IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00072/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 May 2015	**On 10 June 2015**
Prepared 20 May 2015	

Before

THE HON. LORD MATTHEWS
UPPER TRIBUNAL JUDGE MCGEACHY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROHAN EVERTON MONTGOMERY WILLIAMS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Nath, Senior Home Office Presenting Officer
For the Respondent: Mr R Solomon of Counsel instructed by Messrs Jein Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Lingam and Mr G F Sandall (Non-Legal Member)) who, in a determination promulgated on 18 August 2014, allowed the appeal of Rohan Everton Montgomery Williams against a decision of the Secretary of State to refuse to revoke a deportation order made against him on 21 March 2007.

2. Although the Secretary of State is the appellant before us we will for ease of reference refer to her as the respondent, as she was the respondent in the First-tier. Similarly we will refer to Mr Rohan Everton Montgomery Williams as the appellant, as he was the appellant in the First-tier Tribunal.

3. The appellant is a citizen of Jamaica who was born on 8 October 1974. He entered Britain as a visitor in 2001 and thereafter received extensions of stay firstly as a student and then as the husband of Giselle Dowe by whom he had already had two children and whom he married on 31 March 2003. On 2 April 2003 he was granted an initial period of two years' leave as the spouse of a settled person until 2 April 2005.

4. The appellant committed a series of eight drug offences between 12 May 2004 and 14 July 2004 and on 7 January 2005 he was convicted of eight counts of possession and supplying class A controlled drugs and was sentenced to two years' imprisonment concurrent on each count. He did not appeal against conviction or sentence.

5. A decision to make a deportation order was made on 25 June 2005. The appellant appealed against that decision and although his appeal was allowed in the First-tier, largely because of the mental health of the appellant's wife, on reconsideration in the Upper Tribunal, it was set aside, re-made and dismissed. An application to the Court of Appeal was refused.

6. The deportation order was then made on 21 March 2007.

7. It appears that the appellant was not removed at that stage because he was a witness for the prosecution in a murder trial.

8. In 2013 the appellant's solicitors made an application for revocation of the deportation order. That application was refused by the respondent, reasons being given for the refusal in a detailed letter dated 2 December 2013.

9. The writer of the letter referred firstly to paragraph 390 of the Immigration Rules which set out the circumstances in which revocation of a deportation order should be considered before setting out the terms of paragraphs 391 and 391A. These stated:-

> "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 for 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, ..
>
> (b)
>
> Unless, ...the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of

> Refugees, or there are exceptional circumstances meaning 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."

10. The writer of the letter considered that as ten years had not elapsed since the making of the deportation order the appellant's continued exclusion would normally be the proper course. He then went on to consider the relevant background information set out in the appellant's application for revocation.

11. We would comment that as the appellant had not been deported he had not been excluded from the United Kingdom. However we note, of course, that it is now ten years since he was convicted.

12. The relevant factors which were taken into account by the Secretary of State regarding the appellant's change of circumstances were that his marriage had broken down and he had formed a relationship with Ms Maurisa Buckley-Stevens, a British citizen and with her had had a child, T who had been born on 7 May 2007 and who was also British.

13. The appellant had had another relationship during the currency of his relationship with Ms Buckley-Stevens with a Dionne McDonnough. Their child, O had been born on 26 April 2009 and was also British. It was accepted that the appellant also had parental responsibilities for his son.

14. The Secretary of State referred to relevant case law regarding the Article 8 rights of the children including the determination in **Omotunde (best interests – Zambrano applied – Razgar) [Nigeria [2011] UKUT 00247 (IAC)** and **ZH (Tanzania) [2011] UKSC 4**. Weight was placed on the fact that the appellant's appeal against the decision to deport had been dismissed. The writer of the letter then went on to consider the terms of Section 32 of the UK Borders Act 2007 and paragraphs 398, 399 and 399A of the Immigration Rules.

15. Under the provisions of paragraph 399(a) the positions of the appellant's two children were considered. It was stated that it was accepted it was unreasonable to expect T to leave Britain because she was aged 6 and had lived all her life in Britain but it was considered that there was another family member who was able to care for the child in Britain because the child could remain in the continued care of her mother.

16. Similarly, although it was accepted that the appellant also had a genuine subsisting relationship with O, it was considered that his mother could care for him.

17. Under the provisions of paragraph 399(b) it was stated that there were no insurmountable obstacles to the appellant and his wife living together in Jamaica.

18. It was not considered that the appellant could benefit under the private life Rules nor indeed that there were any exceptional circumstances would mean that his deportation would be disproportionate.

19. When considering the appellant's appeal the First-tier Tribunal noted that under the provisions of **Devaseelan [2002] UKIAT 702** the determination of the Tribunal in the appeal against the decision to make a deportation order should be the relevant starting point. In paragraphs 21 onwards of the determination they set out their findings and conclusions.

