



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01227/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2017**

**Decision & Reasons
Promulgated
On 10 January 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[S G]

(~~anonymity direction not made~~)

Respondent

Representation:

For the Appellant: Mr Bramble Senior Home Office Presenting Officer.

For the Respondent: Mr M Alison instructed by Owen Stevens Solicitors.

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Herbert, promulgated on 20 March 2017, in which the Judge allowed the appeal under both the Immigration Rules and ECHR, articles 3 and 8.

Background

2. [SG] is a citizen of Jamaica born on [] 1989 who appealed against a decision by the Secretary of State to refuse his human rights claim and to maintain an order for his deportation from the United Kingdom signed on 28 January 2009.
3. [SG] arrived in the United Kingdom on 17 July 1996 when he was granted 6 months leave to enter as a dependent of his mother. On 29 August 2002, he was granted indefinite leave to remain.
4. On 28 June 2008 [SG] was convicted at Lewes Crown Court on two counts of possessing a Class A drugs with intent to supply, crack cocaine, two counts of possessing a Class A drug with intent to supply, heroin, and one count of possessing a Class C controlled drug with intent to supply. [SG] was sentenced to 30 months imprisonment for each offence relating to the Class A drugs and five months imprisonment for the other offence to be served concurrently. A deportation order was made on 29 January 2009.
5. The Judge records the procedural history involving subsequent decisions and judicial review proceedings which led to the Secretary of State, on 7 January 2016, refusing to revoke the deportation order and the subsequent appeal.
6. The Judge, having reviewed the evidence, sets out findings of fact from [100] of the decision under challenge. The Judge accepts that the offending behaviour in 2008 was very serious and one which applying the relevant law meant that deportation under paragraphs 339 and 339A is in the public interest unless it can be outweighed by other factors which are very compelling circumstances over and above those in paragraph 399 and 399A [100]. The Judge confirms he has had regard to the decision of the Supreme Court in *Hesham Ali [2016] UKSC 60* [101] and the social revulsion for drug offences and the clear public interest in the deportation of foreign criminals as their presence is not conducive to the public good [103]. The Judge also refers to section 117 of the 2002 Act.
7. In relation to [SG]'s family circumstances; the Judge finds he has established a significant family and private life in the United Kingdom and that he is married to a qualifying partner who is a UK citizen and that he is culturally integrated into United Kingdom. [SG] is 28 years of age and the Judge finds it would be unduly harsh given his mental vulnerability, lack of family or cultural ties to Jamaica, and the absence of any employment or accommodation for his family to turn to, which made it unduly harsh for him to return to Jamaica. The Judge finds very significant obstacles to [SG]'s reintegration into Jamaica after a 21-year absence especially in light of his underlying serious mental illness [108 - 109].
8. The Judge finds that as a result of the vulnerability of [SG] he is at serious risk of suicide [113] before finding at [117] that [SG] does have an extremely serious mental health condition and that although there are mental health services in Jamaica the question is whether he can possibly access those services in Kingston or elsewhere without

relatives or friends to turn to for support. The Judge finds [SG] does not have that safety net and that it would be completely speculative to suggest that he could find it in sufficient time to prevent significant self-harm or suicide. The Judge finds that there is a clear causal link between the act or threatened act of removal or expulsion and treatment that would violate [SG]'s article 3 rights and that there is a high degree of likelihood that [SG] would, as he has done already, seek to take his own life and would do so either before he was deported to Jamaica or upon landing there [119].

9. Having found a breach of article 3 the Judge went on to consider article 8 ECHR by reference to the five-stage test formulated in the case of *Razgar*. The Judge notes relevant factors at [136] but finds that even bearing in the mind the need to maintain immigration control and the strong presumption in favour of deportation of foreign criminals, the damage that will be inflicted upon [SG] and his wife by deportation will be disproportionate to the need to maintain immigration control. The Judge therefore allowed the appeal by reference to article 8 ECHR too.
10. The Secretary of State appealed. Permission to appeal was granted by another judge of the First-tier Tribunal on the basis it was arguable the Judge materially erred in the application of the decisions in *Hesham Ali* and *JZ (Zambia)* and did not resolve conflicts of evidence and speculated.

