Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/21658/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2017	**On 31 May 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DWAYNE ST PATRICK GARVAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr N Klear of Counsel instructed by Phillip Priscilla Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Jamaica born on 7 September 1977, as the appellant herein.

2. He arrived in the UK on 21 April 2002 as a visitor. He applied for further leave to remain on 21 October 2002 but this was refused. On 4 November 2011 he applied for leave to remain on human rights grounds and while his application was refused the appellant appealed and his appeal came before a First-tier Judge on 31 July 2012 who

found that the salient factors in the appeal were the family relationships and the impact of the removal of the appellant on them.

3. The appeal was allowed on human rights grounds and the appellant was granted leave to remain on 21 September 2012 until 30 March 2015. The appellant's application for leave to remain was made on 18 March 2015 and gave rise to the decision in this case refusing his application.

4. The appellant had declared convictions in his application dating from April 2007, May 2008, June 2010, September 2010 and March 2011. However it was and is the Secretary of State's case that the appellant had failed to declare subsequent convictions dating from August 2012, March 2013 and May 2014.

5. The respondent took the view in the light of this that the appellant was a persistent offender who had failed to disclose the later convictions and refused the application in particular on the following paragraphs of Appendix FM:

> "S-LTR.1.1. The applicant will be refused limited leave to remain on grounds of suitability if any of paragraphs S-LTR.1.2. to 1.7. apply.
>
> ...
>
> S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good 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.
>
> S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.
>
> S-LTR.2.1. The applicant will normally be refused on grounds of suitability if any of paragraphs S-LTR.2.2 to 2.5 apply.
>
> S-LTR.2.2. Whether or not to the applicant's knowledge –
>
> (a) false information, representations or documents have been submitted in relation to the application (including false information submitted to any person to obtain a document used in support of the application); or
>
> (b) there has been a failure to disclose material facts in relation to the application."

6. The First-tier Judge heard oral evidence from the appellant who said he had been with his wife ever since their marriage in October 2002. They had a child aged 10 and three children from the appellant's wife's previous relationship. They were aged

14, 19 and 22. The 10 year old lived with the appellant's wife's aunt but came to stay with them every weekend and at half term and other school holidays. The appellant explained the circumstances which had led to his previous convictions and said "that he may have committed further offences as claimed by the Home Office but he has no clear recollection and had no intention to deceive when completing his application form." The children had ended up living with relatives because of the problems he and his wife faced. Although they did not live with their children they still formed a happy family.

7. When asked why the appellant had not declared all of his previous convictions the appellant said that he had mentioned the ones that he could remember "that when he was arrested he was usually drunk and that he had done his best".

8. The appellant's wife also gave evidence and said she would not be able to relocate to Jamaica with the appellant.

9. The judge considered there was no evidence at all to show that the appellant had additional convictions as claimed by the Secretary of State and added:

> "His position in evidence was that he had declared all of the convictions he could remember. He said that it was possible that there were others which he could not remember, but the concession of such a possibility does not cure the absence of actual evidence of the further convictions asserted by the respondent, which were the whole basis for the refusal of his application."

10. Having referred to **SS (Congo) [2015] EWCA Civ 387** the judge identified "compelling circumstances in the case for considering the appellant's claim under Article 8 outside the Immigration Rules". He considered that the starting point was the previous determination which had found that family life existed between the appellant, his wife and their children. One of the stepchildren was living with them at that time but was now living with her grandparents. However the judge found that family life still existed despite "that minor change in circumstances".

11. Having referred to **Razgar [2004] UKHL 27** the judge addressed the issue of proportionality and stated that in considering proportionality "I must balance the public interest against the private rights of those concerned." He continued in paragraph 34 "as regards those private rights, a paramount consideration must be the best interests of the children...". The judge referred to the appellant's son and stepson – the other children were both adults. As regards the appellant's son in particular the judge was satisfied "that the evidence shows a meaningful relationship between them, with regular contact every other weekend and during school holidays" which was of importance and benefit to the child. It was in his best interests for that to continue.

12. The judge set out Section 117B and it is convenient to reproduce it here:

> "117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

13. The judge reminded himself that the state had the right to control entry to its territory and that Article 8 did not confer a right to choose where family life was to be established. In relation to the other considerations the judge found that the appellant spoke English but was not financially independent. His private life and his relationship with his wife had been formed while he was in the United Kingdom unlawfully and therefore little weight was to be accorded to those matters. However the judge was satisfied that the appellant had a genuine and subsisting parental relationship with his son who was a "qualifying" child in terms of Section 117D. The judge continues:

> "I find also that it would not be reasonable to expect him to leave the United Kingdom. He was born in this country, has lived here all his life and is now 10 years old. His mother and step siblings are all here as are his extended family members, including his mother's aunt who is his guardian and primary carer. He has no connection with Jamaica other than his father's nationality. It follows, therefore, that the public interest does not require the appellant's removal."

