IAC-CH- CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01746/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision and Reasons Promulgated**
On 12th August 2015	**On 9th September 2015**

Before

UPPER TRIBUNAL JUDGE POOLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AR
(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:
For the Appellant: Mr Irwin Richards, Home Office Presenting Officer
For the Respondent: Mr Andrew Joseph, Counsel

DECISION & REASONS

1. The anonymity direction made by the First-Tier Tribunal is continued. I will refer to the parties by the style in which they appeared before that Tribunal.

2. The appellant is a citizen of Jamaica. In January 2012, the appellant was sentenced to a period of 3 years 6 months imprisonment for possessing heroin with the intent to supply. A deportation order was subsequently signed. The appellant appealed against the decision with regard to

deportation. His appeal was dismissed in November 2013 and an appeal to the Upper Tribunal was rejected. A subsequent appeal to the Court of Appeal was refused and the appellant was removed to Jamaica in August 2014. The appellant subsequently applied for revocation of the deportation order. The respondent refused that application and the appellant appealed that decision.

3. The appellant's appeal came before Judge of the First-Tier Tribunal Holder sitting at Newport on 25 March 2015. Both parties were represented. The appellant's wife and children attended the hearing. In a decision dated 27 April 2015, Judge Holder allowed the appellant's appeal both in respect of the revocation decision and in respect of Article 8 ECHR.

4. The respondent sought leave to appeal. The grounds seeking leave allege three errors of law, namely a misapplication of **Devaseelan**, a misapplication of the law in the proportionality assessment and thirdly a misapplication of law in respect of Section 117 of the 2002 Act.

5. The application went before another judge of the First-Tier Tribunal who granted leave and gave the following as his reasons:

> "1. The Respondent seeks permission in time to appeal against the decision of the First-Tier Judge Holder (the Judge), allowing the Appellant's appeal under Article 8 against the Respondent's decision to refuse to revoke a deportation order pursuant to the provisions of paragraphs 390 – 399A of the Immigration Rules and s 117A – D of the Nationality, Immigration and Asylum Act 2002.
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> 2. It is arguable, as asserted in ground 3, that in applying the criteria set out in paras 399A and 399B of the Immigration Rules, the Judge considered the provisions that were in force prior to June 2014. Para 399A requires it to be established that it would be unduly harsh for the Appellant's children to remain in the UK without the Appellant, and para 399B requires it to be established that it would be unduly harsh for the Appellant's partner to live in Jamaica with the Appellant because of compelling circumstances over and above those described in paragraph EX.1 of Appendix FM. The issues here is whether the failure to apply the correct tests under Immigration Rules would have any bearing on the outcome of the appeal, bearing in mind the similarity of the provisions the Judge in fact applied under s 117C(5). However, the issue is arguable and this will also have some impact on the assessment of proportionality (see ground 2), but not because the Judge failed to consider the public interest, but because the public interest is set out in the relevant legal provisions and the Judge applied the wrong version of the Immigration Rules.
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> 3. Ground 1 is that the Judge misapplied **Devaseelan** and this has less arguable merit; The Judge was mindful of the findings of the previous Tribunal and examined how the report of Dr Claridge, which was not before the previous Tribunal, affected the previous assessment as to whether the effect of deportation of the Appellant on his wife and children would be unduly harsh (see paras 56 – 58, 61, 64 – 65, 73 – 74 and 86 – 87)".

6. Following the grant of permission the appellant's representatives produced a "Rule 24 response". This document dealt with the three

grounds raised in the leave application. In respect of Ground 1, the appellant's solicitor emphasised that the medical report relied on by the appellant had been unchallenged by the respondent before the judge, and that any apparent failure on the part of the judge would not have made a "material difference".

7. In respect of Ground 2, the response supported the judge's proportionality assessment. In respect of Ground 3, the judge had asked himself all the appropriate questions.

8. Hence the matter came before me in the Upper Tribunal.

9. Mr Richards in his submission relied upon the grounds. He submitted that the judge had got "it very wrong". He did not seek to make too much of the **Devaseelan** point. The report of the doctor had not been before the original Tribunal, but Judge Holder made far too much of the contents of the report. Mr Richards referred to paragraph 84 of the determination which contained the findings Judge Holder made from the medical report. The contents of the report were, however, what you would expect where a father is absent from the family. There were certain behavioural difficulties, but these were all typical of such a situation.

