



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/18500/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 September 2014

Determination Promulgated  
On 3 October 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE E B GRANT

Between

YA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Nelson-Iye  
For the Respondent: Mr Jarvis, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant is a 39 year old citizen of Jamaica who has been given permission to appeal a determination of First-tier Tribunal Judge Buckwell promulgated on 13 May 2014.

## **The Background to this Appeal**

2. On 12 September 2013 the respondent made a decision to refuse to revoke a deportation order with reference to the Immigration Act 1971. The appellant exercised her right of appeal against that decision and her appeal became before First-tier Tribunal Judge Buckwell on 24 April 2014. In a determination promulgated on 13 May 2014 he dismissed her appeal.

## **The Grant of Permission to Appeal**

3. On 30 July 2014 First-tier Tribunal Judge P J G White granted permission to appeal in the following terms:

- “1. *The Appellant seeks permission to appeal, in time, against a decision of First-tier Tribunal Judge Buckwell who, in a determination promulgated on 13 May 2014, dismissed the Appellant’s appeal against the Respondent’s decision to refuse to revoke a deportation order.*
2. *Having had regard to the grounds for permission to appeal and the determination, I am satisfied that in reaching his decision the judge arguably made an error of law for the following reasons:-*
  - a. *The judge arguably in regard to the considerations under paragraph 390 and 391 of the Rules failed to give sufficient weight to the influence that the Appellant’s husband may have on the Appellant’s future conduct (the judge having praised the reformed character of the Appellant’s husband at paragraph 46 of the determination).*
  - b. *It is arguable that in assessing the best interests of the child the judge failed to engage properly with the fact that at present the child is in private foster care as a result of the Appellant’s inability to return to the United Kingdom, and the recommendation of the Local Authority that the child should live with both his parents.*
3. *Accordingly I am satisfied that the grounds and determination disclose an arguable error of law.”*

## **The Evidence and Submissions**

4. Mr Nelson-Iye made submissions based on the application for permission to appeal which I set out in full below:

*“Preface: The Appellant and her husband were part of the conspiracy. The husband, who is a British citizen, was described by the Sentencing Judge as one of a senior manager; the head of transport and trusted with over £100,000 (see page B6 of the Respondent’s bundle, page 9 of the Appellant’s main bundle). For this he sentenced the Appellant’s husband to 10 years in prison. He described the Appellant’s role as that of a temp who stepped in to assist whenever anyone member of the conspiracy was away or unavailable and right at the bottom of the company (see page B7 of the Respondent’s bundle and page 10 – 11 of the Appellant’s main bundle). He then sentenced the Appellant to 6 years imprisonment. The Appellant’s husband continued to remain in the United Kingdom (UK) because he is a British citizen. The Appellant however was deported from the UK after an unsuccessful appeal; in this appeal her husband wrote to the UKBA informing them that he was no longer with the Appellant.*

*The Appellant appeals against the decision of the Respondent to refuse her application for the deportation order in place to be revoked so that she can rejoin her family in the UK.*

*It is contended that the Immigration Judge (IJ) erred in law on the following grounds:*

1. The IJ made irrational findings on a matter that was material to the outcome of the appeal: that being the possibility of the appellant re-offending and or remaining a risk to the public here in the UK and the society at large.

The IJ found the Appellant's husband to be a sincere witness who has not exaggerated his evidence but had presented it honestly (see paragraph 46 of the determination). He found that the Appellant's husband had accepted his previous criminal activities; served his prison sentence and has done remarkably well since his release to from open prison in re-establishing himself with the community; and is in gainful employment and even purchased his own flat. He found the Appellant's husband to be a credible witness. He also accepts that the relationship between the couple to be genuine and subsisting as well as acknowledging that the said relationship like many others experienced difficulties (see paragraph 51 of the determination). He also found that the Appellant's husband should not be criticized for not going to Jamaica as he could not afford it because he only recently put himself on a path towards a more secure future, which behaviour the IJ mentioned was worthy of respect. The Appellant's husband had been rehabilitated and is back into the community; posing no threat to the public and society at large.

