IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01416/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 14 September 2015	**On 23 September 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

KERRICK DOVE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Robinson of Counsel instructed by Turpin & Miller Solicitors (Oxford)
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born on 14 April 1989. He arrived in this country in December 2002 and shortly after absconded and the Home Office's next contact with the appellant followed his arrest on 2 August 2010 following an attempted robbery. On 28 March 2011 the appellant was convicted for the offence of attempted robbery and possessing an imitation firearm and was sentenced on 10 June 2011 to a term of imprisonment of eight years. On 8 July 2014 a deportation order was made under Section 32(5) of the UK Borders Act 2007.

2. The appellant appealed and his appeal came before a panel on 17 February 2015. The panel dismissed his appeal. An application for permission to appeal was refused by the First-tier Tribunal but permission was granted by a Deputy Judge of the Upper Tribunal notified to the parties on 6 August 2015. Directions were issued and the parties were notified of the hearing date on 19 August 2015.

3. The panel considered the appellant's offence and referred to the sentencing remarks of the trial judge. The judge found that the appellant had participated in a professionally planned commercial robbery although he had denied before the jury that he had not been present. The judge rejected the claim made by the appellant through his Counsel that he had taken part under duress. The judge took the view that it had been a planned robbery because a getaway car was positioned about a quarter of a mile down the road. The judge took into consideration the appellant's youth and responsibilities for children and noted there was no evidence that the appellant had committed any other criminal offences and that he was not carrying the gun. However the impact on the victims was considerable and the probation reports were not much help. The judge found there was no evidence that persuaded him that imprisonment for public protection was required and expressed the hope that at the end of the appellant's period of imprisonment he would be deported because he regarded his presence as not being conducive to the public good, a matter which would be for the Home Secretary rather than him. The panel then set out in full the respondent's decision letter of 9 July 2014. The respondent considered among other things the appellant's relationship with his children. The concluding paragraphs of the respondent's decision set out in the determination read as follows:

> "You should know that there is an important distinction in deportation cases as it will 'rarely be proportionate' to uphold an order of removal where it severs a genuine relationship with a spouse or child is usually directed at removal cases not deportation cases. However, the reason for this difference is that serious criminal offending may have an effect on the overall balance when considering the issue of proportionality under Article 8(2) as against the legitimate aim of preventing crime and disorder.
>
> The Home Office is satisfied that your conviction on 28 March 2011 for attempted robbery and possessing an imitation firearm when committing the Schedule 1 offence and for which you were sentenced to 8 months imprisonment is one which may be regarded as serious, and which compels the Home Office to give significant weight to the question of protecting society against crime, and the health and morals of others.
>
> The risk of reoffending, while a factor to be weighted in the balance is not the most important thing to consider when weighing up the public interest test under Article 8(2), particularly in serious cases. Other public interest factors, namely deterrence and the expression of revulsion at the gravity of the criminal behaviour, are given greater weight than the possible future behaviour of the individual offender.
>
> On the evidence available there is nothing exceptional about your case and having considered your case, we are satisfied that the decision to remove

you to Jamaica is in accordance with the relevant legislation and the Home Office's published policies in the prevention of disorder and crime.

The Secretary of State is therefore satisfied that the nature and severity of your offence is a factor which fully engages the public interest in securing your removal from the United Kingdom as the subject of a Deportation Order, both in the interests of preventing further offending of this nature on your part and establishing a deterrent."

4. The panel's determination is composed in a structured and helpful manner and having set out the respondent's case it reviews the appellant's case which apart from being based on the relationship with his children and their mother and sister raised issues under Article 3 because of his mental health and the effect on that of his removal. The panel refers to the appellant's witness statement, the appellant's mother's evidence and a letter written from the mother of the appellant's children. It was the appellant's case that there were very compelling circumstances over and above those described in paragraphs 399 and 399A.

