IAC-HX-DML-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/19984/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2014	**On 15 April 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TREVOR LLOYD PRICE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Jarvis
For the Respondent: Mr Solomon

DECISION AND REASONS

1. Mr Price is a citizen of Jamaica born in 1953. He appealed against a decision of the Secretary of State made on 23 July 2013 to refuse to revoke a deportation order.

2. Although in proceedings before me the Respondent is the Appellant, for convenience I keep the terms as they were before the First-tier, thus Mr Price is the Appellant and the Secretary of State the Respondent.

3. The history, which is not in dispute, is that the Appellant came to the UK as a visitor in February 1999 and was granted leave to enter until August 1999. He overstayed. In March 2001 he applied for leave to remain as a student which was refused later that month. He remained as an overstayer. In October 2006 he was convicted of offences of dishonesty and sentenced to a total of 18 months imprisonment. On appeal in January 2007 that sentence was reduced to 9 months imprisonment.

4. That month he was notified of a decision to make a deportation order. He appealed against that decision. His appeal was heard at Taylor House on 27 March 2007. It was dismissed by Immigration Judge Kealy and Mr Taylor CBE. Application for reconsideration was refused as was a renewed application for reconsideration by the High Court, in November 2007. A deportation order was made on 20 May 2008 and he was deported to Jamaica on 20 June 2008.

5. On 26 June 2012 the Entry Clearance Officer refused an application for entry clearance for settlement as the spouse of Mrs Cherry Jack-Warburton on the grounds that he was the subject of a deportation order and could not succeed under paragraph 320 of the Immigration Rules.

6. On 28 August 2012 the Appellant sought revocation of the deportation order. The application was refused on 25 July 2013. On 20 August 2013 he lodged a Notice of Appeal arguing that the decision was contrary to Article 8. It was said that he was not a persistent offender; it had been accepted that he presented a low risk to the public and of reoffending. Such did not make it undesirable to allow him to re-enter the UK. The best interests of a child, the son of Mrs Cherry Jack-Warburton had not been taken into account.

7. The judge made his findings at paragraph [18] ff. He accepted the genuineness of the relationship between the Appellant and Mrs Jack-Warburton. He noted that she has a good job and salary and property here and that her son is a British citizen. He found that she is '*clearly fully integrated into the life of this country'* [19].

8. The judge having noted paragraph 390A of the Rules and that 398(a) and (b) did not apply went on to consider 398(c) and 399(b). In his view 398 (c) did not apply for reasons he gave at [22] in particular that the Appellant's actions did not cause '*serious harm'*. However, he noted at [23] that the Respondent's view that 398 (c) was applicable so proceeded on that basis to look at 399 (b).

9. He found that Mrs Jack-Warburton had lived in the UK continuously for at least fifteen years prior to the decision. Also that there were insurmountable obstacles to family life continuing with the Appellant in Jamaica. He said: '*I find that having regard to the fact that she has lived here for so long, has such a good job, owns a house in this country and her only child lives here, it is not reasonable to expect her to leave all of that behind her and go and live with the Appellant in Jamaica now.' [25]*

10. Having found that paragraph 399 applied the judge did not consider it necessary to go on to consider whether the Appellant had established whether there were exceptional circumstances as would otherwise have been required under paragraph 390A.

11. He then went on (at [27]) to consider paragraphs 391 and 391A. He found that the Appellant had not been sentenced to a period of imprisonment of at least 12 months, had not been convicted of an offence that had caused serious harm indeed *'caused no actual harm to the public*', and was not a '*persistent offender*.' Also, he did not meet the definition of a '*foreign criminal'* in Section 117D(2) of the Nationality, Immigration and Asylum Act 2002. He found that as a result section 117C was not relevant. He then went on to consider section 117B.

12. In that regard he found that the Appellant speaks English and that he would be financially independent. Although he found that the Appellant's relationship with Mrs Jack-Warburton (a '*qualifying partner*') was established when he was in the UK unlawfully it had '*clearly been re-established and consolidated since he returned to Jamaica because of her frequent visits there and indeed the marriage there*.' He considered it appropriate '*to give weight'* to these features of the current relationship.

13. The judge then repeated that the Appellant would not be regarded as a '*foreign criminal'* as defined by Section 32 of the UK Borders Act 2007 and thus would not be liable to automatic deportation and that the offences for which he was convicted '*cannot in reality be regarded as a series of several minor convictions meriting deportation*.' [30]. He also considered it relevant that the offence for which the Appellant was sentenced to 12 months' imprisonment was committed more than fourteen years ago. The second offence was committed nearly nine years ago. Both convictions are now spent.