20. They first consider the provisions of paragraph 399(a). Having noted that the appellant had a genuine subsisting relationship with T and that the respondent had considered that T had another parent who could care for her they have stated in paragraph 32 (the second one-there are two):-

> "We find the respondent's suggestion that Ms Buckley-Stevens can care for T dismissive, without good reason, of the appellant's evidence that Ms Buckley-Stevens is the sole wage earner in their household."

They asserted that the respondent had not properly considered all relevant evidence.

21. In paragraphs 34 onwards the Tribunal noted the evidence before them that the appellant was supported by his partner and that Ms Buckley-Stevens worked shift hours relying on the appellant to take and fetch their daughter to school and deal with daily childcare matters and that the appellant had the responsibility to bathe, feed and put Tiyanna to bed on a regular basis as well as dealing with her medical appointments.

22. Having referred to the need to safeguard and promote the welfare of the child who was in Britain the Tribunal went on to say that:

> "As it is only his partner who is in full-time employment and there is no evidence to suggest different (sic) it is reasonable to find that the appellant would have full daily responsibility and care of their daughter. We accept it probable that his daughter, over the years, would have got familiar with her father being her main carer. Therefore, we accept that the appellant's extensive role as the main carer must be afforded due weight."

23. Having emphasised that Ms Buckley-Stevens was the only earner in the family the Tribunal then referred to the terms of Section 55 of the Borders, Citizenship and Immigration Act and the decision of the ECJ in **Zambrano** and the determination of the Tribunal in **Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)** before reaching the conclusion in paragraph 45 that T and her mother were actively involved in their respective private lives and stating that "based on the principles in **Zambrano** and **Sanade**, it must follow that it would not be possible or reasonable for the Secretary of State to expect or

require British citizens who are also citizens of the EU to relocate, as a family unit outside the EU."

24. They then stated that they gave full weight to the appellant's conviction but said that if he were deported the relationship between the appellant and his daughter would suffer and it would severely interrupt the extensive nature of the appellant's care activities with his daughter. This would have a profound impact on the development of the father/child relationship and would mean that either Ms Buckley-Stevens would have to reduce her working hours or she might have to quit her job to stay home and maintain the same level of care for her daughter. If that happened Ms Buckley-Stevens would become reliant on public funds and would not be in a position to facilitate regular visits to Jamaica.

25. The Tribunal then considered the appellant's relationship with O but and stated that it was generally in a child's best interests to have both its parents together as a unit and they took into account that the appellant was actively involved in both the children's lives.

26. They took into account that the appellant had lived lawfully in Britain between 2001 and 2005 and that he had not been removed in 2007 because removal action had been suspended in 2007. They concluded, in paragraph 54 that the appellant's family life with the children outweighed the public interest in deporting him.

27. They went on to state, on a generous reading of reading paragraphs 55 and 57 together, that given the disruption that there would have to be to Ms Buckley-Stevens' life if she had to leave Britain, the appeal should succeed under paragraph 399(b) as it would be unreasonable to require her to leave this country.

28. They therefore found that the appellant's appeal should succeed under the Immigration Rules. They then turned, it appears to the appellant's Article 8 claim under the ECHR and referred to considerable case law before stating that the appellant's relationship with his daughter was such that it would not be in her best interests or that of O if the appellant were removed. They also appear to have placed weight on the fact that since the initial convictions in 2005 the appellant had not been convicted of any further crime.

29. They therefore allowed the appellant's appeal.

30. The Secretary of State appealed, arguing that the Tribunal had erred in their consideration of paragraph 399(a) in their assessment of the condition in the Rule that there should be "no other family member who is able to care for the child in the UK".

31. It was argued that the Tribunal had materially misdirected themselves in law as there were other family members who were able to care for the children in Britain.

32. With regard to the provisions of paragraph 399(b) it was stated that the Tribunal had conducted very little assessment or consideration of the requirements merely stating that on the totality of the evidence before them the appellant succeeded under that paragraph.

33. In any event it was stated that paragraph 399(b) required that the appellant should have been in Britain with valid leave for a continuous period of fifteen years (the actual requirement is twenty years). It was also argued that the Tribunal had not properly taken into account the public interest in the deportation of foreign criminals. The grounds refer to the judgment of the Court of Appeal in **SS (Nigeria) [2013] EWCA Civ 550**.

34. Although the application was not admitted in the First-tier on the basis that it was out of time, the judge deciding the application considered that there was no error of law in the determination as there had been a proper "proportionality" exercise under Article 8.

