IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02168/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 December 2015	**On 19 January 2016**

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE McWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KEMAR DAMION MARTIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr B Hawkin, Counsel, instructed by Victory Law Solicitors

DECISION AND REASONS

1. This is the appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Keane who, on 9 March 2015, allowed the appeal of Mr Martin against a decision by the Secretary of State to deport him pursuant to the automatic deport provisions.

2. Mr Martin is a citizen of Jamaica, born on 4 January 1981. He first entered the United Kingdom on 27 February 2002 and was granted temporary admission after having been refused leave to enter. He was removed to Jamaica on 19 January 2005 but re-entered the United Kingdom lawfully as

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the spouse of a British citizen on 1 December 2005. On 29 November 2011 he was found guilty of one count of supplying a Class A controlled drug and, on 20 November 2011, he was sentenced to a term of imprisonment of 24 months. On 3 October 2013 the Secretary of State made a deportation order pursuant to Section 32(5) of the UK Borders Act 2007.

The decision of the First-tier Tribunal

3. Mr Martin was represented by Ms Walker before the First-tier Tribunal. In her skeleton argument Ms Walker made an unequivocal concession that Mr Martin did not satisfy the requirements of paragraph 399 and 399A of the Immigration Rules. The First-tier Judge noted this in the first paragraph of his written decision. In light of this concession the First-tier Judge considered whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules that would entitle him to allow the appeal under paragraph 398.

4. The Judge found that there were very compelling circumstances based on Mr Martin’s relationships with his wife, his 14 year old stepson, and his two biological children (an 11 year old son and a 7 year old daughter born from his spousal relationship). In July 2008 Mr Martin’s biological son was diagnosed with autism. At the date of the hearing before the First-tier Tribunal his son’s autism continued to manifest itself through significant disruptive behaviour. Mr Martin’s daughter was diagnosed with autism in January 2010 and was also displaying significant disruptive behaviour at the date of the First-tier Tribunal hearing. Mr Martin's wife suffered from sickle cell anaemia and would often get ‘sickle cell crisis’ which resulted in severe pains. These pains were experienced in the period in which Mr Martin was incarcerated.

5. The evidence relating to the autism of the two children was supported by an assessment report prepared by Paul Levy, an independent social worker, which was dated 4 September 2014, a core assessment carried out by the London Borough of Lewisham dated 3 October 2012, and a report prepared by Dr Tony O’Sullivan, a consultant community paediatrician, dated 12 November 2013.

6. The First-tier Tribunal heard evidence from Mr Martin and his wife. In his decision the Judge gave detailed consideration to the evidence before him and noted several concessions made by the Secretary of State in her reasons for refusal letter. The Secretary of State conceded that Mr Martin’s wife, stepson and biological children were British citizens, that they enjoyed genuine relationships with Mr Martin, and that it would be unreasonable for his wife and children to leave the United Kingdom and relocate to Jamaica.

7. At paragraph 11 of his decision the Judge again noted the concession made by Ms Walker in respect of paragraphs 399 and 399A. The Judge then proceeded to consider whether the appeal fell within the terms of paragraph 398 of the Immigration Rules with specific reference to the Court of Appeal case of *MF* [2013] EWCA Civ 1192.

8. In paragraph 12 the Judge acknowledged and took into account Mr Martin’s poor immigration history and the offences that he had committed. The Judge made reference to Section 117C of the Nationality, Immigration and Asylum Act 2002 and noted that Mr Martin’s deportation was in the public interest. The Judge reiterated that Mr Martin had to demonstrate that very compelling circumstances were present in order for the appeal to be allowed. At paragraph 14 the Judge noted and accepted that Mr Martin expressed genuine remorse for his criminality. At paragraph 15 the Judge noted that Mr Martin was, according to a NOMS report dated 24 December 2012, at low risk of reoffending.

9. At paragraph 16 the Judge found that Mr Martin’s wife would face:

> “… quite overwhelming difficulties, in effect those of a single parent of children suffering from a condition as serious as autism. Her experiences during the period in which the appellant was incarcerated provided a likely indicator as to her experiences after his deportation from the United Kingdom. She would be caring for the children alone as a single parent while working seven days a week. If she was able, as before, to obtain some childminding support from a friend she would nevertheless become exhausted, tired and, it would not be an exaggeration, degraded dealing as she would do with her children and problems resulting from the behaviour of [her children] on her own. The deportation of [Mr Martin] would have a dramatic and highly negative impact on the two children. [Mr Martin] plays an important and positive role in the life of both children.”

10. The Judge then referred to a letter from the Head teacher of Brent Knoll School dated 23 April 2013 indicating that Mr Martin worked in close partnership with the school to put strategies in place so as to manage his son’s challenging behaviour. The Judge also noted that Mr Martin’s daughter would be subject to a severe negative effect if he was deported. Her dependency on routine and familiar carers was emphasised in a letter from the school dated 24 April 2013. The Judge found that her routine would be disrupted if Mr Martin was deported. In respect of the oldest child, not the natural biological child of Mr Martin, it was said that he would lose a father figure and would be at risk of receiving a reduction in attention from his mother. Having regard to these factors the First-tier Judge found that there were very compelling circumstances and allowed the appeal.