5. The panel then record the respective submissions made by the parties. The respondent pointed out that Section 117C of the 2002 Act applied and that there were no compelling circumstances.

6. Counsel argued that there was a strong risk of suicide and emphasised the relationships with the appellant's children and the appellant now posed a low risk of re-offending and had taken steps to reform and in the light of the length of time he had spent in the United Kingdom together with his mental ill-health were all compelling factors which made deportation disproportionate.

7. The panel then give reasons for their decision in relation to Article 3 and the appellant's mental health. It is common ground that it sets out correctly the test by reference to extracts from **J v Secretary of State for the Home Department [2005] EWCA Civ 629**. The panel then state as follows:

"25. We have not been provided with any evidence to show that Jamaica does not have effective mechanisms to reduce the risk of suicide on arrival. As the court made clear in **J** if there are effective mechanisms that will weigh heavily against the appellant's claim that removal will violate his Article 3 rights.

26. We have been supplied with the appellant's prison medical records. They show that when he was first at HMP Huntercombe in June 2011 it was noted that he had no thoughts of deliberate self-harm. In April 2012 in another review he had not tried to harm himself in prison. The appellant had not received treatment from a psychiatrist outside of prison. The appellant has displayed demanding and argumentative behaviour in healthcare in prison. He has walked out of visits to healthcare when he was told he could not be issued with drugs he had requested. He has been reprimanded for his bad behaviour and failure to co-operate. His obstructive behaviour has led to him being informed that he would be removed if he was not willing to co-operate (22 April 2012). On 22 April 2012 he claimed that he had mental health

problems but he did not know what they were and a mental health referral was completed. In May 2012 he had a mental health review claiming he was feeling depressed. On 7 May 2012 he attended healthcare demanding and shouting for Savlon cream and after being told it was not in stock he called the healthcare nurse a liar. The healthcare nurse felt threatened by his behaviour.

27. The healthcare notes make depressing reading showing the appellant as a disruptive and aggressive man who is confrontational whenever he does not get his own way. In June 2012 he said he felt depressed and in July 2012 he claimed he had banged his head against a cell wall and had been having stupid thoughts about hurting himself. This was classified as the appellant disclosing he had self-harmed. He had also taken a higher dose of his medication. By August 2012 there were no reported thoughts of suicide or self-harm. By January 2013 at a mental health team review he was referred for a mental health assessment from education staff stating he was displaying destructive behaviour in class and mentioned he had voices in his head and drew a picture of himself in a coffin. Shortly thereafter he met with a mental healthcare professional and told the mental healthcare professional that he does not need any mental health input as he was feeling fine. He was noted as being bright and cheerful in mood.

28. On 19 February 2013 he was seen again by the mental healthcare professional who noted that the appellant has been abusing drugs and alcohol since the age of 11. He has a generalised anxiety disorder feeling nervous, anxious or on edge and not being able to stop worrying. He has trouble relaxing and is so restless that it is hard to sit still. He felt his antidepressant medication was not working and he had stopped taking it.

29. By 31 January 2014 during a mental health review the appellant was well presented, rational and coherent and there was no evidence of any mental health illness. He was forward thinking and engaging in prison life.

30. The most recent mental health review is dated 29 September 2014 in which the appellant continued to state he had nightmares of killing himself. His speech had normal rhythm rate and tone and conversation was reciprocal. He reported his mood as good and his mood was within the normal range. Medication had helped him when he was initially commenced on it but he manages now to do well without it. The healthcare worker concluded

> ‘There is no immediate risk to Kerrick but this is likely to change when he has failed his bail hearing and has been issued with deportation order. Based on the possible trigger and a safeguarding in place (wing staff to be notified by UKBA of any communication with Kerrick before he has been informed) I have recommended for the ACCT to be closed’.

