**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01687/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 16 June 2014** | **On 17th July 2014** |

**Before**

**UPPER TRIBUNAL JUDGE ESHUN**

**Between**

**MR PAUL ANDERSON SEALY**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms B Smith, Counsel
For the Respondent: Mr J Parkinson, HOPO

**DETERMINATION AND REASONS**

1. The appellant has been granted permission to appeal the decision of the First-tier Tribunal (consisting of First-tier Tribunal Judge A W Khan and Mr A P Richardson

JP) dismissing his appeal against the decision of the respondent to deport him to Barbados.

2. The appellant is a citizen of Barbados born on 1 January 1987. He arrived in the UK on 7 September 2004 with a valid visit visa for six months. On 1 November 2004 he applied for indefinite leave to remain as the child of a settled parent, namely his mother. His application was refused on 9 April 2005 and he appealed against this decision. His appeal was allowed on 7 July 2005. Subsequently the appellant was granted indefinite leave to remain on 31 August 2005.

3. On 16 September 2011, the appellant was convicted at Reading Crown Court for possession with intent to supply class A drugs. On 14 October 2011, he was sentenced to six years' imprisonment. On 2 August 2013 the appellant was made the subject of a deportation order in the light of his conviction and liability to deportation under the UK Borders Act 2007. The drugs had a street value of over £8,000.

4. The Tribunal heard oral evidence from the appellant, his mother, Mrs Paula Williams, his partner Sabrina Johnson, his partner's mother Beverley Johnson, his half-sister Deniesha Williams, and his half-brother Jamal Bovell, most of whom had submitted witness statements. The Tribunal also had the Pre-sentencing report and the OASys assessment dated 20 December 2013.

5. In looking at the facts of this case, the Tribunal took as their starting point the appellant's offence and the judge's sentencing remarks. He found that he was convicted of a serious offence, being in possession of a considerable quantity of drugs namely heroin and cocaine which were not for his personal use. He had pleaded guilty to possession with intent to supply, the total street value being over £8,000. The judge said in the sentencing remarks that the appellant was not a drug user but was intending to sell for his own profit. He was not of good previous character as he had two cautions and a conviction for simple possession of cannabis. His explanation that he discovered the drugs by chance and saw an opportunity to sell them for profit was rejected. The only mitigation, apart from the plea of guilty, was that he owed £600 in rent. The Sentencing Judge said the offence was significantly above the level of selling a couple of wraps to undercover officers on more than one occasion which would have attracted four to five years after a plea of guilty. The quantity and value was very much greater.

6. The Tribunal said that at the heart of this appeal was whether the appellant's family and private life should outweigh his deportation. On the one hand, there was the gravity of the offending behaviour and on the other hand, there was the positive probation report, assessment of a low risk of reoffending and the appellant's constructive time in prison where he has obtained a number of educational qualifications. He has attended a drugs awareness and thinking skills course and that his drug tests were all negative.

7. The Tribunal gave credit to the appellant in attending various courses whilst in prison and the presentence report assessed his likelihood of reconviction as low as confirmed by the OASys Report and the appellant accepted that he intended to sell the drugs for financial gain. The report noted that the appellant did not consider the consequences of his actions and he focused solely on his own needs when he committed the index offence. Contrary to what they were told, the appellant was not a person of previous good character. He had two cautions and a conviction for possession of cannabis. The OASys Report states that the appellant justified this offence stating that the cannabis was for his own use and he did not think that he did anything wrong.

8. The Tribunal accepted in relation to the appellant's family life that he has been in a relationship with Miss Johnson. But clearly he did not think about the consequences of his actions. If he had stopped and thought about what he was doing, he must have realised the co-called ripple effect upon her, members of her family and also members of his family. The Tribunal found that this demonstrated faulty thinking skills and that the appellant was solely motivated by profit in intending to sell the drugs.

9. The Tribunal said they had taken into account the evidence of all the witnesses and listened with great care to what they had to say regarding the effect upon them were the appellant to be deported to Barbados. In relation to Miss Johnson, she is a British citizen, her family are in the UK, she has her own accommodation and is working in a stable job. The Tribunal accepted that paragraph 399(b) of the Immigration Rules applies in that the appellant does have a genuine and subsisting relationship with Miss Johnson but the appellant has not lived in the UK with valid leave continuously for at least the fifteen years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and they did not find that there are insurmountable obstacles to family life with Miss Johnson continuing outside the UK. A Tribunal found that the parties could keep in touch with each other and Miss Johnson could visit Barbados if she chose to do so. While they accepted that it may well not be her choice to go and live in Barbados for practical considerations, the gravity of the appellant's offending behaviour outweighed the competing interests of the appellant's family life with her and that he should not be allowed to remain in the UK for that reason alone.

