Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01267/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 May 2014	**On 17 June 2014**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMARIE FLOYD GEORGE CURRIE

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent/Claimant: Ms T Murshed instructed by Fletcher Dervish & Co

DETERMINATION AND REASONS

1. The respondent (hereafter "the claimant") is a citizen of Jamaica born on 26 October 1992. He came to the UK in July 2002 and was granted six months as a visitor. His father failed to regularise his immigration position, although in November 2005 he applied for settlement in the UK on the basis of having two dependent children under the seven years' child concession. His application

was refused on 15 January 2013 but his appeal against that refusal was allowed on 25 April 2013. This outcome did not assist the claimant because the appellant (hereafter "the Secretary of State for the Home Department") took the view that his criminal conduct justified deportation.

2. The claimant's criminal conduct had begun in 2008 when he was convicted in May 2008 of burglary and theft. Following several further offences he had been convicted in April 2010 for robbery and given a six months' detention order. Two of his offences involved Class B drugs. By 2 February 2012, after he was convicted of attempted robbery and sentenced to three and a half years' imprisonment, he had mustered twelve previous convictions and sixteen offences. The sentencing judge on this last occasion described the claimant as being at the forefront of the commission of the offence, noting that he had armed himself with a brick and later a knife.

3. In response to a request to give reasons why he should not be deported the claimant through his representatives stated that he was in a relationship of four years duration with a Ms Cameron. He has a daughter, SY, by this woman born 23 February 2012 and a son, SE, by a Ms Hansen, born on 9 August 2011. The claimant said that he had not cohabited with either of these women (except for a brief period of two months with Ms Hanson) and each child lived with their respective mother and grandmother and other extended family members. The claimant said he had contact with both children as their mothers had brought them to visit him in prison. His son had asthma and his daughter had eczema. It was said that the claimant continued to live with his father, stepmother and younger brother.

4. The SSHD assessed the claimant's reasons under the new Immigration Rules and considered that if paras 399 or 399A did not apply, the claimant could only avoid deportation if able to show, consistently with para 398(c), exceptional circumstances outweighing the public interest in seeing him deported. On 11 June 2013 the SSHD decided the claimant's case did not demonstrate exceptional circumstances. The respondent pointed out, inter alia, that during his last period in prison the claimant had been the subject of thirteen adjudications for fighting, assaulting, making threats of assault on other inmates, disobeying lawful orders and destroying prison property whilst in custody.

5. The claimant's appeal was heard by a panel comprising First-tier Tribunal Judge Woodhouse and Non-Legal Member Mr A Armitage. In a determination sent on 18 March 2014 they allowed his appeal. By the time of the appeal hearing both Ms Hanson and Ms Cameron had stated that they were now no longer interested in maintaining a relationship with the claimant, but wished to maintain contact for the sake of the children. They both said in oral evidence that in contrast to the position previously, he had changed his attitude to his parental responsibilities and the panel accepted that, although he did not live with or financially support either of them, he had endeavoured since released from prison to remain in a relationship with them by way of daily contact with his son and regularly weekly or bi-weekly contact with his daughter. "[H]e has

a very loving relationship with them", the panel found. The panel also found that whereas before he went into prison on the last occasion he spent very little time at his father's or family house, he was now living with them. He continued to rely for financial support from handouts from family and friends and his friends supported him with his cannabis habit.

6. The SSHD's grounds of appeal, which resulted in a grant of permission was essentially twofold:

(1) that the panel had erred in failing to have regard to the relevant provisions of the Immigration Rules;

(2) that the panel had wrongly found that the claimant's circumstances were exceptional.

Under (2) the two main points advanced were that the panel had erroneously considered the claimant's relationship with his children as a particularly weighty factor in his favour and had also erred in failing to attach due weight to the public interest in his deportation.

7. Mr Deller conceded at the outset that (1) lacked force, as even if somewhat confusingly, the panel had correctly understood that the appeal turned on whether the claimant had shown exceptional circumstances under paragraph 398(c). In the light of MF (Nigeria) [2013] EWCA Civ 1192, he was right to do so.

