IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01216/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2015	**On 15 October 2015**

Before

THE HON. LORD BURNS
UPPER TRIBUNAL JUDGE BLUM

Between

AAB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Jones, Counsel, instructed by Sutovic & Hartigan
For the Respondent: Ms E Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judges of the First-tier Tribunal Scott-Baker and Petherbridge (the panel) who, in a joint decision promulgated on 17 June 2015, dismissed the Appellant's appeal against the Respondent's decision of 02 October 2013 to make a deportation order against him by virtue of section 32(5) of the UK Borders Act 2007.

Background

2. The Appellant is a national of Jamaica, date of birth 21 November 1975. He entered the United Kingdom in February 2002 as a visitor but subsequently overstayed. During this time he met PB and they married on 14 February 2003. The Appellant returned to Jamaica and applied for entry clearance on the basis of his spousal relationship. Entry clearance was eventually granted following an appeal. The Appellant re-entered the United Kingdom in February 2004.

3. The Appellant has two children with his wife, born in September 2007 and November 2010. The Appellant also has two children with LH, born in May 2006 and July 2010. He has two other children, one British and one Jamaican, but he does not have any subsisting parental relationship with either of these two children. The Appellant's wife and LH remained close friends and the Appellant provided child care for both his wife and LH.

4. In October 2005 the Appellant was convicted of possession of a class A drug with intent to supply and received an 18 month custodial sentence. In May 2008, following a guilty plea, the Appellant was again convicted of the same offence and received a three and a half year custodial sentence. He was served with a deportation order in March 2009 and refused Indefinite Leave to Remain as a result of his convictions. An appeal against this decision was dismissed by the First-tier Tribunal but, on appeal to the Upper Tribunal, his appeal was allowed by Lord Justice Sedley and Upper Tribunal Judges Lane and Perkins in a decision promulgated on 22 July 2010. In reaching their decision the Upper Tribunal placed significant reliance on a report by an independent social worker in respect of the impact of the decision on the Appellant's relationship with his children.

5. On 16 August 2013 the Appellant was convicted of inflicting Grievous Bodily Harm (GBH) on a partner and received a three year custodial sentence. The Appellant submitted an application for a further grant of Discretionary Leave to Remain on 12 September 2013 but, following his GBH conviction, the Respondent issued a Notice of Liability to Automatic Deportation against the Appellant on 02 October 2013. The Appellant instructed MK Suri & Co to represent him and a Notice of Appeal was lodged with the First-tier Tribunal.

The decision of the First-tier Tribunal panel

6. Prior to the appeal hearing before the First-tier Tribunal there had been two case management hearings on 25 September 2014 and 27 November 2014. On both occasions the Appellant was represented by MK Suri & Co. The First-tier Tribunal were advised that an independent social worker's report was to be commissioned, as was a psychology report, and that he was proposing to call four witnesses. On 10 December 2014 the Appellant and his representatives were served with notice of the hearing which was to extend for 3 days from 20 to 22 of May 2015. The appeal was identified as a Nexus appeal, one in which there would be evidence from police officers relating to the Appellant's character and conduct.

7. On 11th and 13th May 2015 MK Suri & Co made two identical applications to adjourn the hearing to enable the Appellant to instruct legal aid solicitors. The Appellant's wife, who was privately funding the appeal, did not have sufficient funds to pay for his legal representation. Sutovic & Hartigan, the current representatives, agreed to the Appellant's instruction provided they had sufficient opportunity to make an assessment for exceptional case funding from the Legal Aid Agency and they had sufficient opportunity to prepare the case. Sutovic & Hartigan anticipated that the application for exceptional case funding would take 4 to 6 weeks but that they could only apply once they had the file and they estimated a total delay of 6 to 8 weeks.