31. In the medical report by Dr Beata Godlewska at pages 120-135 of the appellant’s bundle Dr Godlewska goes through the appellant’s prison medical records in some detail at pages 5-8 of her report and after assessing the appellant on 6 December 2014 she comes to a diagnosis at paragraph 2.3.2 (page 11) of her report. She finds that the appellant suffers from recurrent depressive disorder with a ‘current

moderate episode'. She refers to the definition of adjustment disorder at 2.3.2.3 but this does not form part of the diagnosis at 2.3.2. She considers his symptoms may be linked to the stressor of removal to Jamaica and at 2.3.2.5 reiterates she is more inclined to a diagnosis of recurrent depressive disorder over adjustment disorder and gives her reasons stating that 'Mr Dove's symptoms at the time of the assessment were more severe than 'mild'.' She notes he has reported symptoms of panic attacks and is of the opinion he has elements of PTSD following witnessing another prisoner trying to cut his wrists. At 2.3.3 she assesses risk of suicide/self harm if he is removed to Jamaica and concludes the risk could substantially increase if the appellant knew he was to be removed to Jamaica. And the risk is strongly related to the threat of his deportation and how realistic and imminent it is. She notes all the protective factors are linked to his life in the United Kingdom including family support and support of close friends and his children are in the United Kingdom. She notes he may have some traits of impulsivity which can be a risk factor when it comes to assessing suicide risk. In short the findings of Dr Godlewska are in accordance with the notes recorded by the healthcare staff looking after the appellant in prison. There is no disagreement between the various professions in charge of his care.

32. It is quite clear from reading the medical notes that those in charge of the appellant's care in prison are well aware of his thoughts of self-harm and suicide and have a plan in place to manage the same which includes the wing staff being notified of any decision concerning the appellant before the appellant himself receives notification. We are satisfied that communication of any decision that his appeal has been dismissed will be carefully monitored by those tasked with the care of the appellant in detention. We are therefore satisfied that a decision to dismiss the appeal does not amount to a breach of the appellant's protected rights under Article 3 because the risk of suicide will be managed and contained.

33. We now turn to whether the risk of suicide can be managed and contained in Jamaica. There is no evidence to suggest that the appellant's medication (which he refuses to take) is unavailable in Jamaica. Furthermore following **J** if the appellant's mental health deteriorates from his current diagnosed moderate depressed state then the respondent should ensure the appellant is removed with a medical escort and receives medical care on arrival. Overall we find the appellant's mental health issues do not amount to sufficiently serious and compelling reason to prevent removal from the United Kingdom."

8. The panel then turned to Article 8 and concluded its determination as follows:

"34. The appellant's article 8 claim focuses on his eldest son. The evidence before us about the two sons and their mother is very limited. The appellant has disclosed the bare minimum. His mother has given the Tribunal more information. What we do know is that the appellant's relationship with the mother of his children was very troubled and blighted by domestic violence and that when the eldest child was born social Services removed the child from his parents and placed him in

temporary foster care and determined that the appellant was not suitable to care for his son. His mother came forward to keep the child within the family and was able to persuade Social Services and the Family Court she should be granted guardianship of the child. Guardianship was granted to her on condition the application did not reside with her. The removal of his son and custody being given to the child's grandmother predated the index offence. After the child was removed the appellant conceived another child with the same mother. S. was born on 24 March 2011 and Social Services informed the mother that if she continued to see the appellant her second son would be taken into care and placed with the appellant's mother. If it self evidence that she ceased to see the appellant because she has been able to keep her second son. According to the appellant's mother both she and the appellant were allowed supervised contact with the eldest child at the appellant's mother's discretion. She would really like the appellant to come and live with her and his eldest son and help her with the care of his son. There is some difficulty with her evidence about the appellant's contact with the eldest child because it is not corroborated by any evidence from Social Services and no Family Court orders have been placed before us. In the absence of that crucial evidence we do not accept that the appellant has been permitted supervised contact with his eldest son even though we accept that such contact takes place when the appellant's mother visits her son and takes the eldest child with her and when telephone calls to his mother take place.