Error of law

11. On behalf of the Secretary of State Mr Bramble indicated he was relying upon the grounds seeking permission to appeal only.
12. Ground one asserts the Judge may have erred in focusing upon the findings in *SS (Congo)* in light of the findings of the Supreme Court and has made material errors of law when applying the guidance of the relevant authorities. Such a claim has no arguable merit. The Judge noted all relevant case law and even if *SS (Congo)*, in which it was stated that if the case fails under the rules there are only a very limited number of circumstances where it can succeed outside the rules under article 8, preceded the decision of the Supreme Court it is clear the Judge was aware of the need to undertake an assessment of the appeal by reference to article 8 ECHR.
13. The Rules are still relevant to assessing the proportionality of the decision as they set out the Secretary of States view for how the human rights aspects of a case should be assessed. The Rules therefore form a proper starting point for any assessment of the merits of an appeal. The Judge considered the Rules and found [SG] was able to succeed thereunder, indicating on the basis of the Secretary State's own interpretation of the weight to be given to a particular matter, the appellant was able to succeed. If so, it must be accepted the decision to deport is not proportionate and that to do so would be a breach of article 8 ECHR. The Judge did not, however, stop there but proceeded to consider the *Razgar* test [134 - 142], factoring

into the equation those matters in the appellant's favour. The Judge had referred to section 117 earlier in the decision and was clearly aware of the need to consider the same. No error of law material to the decision is made out on this ground.

14. Ground 2 asserts a failure to resolve conflict in the evidence and asserts the Judge speculated in relation to certain aspects of the decision. The grounds assert the Judge failed to give clear reasons why previous findings of fact should not be followed and it is submitted that the previous finding should have been the starting point for the Judge and that in not taking this approach he has ignored the *Devaseelan* principles.
15. The Judge was aware of earlier proceedings and make specific reference to them at [19] of the decision under challenge. The Judge reminds himself of the *Devaseelan* principle at [30] and sets out the Secretary of State's case in relation to the previous decisions from [31 - 35] of the decision under challenge. The Judge was aware of the Secretary of State's view that there was no reason to overturn the original findings First-tier and Upper Tribunal [40]. The Judge, however, did not agree with the Secretary of States view and at [139] states "Notwithstanding on the particular facts of this case, I fundamentally disagree with the findings of fact of the First-tier Tribunal and to some extent with the Upper Tribunal. I have cogent reasons for doing so which I have attempted to set out. I have had the benefit of in-depth new evidence that was simply not available from both the Appellant and Mrs Johnson and the appellant's wife." The Judge was entitled to depart from the previous findings if the evidence justified such an approach. The Judge concludes on the evidence he was asked to consider that the evidence did justify a different conclusion. No procedural error or other error of law has been identified in relation to this aspect of challenge.
16. Ground 3 asserts the Judge failed to give reasons why the requirement for medical treatment in Jamaica was not satisfactory. The author the grounds asserts the failure to give reasons as to how [SG] met the high threshold of article 3 is in error of law and that the Judge should not have departed from previous findings. This ground fails to identify any arguable error. The Judge gives adequate reasons for why he considered [SG]'s current circumstances would lead to a real risk of suicide as a result of his mental health conditions sufficient to breach article 3. The ground is, in reality, no more than a disagreement with findings of the Judge which are adequately reasoned and within the range of those available to the Judge on the evidence.
17. Ground 4 challenges the Judge's findings at [136]. No arguable error arises. The Judge clearly sets out the nature of the protected rights relied upon, the factors in favour of [SG] and the Secretary of State before arriving at his conclusion. Article 3 is an absolute right and not a proportionate right and in light of the fact that no sustainable challenge to the article 3 finding has been made out it is arguable the article 8 aspects of the case are arguably academic, for even if the Secretary of State had shown that the Judge had erred in relation to

the article 8 assessment it would make no difference in light of the sustainable article 3 finding.

18. The assertion in the grounds that the Judge does not give clear reasons for why the appeal was allowed has no arguable merit and amounts to no more than a disagreement with the findings made. The Judge gives clear reasons for why [SG] was able to succeed under the Immigration Rules and ECHR. Whilst the Secretary of State may not like the fact the appeal has been allowed that is not test.
19. The Judge adopted a structured approach to assessing the evidence before him and it is not made out that the conclusions reached are outside the range of those reasonably available to the Judge on the evidence made available.
20. It is the finding of this tribunal that the Secretary of State has failed to discharge the burden of proof upon her to the required standard to establish any error of law material to the decision to allow the appeal.

Decision

- 21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 8th of January 2018