14. The judge concluded that the decision involved a disproportionate interference with the appellant's Article 8 rights and his family, in particular his son, and allowed the appeal on human rights grounds.

15. There was an application for permission to appeal by the Secretary of State and it was said that there had been a material misdirection of law for the following reasons:

> "Firstly, it is submitted that the FtTJ has erred at [25] for finding that the Appellant was not a persistent offender (for the purposes of S-LTR 1.5) nor his presence in the United Kingdom not being conducive to the public good (for the purposes of S-LTR 1.6) or indeed for failing to disclose material facts in relation to the application (for the purposes of S-LTR 2.2).
>
> The FtTJ noted that the Appellant's oral evidence was not to the effect that he had not received a further three convictions between 2012 to 2014, just that '*He said that he may have committed further offences, as claimed by the Home Office, but he has no clear recollection and had no intention to deceive when completing his application form*' [13].
>
> Whilst it is accepted that the FtTJ considered at [25] that the possibility of the offences didn't cure the absence of actual evidence it is submitted that the FtTJ has failed to give sufficient weight to the Appellant's oral evidence and that the Appellant as a matter of fact was not challenging the existence of such three convictions.
>
> Whilst perhaps premature at this stage, an application will be sought to the Upper Tribunal under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for permission to adduce a copy of the Police National Computer check in respect of the Appellant, including the Appellant's antecedence for the period 2012-2014, the contents of which are self-explanatory.
>
> Secondly and in any event, it is submitted that the FtTJ has misdirected himself in law at [34] by considering that the best interests of the child are a *'paramount'* consideration rather than simply a primary consideration, which has resulted in the FtTJ treating the best interests of the child as dispositive in this appeal, see [36(6)].
>
> Reliance is placed on ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department [2011] UKSC 4 where at:-

> ’25. *Further, it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as ‘a primary consideration’. Of course, despite the looseness with which these terms are sometimes used, ‘a primary consideration’ is not the same as ‘the primary consideration’, still less as ‘the paramount consideration.’*

The materiality of this error further illustrated in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, where it was said at:-

> ’44. *These two characteristics are vouchsafed by authority of the House of Lords and the Supreme Court. With great respect they are capable, if not carefully understood, of investing child cases with a uniform prevailing force which yields no or little space to the context in hand. As for the first characteristic, the key phrase is of course ‘a primary consideration’. It appears in ZH and subsequently, but is taken from Article 3(1) of the UNCRC, so the choice of words may be regarded as having particular significance. What sense is to be given to the adjective ‘primary’? We know it does not mean ‘paramount’ – other considerations may ultimately prevail. And the child’s interests are not ‘the’ but only ‘a’ primary consideration – indicating there may be other such considerations which, presumably, may count for as much.*”

16. Permission to appeal was granted by a First-tier Judge on 11 April 2017 who commented that the judge’s findings were not particularly clear. In the light of the findings that the Secretary of State had not made out her claim under the suitability grounds an assessment of the situation under Appendix FM should have formed part of the assessment within the decision. However the judge had gone on to consider Article 8 outside the Rules without considering Appendix FM “which is directly relevant to the assessment of where the public interest lay in the proportionality assessment. He appears to have treated Article 8 as a stand alone provision”.

17. The judge did not find the ground in relation to the appellant having accepted he had previous convictions particularly impressive as the burden lay on the Secretary of State to prove the matter. The judge noted the argument that the judge had erred in treating the best interests of the children as paramount rather than as a primary consideration and found that the second ground had merit as the judge appeared not to have considered the appellant’s circumstances in relation to the Immigration Rules and failed to assess the public interest against that background.

18. At the hearing before me Ms Isherwood applied to introduce the evidence of the appellant’s subsequent convictions which Counsel resisted on the basis that there had been no application under the Rules and no explanation for the delay. The burden lay on the Secretary of State – reference was made to **Muhandiramge (Section S-LTR.1.7) [2015] UKUT 675 (IAC)**. There was an evidential burden on the Secretary of State. I was also referred to **Secretary of State v Shehzad [2016] EWCA Civ 615**.

19. The appellant had not denied having convictions and permission had been granted on all the grounds. Reference was made to **MA (Pakistan) [2016] EWCA Civ 705** where, at paragraph 52, the principles in **Zoumbas v Secretary of State [2013] UKSC 74** were set out. The best interests of a child must be "a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration".

20. The judge had not gone through the other aspects of the legal principles set out, in particular he had not asked the right questions in an orderly manner, the fourth principle. Although the matter had come before the Tribunal on a previous occasion that had been before the change in the Rules.