8. As regards (2), I am grateful to the careful submissions I received from both Mr Deller and Ms Murshed.

Error of law

9. I am satisfied that to the first issue I have to decide - whether the First-tier Tribunal erred in law – the clear answer is that they did. Despite a very thorough examination of the claimant's circumstances, their finding that his ties with his children should carry very great weight was not based on an objective evaluation of his and their circumstances, even on the basis of its own primary findings of fact. Essentially they equated the claimant's two relationships with that of a co-parent father occupying the position of a (joint) primary carer, whereas it was clear that:

(i) he had never lived with them;

(ii) he was no longer in a relationship with either of their mothers;

(iii) their only primary carers were their respective mothers, aided by their own mothers and other family members;

(iv) until he was in prison on the last occasion, he had had very little to do with them;

(v) the period during which he had begun to develop a loving relationship with them broadly coincided with that during which he was under threat of deportation;

(vi) the period concerned was relatively short.

10. In such circumstances it was necessary for any assessment of the strength of his relationship with them to take into account that the best interests of the children were primarily served by continuing to receive the love and care of their mothers and their mothers' respective family support networks. There was no evidence before the panel to indicate that the effect of the claimant's deportation would have any substantial adverse effect on their well-being. The conclusion that the claimant's relationship with his children constituted exceptional circumstances was irrational.

11. I consider the panel also erred in its approach to the public interest of the state in taking action to deport in respect of persons with a serious criminal history. It was only open to the panel to have found the claimant's circumstances exceptional if it had reasonably assessed the public interest factors to carry significantly less weight than usual.

12. I consider the error here on the part of the panel was twofold. First, it wrongly reduced the public interest to a one-dimensional matter of considering whether the claimant was likely to reoffend. Despite stating at paragraph 262 that the risk of reoffending was only one aspect of the public interest and that:

> "[other factors are deterrence and the view of the Secretary of State who has a special expertise in the administration of criminal justice and whose assessment of the public interest must be taken properly into account and given due weight".

the panel proceeded to ignore all but the issue of whether the claimant would reoffend, concluding at 293 that:

> "[h]e has shown we accept over a relatively short period that he is capable of changing his behaviour for the benefit of his two very young British children. The offence for which he was convicted although serious is not one which we conclude falls to be considered in the most serious of offences to which the [SSHD] referred in the Home Office Directive".

13. Not only did this amount to an erroneous reduction of the public interest in deporting foreign criminals to the question of whether the claimant would reoffend, it also sought to justify it by reference to a Home Office statement which did no more than clarify the relative seriousness of sentences. That Directive said nothing to suggest a three and a half year sentence (against the backdrop of thirteen other offences over a four year period) was not sufficiently serious to justify deportation action.

14. A second component of the panel's error here was that in weighing the gravity of the public interest in deporting the claimant, it wholly left out of consideration the fact that he also had a dubious immigration history. Although (again) it noted that all but six months of his residence in the UK since 2002 had been unlawful, it appeared to think this could wholly be disregarded because "[h]e arrived as a minor and therefore cannot be held responsible for his illegal immigration status". That was incorrect. As the panel itself noted he would only have been unaware of his illegal [unlawful] status until the age of 16 and even disregarding the fact that he did not become an adult until he was 18, he turned that age in October 2010 and it was from that age his responsibility became either to leave the UK or make an application to remain as an adult.

15. A third aspect of the panel's erroneous manner of assessment of the public interest was that its conclusion at paragraph 293 that he had shown "he was capable of changing his behaviour ..." cannot properly be said to amount to a firm finding that he was not likely to reoffend; or, if it could, to explain satisfactorily why it chose to depart from that that taken by his Probation Service Officer, Miss Bradshaw, dated 21 February 2012. The latter had concluded that his history of offences over the period 2008-2011 indicated a pattern of offending behaviour and that he demonstrated a willingness to use weapons and partake in reckless behaviour. Miss Bradshaw assessed the appellant as posing a 70% likelihood of reoffending within two years. She referred to his entrenched pro-criminal attitudes and assessed that he and his associates "are potentially involved in offending for financial gain". She rejected his claim to live off money from his family. The claimant was also assessed as posing a 40% likelihood of reoffending in a violent way.

16. There was also a more recent letter from Miss Bradshaw dated 10 December 2013. Despite noting that he had complied with his conditions of licence and had embarked on a Thinking Skills Programme, she still considered that he presented a medium risk of harm to the public and a high risk of reoffending within two years.

17. Whilst it was open to the panel to reach a different view from Mss Bradshaw, notwithstanding that she was a professio0nal trained in this field, it was required to give adequate reasons for doing so. It did not.