The grounds of appeal

11. The Secretary of State’s grounds of appeal contend that the Judge failed to make it clear under which provision of the Immigration Rules the appeal was being allowed. The grounds maintain that the Judge failed to assess his factual findings through the lens of the Immigration Rules. It was contended that the Judge misapplied the appropriate standard of proof by accepting the explanation proffered by the Appellant’s wife in relation to an earlier statement in which she mentioned that she had relatives residing in the United Kingdom. The grounds also claimed that the Judge failed to address the best interests of Mr Martin’s children as required under Section 55 of the Borders, Citizenship and Immigration Act 2009. The Secretary of Stat was of the view that the children’s best interests

would be served "*by the greater consistency of family life that would be likely to result from the appellant's deportation*". The grounds also argued that the language used by the Judge was unduly emotive and was inadequately meaningful or precise. Issue was taken with the use of the words 'overwhelming' 'degraded', and the term 'most vulnerable' when used in respect of Mr Martin's family.

The Upper Tribunal hearing and discussion

12. At the outset of the hearing we indicated our concern that the First-tier Judge did not have had in mind the applicable version of the Immigration Rules when he decided the appeal. Paragraph A362 of the Immigration Rules, as it was at the date of the First-tier Tribunal hearing, indicates that, in determining an appeal involving Article 8 in a deportation context, the appropriate Rules would be those that were in existence on and after 28 July 2014 regardless of when the decision under appeal was made. It was on that date that a significant change in the Immigration Rules relating to deportation occurred. Prior to 28 July 2014 paragraph 399(a) applied if it was unreasonable for a child to leave the United Kingdom and there was no other family member who was able to care for the child in the United Kingdom. Given that the children's mother lived in the United Kingdom it was clear that Mr Martin could not meet the requirements of this version of the immigration rules. As such there would have been good reason for Ms Walker's concession. However, on 28 July 2014 paragraph 399(a) applied if it was unduly harsh for the children to live in Jamaica with Mr Martin and it was unduly harsh for the children to remain in the United Kingdom without him. Given this significant amendment to paragraph 399(a) we find it inexplicable that Ms Walker would have made the concession identified in paragraphs 1 and 11 of the First-tier Tribunal's decision on the basis of the Immigration Rules as they were after 28 July 2014. We can only rationally conclude that both representatives before the First-tier Tribunal and the First-tier Tribunal Judge believed that the version of paragraph 399 applicable when the deportation decision was made continued to be applicable at the date of the appeal hearing. We pause to note that a number of similar situations have presented themselves before the Upper Tribunal in recent months. Given that no clear reference was made in the First-tier Tribunal's decision to the wording of the applicable version of paragraph 399(a) we are satisfied that the First-tier Tribunal applied the wrong version of the immigration rules.

13. Mr Duffy submitted that the First-tier Tribunal Judge was entitled to accept the concession regardless of whether it was made on a misapprehension of the applicable immigration rules. We doubt that a concession based on a misunderstanding of the applicable law is one that a Judge is entitled to accept (*R (on the application of Ganidalgi) v SSHD* [2001] INLR 479) However, putting entirely to one side the issue of whether the concession was properly made and properly accepted, we are satisfied that the decision is, in any event, material in respect of the Judge's assessment under paragraph 398 of the Immigration Rules. This is because the grounds of appeal attack the Judge's assessment under paragraph 398. Of

relevance is the recent Presidential Upper Tribunal decision in *Greenwood (No. 2) (Para 398 considered)* [2015] UKUT 00629 (IAC).

14. At paragraph 14 of *Greenwood* the President said this:

> "The gravamen of the argument on behalf of the Secretary of State is that the Judge erred in law by considering paragraphs 399 and 399A *en route* to his conclusions. We consider this argument to be fundamentally flawed. Logic, reason and common sense dictate that paragraphs 399 and 339A must be considered in the application of the "*over and above*" test enshrined in paragraph 398. Indeed a failure to do so, if material, would itself be an error of law. In cases where, as here, the "*over and above*" test is engaged, paragraphs 399 and 399A provide the bridge, or link, between the application of the test and the resulting outcome. Giving effect to the ordinary and natural meaning of the three provisions of the Rules under scrutiny, we consider that:
>
> (a) The first question is whether, having regard to the findings and evaluative assessments made, the Secretary of State (in the first place) and the FtT (on appeal) considers that either paragraph 399 or 399A of the Rules applies.
>
> (b) If the above exercise yields the assessment that neither of the said paragraphs applies, it is then necessary to decide whether there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

15. In light of *Greenwood* it cannot be said that the First-tier Tribunal lawfully concluded that there were very compelling circumstances over and above those described in paragraph 399(a) if there was no lawful assessment under that paragraph. The absence of any lawful assessment under the relevant version of paragraph 399(a) prevents a lawful assessment under paragraph 398 as we do not know how and to what degree Mr Martin failed to meet the requirements of paragraph 399(a). This amounts to a material error of law.

16. We see little merit in the remaining grounds identified by the Secretary of State. We are satisfied that the Judge gave adequate reasons for accepting the explanation offered by Mr Martin's wife for previously stating that she had family members in the United Kingdom. We are satisfied that the Judge clearly and concisely considered the best interests of the children and we are satisfied that, on the basis of the evidence before him, the Judge was entitled to his conclusions relating to the impact on the various family members.

Notice of Decision

17. Following further discussions Mr Duffy accepted that the factual findings at paragraph 16 of the decision were not seriously disputed by the Secretary of State. On this basis we have decided to remit the appeal back to the same First-tier Judge, (Judge Keane), to enable him to apply the correct legal test under paragraph 399 and 399A and, if necessary, under paragraphs 398 on the basis of the material facts that he has already found.

18. No anonymity direction is made.

Signed

15 January 2016
Date

Upper Tribunal Judge Blum
Judge Blum