14. The judge then went on to note that the Appellant at 60 years of age '*is not a young man'*. He considered that '*exclusion of a man for ten years must be regarded as more drastic for a man of the Appellant's age than it would be for a man of say, half his age.'*[32]

15. The judge then considered Article 8. He found that the continuance of the deportation order prevented the Appellant from making a successful application for leave to join his wife in the UK. Such represents a considerable interference with his family life. There was no reason to doubt that but for the deportation order such an application would be successful.

16. Advancing to proportionality he took particular heed of the '*relatively minor nature of the Appellant's offences'*; that *'no serious harm was caused by any of them'*; that he is of no '*real risk to the public and never has been'*; '*his age*'; '*the length of time he has been excluded from this country'*; '*the strength of his relationship with his wife as demonstrated by*

the fact that it has survived his exclusion for more than six years', and the '*principles of rehabilitation'.*

17. He concluded that the case succeeded under the Rules and on human rights grounds.

18. The judge ended by considering that there was a '*more fundamental error*' why the appeal must be allowed. The deportation order stated that a court had recommended that a deportation order be made. He was thus liable to deportation under Section 6(3) of the Immigration Act 1971. In fact the criminal court did not recommend that a deportation order be made. He was not therefore liable for deportation under Section 3(6).

19. The Secretary of State sought permission to appeal which was granted by a judge on 14 October 2014.

20. At the error of law hearing Mr Jarvis sought to rely on the grounds and a skeleton argument. In summary, first, it was an error for the judge to conclude that the appeal must be allowed because the deportation order itself was '*unarguably defective and invalid'* because it refers to a recommendation for deportation by the Court. It was, Mr Jarvis stated, the notice of decision to make a deportation order which ordered the deportation order not the order itself.

21. Second, it was an error for the judge to substitute his own findings on the definition '*serious harm to the public'* and '*persistent offender*.' What constitutes '*serious harm'* and *'persistent offender'* is a matter for the Secretary of State. In any event, obtaining a British passport by deception was an offence deemed to amount to '*serious harm'*. As for '*persistent offender'* he gave no obvious consideration to the Appellant's offending history which included two separate applications for a British passport using a false name and two convictions for possession of crack cocaine. He was deported owing to the seriousness of the offences.

22. Third, the judge applied the wrong rule. HC 532 came into force on 28 July 2014. The test under paragraph 399(b)(ii) had changed. It is an '*unduly harsh'* test. The judge erred in applying an '*insurmountable obstacles'* test. Even applying that test he had done so wrongly. His analysis that these words '*mean obstacles that cannot reasonably be surmounted'* was not the correct approach.

23. Further, the judge erred in taking account of the amendments to the Rehabilitation of Offenders Act 1974. Such amendments did not affect the requirement for ten years exclusion. There is nothing in the immigration legislation or the wording of the amended 1974 Act which requires spent conviction legislation to be the same as immigration legislation. Each piece of law addresses different social policy needs.

24. Mr Jarvis ended by submitting that the judge further erred by stating that he was '*not strictly bound'* by the requirements of section 117B(4) in

assessing the family life of the Appellant because he considered that family life had been '*re-established and consolidated whilst the Appellant was in Jamaica rather than in the UK*.' Also, the judge had given weight to immaterial matters namely that the Appellant would '*not be regarded as a foreign criminal'* under S32 of the UK Borders Act 2007.

25. In reply, Mr Solomon submitted that the determination looked at as a whole was logical and well reasoned. The judge had applied the correct rule (paragraph 399) which had been in force at the date of decision and was the rule referred to in the refusal letter. As for the '*serious harm'/'persistent offender'* issue the judge acknowledged (at [23]) that such was for the Secretary of State. As such his comments in the preceding paragraph 22 were irrelevant and not material.

26. Mr Solomon said that having properly found that the Appellant succeeded under paragraph 399 he continued in a 'belt and braces' approach to consider human rights outside the Rules. In doing so he dealt with the material matters. It had been found that the Appellant was not a '*foreign criminal'* under paragraph 117D, thus the assessment was under 117B not 117C. The judge had dealt satisfactorily with 117B. Paragraph 117B needed to be modified when dealing with entry clearance cases.

27. Mr Solomon continued by submitting that the judge's findings on proportionality were open to him on the evidence. His approach on the Rehabilitation of Offenders Act was also one that he was entitled to take. All in all adequate reasons had been given. The Respondent was merely seeking a 'second bite of the cherry'.

28. Finally, on the issue of the deportation order, paragraph 320(2) which deals with the requirement for entry clearance refers to the deportation order, not the notice of intention to deport. Thus it is the signing of the order that results in removal/exclusion not the notice. It is an important document signed by a senior officer. Its contents are flawed. The judge was correct to find that it was invalid.

