Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01421/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 7 December 2015	**On 29 December 2015**

Before

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DONALD CLINTON BAILEY

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr C. Jacobs of counsel, instructed by Bushra Ali, solicitors

DECISION

1. The Secretary of State has been granted permission to appeal against a decision of First-tier Tribunal Judge Cox who, by a decision promulgated on 4 February 2015, allowed Mr Bailey's appeal against a deportation order that had been made against him as a consequence of his conviction and imprisonment for criminal offences committed by him. That means that it is the Secretary of State that is the appellant before the Upper Tribunal and Mr Bailey is the

respondent. However, as it will be necessary to reproduce extracts from the decision of the First-tier Tribunal Judge, it is convenient, in the interests of consistency, for me to refer to Mr Bailey as the appellant and the Secretary of State as the respondent.

2. As we shall see, Mr Bailey's immigration history and his history of criminal offending is at the heart of the issues that fall to be considered and so it is necessary to set out, at the outset, a summary of those matters.

3. The appellant, who is a citizen of Jamaica born on 19 March 1975, arrived in the United Kingdom in March 2000 and was admitted as a visitor for three months until 17 June 2000. He was then 25 years old. Having applied for and been granted an extension of leave until 18 September 2000, so that he had the benefit of a full six months leave, presumably as a visitor, he overstayed that leave and in October 2002 he was married to a British citizen and applied for leave to remain on the basis of that marriage. However, in November 2002 the appellant was convicted of a number of offences, including failing to stop after a road traffic accident, driving otherwise in accordance with a driving licence and driving without insurance. After this, his application for leave to remain was rejected because essential documentary material was absent from it. He made a further such application that was rejected for similar reasons in March 2003. Undeterred, he made yet another similar application, in April 2003.

4. While that application was pending two significant events occurred. On 2 November 2005 the appellant was convicted before the Northampton Crown Court for offences of assault occasioning actual bodily harm and harassment, for which he was sentenced to concurrent prison sentences of 2 years. A further conviction arose in November 2005 for driving whilst disqualified and uninsured. The appellant was released from custody in May 2006 and in October 2006 he withdrew his application for leave as a spouse because that relationship had broken down.

5. In 2007 the appellant commenced his relationship with his present partner, Ms Hamid, with whom he now has two children, born on 26 March 2008 and 13 July 2009. In July 2009, shortly after the birth of his second daughter, the appellant was served with notice of his liability to be removed as a person unlawfully present in the UK.

6. It is pertinent to observe that the appellant's leave expired on 18 September 2000 and the first of his subsequent series of applications for leave to remain was made on 5 November 2002. Therefore, contrary to a submission made to the judge that he had leave continued by s3C of the Immigration Act 1971, a submission the judge accepted, the appellant had been in fact unlawfully present between September 2002 and 24 November 2009 when he was granted discretionary leave to remain, until 24 November 2012, in response to

an application made on 28 August 2009. The appellant made a further application, on 11 March 2010, to convert his discretionary leave into leave to remain, that being successful.

7. The difficulty with those last two applications was that the appellant had failed to disclose his criminal convictions, answering in the negative a direct question enquiring if he had any criminal convictions.

8. Thus, that grant of leave was, on its face, obtained fraudulently.

9. Those applications had been successful because the information offered by the appellant was accepted at face value, the respondent explaining that a lack of resources meant that every application could not be checked. However, when the appellant submitted an in-time application for further leave, that was referred to the Criminal Casework Team and, on 17 March 2014, the appellant was advised that he was liable to be deported.

10. The decision under challenge in these proceedings is that of the respondent made on 4 July 2014 to make a deportation order. In explaining the reasons for that decision, the respondent said, referring to the appellant's conviction for assault occasioning actual bodily harm and harassment:

> "The Secretary of State regards as particularly serious those offences involving violence, sex, arson and drugs.
>
> Also taken into account is the sentencing Court's view of the seriousness of the offence, as reflected in the sentence imposed, as well as the effect of that type of crime on the wider community. The type of offence and its seriousness, together with the need to protect the public from serious crime and its effects are important factors when considering whether deportation is in the public interest. In addition to those factors your client's offence(s) have been carefully looked at. ..."

The respondent then considered the appellant's family circumstances, with reference to both the applicable immigration rules then in force and her duty under s 55 of the Borders, Citizenship and Immigration Act 2009. However, it was plain that did not assist the appellant because as the decision was taken before para 399(a) of the rules was amended with effect from 28 July 2014, he did not fall within the exception to deportation provided because there was another family member, their mother, who could remain in the United Kingdom to care for the two daughters. Nor did the appellant's relationship with Ms Hamid bring him within the exception provided by the rules in respect of such relationships.

11. Similarly, it is not in dispute that it was open to the respondent to find that the appellant could not rely upon the provisions of the rules to avoid deportation on the basis of his private life established in the UK.