35. The application was renewed in the Upper Tribunal, the further grounds stating that the Tribunal had failed to consider the effect of Section 117 of the Nationality, Immigration and Asylum Act 2002 which had come into force on 28 July 2014. That was after the hearing but before the promulgation of the determination: that was a misdirection such that the decision should be set aside.

36. Upper Tribunal Judge O'Connor considered it appropriate to extend time to apply for permission to appeal and also granted permission to appeal. He wrote:-

> "It is arguable that, although the terms of relevant rules had changed from those cited in the respondent's grounds, the First-tier Tribunal's reasons and conclusions in relation to paragraphs 399(a) and 399(b) of the Immigration Rules are legally flawed.
>
> It is further arguable that the First-tier Tribunal's determination contains an error of law capable of affecting the outcome of the appeal, in that it failed to have regard to, and apply, sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002."

37. At the hearing of the appeal before us Mr Nath referred to the terms of the letter of refusal and to relevant case law including the judgments in **SS (Nigeria)** and **SS (Congo) [2015] EWCA Civ 387**. He argued that the Tribunal had not properly considered the public interest in the deportation of the appellant and whether or not the appellant's relationship with his daughter outweighed the public interest in deportation. The fact that the appellant looked after his daughter did not mean that this was an exceptional case. While he accepted that the appellant looked after his daughter, taking her to school and dealing with much of her day to day care, he stated that the Tribunal had not properly considered the fact that the appellant had committed very serious offences – he referred to the judge's sentencing remarks. He referred to paragraph 13 of the judgment

of the Tribunal in **Chege (Section 117D – Article 8 – approach: Kenya) [2015] UKUT 165 (IAC)** which referred to the provisions of HC 532 which provided that the changes which took effect on 28 July would apply to all ECHR Article 8 claims from foreign criminals who were decided on or after that date and went on to say:-

> "Although this appears on the face to mean a decision by the SSHD because the Tribunal does not take decisions in the context in which that expression is here being used, paragraph A362 refers to Rules having effect *regardless of when the notice of intention or the deportation order was served*; the explanatory memorandum at 3.4 and 3.5 talks of harmonisation of the Rules with Immigration Act 2014 and [38]-[39] of **YM (Uganda) [2014] EWCA Civ 1292** made it clear that irrespective of when the deportation order was signed or the decision to deport was made, if the appeal is determined after 28th. July 2014 then the Rules in force on that date are the relevant Rules."

He also referred to the judgment of the Court of Appeal in **YM (Uganda) [2014] EWCA Civ 1292**. In that paragraph Aikens LJ having considered the coming into force of Section 117A of the 2014 stated that:

> "To my mind there is no unfairness in applying the new statutory provisions to a decision that has now to be made by a Tribunal or court. The decision should reflect the balance that has been struck, which has some benefits and, perhaps, some drawbacks for the person concerned.

38. He went on to say in paragraph 39:-

> "So far as the 2014 Rules are concerned, it is clear from the provisions of Rule A362 itself, as well as the statement under 'implementation' in the Statement of Changes and paragraphs 3.4 and 4.7 of the Explanatory Memorandum, that the 2014 Rules are to be applied to all decisions concerning Article 8 claims that are made after 28 July 2014. As Lord Hoffmann said in the **Odelola** case at [7], the Immigration Rules are a statement by the SSHD of how she will exercise powers of control over immigration. Thus, in the absence of any statement to the contrary, the most natural reading of the Rules is that they apply to decisions taken by the SSHD until such time as she promulgates new rules, after which she will decide according to the new rules. The same applies to decisions by tribunals and the courts: that is why in **MF (Nigeria) v SSHD** (hereafter "**MF (Nigeria)**"), the Court of Appeal held that both the UT and it were obliged to apply the 2012 Rules to **MF**, despite the fact that the SSHD had taken her original decision in 2010 under the pre-existing rules."

39. We were asked to find that the finding of the Tribunal was legally flawed and to set aside the decision.

40. In reply Mr Solomon asked us to find that the Tribunal had properly considered all relevant factors under paragraphs 399(a) and 399(b) of the Rules and had reached conclusions that were fully open to them on the evidence. They were entitled to find that there were compelling exceptional circumstances.

41. In that regard he referred to the provisions of Section 117A-D of the 2002 Act.

42. He accepted that the Tribunal might have erred with regard to issues regarding paragraph 399(b) but stated that there were sustainable reasons given for the conclusion of the Tribunal that the appellant should succeed under the provisions of paragraph 399(a). He stated that they had taken into account the previous determination and the terms of the Immigration Rules. He took us through the appellant's history and emphasised that he had not been removed because he had been a witness for the prosecution in a murder case.