29. In considering this matter I deal first with the issue of the validity of the deportation order. Section 3(5) of the Immigration Act 1971 gives the Secretary of State power to deport a non-British citizen (a) if she deems it to be conducive to the public good. The appealable decision is not the signing of the deportation order but is the decision to make the deportation order (Section 82(2)(j)) of the 2002 Act). The deportation order was simply the last step in the administrative process confirming the act of deportation which had already been found by a Tribunal to be a lawful decision. A mistake in the order as to the justification for deportation made no material difference to its legal status. If it was incorrect it could have been challenged by judicial review. I conclude that the judge erred in his findings on that matter at [37f].

30. His decision on that matter however is not *per se* materially fatal to his determination as he allowed the appeal on other grounds which I now turn to consider.

31. I look first at the issue of '*serious harm'/'persistent offender'*. The judge noted paragraph 398(c) which states '*the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending caused serious harm or they are a persistent offender who shows a particular disregard for the law.'*

32. I find the judge's treatment of this issue somewhat confusing. At [22] he found that the Appellant's offending did not cause serious harm; that he had only been convicted on two occasions viz for two offences of possession of class A drugs and the passport offences '*which were attempts only'*. Indeed none of the offences '*caused any actual harm at all*'. Further, that he could not be considered a *'persistent offender*' or that he showed a '*particular disregard for the law'*.

33. I find several problems with this. First, I agree with Mr Jarvis that '*serious harm'/'persistent offender'* is a matter for the Respondent. It was not for the judge to make his own findings on the definition. In that regard the Respondent's own guidance states '*Serious harm 2.1.2. It is at the discretion of the Secretary of State whether or not she considers an offence to have caused serious harm*.' *2.1.3 'An offence that has caused serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that caused serious harm to a community or to society in general*". (IDI Chapter 13: criminality guidance in Article 8 ECHR cases (28 July 2014)).

34. The approach is also inconsistent with **M v SSHD [2003] EWCA Civ 146** in which Laws LJ said:

> '25. Thus as it seems to me this whole raft of authority tends firmly to contradict Mr Blake's argument that a considered refusal of a recommendation to deport creates a presumption which touches the Secretary of State's exercise of power under S3(5)(a). It is also, I think, contradicted by the scheme of the Act of 1971. S3(5)(a) plainly establishes a free-standing power, whose exercise is entirely within the responsibility of the Executive … '.

35. I find other difficulties in the judge's approach to this matter. The judge without explanation has paid no heed to the Tribunal decision which dismissed the Appellant's appeal against notice of intention to deport made in April 2007. Such should have been his starting point. At [66] the Tribunal found '*a passport offence of this kind being bound up with immigration, is in our judgement nearly always likely to be serious enough to justify deportation and we are satisfied that it did so here*.' Further, I do not think that it was open to the judge to find that '*none of the offences caused any actual harm at all*.' The courts have repeatedly said that the use of false passports and stolen birth certificates contribute to the

undermining of the good order of society (see **R v Benabbas [2005] EWCA Crim 2113**) at [41] and the use of class A drugs also in small part facilitates the scourge that affects all layers of society in the UK.

36. That the First-tier Judge was not wholly clear on his approach to '*serious harm'/'persistent offender'* is apparent from the very next paragraph [23] of his determination where he stated that '*However that may be, it appears that it is the view of the Secretary of State that it is important and accordingly 398(c) is applicable*.' However, he again in the latter part of his determination [28f] returned to the view that the Appellant had not been convicted of offences that caused serious harm. I find his failure to properly consider or apply the law to be a material error.

37. The judge went on to find that the Appellant has a genuine and subsisting relationship with his wife, and that she has lived in the UK for at least fifteen years prior to date of hearing. He found (*per* paragraph 399(b)(i)) that there were '*insurmountable obstacles'* i.e. '*obstacles that cannot reasonably be surmounted'* to her going to live with the Appellant in Jamaica [25]. He made that finding because she has *'lived here so long'*, '*has a good job'*, '*owns a house here'* and her only child lives here. It was not, the judge considered, '*reasonable to expect her to leave all of that behind her'.*

38. Mr Jarvis submitted that the judge applied the wrong version of the Rules. He should have applied HC 532 amendments, namely 399(b) applicable from 28 July 2014.