12. Under a heading "Discussion, Findings and Conclusions" the judge set out the reasoning that led to his decision to allow this appeal. He said, at para 10, that he was initially "puzzled" by the deportation decision. Although the appellant had committed serious offences in 2004 he had not been made subject to deportation at the time despite being imprisoned. The judge said:

> "… he had not offended since but had rather settled down (since about 2006) into a family life relationship with his partner and daughters and had been granted extensions of leave. It seems to me extraordinary in those circumstances that in February 2014 (some fifteen months after his 2012 application for further leave to remain) his case should have been referred to the Criminal Casework Team leading to the decision now under appeal. Indeed, at the outset I asked Mr Smith (who appeared for the respondent) whether he really wished to defend the decision…"

But, the judge went on to say that as the case proceeded, and it became clear that the appellant had secured leave to remain by falsely representing that he had no convictions, it became "at least possible to understand why the respondent took the view she had". He continued:

> "Now all of this does put the matter in a somewhat different light. Nevertheless, it was still Miss Rutherford's submission (counsel for the appellant) that the decision was "outrageous"."

This was because, the appellant had not earlier been made subject to deportation action; he was a "hardworking man" who had turned his life around and during the period when the respondent failed to take enforcement action he had formed a relationship with his present partner, a British citizen, and they had had two children.

13. The judge then went on to set out a lengthy extract from Ms Rutherford's skeleton argument, making clear that he agreed with all that she had written. Indeed, at para 16 of his decision he said that he "adopted" those sections he reproduced. Although at the time of the decision the issue under the rules was whether there was another family member available to care for the children should the appellant be deported, by the date of the hearing the rules had been changed and the question for the judge was that posed by the current version of the rules, that being whether the effect of the appellant being deported and the children remaining here without him, with their mother, would be unduly harsh: *YM (Uganda) v SSHD* [2014] EWCA Civ 1292. The judge found that it would be unduly harsh to expect the children and Ms Hamid to give up their lives in the UK and to move to Jamaica. That perhaps is uncontroversial given that the children are British citizens settled in their education. It is necessary to set out the reasons why Ms Rutherford submitted, and the judge accepted, it would also be unduly harsh upon the children to remain in the United Kingdom without their father:

> "In the alternative it would be unduly harsh to expect them to remain

> here without their father. He is part of their family unit. Not only does he provide for them, he plays a very active role in their upbringing. To remove him from their lives, when all they have known is living with both parents, would be grossly unfair, especially in the circumstances of this case."

14. The section of Ms Rutherford's skeleton argument reproduced by the judge concluded with a reference to s117C of the Nationality, Immigration and Asylum Act 2002, as amended. The effect of that was that it was not in the children's best interests to be separated from their father and the effect upon them of the appellant's deportation would be unduly harsh. This was because:

> "… the SSHD accepts that their father's deportation is not necessarily in the children's best interests. Therefore it is in their best interests that their father be allowed to remain in the UK so they can maintain their relationship with him."

Building upon that premise, the judge reproduced more of the skeleton argument that he had "adopted":

> "There has been an extraordinary amount of delay in this case. The delay is significant and is of relevance when determining the Article 8 aspect of this case…"

15. If the Secretary of State's representative did make any submissions to the contrary we do not know what they were because the decision of the judge is silent as to that. The judge concluded:

> "In my assessment, the Appellant falls squarely within exception 2 at Section 117C(5) of the 2002 Act. In such circumstances Parliament has decreed that the public interest does not require the Appellant's deportation. Therefore whether one talks in terms of "exceptional circumstances" under the Rules or "disproportionality" under Article 8 itself, the result is the same. The deportation decision cannot stand and the appeal must be allowed."

16. It is not altogether easy to follow that reasoning and to be sure of the precise basis upon which the decision to allow the appeal was founded. It would appear from the opening words of that finding that the appeal has been allowed because the judge found that the effect upon the children of the appellant's deportation would be unduly harsh so that, the exception in s117C(5) applied.

17. That seems to be the view also of Upper Tribunal Judge Blum who said, in granting permission to appeal:

> "It is arguable that any consideration of "undue harshness" under para 399 of the immigration rules should involve a public interest assessment. It is also arguable that the Judge's failure to consider the appellant's unlawful status when his relationship with his partner was established may have affected his conclusions."

I would add that the same can be said in respect of an assessment

under s117C(5). Although expressing the view that there was less cogency in it, Judge Blum granted permission also on the basis that the judge erred in placing the weight he did on the respondent's delay.