43. The appellant had properly made an application to regularise his stay and there had been a material change in circumstances as he now had two children with which he had a parental relationship. The Tribunal were entitled to conclude that the appellant was the primary carer for T and gave reasons for that. He emphasised that Ms Buckley-Stevens' evidence had been that neither her mother nor the appellant's sister would be able to offer assistance in looking after T.

44. He emphasised the Tribunal were entitled to find that there would be a profound impact on T should the appellant be removed. He argued moreover that the Tribunal had been entitled to carry out the relevant proportionality test and had given reasons why this was an exceptional case. He stated that the judge's sentencing remarks had not been unfavourable and asked us to take into account the fact that the appellant had not sought to evade the police or immigration authorities in any way since he had been served with the deportation order.

45. Taking into account the consequences of the removal to family life he asked us to conclude that the Tribunal had conducted proper balancing exercises and that they reached conclusions which were fully open to them.

46. In any event he emphasised that applying the amended terms of paragraph 399(a) the removal of the appellant would have an unduly harsh effect on his daughter. Similarly the appellant met the terms of exception 2 in Section 117C of the 2002 Act. The Tribunal he argued had clearly found that the removal of the appellant would have unduly harsh consequences for his daughter.

47. He stated that in any event it was clear from the determination of the Tribunal in **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)** that it was not an error of law to fail to refer to Sections 117A-117D if the judge had applied the test which she was supposedly to apply according to its terms and that what mattered was substance and not form.

48. He therefore asked us to find there was no material error of law in the determination of the Tribunal and to dismiss the Secretary of State's appeal.

Discussion

49. In order to consider what was the relevant law which had been applied by the Tribunal it is necessary to set out the chronology: the application, the decision and the changes in the Rules and in statute.

50. The application for revocation was made on 11 June 2013. It was made on the form for leave to remain on human rights grounds.

51. The decision to refuse to revoke the deportation order was made on 2 December 2013. The appeal was heard on 9 July 2014. The decision was reserved. The changes in the Immigration Rules came into effect on 28 July 2014 which was the date on which the 2014 Act which inserted Sections 117A-D into the 2002 Act came into force. The determination was promulgated on 18 August 2014. The new Rules and statute should have applied to all decisions made after 28 July 2014. We consider that the date of promulgation is the date of the decision. The first issue which we must consider is whether or not the determination of the Tribunal should have applied the new Rules because the decision was not promulgated until after the new Rules came into force. We consider that that must be the case. It would have been open to the Tribunal to reconvene so that they could be addressed on the terms of the new Rules.

52. The reality is that the terms of the Rules are different from those which were in force at the hearing of the appeal. Moreover, the 2002 Act had been amended with the insertion of Section 117. In particular we note the terms of Section 117C of the 2002 Act which at (3) states that:

> "In the case of a foreign criminal who has been sentenced to a period of imprisonment of four years or more the public interest requires C's deportation unless Exception 1 or Exception 2 applies."

At 117C(5) it states:-

> "Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

53. Moreover, the amendment to the Rules states that at 399(a)(ii)

> "(a) It would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) It would be unduly harsh for the child to remain in the UK without the person who is to be deported."

54. That test of undue harshness was not the test which was supplied by the Tribunal nor indeed was it the test to which reference was made in the grounds of appeal.

55. We consider that in not applying that test in a decision which was made after 28 July there was a clear error of law.

56. We would add that when considering the test as it stood prior to the changes of the Rules which stated that in paragraph 399(a) that the test was whether or not it would be reasonable to expect the child to leave the United Kingdom there was the further requirement, as stated in the grounds of appeal that there would be "no other family member who is able to care for the child in the UK." Applying that condition and in reaching their conclusion that there was no other family member who was able to care for the child in the UK we do not consider that the decision of the Tribunal was sufficiently clearly argued. The reality is that T's mother would remain in Britain and would be a carer for her. While we accept that any single mother, particularly one who works shift work has difficulties in caring for a child that does not meet the test of whether there is no other family member who is able to care for the child in the UK. Moreover, the requirements of Section 117C were not considered.

57. We therefore consider that there are a material errors of law in the determination of the Tribunal.

59. We therefore set aside the decision of the Tribunal. Both representatives argued that should we find a material error of law in the determination the appeal should be remitted to the First-tier for a consideration afresh. On the basis that we consider that a further fact-finding exercise should take place and, indeed, that it is now appropriate that the test as set out in Section 117C and in the changed Rules should apply that it is appropriate this appeal should proceed to a hearing afresh in the First-tier Tribunal.

Notice of Decision

60. The appeal of the Secretary of State is allowed to the extent that the appeal is remitted to the First-tier Tribunal for a hearing afresh.

Directions

1. The appeal will proceed to a hearing afresh at Taylor House.

2. Time estimate: 3 Hours

Signed Date

Upper Tribunal Judge McGeachy