10. Mr Richards said that the judge fell into error by applying the wrong Immigration Rules, which was a clear and material error of law. He had looked at the situation through the wrong prism. He had looked at unreasonableness rather than "unduly harsh". Mr Richards produced the Upper Tribunal decision (reported) in the case of **MAB (para 399 "unduly harsh") USA [2015]** UKUT 00435 (IAC). He very fairly pointed out that the effect of **MAB** was to weaken the contention made in paragraph 9 of the grounds. Mr Richards made various comments from **MAB** which are noted in the record of proceedings. In effect the situation had to be "inordinately harsh". A situation such as the appellants would always involve difficulties. There is nothing the reports to say that it reaches the heightened standard as set out in **MAB**. Mr Richards pointed out that the offences committed by the appellant were extremely serious and Judge Holder had sought to gloss over the seriousness of those offences. In short the judge had approached the case in the wrong way and his decision was irrational given the seriousness of the offence. Mr Richards invited me to find a material error of law and to set aside Judge Holder's decision.

11. Mr Joseph acknowledged the content of the Rule 24 response. He said that irrationality had not been argued in the grounds and had not been raised before. The question was whether or not Judge Holder had applied the wrong form of the Immigration Rules. He referred me to paragraph 27 of the determination which shows that Judge Holder was conscious of the date of the decision and the relevance of the Immigration Rules. At paragraph 85 Judge Holder had concluded that it was unduly harsh and at paragraph 90(g) the judge had engaged with Section 117. The judge had found the case exceptional. Any error is not material. At paragraphs 58

and 62, Judge Holder had found that the old rules had not been met by the appellant and at paragraph 64 he had quoted from the original Tribunal determination with regard to obstacles for the family to relocate. Mr Joseph referred to paragraph 47 of **MAB** and that it was clear from paragraphs 90(h) and 91 of Judge Holder's determination that there was, in this case, something over and above the situation set out in **MAB (47)**. In short the judge had found very compelling reasons. His decision was not irrational and he emphasised that the doctor's report had not been challenged at the hearing.

12. In response Mr Richards again stated that in his opinion the error was material. The judge had not looked at the correct rules and paragraph 8 of the grounds seeking leave can be read as a suggestion of irrationality.

13. At the end of the hearing I indicated that I was reserving my decision, which I now give with reasons.

14. I find no error that was material to the outcome of the decisions made by Judge Holder.

15. As to Ground 1, Judge Holder was clearly conscious of the previous determination. Judge Holder had before him medical evidence from Dr Claridge. The reports of Dr Claridge were not before the original Tribunal and it is quite clear that Dr Claridge's evidence was not challenged by the respondent at the hearing. Judge Holder was perfectly entitled to accept the evidence of Dr Claridge, especially when it was taken in the round with the evidence of the appellant's family. Indeed Mr Richards in his submission to me indicated that he did not "make too much" of that ground. I take the view that Judge Holder properly dealt with the previous Tribunal's decision as a starting point and had the further evidence before him which led him to the conclusions that he reached. There was no error in respect of this allegation.

16. As to the remaining two grounds upon which leave have been granted, these in essence relate to a single allegation that the judge failed to properly assess proportionality in keeping with the rules and statutory provisions that were relevant at the time of the decision and/or hearing. Mr Joseph rightly drew my attention to paragraph 27 where the judge directs himself with regard to dates. On the other hand Mr Richards makes the point that the judge viewed the relevant questions through the wrong prism.

17. It is quite clear from a reading of the determination as whole that Judge Holder fully engaged with all the evidence before him and systematically worked his way through the "legal framework" at paragraph 25 onwards. Paragraphs 58 and 62 show that he reached the conclusions that the "old" provisions were not met, but it is arguable that Judge Holder then did take an incorrect view of the evidence.

18. The respondent, in the grounds, criticised Judge Holder for the way he has accepted the evidence (the question of proportionality). Mention is made of the Court of Appeal case of **Gurung** and it is suggested that at paragraph 88 of the determination, Judge Holder is simply finding arguments against deportation and is merely listing "apparent mitigation" for the conduct of the appellant. However I do not agree. Again it is necessary to read the determination as a whole by reference to findings on all the evidence and to understand how Judge Holder has reached his conclusions on proportionality.

19. I have noted the third allegation of material error. In addition I have noted the views of the Upper Tribunal in **MAB** as to how a judge should view situations such as this appellants. Again Mr Joseph refers me to paragraph 90(g) and paragraph 91 of the determination, and clearly Judge Holder considered the term "unduly harsh" and "very compelling circumstances" in reaching the conclusions that he did.

20. Whilst I accept Judge Holder may have made an error in the way he has described both the rules and the statutory provisions, through which he must look at the evidence, he has asked himself the right questions in his general assessment of proportionality and has reached conclusions on the evidence that were perfectly open to him. Any such error is therefore not material to the outcome of the appeal.

21. I therefore conclude that no material error of law is contained in the determination.

22. The respondent's appeal is dismissed and the decision of Judge Holder must stand.

Signed Date

Upper Tribunal Judge Poole