Submissions

18. For the Secretary of State Mr Whitwell submitted that the decision of Judge Cox disclosed a number of material errors of law. He had failed to appreciate that the appellant's private life and his relationship with his partner were both established while he was unlawfully present in the United Kingdom. The judge failed to have regard to the public interest arguments when carrying out his assessment and failed to realise that the appellant had no expectation of being granted any form of leave after having served his prison sentence in 2006. The leave he did secure was obtained by falsely asserting that he had no convictions, a false statement he made not once but three times in submitting applications. Mr Whitwell submitted that the judge erred also in failing to have proper regard to the case being put forward by the Secretary of State. Having taken the provisional view that the decision to deport was "outrageous" the judge adopted the skeleton argument setting out the appellant's case and failed to engage adequately with the arguments that pointed the other way.

19. Mr Whtwell submitted also that in leaving out of account any consideration of the public interest arguments when considering whether the impact upon the children would be unduly harsh the judge had fallen into legal error, for reasons set out in *KMO (section 117-unduly harsh)* Nigeria [2015] UKUT 00543 (IAC).

20. For the appellant Mr Jacobs submitted that the judge made no material error of law. There had been far too long a delay before taking deportation action and the judge was entitled to consider, as he did, that this was a determinative factor. Although the appellant had no leave to remain when he established and built his private and family life, the appellant and his family could not, Mr Jacobs argued, have had any expectation that deportation action would be pursued. Developing that submission, Mr Jacobs said that the expectation that there would be no deportation action was reinforced by the grant of leave in November 2009. Mr Jacobs accepted, though, that the judge was wrong to proceed on the basis that the appellant had leave under s3C of the Immigration Act 1971.

21. Mr Jacobs did not accept that the judge had failed to consider the respondent's case. He pointed to paragraphs 11 to 13 of the decision, submitting that in the first of those paragraphs the judge identified the Secretary of State's "best points"; at paragraph 12 he discussed the points that spoke in the appellant's favour and in paragraph 13 he explained that he adopted the course set out in the skeleton argument submitted on the appellant's behalf as his prefers view of

those competing submissions.

22. The primary position adopted by Mr Jacobs was that the judge did factor the public interest arguments into his assessment under s117C(5) so that in finding that the effect of deportation upon the appellant's children would be unduly harsh he did take the approach advocated in *KMO*. That was because in applying s117C(5) he "must" have done so. If that submission was not accepted, and in the alternative, Mr Jacobs said that the correct approach was that set out in the earlier reported decision *MAB (para 399 "unduly harsh")* USA [2015] UKUT 00435 (IAC) so that *KMO* was wrongly decided and so if the judge had not had regard to the public interest arguments no error of law was disclosed.

Conclusion:

23. I am satisfied that, for the reasons that follow the judge did make material errors of law such that his determination cannot stand.

24. The judge determined the appeal on the basis of a mistaken understanding of the appellant's immigration history. It is clear from paragraph 12 that the judge thought, wrongly, that the appellant had 3C leave, whereas in fact, as I have observed above, for most of the period up to November 2009 when he was granted leave, the appellant was present unlawfully with no leave of any kind. This error was a material one because the acceptance of the appellant as a "hard working man "who had "settled down into a family life relationship with his partner and daughters and had been granted extensions of leave" did not adequately represent the salient facts to be factored into the assessment.

25. The judge failed, therefore, to recognise that the appellant's private and family life was established and developed while he was unlawfully present in the United Kingdom. The judge was required by s117B(4) to give little weight to private life and the relationship formed with the appellant's partner while he was present unlawfully but because of the error made concerning his immigration status, he left that out of account.

26. The judge was wrong also to give the weight he did to the asserted delay by the respondent in taking enforcement action. No regard at all was given to the fact that between September 2000, when a brief period of leave as a visitor had come to an end, and November 2009 when the appellant secured the grant of leave by falsely representing that he had no criminal convictions, the appellant was in fact under a legal obligation to leave the United Kingdom and the respondent was entitled to assume that he would and so was under no obligation to enforce his departure. Instead, the appellant remained unlawfully,

committed serious criminal offences and entered into two successive relationships, which produced children, all when he should not have been in the United Kingdom at all.

27. Despite Mr Jacob's valiant efforts to draw from the determination a construction that demonstrates the contrary, I am entirely satisfied that the judge failed to have proper regard to the case being advanced by the respondent. There is some reference to points taken by the respondent at paragraph 11 of the decision, but it is impossible to see that the public interest arguments have informed the assessment of whether the effect of deportation upon the children would be unduly harsh. The judge allowed the appeal with reference to s117C(5). But the question of whether the effect upon the children of the deportation would be *unduly* harsh has to be informed by all of the relevant circumstances and here it is not apparent that has been the case.

28. Both parties to an appeal are entitled to see that their case has been considered and the appeal determined on the basis of a correct understanding of the significant and relevant facts in play. That has not been the position in this appeal.

Summary of decision:

29. The decision of the First-tier Tribunal Judge discloses material legal error and is set aside.

30. The Secretary of State's appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed

Upper Tribunal Judge Southern

Date: 15 December 2015