8. The applications were refused on 14th and 15th May 2015 on the basis that the funding issue should have been considered earlier, that, as the Appellant was detained, it was in his interests for the appeal to be heard as soon as possible, and that the obtaining of legal aid was wholly speculative and the appeal could proceed with the Appellant unrepresented. On 15th May 2015 MK Suri & Co indicated the Appellant had an outstanding bill of £10,000 together with Counsel's fees and they requested that they be struck off the record. On 18th May 2015 Sutovic & Hartigan renewed their application for an adjournment. They maintained they had now been formally instructed by the Appellant, that the case was extremely complex, and that it affected not just his rights but those of his wife and children. They maintained that the application for exceptional funding was not speculative and that the Appellant's inability to obtain legal representation, in light of the complexities of the case, would constitute a breach of Article 8, in light of **Gudanaviciene [2014] EWHC 1840**.

9. There was no appearance by any legal representative on 20 May 2015. There was no independent social worker's report before the First-tier Tribunal. The panel considered the adjournment application having heard from the Appellant. In refusing the application the panel noted that the Appellant had experience of the appeal procedure in light of his 2010 appeal, and that he hoped to be at home when the independent social workers report was commissioned. Given that he remained in detention and had been separated from his family for two years, the panel were of the view that any social worker's report would have been afforded little weight as it could not have recorded the familial relationship and the interaction due to the separation. The panel noted it had on file an OAsys report dated November 2014 and that a psychological report would be provided. The panel believed it had all the documentation before it that it needed to enable it to make its decision. The panel noted that, despite being on record, Sutovic & Hartigan had not attended the hearing. The panel stated it had no indication as to the chance of success in obtaining legal aid, that the chances of obtaining exceptional funding was speculative, and there was no good explanation as to why an application for legal aid had not been made at an earlier opportunity. The panel indicated it was mindful that the Appellant remained in detention and noted the significant delays in the listing of deportation appeals.

10. The panel proceeded to hear the appeal. It is apparent from the determination that the Respondent produced a bundle of documents including CRIS entries late in the day (see paragraphs 18, 22 and 26). The panel heard from two police officers and then from the Appellant, his wife and LH. The Home Office Presenting Officer made submissions and the panel heard submissions from the Appellant's wife on his behalf.

11. The panel's determination ran to 38 pages, and there was an addenda decision in respect of the refusal to grant an adjournment. Although accurately setting out the relevant legal framework by reference to paragraph A362 of the immigration rules the panel applied paragraph 399 as it was prior to 28 July 2014. The panel found that the Appellant had a genuine and subsisting parental relationship with his wife's two children, and that his relationship with his wife was also genuine and subsisting. The panel found it would not be reasonable to expect his wife's two children to leave the United Kingdom, but found, applying paragraph 399(a)(ii)(b), that their mother was able to care for them in the United Kingdom. The panel found the Appellant also had a genuine and subsisting parental relationship with his two children with LH, but, for the same reasons, there would be no breach of 399(a)(ii)(b) as LH would be able to care for them. The panel found it in the best interests of the children to remain with their respective mothers. The panel were not satisfied it would be unduly harsh for his wife to remain in the United Kingdom without the Appellant, or that he met the requirements of 399A. The panel went on to consider whether there were 'very compelling circumstances' over and above those described in paragraphs 399 and 399A, applying **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** and taking into account the factors identified in sections 117A to D of the Nationality, Immigration and Asylum Act 2002. Having concluded there were no compelling circumstances the panel dismissed the appeal.

The Grounds of Appeal to the Upper Tribunal

12. The Grounds contend that the panel materially erred in refusing to grant the adjournment request, and in its assessment both under paragraph 399 of the immigration rules and in respect of Article 8.