The IJ fails to note, take in to account and to make findings in relation to the impact of the Appellant's husband's new behaviour on her, which he described as worthy of respect, as a means of encouraging her to change and thus directing her towards the right path. He does not consider that the Appellant can benefit from her husband and can be encouraged by the remarkable progress that her husband has made; after all his whole effort is geared toward putting his family together. The IJ's reasoning on this point which is material to the outcome of this appeal is irrational.

The IJ noted that the consideration of the effects of the decision to refuse to revoke the deportation order on her son, A, was an important point of consideration in his mind (paragraph 47 of the determination). He goes on to find that he was satisfied that A was being cared for and that there is appropriate local Borough support (paragraph 52 of the determination. The IJ fails to give weight to the plan and or recommendation of the local Borough assessment with his God parents were only temporary because it was in A's best interest that he grows up with his parents (see page 28 of the Appellant's supplementary bundle); if there was going to be delay in his mothers return to the UK then his father should take him. The IJ fails to make a finding as to why it is A's best interest for him to be continually separated from his mother or why it is in A's best interest that he be raised by only his father.

2. The IJ failed to give adequate explanations for his findings on material matters

The IJ fails to give reasons and or adequate explanation as to why the Appellant cannot benefit from the same process her husband went through; she had served her sentence just like he did and had accepted responsibility for her actions (see page A7 paragraphs 3 to 6) she would no doubt be encouraged positively by the remarkable progress that her husband has made; after all his whole effort is geared toward putting his family together.

The IJ fails to explain why recommendation of the local Borough assessment team, that he be rejoined with his parents as soon as possible, as the arrangement with his God parents were only temporary, were not in A's best interest, and why it is not in his best interest for him to grow up with his parents and why it is A's best interest for him to be continually separated from his mother or that he be raised by only his father.

The IJ fails to explain and or give reasons as to why taking into account A's needs together with the progress his father has made, his mother would not turn a new leaf and be reformed just like her husband.

3. *In light of grounds 1 and 2 above it is contended that the article 8 point is fundamentally flawed."*
5. Mr Nelson-Iye submitted that at the time the deportation order was served the appellant was guilty of conspiracy to import drugs. She had served six years in prison and her husband had also served time in prison. The relationship between

them had broken down. At the time of the appeal against deportation there was no family life. However it is now known that the parties did not divorce and they remain married. There have been difficulties between the husband and wife but the marriage is genuine and subsisting. The appellant's husband is out on licence and supports the appeal and appeared in court before me.

6. It is the appellant's case that the circumstances today are significantly different from those in place at the time when the deportation order was signed.
7. In a further change of circumstances the best interests of A were not taken into account. This amounts to exceptional circumstances and requires the appeal to be allowed on Article 8 grounds.
8. The respondent served a Rule 24 response to the Grounds of Appeal by letter dated 8 August 2014 in which the respondent submitted that *"the judge was not obliged to speculate as to what effect if any the appellant's husband might have on her future character and behaviour. The judge noted the appellant's husband appeared to have made progress since his release from prison. The appellant's child is in foster care as a result of a private arrangement which it appears was undertaken when the appellant and her husband were imprisoned for their part in the illegal importation of cocaine. The child was 3 years old at the time. He is 11 years old now. The appellant's child remains within the foster arrangement because his father has chosen to not have him live with him. The theoretical view of the Borough is but one aspect of the appellant's case. The appellant's child has spent the majority of his life with his godparents and is secure and supported there/. It is clear the appellant's husband has put his home purchase and employment before being reunited under the same roof as his son. The grounds are a disagreement with the determination and an attempt to reargue the case. The judge was entitled to rely on AD Lee and dismiss the appeal"*
9. Mr Jarvis relied upon the Rule 24 response and submitted that the Grounds of Appeal were nothing more than a disagreement with the determination. The grounds speculate about the potential beneficial effects on the appellant by her husband but the First-tier Tribunal Judge dealt with that not only in relation to the husband's behaviour and accepted they were still on good terms (paragraph 31).
10. Judge Buckwell did take into account all the submissions and properly found that the circumstances presented did not constitute changes of such significance from the circumstances which subsisted when the original order was made and they did not in any event constitute exceptional circumstances.
11. The appellant and her husband are serious criminals. He could not be removed from the United Kingdom because he has British citizenship. This is a case where a six year sentence for a peripheral role in relation to class A drugs was a very serious sentence and six times the minimum requirement for automatic deportation. The appellant's husband may be better at advising her now but that is a minimal and irrelevant point.
12. The point of paragraph 390 and 390A of the Immigration Rules are that she has been deported and the public interest was justified. The point of paragraph 391 of the

Immigration Rules is not to re-argue the case of deportation but to show that the circumstances are exceptional that the normal course of exclusion should not be met in any case. The risk of the appellant reoffending now would make no difference to the deportation action that was taken against her.