39. It reads (b) '*the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and (ii): it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above these described in paragraph EX.2 of Appendix FM; and (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.'*

40. If Mr Jarvis is right the judge erred in applying the wrong rule. Such would be a material error.

41. I think Mr Jarvis is correct. He referred to **YM (Uganda) v SSHD [2014] EWCA Civ 1292**. In that regard the court at [16] noted that the *Statement of Changes in the Immigration Rules HC 532* said under the heading '*Implementation'*: '*The changes set out in paragraphs 14 to 30 of this statement 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.'*

42. Further, at [19] the court notes an explanatory memorandum attached to the statement of changes made to create the 2014 Rules. It notes paragraphs 3.4, 3.5 and 4.7.

> '3.4. The changes relating to family and private life will come into force on 28 July 2014, in line with the commencement of section 19 of the Immigration Act 2014. The Home Office regrets that it was not possible to finalise this Statement of Changes on a basis that, consistent with normal practice, would have allowed the changes to be laid at least 21 days prior to their coming into force. This is because many of the changes to the Immigration Rules need to coincide with the coming into force of sections 17(3) and 19 of the Immigration Act on 28 July 2014.
>
> '3.5. However, the substance of those changes which concern the alignment of the Immigration Rules relating to family and private life with sections 117B,117C and 117D of the Nationality, Immigration and Asylum Act 2002, were extensively debated by both Houses of Parliament during the passage of the Immigration Act.'
>
> '4.7. The changes set out in paragraphs 14 to 30 of this statement 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.'

43. Thus, in my judgement, '*decided*' refers to the date when the Tribunal made its decision having heard the case after 28 July 2014, rather than '*decided*' refering to when the immigration decision was made which was in July 2013.

44. Even if I am wrong and in his decision he referred to the correct rule, I consider that the judge has erred in his consideration of the '*insurmountable obstacles'* test. In **Gulshan (Article 8-new Rules-correct approach) [2013] UKUT 640** the Upper Tribunal set out the correct approach to appeals involving both Article 8 and the Rules. The head note reads *'...(c) the term "insurmountable obstacles" in provisions such as Section EX1 are not obstacles which are impossible to surmount...they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that the removal will be unjustifiably harsh (**Nagre v SSHD [2013] EWHC 720**)'.*

45. In this case the judge should have considered all the material, relevant facts. Instead, he dealt only with a small number of matters which he considered she would have to give up (her residence, her job, her property, her adult son). He did not consider the practical possibilities of relocation. In failing to apply the relevant test the judge materially erred.

46. In finding that the Appellant satisfied the Rules the judge could have stopped there the Rules being a complete code. However he went on to consider the case on Article 8 grounds outside the Rules. In his analysis on that issue I consider that he made further mistakes. In particular, he found, correctly, that the relationship between the Appellant and Mrs Jack-Warburton was established when he was in the UK unlawfully but that it had been re-established and consolidated since he returned to Jamaica because of her frequent visits there. However, he erred in stating that he was not '*strictly bound by the requirements of sub-section 117B(4) to give little weight to their relationship*' because of their current relationship. He

was strictly bound to apply the requirements. I disagree with Mr Solomon that they do not have application in an out of country case.

47. For the reasons given I conclude that the First-tier Judge materially erred and that his decision must be set aside to be remade.

48. It was submitted by both parties at the hearing that if such was so the case should be dealt with under the new Rules.

49. I agree that the new Rules apply. In **YM** (supra) (in which the immigration decision had been made in 2008) it was stated at [37] '*If this court were to set aside the decision of the UT and either remit the matter or remake the decision itself, then, at that stage I think that both the new statutory provisions and the 2014 Rules would become relevant.'* (Aitkens LJ). I see no reason why I should not proceed to remake the decision. There is no dispute on the facts in particular the strength of the relationship. The facts stand.

50. The Appellant was sentenced to 9 months imprisonment. The deportation order was made on 20 May 2008. The application for revocation was made on 28 August 2012. The refusal decision was made on 25 July 2013. I consider the relevant rules. I note paragraph 390, 391 and 391A. Paragraph 390 states that an application for revocation will be considered in the light of all the circumstances including the grounds on which the order was made, any representations, the interests of the community, the interests of the applicant, including any compassionate circumstances. Paragraph 390A states that where paragraph 398 applies the Respondent will consider whether 399 or 399A applies and if it does not, '*it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors*.'

51. Paragraph 391 states in the case of a person deported following a criminal offence continued exclusion will be the proper course in the case of conviction for less than 4 years, unless 10 years have elapsed since the making of the deportation order unless the continuation would be contrary to the Human Rights Convention or there are other exceptional circumstances that mean that continuation is outweighed by compelling factors. As for 391A, it states that revocation will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, which may include the passage of time since the person was deported. Also, fresh information which has come to light which was not before the appellate authorities or the Respondent.