The error of law hearing

13. On behalf of the Appellant Mr Jones accepted that the Appellant had been convicted of a serious offence. He referred us to the basis of the adjournment request in the written applications of 13th and 18th May 2015 and submitted that a report from an independent social worker had tipped the balance in the previous 2010 appeal. He submitted that such a report would have provided the First-tier Tribunal with assistance as to the best interests of the children. Although the Appellant was in detention there had been a long period since his previous release when he co-habited with his wife and their children. He submitted that the absence of any legal representative resulted in perceived unfairness and drew our attention to the relative brevity of the evidence as recorded by the panel. Although

the Home Office Presenting Officer indicated that the Nexus bundle had been served on the previous representative on 27 October 2014 it was apparent that the Appellant did not have that bundle at the commencement of the hearing. According to the determination documents GG1 to SS34 had not been included in the Respondent's bundle. Mr Jones noted that the panel only accorded minimal weight to the psychological report as the report did not take into account the Nexus documents. Had an adjournment been granted the psychologist would, in his submission, have been asked to comment on the further Nexus documentation. The only evidence relating to the impact on the children had been given by the mothers, but they had emotionally invested in the appeal and the First-tier Tribunal would have been greatly assisted by a report from an independent social worker which would have more effectively given a voice to the children. Mr Jones submitted it was not speculative that exceptional finding would be provided, as evidenced by the fact that the Legal Aid Agency had in fact issued such funding after the decision. As a minimum the panel should have adjourned to consider whether legal aid would become available rather than proceed on its own view of the likelihood of such finding becoming available. The panel should have given more weight to the letters from Sutovic & Hartigan, a reputable firm, in terms of their assessment of the likelihood of legal aid becoming available. Had the Appellant been legally represented he would not have given his own judgement as to the circumstances in which an independent social workers report would be obtained because one would have been commissioned regardless of his judgement. Given the complexity of the law in this area elements that should have been drawn out in the hearing had not been.

14. Ms Savage submitted that any error in respect of the application of the wrong immigration rules was immaterial because the panel had taken into account all relevant factors. On the basis of the evidence before the panel it was difficult to see how they could have concluded that the impact on the children could be unduly harsh. Ms Savage pointed out that there had been two case management hearings at which the Appellant had been represented by his previous solicitors. The adjournment application was only made a short time before the appeal hearing and the panel were entitled to find it speculative that exceptional case funding would be obtained. Ms Savage pointed to various parts of the determination such as paragraph's 26, 33 and 69 where the panel had taken steps to ensure the hearing was fair and that the Appellant could properly present his case. In response Mr Jones made us aware that the Appellant did not have the Respondent's bundle throughout the hearing and that he had only been served with the Nexus bundle on the 2nd day.

Discussion

15. The first ground of appeal relates to the lawfulness of the decision to refuse to grant an adjournment. In an addenda report the panel gave their reasons for rejecting the adjournment request. The panel accurately referred to the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which is to enable the Tribunal to deal with cases fairly and

justly. The panel referred to the authority of **Nwaigwe (adjournment; fairness) [2014] UKUT 00418 (IAC)**. This indicates that the test to be applied when considering an adjournment request is essentially one of fairness, as opposed to a consideration of whether the Tribunal acted reasonably. The question is whether the refusal to grant the adjournment resulted in any deprivation of the Appellant's right to a fair hearing. Having asked ourselves this question, and for the following reasons, we are satisfied that the Appellant was deprived of a fair hearing.

16. The Appellant, or rather his wife, could no longer afford to privately fund his appeal. They owed their previous solicitors a large amount of money. Very late in the day it appears that the Appellant was informed of the possibility of instructing legal aid solicitors, who could apply for exceptional case funding. The Appellant's current solicitors were approached and indicated they would be able to represent the Appellant. They needed however to obtain the papers from the previous solicitors and to take full instructions from the Appellant, who was detained. It was anticipated, relying on detailed grounds in the adjournment letters and in light of the authority of **Gudanaviciene [2014] EWCA Civ** 1622, that funding to enable legal representation would be obtained, but that there would be a delay of about 6 to 8 weeks.

