IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00342/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21 October 2014	**On 10 November 2014**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IEAN THOMAS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr C Avery
For the Respondent: In person

DETERMINATION AND REASONS

1. For ease of reference the parties are referred to hereafter as they were before the First-tier Tribunal so that Mr Thomas is now the appellant and the Secretary of State is the respondent.

2. The appellant is a citizen of Jamaica who was born on 9 April 1979. On 4 February 2014 the respondent decided to make a deportation order against him. It was said in

the decision that on 11 June 2013 at Inner London Crown Court he was convicted of supplying a controlled drug – Class A – cocaine. In fact this was clearly a mistake and it is apparent that his conviction was in fact some nine years earlier on 4 May 2004. In respect of that conviction he received a sentence of four years' imprisonment on each of five counts of supplying controlled drugs, such sentences to run concurrently.

3. It does not appear to be in dispute that on 31 July 2010 the appellant applied for a certificate of marriage but this was refused on 23 March 2011 as he was an overstayer having arrived here on 1 November 2000. He was cautioned by the police for assault on 16 September 2011 and convicted on 10 June 2013 of possessing a Class B controlled drug – cannabis resin – and given a conditional discharge for twelve months.

4. The appellant appealed against the decision to deport him and the matter came before a panel of the First-tier Tribunal. In a determination promulgated on 9 June 2014 the panel allowed the appeal.

5. The respondent sought permission to appeal. In the grounds it is asserted that although the panel correctly identified that "exceptional circumstances" means "unjustifiably harsh consequences" or "very compelling reasons" they have undertaken a standalone consideration of what is unjustifiably harsh without considering the entirety of the family and private life Rules. Had they directed themselves correctly they would have noted that as the appellant was sentenced to a period of imprisonment of at least four years the government's view, endorsed by Parliament, is that deportation would ordinarily be proportionate even if the appellant (sentence notwithstanding) met the requirements of paragraph 399(a) of the said Rules.

6. The submission is that the First-tier Tribunal erred in its assessment of the public interest. The panel failed to provide sufficient reasons why the effect of deportation on the appellant's children outweighed the public interest in deporting the appellant. In considering that public interest the panel gave great weight to the lack of reoffending, which is arguably irrelevant given the seriousness of the appellant's criminal history or, if not irrelevant, then the "last" important public interest consideration. Given that the appellant is still using drugs and has not rehabilitated he runs the risk of being in prison once more and therefore it would not be in his best interests to remain in the UK.

7. It is further submitted that the Tribunal also failed to recognise that a period of imprisonment of at least four years reflects the most serious level of offending so that a sentence of more than four years can never be spent. Although there may have been a delay in pursuing the appellant's deportation after his conviction (in 2004) there is no evidence that the Secretary of State was aware of his conviction until the deportation was pursued. Given that he was refused a certificate of approval due to overstaying there is no evidence that a criminal conviction check was required to be carried out. It is submitted that there is no evidence that the Secretary of State even

knew of the appellant's whereabouts until the application for a certificate of approval was made as he had used an alias in the past. It is clear that the appellant has not rehabilitated as he has been found to be in possession of cannabis recently and has denied responsibility for this by blaming a friend and claiming it was a lesser category of drugs which completely ignores the fact that it is still an illegal substance. It clearly demonstrates also that the appellant is still associating with negative influences so there remains a risk of reoffending and harm to the public in future.

8. The final submission is that the Tribunal has failed to carry out a thorough assessment taking into consideration society's revulsion against such serious crime and the deterrence of other foreign criminals.

9. In his oral submissions Mr Avery said that the appellant was tried in 2004 in a different name and he had given a different date of birth. There is no reason why the Secretary of State would have been notified of the conviction and the criticism in the determination about delay is unjustified. The alleged delay formed a significant part of the panel's reasoning in the appeal being allowed.

10. Before me the appellant said that he had told officers his real name but they simply told him to tell the judge, and he did so.

11. On a renewed application to the Upper Tribunal for permission to appeal the judge granting permission found that it is arguable that the panel erred in its approach to the balancing exercise when it considered the issue of exceptionality. The panel did not refer to paragraphs 398, 399 and 399A of the Immigration Rules. The panel appears to have assumed that paragraphs 399 and 399A were not applicable and therefore did not need to be mentioned. However, in so doing, it arguably failed to appreciate that as the appellant's case fell within paragraph 398(a) his circumstances and those of his partner and children had to be over and above those set out in paragraphs 399 and 399A to outweigh the State's interests. If the panel has made this error it is arguable that it did not approach the balancing exercise from the correct starting point.

12. The judge granting permission wrote also that it is evident that the circumstances of this family are unusual. In addition it may be that the long delay in the respondent taking deportation action after the conviction for which the appellant was sentenced to a term of four years' imprisonment reduces the weight to be given to the State's interests. The comment is also made that unusual as the circumstances may be in this case it is not possible to say that there is only one outcome on the facts as found by the panel.

My deliberations

13. I note that the appellant was unrepresented at the First-tier Tribunal hearing. He appeared in person before me also. The panel heard oral evidence from him and made a finding that he is an honest and credible witness who did not seek to embellish his evidence at any stage. Examples were given and there is no challenge to that credibility finding. From what they wrote therefore the panel must have

accepted that the appellant's alias of Simon Merchant was imposed upon him by the arresting police officer in 2004 and that the appellant notified the judge at his trial of his true identity as Iean Thomas.