35. The Article 8 assessment has been hindered by the absence of any report from social services that the appellant's presence is now desirable in his children's lives and would not be opposed by social services. There is nothing before us to suggest that Social Services are happy for the appellant to live with his mother and his son. There is nothing before us to support the assertion that he is permitted supervised contact. In other words we are not able to find from the evidence before us that if this appeal is allowed the appellant will be able to maintain the sort of contact with his sons and the presence in their lives he professes to desire.

36. In any event the appellant has only seen his youngest child once approximately four years ago. The youngest will have no memory of him. His mother has contact with the appellant's mother but has not given her address on her letter to the Tribunal and she has requested all contact is through the appellant's mother.

37. As matters stand the appellant has no contact with the youngest child and telephone contact and occasional visits from his eldest son. There is no evidence before us from Social Services that ongoing contact will be permitted if the appellant is released from detention and his appeal is allowed. There is no credible or any evidence before us that the best interests of the appellant's eldest son will be met by ongoing contact with the appellant and the appellant's involvement in his life. Such evidence from Social Services was necessary for us to find the child's best interests would be harmed by removal of the appellant to Jamaica.

38. On the evidence before us we find paragraph 399 of the Immigration Rules does not apply: we find that the appellant does not have a genuine and subsisting parental relationship with the eldest child

because Social Services removed the eldest child and in care proceedings guardianship was conferred on his mother not the appellant. His mother exercises parental responsibility for the eldest son. The appellant never lived with the youngest child and has no contact with the youngest or the child's mother. Paragraph 399A of the Immigration Rules is not applicable because the appellant is not under the age of 25.

39. The factors in favour of the appellant are that he has lived in the United Kingdom since the age of 13 and has spent almost half of his life in the United Kingdom. He has developed ties to the United Kingdom in the form of his mother, half sister, his eldest son and his friends and education in the United Kingdom. He has not lived in Jamaica for 12 years and he left Jamaica as a child. He did not get on with his grandmother – she was too strict. His mother is estranged from her sisters. The appellant is suffering from depression which will intensify if he is removed to Jamaica. The appellant is likely to become suicidal if removed.

40. The factors in favour of the respondent are that the appellant has never lived lawfully in the United Kingdom. He has never worked and has shown a complete disregard for the laws of the United Kingdom. He has committed a very serious offence. He has previously visited violence on the mother of his two sons. His eldest was taken into care then permitted to live with the appellant's mother on condition the appellant did not live with her. He has no contact with the mother of his youngest child or with the child. There is no Social Services evidence indicating previous objections to the appellant living with his mother and having contact with his children have been overcome. The appellant has a grandmother with whom he previously lived in Jamaica and she is aware of the proposal to deport him. He has two aunts in Jamaica. There is a need to deter foreign nationals from committing crime in the United Kingdom. The interests of society require the appellant to be removed from the United Kingdom. His mental health care needs can be met in Jamaica. The appellant's care and return can be medically managed to ensure he is safely returned. His mother and half sister can visit him in Jamaica. If permitted by Social Servicers she can take his eldest son to visit him. The telephone contact with his mother and son can continue from Jamaica in the same way they continue while the appellant is in prison. The Trial Judge recommended deportation.

41. We have considered the factors in favour of the appellant and taken into account the guidance in Maslov v Austria 1638/03. We have taken into account the medical evidence placed before us. We have considered the evidence of the appellant and his mother. There is no evidence about the best interests of the appellant's eldest child before us save that Social Services took a decision the best interests of the child required his removal from the appellant and his former partner and the placement with the appellant's mother was on condition the appellant did not live with her. We agree with the Respondent's assessment that it is in the best interests of the appellant's children that they remain respectively with their mother and grandmother in the United Kingdom. Overall, weighing the competing factors in the scales, we find the seriousness of his offence is such that the balance on proportionality tips in favour of the respondent. We find that the

appellant's removal is proportionate to the aims to be achieved. We uphold the respondent's decision. We would add that even if the appellant did have a subsisting parental relationship with his eldest son that would not outweigh the factors in favour of the respondent and it would not render the respondent's decision disproportionate.