17. The panel were however of the view that any application for exceptional case funding was speculative. There was of course no guarantee that the Legal Aid Agency would have granted legal aid. We have carefully considered the letter from Sutovic & Hartigan, dated 18 May 2015, setting out why the firm believed that funding would be granted. It would have been clear to the Legal Aid Agency that this was a relatively complex appeal directly impacting on four young children and which involved, over a three day hearing, the giving of evidence by two police officers and the need to assess a significant volume of evidence, including technical CRIS reports relating to matters in respect of which no charges were brought against the Appellant, and expert evidence. The likelihood of obtaining legal aid should also have been considered in light of the authority of **Gudanaviciene [2014] EWCA Civ 1622**, which indicated that equality of arms had to be guaranteed to the extent that each side was afforded a reasonable opportunity to present their case under conditions that did not place them at a substantial disadvantage vis-à-vis the other side. Having holistic regard to these factors we are satisfied the panel were not reasonably entitled to conclude that the likelihood of obtaining legal aid was purely speculative.

18. The panel did not believe there was any utility in obtaining an independent social worker's report given that the Appellant remained in detention. Any such report, in the panel's view, would attract little weight given that the Appellant had been separated from his family for 2 years. It is not clear whether the panel were aware that an independent social worker would be able to carry out his or her assessment even if one parent was detained. It was clear that the Appellant continued to have direct contact with his children throughout his incarceration (see paragraph 31 of the determination). The social worker would have been in a position to comment on the continued direct interaction between the Appellant

and his children. Given the primary importance in the appeal of identifying the best interests of the children and in assessing the impact on the children of the Appellant's deportation, we respectfully disagree with the panel's conclusion concerning the utility of an independent social worker's report. We note that the earlier Upper Tribunal decision allowing his previous appeal against a deportation order placed significant reliance on such a report. An independent social worker would have assisted the Tribunal by way of an independent expert assessment of the impact on the children of permanent separation from their father. In circumstances where there was a reasonable likelihood of obtaining such a report we are satisfied the panel erred in law in finding that the report would not have been of assistance to them were the adjournment granted.

19. The First-tier Tribunal took into account the Appellant's continued detention and noted that an adjournment would result in a much later hearing date as deportation appeals were being listed for January 2016. While the First-tier Tribunal were entitled to take account of the likely delay in re-listing the hearing as a factor relevant to the overriding objective to deal with the case fairly and justly, the Appellant had indicated his willingness to remain in detention for a longer period to ensure that all reasonable opportunities were explored to obtain legal representation. No account appears to have been taken of this indication. In assessing whether the Appellant was deprived of a fair hearing by reason of the failure to adjourn to seek legal aid representation, we additionally take into account Mr Jones's submission that the Appellant did not have a copy of the Respondent's main bundle throughout the appeal hearing, and that he was only served with the Nexus bundle (which we understand is the respondent's 'supplementary bundle' as identified in the determination) on the 2nd day of the hearing.

20. We are also satisfied that the panel applied the wrong version of the immigration rules in respect of paragraphs 399 and that this amounted to a material legal error. Paragraph A362 of the immigration rules, which the panel referred to at paragraph 65 of its determination, reads:

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served."

21. Paragraph 39 of **YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292** reads:

> "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*** [15] (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."

22. Paragraph 13 of **Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC)** reads:

"There had been some discussion before the First-tier Tribunal as to whether the Rules presently in force were the relevant Rules to be considered in determining Mr Chege's appeal or whether the Rules in force at the date of the decision were the relevant Rules. In so far as his appeal was concerned the parties agreed that the outcome would in any event be the same whichever set of Rules was considered. HC 532 provides that "the changes take effect on 28 July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date". Although this appears on its 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 the 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] and [39] of YM (Uganda) [2014] EWCA Civ 1292 make clear that irrespective of when the deportation order was signed or a decision to deport made, if the appeal is determined after 28th July 2014, then the Rules in force on that date are the relevant Rules."

23. The appeal was heard in May 2015. Following the authorities of both **YM (Uganda)** and **Chege** the panel should have applied the version of paragraph 399 as it was after 28 July 2014. It is apparent from paragraphs 127, 134 and 138 that the panel applied the wrong legal test. The change in the immigration rules was significant. The new version of paragraph 399(a) required the panel to consider whether it would have been unduly harsh for the Appellant's children to live in Jamaica, and also whether it would be unduly harsh for them to remain in the United Kingdom without him. There is no requirement that there be another family member who is able to care for the children, the basis upon which the panel dismissed the appeal under paragraph 399(a). Following **MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)** the focus of whether the decision would be unduly harsh is solely upon an evaluation of the consequences and impact on the children. In respect of this particular rule, there is no balancing exercise against public interest factors (see also **Bossade (ss.117A-D – interrelationship with Rules) [2015] UKUT 00415 (IAC)**). It cannot therefore be said that the panel's assessment, at paragraph 166, of the unduly harsh consideration contained in section 117C, renders immaterial its assessment under the wrong version of paragraph 399(a). This is because, in finding that the impact on the children would not be 'unduly harsh', the panel only gave as their reasons the fact that the Appellant had been sentenced to a term of imprisonment for GBH and was subject to a deportation order. Both are extraneous, public interest factors. There has therefore been no lawful assessment under paragraph 399(a).

24. Ms Savage sought to convince us that the panel had taken account of all factors relevant to the children, including the absence of evidence relating to safeguarding concerns and the fact that children could maintain contact with their father through visits and remote forms of communication. She submitted it was difficult to see how, on the evidence before the panel, it could have found the impact on the children to be unduly harsh.

25. Having failed to address their mind to the correct legal test, we are not satisfied that the panel would, as urged by Ms Savage, have been bound to conclude that the impact on the children would not be unduly harsh. The determination itself does not disclose any detailed investigation by the panel in respect of the likely impact of the Appellant's deportation on his children. At paragraph 50 of the determination it appears that the Appellant's evidence commenced with cross-examination. It is unclear from the face of the determination whether the Appellant was given any initial opportunity to present evidence prior to cross-examination and no questions appear to have been asked of him in respect of the likely impact of his deportation on his children. The evidence from the Appellant's wife was recorded in three short paragraphs. She was asked (it is unclear by whom) what would happen if the Appellant was deported. She said that the children would not understand why he was not with them and that they continued to ask when he would be back. The evidence from LH purports to have been recorded in four paragraphs; however it is only paragraph 60 that expressly records her evidence. She claimed the Appellant was a great father, that he saw her children most days, that the children were in good health and that she and her children visited the Appellant in prison.

26. We are in no doubt that, had the Appellant been legally represented, the representative would have sought to extract significantly more information concerning the children's circumstances and the consequences for each of them of the Appellant's deportation. We accept Mr Jones's submission that the mothers would have emotionally invested in the appeal and that the panel would have been assisted by an independent social workers report, which would have been provided a more independent voice to the children in respect of their bonds with the Appellant and the impact on them of his deportation. Given the central importance in this appeal of the children's best interests we are satisfied that the deprivation of an opportunity to apply for exceptional funding to obtain legal representation as a result of the adjournment decision constituted a material error of law. We consequently find that the panel's failure to apply the correct immigration rule renders unsustainable its assessment under paragraph 399(a).

27. Mr. Jones informed us that a new independent social worker's report had already been prepared, albeit in draft form, and that the psychologist would be approached to enable her to provide an amended or addendum report taking into account the Nexus documentation that was not previously before her. In light of this new evidence, and given our finding that the panel had not adequately addressed their minds to the issue of the impact of the deportation on the children, we are satisfied that the most appropriate course of conduct would be to remit the

appeal back to the First-tier Tribunal for a complete re-hearing, before a panel of two judges or a single Judge and a lay-member, other than Judges Petherbridge and Scott-Baker.

Notice of Decision

The First-tier Tribunal made a material error of law.

The appeal is remitted back to the First-tier Tribunal pursuant to section 12 of the Tribunals, Courts and Enforcement Act 2007 for reconsideration, to be decided afresh.

The appeal will be heard by a panel of either two Judges or a single judge and a lay-member, other than Judges Petherbridge and Scott-Baker.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

14 October 2015

Signed Date

Upper Tribunal Judge Blum