10. In relation to the appellant's remaining family life, the Tribunal found that he was not living with his mother prior to his custodial sentence. There appears to have been a disagreement between them but now they are reconciled. However, the appellant is an adult. He was 27 years of age and there was no evidence before the Tribunal of any emotional or financial dependency upon his mother. The Tribunal were satisfied that the evidence shows that the appellant has a normal relationship as an adult with his mother and whilst it may be hard upon her if the appellant has to go to Barbados, they did not find that there is a strong family life claim which would outweigh the requirement for deportation as there was no evidence of any special kind of dependency.

11. In relation to the appellant's half-sister it was claimed that he was a father figure and role model to her and that she would be devastated if he had to go to Barbados. The Tribunal said regrettably the appellant took little heed of all this when he was committing a very serious offence. The OASys Report clearly shows that he did not think about the consequences of his actions and the Tribunal were clearly of the view that the appellant ignored the effect of his behaviour upon others, including his younger half-sister. The same could be said in relation to the appellant's relationship with his half-brother because again, he did not consider the consequences of his action upon other members of the family. Whilst it is very regrettable that others have had to suffer because of the appellant's actions, the Tribunal did not consider that this was determinative of the appeal. They were clearly of the view that dealing in class A drugs is an extremely serious matter which ultimately brings a great deal of misery to others. The appellant cannot now excuse himself by saying that his family considerations and his rehabilitation outweigh factors regarding his offending behaviour. In coming to this conclusion, the Tribunal had also taken into account the Tribunal decision in which the appellant's appeal against refusal of indefinite leave to remain was allowed in July 2005. However this was some considerable time ago and at that time the appellant was 18 years old, living at home with his mother and had not committed any offences. The facts before them at the hearing were quite different.

12. The Tribunal considered the claim that the appellant has nothing to return to in Barbados and that he has not been there for some considerable time. They found that even if the appellant has no immediate family to return to, he is 27 years of age, an adult and returning to an island where English is the spoken language. Ethnically and culturally, the appellant has not shed himself of these characteristics; indeed he would be unable to do so from the point of view of his ethnicity. The Tribunal did not find that the appellant would be a complete stranger in Barbados. He might not have any work and he may well find it a struggle but these are not reasons why the appellant should be entitled to succeed in his appeal. Furthermore, the appellant has visited Barbados recently, in 2010 when he went there for a holiday. There was no evidence that he would be in any kind of danger. He claimed that his brother had been murdered but this is what he was told by others who were close to his brother. The Tribunal were entirely satisfied that it would not be unreasonable to expect the appellant to resume his life in Barbados.

13. In conclusion and looking at all the facts of the case, the Tribunal said that whilst they had some considerable sympathy for the feelings of the appellant's family and Miss Johnson's family, the sad fact is that they could not simply overlook the index offence and what the Sentencing Judge said. A period of six years' imprisonment clearly reflected the seriousness of the matter and in conducting the balancing exercise, the Tribunal found that deportation is not outweighed by the appellant's family life claim nor is it in respect of any private life. The appellant arrived in the UK in 2000 and he was sentenced in October 2011. He had thus spent seven years in the UK prior to imprisonment. While they accepted that the appellant attended

Reading College to undertake a catering course, he did not complete the course. He worked at a local tie shop for a short period of time and after his brother's death in Barbados, he does not appear to have worked but had signed on at the local job centre and began to get into debt. Any private life established clearly cannot comply with the Immigration Rules and outside the Rules, deportation would be entirely proportionate for the prevention of crime, assuming there would be an interference with the appellant's limited private life.

14. The Tribunal then had regard to the decision in **MF Nigeria [2013] EWCA Civ 1192** and concluded that insurmountable obstacles do not exist in respect of family life continuing outside the UK. It could not be said that literally obstacles exist which are impossible to surmount. Having considered other case law the Tribunal found that the decision taken by the respondent was entirely proportionate, looking at the whole of the evidence in the round.

15. The Tribunal then went on to say that Section 55 of the Borders, Citizenship and Immigration Act 2009 was raised on behalf of the appellant in respect of the respondent's duty regarding the welfare of children. Whilst they accepted that Deniesha Williams was under the age of 18, she was not the appellant's child. Their relationship was one of half-sister and half-brother because they have different fathers. It was claimed in the evidence that the appellant was a father figure and role model for her but the Tribunal found that praying in aid Section 55 is wholly misconceived and would indeed be a distorted application of the act to do so by way of putting forward an argument that the Secretary of State failed to consider the welfare of Deniesha Williams because the appellant was looked up to by her as a father figure. In the view of the Tribunal there was no merit in this argument. The respondent was not under a duty to consider Deniesha's welfare in making the decision to deport the appellant because he is not her father. Even if she regarded him as a father figure, he abdicated this role by his behaviour which led to a substantial custodial sentence.