13. The judge plainly took into account the best interests of the child. The best interests of the child have not been best served by his own parents and their behaviour. The judge did not have to speculate on what the effects of his decision would be and who the child would stay with. He was plainly aware of the consequences of his decision which were that the mother would stay outside the United Kingdom and the child with foster parents. The findings he reached at paragraphs 47 and 52 were properly open to him.
14. Mr Jarvis submitted that the judge arguably gave less weight to the public interest in reaching his decision but still found it outweighed the appellant's case. The appellant's conviction is not capable of being spent and so if anything the judge underestimated the length of exclusion from the United Kingdom. In respect of the length of her sentence her exclusion is indefinite. But this does not mean she cannot apply and show human rights grounds why she should not be excluded.
15. Finally Mr Jarvis submitted that the determination does not contain any error of law.
16. In reply Mr Nelson-Iye re-emphasised the point that there had been a significant change between the deportation of the appellant and circumstances now such that they amounted to exceptional circumstances and she should be permitted to return to the United Kingdom so that the child could be reunited with both of his parents.

### **The Immigration Rules**

17. The requirements relevant to revocation of a deportation order are set out in paragraph 390 of HC 395 (as amended) as follows:

*"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:*

- (i) the grounds on which the order was made;*
- (ii) any representations made in support of revocation;*
- (iii) the interests of the community, including any compassionate circumstances."*

*"390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."*

*"391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:*

- (a) in the case of a conviction of an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, or*

- (b) *in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,*

*Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."*

"391A. *In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order."*

## **Discussion and Decision**

18. Paragraph 391 is a helpful indicator of the kind of factors that the Secretary of State would expect to see before agreeing to revocation of a deportation order.
19. I have had regard to the judgments to which I was referred by the parties and, additionally I have considered the principles enunciated in **N (Kenya) 2004 EWCA Civ 1094**. The gist of the court's decision in N (Kenya) was that the Adjudicator's analysis of the public interest had been inadequate. The importance of the public interest is reiterated in **OH (Serbia) [2008] EWCA Civ 694**. Despite sympathy for the appellant who had his parents and siblings in the United Kingdom and who had sought to rehabilitate himself the court found itself unable to allow the appeal. In **DS (India) [2009] EWCA Civ 544** a compulsive gambler who had attempted to rob a betting shop whilst armed with a knife resulting in a sentence of imprisonment of 4 years and 3 months was reconciled with his wife and wanted to formally adopt the five year old son of his wife's nephew. The court considered the issue of relocation for the wife and child. It found that:

*If it would be reasonable for a wife to accompany her husband, then the interference in family life is that much the less. If it would be unreasonable, then the interference would be that much the more. However, where the scales ultimately fall will depend on the overall evaluation of every factor in the balance. In the present case, a critical factor is the serious offence of which DS was convicted (at paragraph 30).*

20. It also found that:

*The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending (at paragraph 37).*

21. In **AD Lee [2011] EWCA Civ 348**, Mr Lee was a 32 year old Jamaican national who had been deported and who had appealed from Jamaica against the refusal of the Home Secretary to revoke the deportation order. He initially entered the United Kingdom as a visitor in 1996 but was granted a variation to enable him to remain as a student. When this leave expired at the end of October 1999 he overstayed, but at some point thereafter left the country, returning in April 2002 and absconding after

