Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03982/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Oral decision given following hearing	**On 10 October 2017**
On 19 September 2017	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR BARRINGTON LAING
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Mold, Counsel instructed by LB & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Jamaica who arrived in the United Kingdom with his mother and siblings in March 2001 being granted leave to enter as a visitor, which leave expired at the end of the month. Prior to that leave expiring his mother applied for leave to remain with the appellant as a dependant, which application was granted on 18 September 2001 and expired on 31 December 2001. It is not entirely clear whether before the expiry another application was made, but either then or very shortly thereafter his leave to remain expired. His mother and he and his siblings

remained thereafter without leave and this continued to be the position until in March 2007 an application was made which included an application by the appellant for leave to remain on human rights grounds. He was ultimately granted discretionary leave to remain in 2012 until 6 September 2015. Accordingly, the technical position is that although the appellant has been in this country since March 2001, he has only had leave to be in the UK for between three and four years in total, being from 2012 to 2015 and the few months between March and December 2001 or thereabouts. Although the discretionary leave to remain which was granted in 2012 was pursuant to an appeal against the respondent's refusal of the application which had been made in 2007, neither the appellant nor his mother or siblings had 3C leave during this period because the application had been made when they were all overstayers. In a decision letter which is the subject of this appeal and will be referred to below, the respondent stated at paragraph 42 that "the period in which you have been lawfully in the UK and held Leave to Remain equates to only 8 years and you are now 18 years of age". This is incorrect for the reasons I have already given. On behalf of the appellant, Mr Mold suggests that by so stating the respondent indicated that she intended to treat the appellant as if he had had lawful leave from 2007 when the application was made, but an equally likely explanation in my judgement is that the respondent's caseworker who is responsible for writing this letter made a mistake.

2. Regrettably and shamefully, from a very young age the appellant has committed a succession of offences. His first conviction was in May 2009 when he was 11 years old and he has continued offending to this day. By the time that he received the sentence which led to the decision under challenge, he had amassed some eighteen convictions for 23 offences. These are set out in the refusal letter and I do not need to set them out in detail here. They are very numerous, and what is more, the respondent on investigation considers also that she had reliable information that he was a member of a "gang" which had committed a number of anti-social and criminal activities in his local area. His offending escalated and on 20 May 2014 he was convicted at Kingston-upon-Thames Crown Court for a robbery involving two other defendants. He was sentenced to 30 months in a young offenders' institution. The commission of this offence was sufficiently significant, being the culmination of his very long record of offending that the respondent wrote to the appellant on 9 March 2016 notifying him that because of his criminal convictions/behaviour in the UK the respondent had decided to make a deportation order against him under Section 5(1) of the Immigration Act 1971 because his presence in the UK was not conducive to the public good. In response to that decision the appellant submitted representations dated 4 April 2016 setting out why he should not be deported, which were essentially that for Article 8 purposes this was not proportionate, but in a decision dated 31 August 2016 the respondent rejected the appellant's human rights submissions founded on his family and private life under Article 8. I note at this stage that the reason why the offence did not trigger the automatic deportation provisions set out within Section 32 of the UK Borders Act 2007 is because exception (2) (set out at Section 33(3) of that Act) applied because the defendant was under the age of 18 at the date of conviction. He had been born in 1997 and he was convicted in

2014. However, the provisions of the 1971 Act with regard to conducive deportations did apply for which purpose the respondent (and the Tribunal considering any appeal) is required to have regard to the relevant Immigration Rules which are set out within paragraphs 398, 399 and 399A.

3. The appellant appealed against this decision and his appeal was heard before First-tier Tribunal Judge Wyman sitting at Harmondsworth on 14 June 2017, but in a decision which was signed on 3 July 2017 (some three weeks after the hearing) and promulgated shortly thereafter, the judge dismissed the appellant's appeal.