16. In granting the appellant permission to appeal, First-tier Tribunal Judge Carruthers said he suspected that there was little substance in at least some of the complaints made in the ten pages of grounds on which the appellant sought permission to appeal – particularly the complaints in paragraphs 10 to 23. Paragraphs 1 to 9 of the grounds complain (by reference to Section 55 of the Borders, Citizenship and Immigration Act 2009) that the Tribunal did not take a proper approach to the situation vis-à-vis the appellant's half-sister, Deniesha Williams. Looking at paragraphs 33 and 34 of the determination, the First-tier Tribunal Judge's assessment was that those paragraphs of the grounds were at least arguable. Given the nature of the appellant's index offences, he suspected that factoring in the best interests of Deniesha may make no difference to the outcome of this appeal (by analogy **Zoumbas [2013] UKSC 0074**, 27 November 2013). But because he could not be sufficiently confident that the outcome would be the same, he decided to grant permission.

17. In spite of the indication given in the grant of permission, Counsel relied on all five grounds. They are (1) the panel took the wrong approach to Section 55 of the Borders, Citizens and Immigration Act 2009 thereby failing to consider Deniesha's interests. (2) The panel erred in law when they held that the appellant abdicated his role as a father figure by his behaviour which led to a substantial custodial sentence. (3) The panel erred when they applied the test of insurmountable obstacles in respect of family life continuing outside the UK. (4) A challenge to the panel's finding that there was no family life between the appellant and his mother. (5) The panel failed to consider relevant factors as a result of misstating material facts and/or omitting material facts.

18. I find no error of law in the Tribunal's decision for the reasons given below.

19. I do not find that the Tribunal took the wrong approach to Section 55 of the Borders, Citizenship and Immigration Act 2009 and thereby failed to consider Deniesha's best interests. The Tribunal were right in saying that Deniesha is not the appellant's child. Their relationship is one of half-sister and half-brother because they have different fathers. I find that the evidence that Deniesha has a strong bond with the appellant, that she wears his clothes and would be devastated if he is deported, is not sufficient to elevate their relationship into a father and daughter relationship. I agree with Mr. Parkinson's submission that what is clear is that as time went on, far from becoming a more integrated member of the family, the appellant moved away in 2009 because he wanted his independence. He rented a house. He saw the family often. After the house was being sold he moved out and rented a room in a house where he was arrested from with a significant amount of drugs. The fact that the family were in shock and knew nothing about this part of the appellant's life does not say much for the closeness of their relationship. The evidence does not suggest that the appellant assumed parental responsibility for her. His description of what he did for her was no more than the normal care and attention an older brother would give to his younger sister.

20. I find that the panel did not err in law when they held that the appellant abdicated his role as a father figure by his behaviour which led to a substantial custodial sentence. The finding was open to the Tribunal on the evidence.

21. I find that the panel did not err in their application of the insurmountable obstacles test in respect of family life continuing outside the UK. The factors listed in paragraph 17 of the grounds and identified again at paragraph 23 were all factors which the Tribunal considered throughout the determination. At paragraph 22 they considered that the appellant has not lived in the UK with valid leave continuously for at least fifteen years immediately preceding the immigration decision. They considered the strength of the appellant's relationship with Miss Johnson at paragraph 22. The panel's failure to consider the future intentions of the appellant and Miss Johnson did not amount to a material error. In any event I find that if their future plan is to marry, the appellant's removal to Barbados should not prevent that from happening. The fact that the appellant was living with his mother and siblings

prior to being sentenced, does not materially affect the Tribunal's decision as his return to the family home was as a result of a bail condition. At paragraph 26 the Tribunal considered that the appellant had spent seven years in the UK prior to his imprisonment. The Tribunal accepted that he had attended Reading College to undertake a catering course but did not complete the course. They also considered that he had worked at a local tie shop for a short period of time. Consequently I find that ground 5 is without merit.

22. Ground 4 states that it was submitted on behalf of the appellant at the hearing that although he was an adult he had family life with his mother and sister, which went beyond normal emotional ties, because of the special emotional dependency the family have on each other due to the loss of Ron, the eldest son of the family who was killed at age 25 in Barbados. It was argued that nowhere in the determination is there consideration of the family history. There is consideration of Ron's death in paragraph 25 but this focuses on whether Barbados is a dangerous on account of Ron having been killed there. Whilst I accept that the death of Ron would have created a special emotional bond between members of the family, I find that it does not satisfy the **Kugathas** test. There was no evidence of dependency which went beyond the normal emotional ties. The appellant was not financially dependent on his mother, nor was his mother dependent on him. He was leading an independent life away from his mother and the rest of the family. The family history does not materially add to the findings made by the Tribunal. Their focus on whether Barbados is dangerous does not materially affect their decision.

23. I accept Mr Parkinson's submission that there is nothing in the current jurisprudence, that is, **SS Nigeria** and **MF Nigeria**, to show that there are compelling circumstances in this case for the appellant's rights to trump the Secretary of State's decision.

24. I find that the Tribunal's decision does not disclose an error of law. The Tribunal's decision dismissing the appellant's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun