Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09447/2017

THE IMMIGRATION ACTS

Heard at : Field House
On : 27 September 2018

Decision Promulgated
On : 10 October 2018

Before

THE HONOURABLE LADY RAE
SITTING AS JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

SH
(ANONYMITY ORDER MADE)
Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Ms D Revill, instructed by D J Webb & Co Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing SH's appeal against the respondent's decision to refuse his human rights claim and to refuse to revoke a deportation order previously made against him.

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2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and SH as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Immigration History

3. The appellant is a citizen of Jamaica born on 23 June 1973. He first entered the United Kingdom on 4 June 1999 using an alias, having been refused entry and returned to Jamaica in December 1998. He was granted leave to enter until 3 December 1999 and was subsequently granted further leave as a student until 31 January 2001. He left the UK at some point and then returned on 7 July 2001 and was granted temporary admission, but failed to report and was listed as an absconder.

4. On 13 March 2002 the appellant was convicted, under an alias, of possessing a controlled drug with intent to supply – Class A Crack Cocaine and possessing a controlled drug with intent to supply – Class A Heroin and was sentenced to two years for each offence, running concurrently. On 9 October 2006 the appellant was encountered by the police under the same alias, and served with a liability to removal as an overstayer. On 15 January 2008 the appellant was convicted under the same alias of using a vehicle whilst uninsured and he served one day in detention. On 26 February 2008 he was convicted under the same alias of possessing a controlled drug with intent to supply – Class A Cocaine and possessing a controlled drug with intent to supply – Class A Heroin and was sentenced to four years' imprisonment for each offence, running concurrently. On 16 May 2008 the appellant submitted an application to return to Jamaica under the Assisted Voluntary Returns Scheme. On 17 February 2009 he was served with liability to automatic deportation and on 23 February 2009 was made the subject of a deportation order under his alias. He was deported to Jamaica on 11 March 2009 under the Early Removals Scheme.

5. On 5 April 2010 the appellant was encountered at Ramsgate Port attempting to enter the UK on a false passport in another alias and was detained. At an interview he admitted his true identity to be SH. As he had returned to the UK in breach of the conditions of his early release he was recalled to prison, issued with a notice of liability to automatic deportation and deported to Jamaica again on 3 January 2011.

6. On 11 January 2015 the appellant was encountered when arrested by police on suspicion of drink driving and theft. He was issued with a notice of liability to administrative removal and admitted, during an interview, to have re-entered the UK clandestinely in March 2012. On 23 April 2015 the appellant was issued with a Statement of Additional Grounds and he returned the statement requesting leave to remain on the basis of his relationship with his British child.

7. On 10 February 2016 the appellant submitted an application for a derivative residence card as the primary carer of a British citizen. That application was refused together with a decision made on 11 October 2016 to

refuse his human rights claim. On 26 June 2017 the appellant made further submissions and the decision of 11 October 2016 was withdrawn and re-made on 16 August 2017.

8. In that decision the respondent considered the appellant's human rights claim which was made on the basis of his relationship with his partner DG, his son D, born on 21 December 2005, and another child T, both of whom were the sons of his former partner CO. The respondent considered that paragraph 399D of the immigration rules applied, as the appellant had entered the UK in breach of a deportation order, and that he could not, therefore, benefit from the exceptions in paragraph 399 and 399A and had to meet the same test as in paragraph 398(a), of very exceptional circumstances or very compelling circumstances over and above the exceptions to deportation. The respondent did not accept that the appellant played a significant and meaningful role in his son D's life and did not accept that he had a genuine and subsisting parental relationship with him. The only evidence of any role he played in D's life consisted of an unsigned letter from his mother and a letter from the child's school confirming that he collected him from school on occasions. The respondent noted from the appellant's application for a derivative residence card that his son lived 13 miles away. The respondent considered in any event that it would not be unduly harsh for the appellant's son to live in Jamaica or for his son to remain in the UK whilst he was deported. There was no independent evidence to show that CO required the appellant's support in raising D because of her other son, T's autism. With regard to the appellant's claimed partner DG, the respondent found there to be no evidence of such a relationship or of DG's immigration status or nationality. The respondent found that the appellant could not, therefore, meet the requirements in paragraph 399(a) or (b). The respondent considered that the appellant could not meet the requirements in paragraph 399A on the basis of his private life as he had not been in the UK lawfully for most of his life, he was not socially and culturally integrated in the UK and there would be no very significant obstacles to his integration in Jamaica. The respondent considered that there were no very compelling circumstances outweighing the public interest in deportation and that his deportation would not breach his Article 8 human rights. Consideration was given to the application to revoke the deportation order under paragraph 390 of the immigration rules and it was concluded that the order should not be revoked.