14. It is reasonable to conclude, as the panel did, that the appellant's release from prison in 2006 coincided with the (then) Home Secretary's criticism of the Home Office's conduct relating to foreign national prisoners. The panel found it unusual that the appellant's criminal conduct did not fall for consideration at that time. The panel noted that the appellant established a stable domestic existence shortly after his release from prison and came to the attention of the authorities in 2011 and 2013. He also made direct contact with the respondent in 2010 when he sought permission to marry. His application for a certificate of approval was refused on the exclusive grounds of his immigration status as an overstayer. No reference was made to his first conviction which the panel found and was entitled to find, was reasonable to expect was within the respondent's contemplation "with relative ease".

15. The respondent finally took exception to the appellant's first conviction nine years after the event and seven years after his release from prison. The respondent did not assert that the caution and conditional discharge in 2011 and 2013 respectively formed part of their decision to make a deportation order but in any event the sentences in relation to the subsequent offences demonstrate that the appellant was not considered to be of any significant threat to law and public order.

16. The panel recognised that under Rule 396 of the Immigration Rules the presumption shall be that where a person is liable to deportation the public interest requires deportation and later stated that "it therefore follows that the appellant must demonstrate exceptional circumstances to succeed at appeal". The panel recognised that the appellant's claim under Article 8 "may" also be considered in conjunction with Rule 398 of the Immigration Rules. Although the use of the word "may" is not seemingly appropriate, in context it does not appear to be a material misdirection.

17. The panel has not referred specifically to paragraphs 399 and 399A and their relationship to paragraph 398. The panel recognised and made findings in relation to the appellant's demonstration that exceptional circumstances must exist in accordance with the Rules and that "significant evidence" had to be provided to outweigh the public interest in deporting the appellant from the UK.

18. Although it may be a matter of argument as to whether the evidence considered in the round demonstrates that unjustifiably harsh consequences would befall the children should the appellant leave the UK (para 59) the panel reasoned why it came to that conclusion. The panel was mindful of the circumstances in which the children find themselves. There are five of them – one is the appellant's stepchild – and the youngest child was found to be especially vulnerable as she has Down's Syndrome. Enquiries of the appropriate Children Services brought the response that:

> "It is imperative that Mr Thomas is involved in the children's lives due to the high levels of concern raised by professionals in relation to his partner's care of

> all 5 children, and that should the appellant not be granted Leave to Remain in the UK it would cause a high level of stress to the children's lives as well as disruption in their daily routines and in my view would be very detrimental to the children's safety as well as their emotional well-being." (Paragraph 21 of the refusal letter)

19. I note that the respondent telephoned Children's Services earlier this year who informed the respondent that the children had not been attending school but that steps were underway to assist their reintegration into school. The person of whom enquiries were made stated that in her opinion should the appellant be deported "they" would have serious concerns as to the children's mother's ability to cope with the needs of the children, particularly in relation to the youngest who has Down's Syndrome.

20. In the report of 17 October 2013 it was said that the main worries in terms of unmet needs were not in relation to the children's physical care but to their emotional care. It was evident that their mother was causing emotional harm to all her children through harsh emotional expression to them and carrying such negative feelings to them.

21. The panel was especially mindful that the children may find themselves in residential care should the appellant leave the UK and decided that it could not be in the children's best interests to be taken into residential care if that happened. The panel went on to decide (paragraphs 52 and 53) that the evidence demonstrates that the appellant does not pose a risk to wider society. The respondent's failure to act with reasonable diligence and the appellant's general conduct since 2006 supports that finding. Had the respondent taken action to deport the appellant in 2006 or within a reasonable timescale thereafter the panel's conclusion may well have been different.

22. Although the respondent takes exception to the comment that it is clear that the appellant's whereabouts were known to the authorities at all material times and the respondent only chose to act against the appellant almost one decade after the event there is no good reason to suppose that the respondent could not have ascertained the appellant's whereabouts upon or after release. In those circumstances although the appellant's status in the UK could be said to be precarious so much has happened since his release from prison in terms of his family and private life that the panel reasoned and found that those events outweigh the public interest in deporting the appellant from the UK. Read in the round it is clear enough that the panel appreciated that the appellant's circumstances and those of the children and his partner had to be of greater exception than those set out in paragraphs 399 and 399A to outweigh the State's interests. This is a thorough and reasoned decision.

23. For these reasons and although it was not the only conclusion to which the panel could have come I do not find that there are such errors in the determination that require the decision to be set aside for material error of law or for any other good reason.

24. Having made that finding and announced it at the hearing I note with interest a letter dated 29 May 2014 from the appellant's solicitors who are acting for him in relation to his role as father of the children in care proceedings. That letter was before the panel but at the time the outcome of the care proceedings was not known.

25. The appellant produced a further letter from those solicitors dated 16 October 2014 which although not relevant to the application before me indicates that the children's mother has refused to take responsibility for the ongoing care of the children. An order has now been made that the children should live with Mr Thomas and they do so in accommodation separate from their mother. The appellant is therefore currently the children's sole carer, it appears.

Decision

26. The decision of the First-tier Tribunal panel stands.

27. I was not addressed on the matter of anonymity but in the particular circumstances and because the children have not been named in this decision I do not find that the circumstances require that such a direction be made.

Signed Date

Upper Tribunal Judge Pinkerton **7 November 2014**