4. The appellant now appeals against this decision, permission having been granted by First-tier Tribunal Judge Gibb on 24 July 2017. When granting permission, Judge Gibb stated that the appellant had become subject to deportation "following various convictions including a twelve month detention and training order in 2014 of robbery", which is in fact incorrect, because, as already stated and as is clear from the judge's sentencing remarks, the sentence was in fact 30 months' youth custody. It is clear from the sentencing remarks that this was a very unpleasant offence indeed involving a woman with a child in a buggy. The judge remarks at page 2 of the sentencing remarks, at F, as follows, when setting out the details of the offence:

> "The robbery was a nasty robbery. It involved a woman with her child in a buggy. That buggy was pushed over with the 18 month old child still strapped in it, fortunately not hurt in any way. Naturally, the mother went to the child's assistance and it was at that stage that between the two of you, you wrenched off her gold necklace worth £4,500, something which was of sentimental value which she has not got back".

5. So far as this appellant's convictions are concerned, even though he was still at a very young age, by that time, when he was only 16 his extensive criminal history involved various offences of robbery, grievous bodily harm, burglary, possession of a knife and at various times he had provided a false address for a home address search. Had it not been for his youth, he would undoubtedly have been sentenced for the various offences of grievous bodily harm, robbery and burglary to substantial prison sentences. The information which the police had obtained indicated, as I have already noted, that he was a member of a gang, and certainly the robbery of which he was convicted was committed with two others, although that in itself does not prove membership of any particular gang. However, the respondent took the view in light of the huge number of serious offences culminating in the very serious street robbery that it was conducive to the public good for this appellant now at last to be deported.

6. The submissions contained within the grounds on which permission to appeal was granted was that the judge had not taken into account the relevant Immigration Rules, being paragraphs 399 and 399A, and had also failed to give adequate reasons for finding these paragraphs did not apply. It was also submitted that the judge had not provided adequate reasons for his findings, in particular when he found that being involved in a joint enterprise robbery was equivalent to "gang membership" or that he had been brought up within "Jamaican culture".

7. The complaint was also made that the judge had failed to consider adequately the position of his daughter who was a baby whom, as a matter of fact, the appellant had practically never seen.

8. In oral arguments before me, on behalf of the appellant, Mr Mold relied upon these grounds and expanded on them. He accepted that the judge had indeed set out within the decision what was said within paragraphs 399 and 399A, but it was claimed the judge had not referred to them in terms within his findings. This, it was said, was a material error and the judge did not address the fact that the appellant had been in the UK for the bulk of his life when making his findings. Although initially Mr Mold suggested that the appellant had been in this country lawfully for nearly ten years, which would have been over half his life at the time the decision to deport him was made, ultimately he was obliged to accept that from a technical point of view at any rate that was not the position.

9. I set out as the judge did the relevant provisions of paragraphs 398, 399 and 399A of the Rules, which provide as follows:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
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> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
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> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
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> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
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> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
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> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
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> (i) the child is a British Citizen; or
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> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(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 those 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.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

10. So far as 398 is concerned, it is clear that the appellant does indeed fall within these provisions because under 398(b) it is provided that deportation of a foreign criminal from the UK is conducive to the public good and in the public interest where they have been convicted of an offence for which they have been sentenced to a period of imprisonment of between twelve months and four years, which this appellant has. Accordingly, any argument based on a failure to consider this provision in terms cannot succeed because 398(b) clearly applies.

11. With regard to paragraph 399(a), it was accepted and is still apparently the case, that although the appellant has a very young child born when he was in custody, he has barely seen her, does not live with her, and there was no evidence even that he is still in an ongoing relationship with that child's mother. Judge Wyman, in her decision, stated as follows with regard to that relationship:

> "The appellant is not married and has never been so. It is unclear if he is in an ongoing relationship with Miss Kaysia Smith, although he is clearly the father of Miss Smith's young child. The letter from Miss Smith does not state that they are in an ongoing relationship – only that they have known each other since primary school and that he is a good person".