<u>The Appellant's Appeal</u>

9. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 20 March 2018 by Judge Clarke. The Tribunal heard from the appellant and his partner CO. He rejected the suggestion that T was the appellant's step-son, as the appellant was not married to T's mother CO. The judge noted that the appellant also had a daughter, SH, who lived in the UK and was 22 years of age. The judge considered the exceptions to deportation. He found that the appellant could not meet the requirements of paragraph 399A as he had not been lawfully resident in the UK for most of his life, he was not socially and culturally integrated in the UK and there were no very significant obstacles to integration into life in Jamaica. The judge noted

that the appellant and CO did not cohabit and that the boys lived with her. He accepted that the appellant had a genuine and subsisting relationship with D and that it would be unduly harsh for D to leave the UK and live with the appellant in Jamaica. He accepted that the appellant had a level of contact with T, was involved in his day to day care but did not accept that he had any parental responsibility for him. The judge found that it was in the best interests of both boys for the appellant to remain involved in their lives and, on the basis that the appellant played an integral part in the lives of D and T, that that constituted exceptional circumstances outweighing the public interest in the appellant's deportation. The judge concluded that there were very compelling reasons why the appellant should not be deported and allowed the appeal under the immigration rules and on human rights grounds.

10. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge had failed to assess the exceptionally high strength of the public interest in the appellant's removal from the UK and that none of the factors identified in the determination amounted to very compelling or exceptional circumstances. The grounds asserted that the judge had failed to give clear reasons why any of the evidence regarding the appellant's claimed contact with his son should be accepted. It was asserted further that the judge had failed to identify any factors beyond the best interests of the children either within the rules or exceptionally outside the rules to allow the appeal. The judge, although quoting the relevant immigration rules and requirements, failed to then apply them within the body of the determination rather than focussing on separate free-standing Article 8 considerations in particular in relation to the best interests of the children.

11. Permission to appeal was granted in the First-tier Tribunal on 17 July 2018 on all grounds. The matter then came before us for a hearing.

Hearing and Submissions

12. Mr Wilding relied upon the grounds of appeal. He submitted that there were two main complaints about the judge's decision: a failure to apply the correct structured approach and a failure to weigh and properly recognise the public interest. In regard to the first complaint, the judge's findings on the family life exceptions, from [86] onwards, were confusing. There was no reference to the immigration rules and no consideration of unduly harsh consequences for the appellant's child if separated from the appellant. The judge was required to consider whether there were very compelling circumstances over and above such a consideration and therefore the determination was incomplete. The judge found that the best interests of the child trumped everything and failed to carry out a full assessment. This was far from being a unique case. There was no evidence from professional or other organisations as to the appellant's role with the children, aside from a passing reference from the school about him collecting D from school on occasions. The judge failed to recognise that the immigration rules were all-encompassing and erred in his reliance on The Secretary of State for the Home Department v SS (Congo) & Ors [2015] EWCA Civ 387. In regard to the second complaint, the judge failed to give proper weight to the public interest, considering it only in

the context of his findings on paragraph 399A, and made a surprising comment at [104] as to the significant weight to be attached to the fact that the appellant had not committed further criminal offences since 2007, whilst ignoring his entry to the UK on two occasions in breach of the deportation order, which was perverse. The judge had made material errors of law and the decision should be set aside and re-made by dismissing the appeal.