52. In this case the claim is that the immigration decision is contrary to Article 8. There is clearly family life between the Appellant and his wife. The refusal to revoke the deportation order interferes with the right to respect for that family life. Such is sufficiently serious as to engage Article 8. The issue is proportionality. It is necessary to consider whether 399 or 399A applies. These apply if 398 applies. The issue in this case is whether

398(c) applies. It does. The deportation was found to be to the public good because the offending has caused serious harm or they are a persistent offender.

53. I consider whether 399 applies. In this case 399 (b) is the issue, namely, whether the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen and (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX2 of Appendix FM; and it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

54. On the evidence I find, and it is not disputed, that the relationship was not formed at a time when the Appellant was in the UK lawfully. (i). I look additionally at (ii). His poor immigration history as well as his criminal history has been noted. As for Ms Jack-Warburton's situation, while she has a job and property in the UK and has lived here for some years, she is of Jamaican origin, spent her formative years there and will have knowledge of the culture and life there. She married the Appellant there and has visited him often there. She has relatives including cousins and brothers there. There are no language issues, nor is it suggested there are any significant health problems. There is no indication that she is financially dependent on him. Any skills she may have acquired in the UK can be used to assist her in settling in Jamaica. Whilst she has a son he is an adult in his twenties. I see no reason why her contact with him could not continue though modern means of communication and by visits by either. On the evidence I do not see it to be unduly harsh for her to live in Jamaica or to remain here without her partner.

55. I conclude that paragraph 399 does not apply. Paragraph 399A also does not apply.

56. The next issue to consider is, with neither paragraph 399 nor 399A applying '*it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.'* (390A*).* Per **MF (Nigeria) [2013] EWCA Civ 1192** the court said (at [42] '*The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances"'.*

57. The court added: '*We would therefore hold that the new Rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence…'* [44] And (at[55]) '*Even if we*

were wrong about that, it would be necessary to apply a proportionality test outside the Rules…Either way, the result would be the same.'

58. I note that the Appellant has been excluded since mid 2008. It is to their credit that the relationship between him and Mrs Jack-Warburton has prospered despite the obvious difficulties inherent in a long distance marriage. The problem for the Appellant is that he was removed for committing serious crime in a country where he had been staying unlawfully for many years. Mrs Jack-Warburton was aware of his circumstances when she began a relationship and subsequently married him. Article 8 does not confer a choice upon the Appellant and his wife as to where they wish to enjoy their family life together. Whilst sacrifices may have to be made, such are the hardships a couple may encounter when one partner does not have entry clearance to come to the UK owing to their previous criminal conduct.

59. In that regard as the tribunal who considered the deportation appeal noted (at[65]) '*each* (offence) *was committed with the intention of using the resulting passport as his own, to be used to avoid identification as an over stayer and the consequent removal as an over stayer, that certainly the second offence had been premeditated in the sense that a false birth certificate was involved. Had the application been successful, no doubt Mr Trevor Lloyd Price would have quietly disappeared and Mr Leonard Lloyd Wedderburn…would have been quietly substituted. He would have achieved the object which he had been pursuing since becoming an over stayer in 200*0.'

60. Looking at the facts in the round I do not find the passage of time since deportation to be such in itself to warrant revocation. Looking at the material evidence I do not see there to be any exceptional or compelling circumstances which outweigh the public interest in maintaining the deportation order. The case cannot succeed under paragraph 390A.

61. For the sake of completeness I consider the case out with the Rules. The same findings apply. Additionally, I require in considering proportionality to take into account s117A and B of the 2002 Act. In that regard it is in the Appellant's favour that he speaks English (117B(2)). However, he does not appear to be financially independent (117B(4)). Also, the relationship with his wife, a '*qualifying partner*', was established at a time when he was in the UK unlawfully. As such I give it little weight (117B(5)). I find also that he is a *'foreign criminal'* as defined in 117D as he has been convicted of an offence that has caused serious harm (2)(c)(ii) or (iii) is a persistent offender. Exception 1 does not apply not least because he has not been lawfully resident in the UK for most of his life. Nor does Exception 2 apply because on the facts found above the effects of his deportation on his partner are not unduly harsh. I see no exceptional circumstances that mean the continuation is outweighed by compelling factors. The appeal does not succeed on Article 8 grounds.

62. The appeal fails under the Immigration Rules and on human rights grounds.

Decision

The decision of the First-tier Tribunal showed an error of law. Its decision is set aside and remade as follows:

The appeal is dismissed under the Rules.

The appeal is dismissed on human rights grounds

No anonymity direction is made.

Upper Tribunal Judge Conway