Miss Smith's definition of a "good person" is clearly not a conventional one, bearing in mind the appellant's criminal history, but in the absence of any evidence, even of an ongoing relationship, or of any ongoing subsisting parental relationship that the appellant could be said to have with his child (which clearly the judge did consider), it is hard to see how an appeal could possibly have succeeded founded on the relationship with the child. In any event, it is clear that this was indeed considered

properly by the judge. At paragraph 110, the judge specifically considered Exception 2 set out within Section 117C of the Nationality, Immigration and Asylum Act 2002 which was added by Section 19 of the Immigration Act 2014 which sets out the additional considerations that apply in cases involving foreign criminals. Exception 2 is set out at 117C(5) and:

> "applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh".

Given the factual background in this case the judge's finding within paragraph 110 that "There is no evidence that a further separation would have unduly harsh consequences on [the appellant's child]" is entirely sustainable.

12. So far as paragraph 399(b) is concerned, which applies where "the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen", in the first place, the relationship was not formed at a time when the appellant was in the UK lawfully and his immigration status was not precarious; and secondly, in any event, there is no evidence that there is indeed any genuine subsisting relationship at all. As the judge noted, even though she provided a witness statement, the mother of his child did not claim to be in a subsisting ongoing relationship. In any event, given the appellant's background, it is hard to see how it could be said to be unduly harsh for her to remain in the UK without the appellant.

13. So far as paragraph 399A is concerned, all three sub-sections set out in (a), (b) and (c) have to be satisfied and, as already noted (a) was not satisfied because the appellant has not been lawfully resident in the UK for most of his life, having been lawfully resident for somewhat under four years. Also, it must be doubted whether a person with his criminal record could be truly said to be "socially and culturally integrated in the UK", but for present purposes I will accept that he was and that the judge certainly acknowledged that he had been here as a child and that he had built up a private life in this country. However, even if (a) and (b) were satisfied, the appellant would still need to establish that "there will be very significant obstacles to his integration [to Jamaica]". The judge clearly understood that this was the test because Section 399A was set out within paragraph 40. She also considered this aspect because at paragraph 111 she referred to his family background being from Jamaica, from which she considered it could be inferred that he would have been brought up within Jamaican culture, but she also at paragraph 102 noted that he was physically fit and well and "more than capable of looking after himself". He had an apprenticeship in mechanics, a positive reference and, as the judge noted, "This will assist him either continuing with an apprenticeship in Jamaica or alternatively in finding employment as a trainee mechanic in Jamaica". In the course of discussion, Mr Mold was asked by the Tribunal as to what he said were capable of constituting "very significant obstacles" to his integration into Jamaica, to which the highest that Mr Mold suggested that this could be put was that he had not been in Jamaica for nearly all his life, had a lack of ties in Jamaica, not knowing anybody there, and that

his relationship with his family was in this country. In my judgement, whatever approach the judge took (and I consider he did consider this thoroughly), on the facts of this case there is absolutely no arguable basis upon which it can be suggested that there would be "very significant obstacles" to the appellant's integration into Jamaica once he is deported there.

14. It is also suggested that the judge failed to consider adequately whether (as he was required to do within paragraph 398) there "are very compelling circumstances over and above those described in paragraphs 399 and 399A", although again it is hard to discern from the facts in this case what such "very compelling circumstances" can possibly be. The judge clearly did consider proportionality properly, finding as follows at paragraph 107:

> "107. The ultimate issue in this appeal is proportionality. In the Tribunal's view, the appellant falls within paragraph 396 and 398 of the Immigration Rules. It is clear that the public interest outweighs the appellant's and his family's private interests by a considerable margin".

15. The judge set out all the arguments advanced on behalf of the appellant, including his family life in this country, the private life he has and the fact that he had a young baby, but was impelled to the view after taking account of his extensive criminal history, which is exceptionally bad, that the public interest outweighs such private and family interests as he may have "by a considerable margin". On the facts of this case it is difficult to see how any judge could possibly have come to any other conclusion.

16. Accordingly, I am entirely satisfied that there was no material error of law in Judge Wyman's decision and accordingly this appeal must be dismissed.

Decision

There being no material error of law in the decision of First-tier Tribunal Judge Wyman, this appeal is dismissed and her decision is affirmed.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 9 October 2017