securing temporary admission. He was however arrested within three months for having a forged insurance certificate. In January 2003, having been removed to Jamaica, he re-entered the United Kingdom on a false passport and within a few months had again been arrested, this time for possession of class A drugs with intent to supply. On pleas of guilty to ten counts he was sentenced on 3 October 2003 to 7 years' imprisonment. In April 2006, while still in prison, the appellant was served with notice of intention to deport him. He completed his sentence and following the final dismissal of his appeal he was deported in November 2008. Whilst in prison he married Rachel Lee with whom he had two daughters. It appears from the evidence that his relationship with his first daughter only took root after his release from prison. The younger child was unaffected by his departure. The wife established a small cleaning business when the appellant was in prison and his presence as a child-minder upon release enabled her to keep it going. The issue before the Tribunal was whether it was proportionate to break the family up. The judge considered that despite the distress deportation would cause the family, it was appropriate because of the appellant's bad immigration history and his criminality and because his wife was aware of both when she married him. In upholding his determination, the court found:

*27. The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge.*

22. In **SS (Nigeria) [2013] EWCA Civ 550** the court had to consider the appeal against deportation of an appellant who had a relationship with a British national and a young son. SS was convicted on three counts of supplying crack cocaine sentenced to three concurrent terms of three years imprisonment. He had been a street dealer. An antisocial behaviour order was imposed prohibiting him from entering Walsall Town centre. In dismissing his case, the court took note of Parliamentary endorsement of the new rules on deportation with the result that this gave the proportionality scales a markedly greater weight than in other cases and meant that only a very strong claim indeed could override the pressing nature of the public interest in the criminal's deportation.
23. While the interests of children whose lives will be affected by the deportation of a parent must be a primary consideration and this must also be so when the Tribunal considers a refusal to revoke a deportation decision, I have had regard to the observations of Lady Hale in **ZH (Tanzania) [2011] UKSC 4** that there can be circumstances where the best interests of children, although of primary consideration, are not necessarily determinative.
24. In making my findings I have had full regard to the evidence before me, the submissions made, the applicable rules and the law and the relevant jurisprudence.
25. At the time of the appellant's deportation the impact of her removal on A was considered; the appellant had been separated from her son by her prison sentence as

had her husband, the marriage had seemingly broken down, the child was in the care of foster parents and the appellant as a foreign criminal who had committed a serious offence was deported.

26. The appeal before Judge Buckwell following on from a request to the Secretary of State to revoke the deportation order was an attempt to reunite the family. It was said much had changed. The father was now out of prison and had not reoffended. He would be a good influence on the appellant in ensuring she did not reoffend and the best interests of A required him to live with both of his parents in the United Kingdom. The same arguments have been placed before me.
27. A has now spent 8 of his 11 years in foster care. The appellant's husband has shown no interest in removing the child from foster care to live with him a decision undoubtedly in the best interests of A, who will be settled where he is. It is submitted before me that the judge failed to take into account A's best interests where he is continually separated from his mother or brought up by his father alone if the originally temporary arrangement with the Godparents ceases.
28. Judge Buckwell had in mind the determination in the deportation appeal in DA/00608/2009. At paragraphs 16-23 the judge in that appeal considered the interests of the Secretary of State in the appellant's deportation in the context of her relationship with her young son (then aged 6). Although the determination does not specifically mention the phrase "best interests" it is clear the judge had them in mind and gave careful consideration to the arrangements for the care of A or the alternative choice of taking A to Jamaica by his mother (his father was still in prison at the time of the appeal).
29. Judge Buckwell carefully considered the best interests of A and was satisfied that he was properly cared for and there was appropriate local government support. The judge noted that human rights considerations were taken into account when the appellant was deported and that it would only be in exceptional circumstances that the public interest in maintaining the deportation order would be outweighed by other factors.
30. Judge Buckwell properly found on the evidence before him that the circumstances presented did not constitute changes of such significance from the circumstances which subsisted when the original order was made and they did not in any event constitute exceptional circumstances.
31. Overall the findings reached by Judge Buckwell were open to him on the evidence before him and the Grounds of Appeal do not disclose any arguable error of law. I am in agreement with the submission of Mr Jarvis that the Grounds are a disagreement with the findings of the judge and an attempt to reargue the appeal.



**Conclusions**

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

**Anonymity**

The First-tier Tribunal did not make an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. However as this determination refers to a young child and the appellant's husband I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

2 October 2014

Judge E B Grant

Deputy Upper Tribunal Judge