18. Curiously, although devoting considerable space to the issue of whether the claimant's activities and involvements were gang-related (concluding that the SSHD had not shown that they were) the panel appeared to disregard the accepted fact that he continued to associate with persons involved in criminal activities. Just as curiously, despite the claimant giving a quite unsatisfactory account of his prison adjudications, only purporting to know about 4 or 5 of the 13 and not addressing the fact that (fighting aside) he was also recorded as damaging prison property. If the panel considered it did not have enough informatio0n to assess the evidence regarding these adjudications, as it indicted in paragraph 105, then it should have taken steps to direct its production. It appears instead to have considered that nothing about these

adjudications had been established and therefore it could entirely ignore them. A further minor point was that the panel appeared to attach no weight to the fact that the claimant continued to use a Class B drug (cannabis).

19. The upshot of these failings was that it simply cannot be said that the panel properly engaged with the evidence from the Probation Service (and also the police services) indicating that he was not likely to avoid reoffending.

20. These errors on the part of the panel necessitate that its decision is set aside.

Re-making of Decision

21. Despite being informed that if it was intended to rely on further evidence notice was to be given to the Upper Tribunal, the claimant's representatives did not identify any further evidence. Accordingly I shall proceed to re-make this decision on the basis of the evidence before the First-tier Tribunal panel. In her grounds of appeal the SSHD has not sought to challenge any of the primary findings of fact made by the panel. My task can be confined, therefore, to evaluating by reference to correct legal principles, the claimant's circumstances in the light of these primary findings.

22. The factors in the claimant's favour when seeking to strike the Article 8 balance are principally the following: that he has been in the UK since 2002; that he has family here, including his father and younger brother; that although he has been an overstayer for all but six months of his period of residence in the UK, he came as a minor and cannot be held responsible for the unlawful nature of his stay for the period until he turned 18; that he currently has a genuine and loving relationship with his two children (supported by their respective mothers); that both of his children are British citizens; and that since his release from prison he has begun spending more time living at his father's house and has shown a capability of changing his behaviour from the former criminal pattern.

23. Whilst these factors carry significant weight that is reduced somewhat, for the reasons already set out, by the following facts: that his relationship with his children cannot be described as having several of the elements of a normal father-child relationship; that he has never lived with either of them; that he has not devoted care to them until relatively recently; that their primary care is afforded by their mothers and grandmothers; and that the period during which he has changed his behaviour towards them broadly coincides with that during which he has been under threat of deportation.

24. Counting against the claimant are a number of weighty factors. There is first of all the fact that between 2008-2012 he had committed multiple criminal offences. Although most of these were committed when he was a minor, his most recent offence, for which he was sentenced to three and a half years, was committed when he was an adult. It is true that none of his offences have involved the infliction of physical injury but he has clearly engaged in

threatening conduct and has carried weapons. The only assessment made of his risk of his reoffending made by an independent statutory body rated him a high risk of reoffending within two years and a 40% risk of committing a crime of violence. Whilst in prison the claimant had been the subject of 13 prison adjudications and the answers he gave regarding them when giving evidence to the First-tier Tribunal do not indicate that, whatever the rights and wrongs of those adjudications, he had faced up to the fact that during his time in prison he had used or threatened violence and damaged property. On the panel's findings of fact, although the claimant now lives with his father and family, there is no indication that he has ceased associating with other offenders and indeed his friends are said to fund his continued use of an illegal drug.

25. In addition to the significant risk of his likelihood to reoffend his history of criminality is such as to justify public revulsion and to warrant the SSHD deciding that his deportation would achieve a deterrent effect.

26. In respect of his immigration history, he did not seek to do anything about his unlawful status since he turned 18, although he clearly knew he was here unlawfully by that age. In contrast to the applicant in Maslov v Austria, he cannot point to any settled status or lawful residency beyond a few months.

27. The removal of the claimant from the UK would separate him from his family members in the UK and effectively end his relationship with his son and daughter (it being accepted by the First-tier Tribunal panel that their mothers could not afford to travel to Jamaica so that they could visit him there). However, it would not mean he was returned to a situation where he had no family connections. As the panel found at paragraph 248, "it was not disputed that the [claimant] has his mother, his paternal grandmother and a paternal uncle who reside in Jamaica at 'the present time'".

28. Given that there is a significant preponderance of factors weighing in favour of the public interest in the claimant's deportation I conclude that his circumstances cannot be said to be exceptional within the meaning of paragraphs, 398, 399 and 399A. There are no compelling reasons that would make it disproportionate for him to be deported.

29. For the above reasons:

The First-tier Tribunal erred in law and its decision is set aside.

The decision I re-make is to dismiss the claimant's appeal.

Signed Date 13.06.2014

Upper Tribunal Judge Storey