42. Overall we find there are no exceptional circumstances in the appellant's family life or his mental health which outweigh the public interest in his deportation from the United Kingdom."

9. Counsel relied on the grounds of appeal and referred to the psychiatrist's report to which the panel make reference in paragraph 31 of the decision set out above. She referred to paragraph 2.3.3.7 where the psychiatrist gives her opinion that the appellant's risk of suicide was very likely to increase if a decision was taken to deport him. Counsel referred to paragraph 2.3.3.10 and the protective factors which all seem to be linked to the appellant's life in the UK. One of the most important protective factors was the appellant's children.

10. Counsel took up the point made in the grounds of appeal that the panel had misdirected itself in relation to the risk of suicide in the concluding sentence of paragraph 33 despite setting out the correct test in **J**. The panel had erred in not taking into account the protective factors mentioned by the psychiatrist.

11. The panel had also erred in paragraph 32 in failing to appreciate that the appellant was no longer in prison but was now detained at Brook House Immigration Removal Centre.

12. In relation to Article 8 (ground 2) the Tribunal had erred in failing to consider that the appellant had been assessed as posing a low risk of re-conviction. He had undertaken courses while in prison. Simply mentioning matters at the start of the decision (see paragraph 11) was not sufficient.

13. In relation to the point that the panel had erred in concluding as it did in relation to the appellant's eldest son (ground 3) the point relied on by the panel concerning the appellant's mother's evidence had not been raised with her. Counsel acknowledged that no further evidence had been put in dealing with the complaint that there had been procedural unfairness (see paragraph 17 of the grounds). In paragraph 18 the point was taken that the panel had referred to the appellant having "previously visited violence on the mother of his two sons". Counsel acknowledged that violence might not be limited to physical abuse and it was acknowledged in the grounds that the appellant admitted he had been verbally aggressive with his partner but had not been physically violent.

14. Mr Melvin relied on the response that had been filed on 11 August 2015. No further evidence had been provided to support the contentions made in the grounds despite the directions that had been given. Mr Melvin

referred to **LC (China) [2014] EWCA Civ 1310**, where the appellant had been convicted, as in this case, of robbery.

15. Mr Melvin submitted that the panel had considered the case of **J** correctly and had made sufficient findings in paragraphs 25 to 33. There had been little medical evidence concerning the appellant's situation in immigration detention. There was sparse family life in this case. The appellant had been in prison for a large proportion of the life of his children. The grounds simply re-argued the case and raised no error of law. There had moreover been ample time for evidence to be produced either at the First-tier Tribunal or before this Tribunal.

16. In reply Counsel referred to the Rule 15A notice which had been given in at the hearing stating that the appellant was "likely to seek to adduce further evidence in support of his case under Rule 15A if the appeal were to be remitted or adjourned and that the following evidence was anticipated: "an updated witness statement from the appellant; and updated medical evidence."

17. At the conclusion of the submissions I reserved my decision. I have carefully considered the points made by both sides. As I have noted above the determination in this case was carefully structured and the points made by both sides were summarised at various stages during the course of the determination.

18. In relation to Article 3, as I have mentioned there is no dispute that the panel directed itself correctly in paragraph 24 of the decision. Reference is also made to that case in paragraphs 5 to 8 of the decision where the panel sets out the appellant's case. It was submitted that there are strong grounds for believing that the appellant if returned faced a real risk of inhuman or degrading treatment and at paragraph 24 the relevant paragraph is set out in full and indeed the panel sets out in full paragraphs 25 to 31 from the decision. It is quite clear that the panel had in mind what was said at paragraph 31 of **J** in referring to the need for the respondent to take care when removing the appellant should his mental health deteriorate. The panel further had in mind the views of the psychiatrist about the protective factors being linked to the appellant's life in the United Kingdom as it refers to that in paragraph 31 of the determination. In paragraph 33 the panel refer to the ability of the appellant to contact his mother by telephone from Jamaica in the same way that he did from prison. Again I do not find that the panel overlooked a relevant matter to which it had made recent reference.

