primary consideration'. It appears in *ZH* and subsequently, but is taken from Article 3(1) of the UNCRC, so the choice of words may be regarded as having particular significance. What sense is to be given to the adjective 'primary'? We know it does not mean 'paramount' – other considerations may ultimately prevail. And the child's interests are not 'the' but only 'a' primary consideration – indicating there may be other such considerations which, presumably, may count for as much. Thus the term 'primary' seems problematic. In the course of argument Mr Auburn accepted that 'a

primary consideration' should be taken to mean a consideration of substantial importance. I think that is right.

45. The second characteristic is that there is no rule requiring an exceptional case under Article 8 to be demonstrated. Here there is a risk that the absence of such a rule may appear to suggest that there is a single standard for breach of Article 8 which, once met, will carry the claim whatever the context. But that cannot be what is meant. The public interest in favour of removal or deportation may be stronger or weaker; and accordingly it will take more, or less, to mount an Article 8 claim that will prevail against it."

52. As is mentioned in paragraph 47 of the judgment, the approach needs to strike two balances, the balance between public interest and private right.

53. As was made clear in paragraph 54 of the judgement:-

> "The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could, in my judgment, only be justified by a very strong claim indeed".

54. Mr Jarvis submits that accepting that the absence of the appellant from his family will inevitably cause distress and difficulties, his private and family concerns need to be balanced with the wider public interest which has been so clearly expressed in the Immigration Rules put before Parliament. The more serious the crime the less easy it will be for a family to claim that removal is disproportionate.

55. Ms Thomas, in her submissions, recognises the force of those judgments. She invites me to find that the appellant has not offended for many years and in those circumstances the public interest may be less served by his removal than otherwise is the case. I was invited to find that he was a good parent and good husband and that his continuing presence within the family was essential for their continuing wellbeing and function. I was asked to find that in those circumstances it was entirely proper that proportionality be resolved in favour of remaining rather than the appellant's removal.

56. The decision in **MK (best interests of the child) India [2011] UKUT 00475 (IAC)** is a useful starting point for this determination. That requires a twofold process in Article 8. The first aspect is to consider whether or not the appellant meets the requirements of the Immigration Rules. If not, whether there are considerations outside the Rule under Article 8 of the ECHR which would provide the relief sought.

57. It is not suggesting that the appellant's situation and circumstances fall either within paragraph 399 or within 399A. The focus therefore is upon paragraph 398 that having a sentence of over four years it would only be in exceptional circumstances that the person's right to family and private life would outweigh the public interest

in seeing them deported. The Rules make it clear that for such offences it is clearly in the public interest, subject to exceptional circumstances, that they be deported.

58. It is not argued in this case that there are such exceptional circumstances.

59. The issue therefore to be considered is whether or not Article 8 of the ECHR is engaged upon general principles that had been applied before the Rules came into being.

60. In **MK** the appellant, his wife and two children were citizen of India and essentially it was found that they may return to live there. The situation in this appeal is somewhat different as the appellant's wife and children are British subjects. Considerations in **Zambrano** and **Sanade** come into play.

61. Although the initial refusal letter indicated that it would be reasonable to expect them to return to Jamaica with the appellant, it is not a factor advanced before me by Mr Jarvis. He most fairly accepts that it would not be reasonable to expect family members to relocate to Jamaica, notwithstanding that the appellant's wife is of Jamaican origin.

62. Ms Thomas invites me to find that the concept of any meaningful contact being maintained as between the appellant, were he removed, and his family as somewhat unrealistic in all the circumstances. Amira is a little girl who wants to be hugged and made the centre of attention by her father. Skype and letters would be of no relevance to her. Although the possibility of visits cannot be ruled out it is unlikely, given the financial situation and circumstances of the appellant's wife, particularly in looking after her mother and two small children, that that is a realistic possibility. Essentially therefore, to remove the appellant from the jurisdiction, and particularly for the period which would need to elapse prior to any application to return, would effectively remove the appellant from the life of his family. That would have the result of forcing his wife to choose between her family in the United Kingdom or go with the appellant to Jamaica but she has no wish to do so and no requirement to go.

63. There is no issue other than the appellant is a loving and caring husband and father and supportive of his family. The starting point for any consideration of the best interests of a child is to recognise that, generally speaking, it is in the best interests of a child to have both parents present and supportive. Equally there may be factors which displace that understanding, for example a father who commits crime or is a bad role model, in his case where Parliament has decreed that those who commit serious crime should be removed from the jurisdiction.