21. The appellant had acknowledged his criminal convictions. The appellant could have returned to Jamaica and applied for an entry clearance. If there was a material error of law the appellant's subsequent convictions would be submitted.

22. Counsel submitted that the first appeal had been allowed and the appellant's family life had strengthened since then. The First-tier Judge had heard all evidence from the appellant and his wife. He had turned to consider proportionality and could not be criticised in deciding as he did. There was an evidential burden on the Secretary of State to put in the convictions. The ground relied on by the Secretary of State had been described as not particularly impressive when permission to appeal was granted. While it was accepted that the best interests of the children were a primary rather than a paramount consideration the Judge was correct to refer to the best interests of the children and reference was made to **MA (Pakistan) [2016] EWCA Civ 705** at paragraph 116.

23. Ms Isherwood submitted in reply that there had been no Rule 24 response. The judge had erred in referring to a "paramount" consideration and it was not a typographical mistake. It was an error of approach. The appellant did not meet the Rules and what was said in **SS (Congo)** was of relevance.

24. At the conclusion of the submissions I reserved my decision. I have carefully considered all the material before me. I remind myself that I can only interfere with the decision if it was materially flawed in law.

25. It does appear that the judge neglected to consider the appellant's case under the Rules and I cannot improve on the way in which it was put when permission to appeal was granted by the First-tier Judge. The case should have been dealt with in an orderly way had the judge found that the Secretary of State had not made good the allegations about the appellant failing to comply with the suitability requirements. The judge appears to have misunderstood the learning on what consideration must be given to the best interests of the children – as Ms Isherwood submitted it is quite clear that the best interests of the children while a primary consideration are not – as the extract from **ZH (Tanzania)** referred to above makes clear - the primary consideration, still less the paramount consideration. It is quite clear that there is a distinction between the words primary and paramount although they may be loosely used.

26. Furthermore the judge failed to remind himself that matters had moved on since the previous determination – the Rules had changed.

27. While of course the Secretary of State should have supplied the First-tier Judge with the material to support the allegations that the appellant had undeclared convictions, in mitigation it may be mentioned that issue had not been taken by the appellant in the grounds against the decision with these convictions. The appellant admitted he had convictions although the judge did not consider this to be sufficient.

28. It was not apparently appreciated at the hearing by either side or indeed by me that the Secretary of State had taken steps albeit after the hearing to rely on the appellant's previous convictions.

29. The grounds dated 11 November 2016 were compiled by Stephen Whitwell. It is described as form IAFT4. Mr Whitwell says in his cover note "Please find attached completed IAFT4 appeal form and associated determination". There is a letter from Mr Whitwell on 11 November 2016 with attachments addressed to "Dear Colleague" and stating:

> "Please find attached the IAFT-4, associated determination and P and C check for the appellant."

30. It appears that when the grounds of appeal were sent out to the parties the associated documents were not reproduced. I have set out ground 8 above but it would appear that the draughtsman was anticipating that the appellant's antecedents would be attached to the grounds. They appear as a separate part of the court file and are dated 11 November 2016 – after the decision of the First-tier Judge.

31. None of this alters the position that those antecedents should have been placed before the First-tier Judge and was not. However it does mitigate somewhat the points taken on delay thereafter.

32. I found that the determination of the First-tier Judge was materially flawed in law.

33. I understand that all parties now have a copy of the appellant's antecedents. The appellant has had or will have an opportunity to see whether these antecedents are disputed.

34. In the particular circumstances of this case I am satisfied that there is a material error of law in the determination for the reasons I have given earlier. While Counsel is anxious that there should not be a *de novo* hearing I am satisfied that that is the right course in this case. I am also satisfied that it would be right to grant the application to admit the convictions at the resumed hearing providing the appellant has had the opportunity to go through them. I do this in the light of the various points I have made above. It seems also appropriate to note that the issue of a person's convictions may not be without relevance to the consideration given to the best interests of that person's child, quite apart from general public interest considerations. For example, a child's best interests might more readily be found to be compromised if that child

was cared for by a parent of good character and it was proposed to remove that parent than if the parent was a persistent offender. In the latter case the position might – I stress that word – be more nuanced, but it would always depend on a careful examination of the individual circumstances.

35. The appeal must be heard *de novo* before a different First-tier Judge.

Notice of Decision

36. Appeal allowed to the extent indicated

Anonymity Order

37. The First-tier Judge made no anonymity order, no anonymity order was applied for, and I make none.

Fee Award

38. The First-tier Judge made a fee award in the sum of £140. The judge relied in part on the Secretary of State's failure to adduce the appellant's antecedents in evidence and in the light of that admitted failure I have decided that the fee award should stand notwithstanding the other defects in the decision and the fact that the respondent has been successful in overturning the judge's decision.

Signed Date 26 May 2017

G Warr, Judge of the Upper Tribunal