19. In relation to the claimed mistake of fact the psychiatrist's assessment was made on 6 December 2014 and the report was dated 15 December 2014. The psychiatrist was not clear about the exact date of the appellant's transfer from prison to Brook House but she was told by the appellant that he had been at Brook House for about two months and the last medical record from the prison was made on 30 September 2014. The psychiatrist records in paragraph 2.3.1.8 of her report that she had no

access to any medical documentation covering the applicant's stay in Brook House. It is clear from the determination that the most recent mental health review was dated 29 September 2014 and this is referred to at page 8 of the psychiatrist's report. The appeal came before the panel as I have mentioned in February 2015. No steps have been taken to update matters. The panel considered all the medical evidence made available to it. Insofar as there was any mistake of fact in paragraph 32 of the decision I am not satisfied that it was a mistake amounting to an error of law. Insofar as there has been any change in the appellant's mental state the representatives have had ample time to put in evidence.

20. In the grounds it was submitted that there was unfairness in that the panel stated that the appellant's mother's evidence was not corroborated by any evidence from social services or family court orders.

21. In my view the panel did not arguably act unfairly in paragraph 34 of the determination given that this was a case concerning the welfare of a child. It was right to probe matters as it did and conclude there was some difficulty with the appellant's mother's evidence. Again it would have been an easy matter for evidence to be lodged on the issue. Nothing has been done. The belated Rule 15A notice gives no particulars whatsoever. Indeed it is not anticipated that there will be further evidence from the mother and nothing is said about social services or family court orders. The most that is promised is an up-to-date witness statement from the appellant and updated medical evidence. The directions made the position quite clear and refer to the Procedure Rules at paragraph 15(2A).

22. The panel is criticised for failing to take into account that the appellant was assessed as posing a low risk of re-conviction although the panel make express reference to this in paragraph 11 of its decision. As the respondent points out the appellant was convicted of a particularly serious crime and the panel had set out the respondent's case on the issue on page 10 of its determination and I have set out the relevant extract above. The risk of re-offending was not the most important thing to consider when weighing up the public interest. It is worth making the point that the panel's decision would have been the same in this case even if it had been satisfied that the appellant did have a subsisting parental relationship with his eldest son – see paragraph 41 of the determination.

23. A point is taken in paragraph 18 of the grounds though not perhaps pressed by Ms Robinson that the panel had erred in concluding that the appellant had previously visited violence on the mother of his children. The appellant admits that he had been verbally aggressive with his partner but had not been physically violent. It is clear that domestic violence is not restricted to physical violence and this has indeed been accepted for some time by the respondent – see for example **Ishtiaq [2007] EWCA Civ 386** at paragraph 14 where the Court of Appeal makes reference to the relevant Immigration Directorate Instructions which define domestic violence as "any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional)

between adults who are or have been intimate partners or family members, regardless of gender or sexuality". The current guidance refers to a new definition of domestic violence from 31 March 2013 which includes this sentence:

> "There is no difference between psychological (mental) abuse and physical abuse when it comes to assessing if a person has been the victim of domestic violence."

I am not satisfied that the panel misdirected itself in paragraph 40 in referring to the respondent's case including the appellant previously visiting violence on the mother of his children.

24. For the reasons I have given, this challenge to the panel's decision fails.

25. At the hearing it was agreed that the determination should be sent to the appellant's representatives and not the appellant directly.

Notice of Decision

26. The decision of the panel dismissing the appellant's appeal stands. The panel made no anonymity direction and I make none.

FEE AWARD

I make no fee award.

Signed Date 22 September 2015

Upper Tribunal Judge Warr