64. In balancing the various factors it cannot be said that simply by having a child or enjoying family life should defeat removal. If that were the case there would be little purpose in the Regulations having been laid before Parliament and approved. It has been made very clear in the judgment of **SS (Nigeria)** 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.

65. For many foreign criminals they will have a family to love and who loves them. It will normally be a particularly important part of family life, that upon release from custody, all seek to re-make the lives that have been torn apart. For most foreign criminals there will therefore be a period of bonding and relationship building which would be severed by their removal.

66. Equally, as Ms Thomas submits, it is simply not sufficient merely to "rubberstamp" the decision of the Secretary of State for the Home Department authorising removal for all persons who fall within the category envisaged within the Regulations. There needs to be anxious consideration of the private and family life in the overall assessment of proportionality, giving due weight to the public interest in that analysis, seeking also to give anxious consideration to the welfare of the child. Mr Jarvis invites me to note that in the circumstances of this particular family a second child has been conceived at a time when the appellant was the subject of deportation. Apart from the fact indeed that Amira likes to be cuddled by her father it is not necessarily a factor determinative of the issue, particularly as she is young enough to adapt to changing situations within the household.

67. Clearly, I also have to bear in mind the situation and circumstances which may face the appellant upon return as part of the overall equation. In that connection, Mr Jarvis has invited my attention to details of the support mechanisms that would be available on return to Jamaica. In any event, the appellant has family there and has worked there. Indeed, as Mr Jarvis remarks, he may have a better chance of finding employment in Jamaica than in the United Kingdom.

68. In this case, although Amira clearly is to be the focus of concern, it is right to note the dynamics of the family as a whole and the interests of each member thereof. Central to that family is of course the appellant's wife. No criticism or blame attaches to her for what he did. Indeed, he kept his activity in a different area and away from her knowledge of his actions. She has sought in the period of his imprisonment to maintain a family life. She is someone who herself has experienced difficulties. She had a miscarriage before the birth of Amira. She had to deal with the premature birth of Amira and she has to deal with the potential complications arising from a second pregnancy. In a few months time she will hopefully have two children and faces the possibility of being a single mother. She herself has the potential to work, as she had worked in the past, and to change the dynamics of the family. She has responsibilities to her mother as well as to her daughter. Her mother is disabled and I have seen the documents presented. There is no issue arising to the contrary. There is therefore a marked dynamic of dependency within the family unit, the mother depending significantly upon her daughter and the daughter seeking some support from her mother and sister. It was mentioned in the course of the hearing that her brother also may have psychological problems but that these have not been identified in any clear way. It may be said that the situation of the appellant's wife is little different from other wives who face the absence of their husbands, but in this particular circumstance I find that there is an inter emotional dependency within the family as a whole, linked to the emotional as well as the physical need for the appellant being present and the support he gives to the family as a whole. It is a

family that has had difficulties and has coped but needs stability and support to maintain itself further.

69. It is also right to note that the appellant's offending was some time ago. He has not re-offended. The offence, albeit extremely serious and distressing, was however of relatively short duration during that two month period. The offence was committed out of greed which the appellant sincerely regrets. In terms of deterrent and punishment the appellant received a very substantial prison sentence indeed.

70. This is not an easy case to determine. It seems to me, and I so find, that the removal of the appellant would adversely affect the lives not only of Amira but also his wife and her mother and potentially brother-in-law to a damaging degree. As I have indicated I do not detect from their evidence any concealment or lack of candour but rather a family endeavouring to cope with the situation into which it has been placed.

71. The presence of the appellant in the family will bring stability and a chance for a family to be supported and to develop, if not so much in financial terms but in emotional and human terms.

72. Doing the best that I can therefore to balance the interests of the family with those of the public as so eloquently expressed in the Rules, I find in the circumstances of this particular case, on the findings of fact which I have made, that removal of the appellant would in the circumstances be disproportionate and in breach of the fundamental human rights, not only of the appellant but of those emotionally and physically linked with him.

73. In the circumstances therefore the appellant's appeal against the deportation is allowed. His appeal in respect of Article 8 of the ECHR is also allowed.

Signed Date

Upper Tribunal Judge King TD