13. Ms Revill submitted that there was no material error of law in the judge's decision. The grounds had not included any challenge on the basis of a lack of findings on separation being unduly harsh and the Tribunal therefore had no jurisdiction to consider that. In any event there was an implicit finding by the judge that it would be unduly harsh for the children to be separated from the appellant. The judge did set out the importance of the public interest and it could be inferred that he took that into account in the proportionality balancing exercise. Ms Revill accepted that the judge had erred in his reference to SS (Congo), but submitted that that was not material. The judge's findings did not meet the high threshold of perversity. The judge was entitled to accept the appellant's evidence as to the role he played with the children and to find that there were very compelling circumstances over and above the unduly harsh test.

14. Mr Wilding reiterated the submissions previously made in response.

Legislative Framework

15. In so far as is material to this case, the relevant rules relating to deportation state:

> **"Revocation of deportation order**
>
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
>
> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 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."
>
> **"Deportation and Article 8**
>
> A398. These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(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;

(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

(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.

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

(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

(i) the child is a British Citizen; or

(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 …"

399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."

16. In so far as is material, the relevant statutory provisions relating to deportation in section 117 of the Nationality, Immigration and Asylum Act 2002 state as follows:

"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…"

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

Discussion and Findings

Error of Law

17. We have no hesitation in finding that the judge's decision is materially flawed and we find merit in both of Mr Wilding's grounds of challenge. Whilst Ms Revill submitted that it was not open to us to consider any error by the

judge in relation to a lack of findings on separation of the appellant and the children being unduly harsh when that was not pleaded in the grounds, it seems to us that [11] of the grounds makes it clear that there was such a challenge. Although not expressed in terms, it is clear that, by referring to factors beyond the best interests of the children within the rules, that must necessarily include a challenge to the judge's findings on paragraph 399(a) and the question of undue harshness.

18. We agree with Mr Wilding that the judge made no specific finding on whether separation of the children from the appellant would be unduly harsh. At [95] he made a specific finding that it would be unduly harsh for D to move to Jamaica with the appellant, but he made no such finding on the question of separation for the purposes of paragraph 399(a)(ii)(b). It could be inferred, we accept, that he made initial and indirect findings on the matter by his comments at [101] on the importance of face to face contact and at [105] on the significant role the appellant played in the lives of both boys. However, as the respondent properly asserts, the judge's focus was on the best interests of the boys and there is little else in his decision by way of a relevant assessment of "unduly harsh" beyond those best interests. Indeed at [110] the judge commented that he had found that the appellant did not satisfy the requirements of the immigration rules and at [106] he skipped to the next stage of "exceptional circumstances" and did so without any balancing of relevant matters, in effect finding that the boys' best interests trumped all other matters and was the entire answer.

19. In the circumstances it is plain that the judge materially erred in failing to follow the correct, structured approach, but in addition the findings that he made in following his own approach were clearly contradictory and confusing and it is not clear how he reached the conclusions that he did. At [87] the judge noted that the appellant did not live with D or the mother of the two boys and at [90] he referred to inconsistencies in the evidence of frequency of contact between the appellant and D. At [91] he found that the appellant and the boys' mother were trying to embellish their evidence. At [98] he observed that the appellant was not named in any of the documentary evidence as an adult with any involvement in T's life and certainly not as someone with parental responsibility for him. At [99] the judge was prepared to accept that there was a degree of contact between the appellant and T, but only on the basis of there being contact between him and his biological son D who lived with T. On the basis of such findings it is difficult to see how the judge managed to achieve the significant leap to the conclusion that the appellant's role in the boys' lives was so exceptional that it outweighed the public interest in his deportation, let alone that separation would be unduly harsh. We have to agree with Mr Wilding that that was bordering on perverse, if not reaching the very high threshold of perversity.

20. We also agree with Mr Wilding that the judge failed to weigh in and properly recognise the public interest factor when considering family life. At [73] and [74] the judge referred to the seriousness of the appellant's crimes and his disregard for the rule of law by repeat offending and re-entering the UK in breach of the deportation order. He factored that into his assessment of

private life under paragraph 399A, at [82]. However those considerations did not feature at all in the judge's assessment of family life from [86] onwards and he made only a passing reference to the public interest in deportation cases at [106]. Like Mr Wilding, we find the judge's observation at [104] to be surprising and again bordering on perverse. The judge attached significant weight to the fact that the appellant had not committed further criminal offences since 2007 and had not involved himself in criminal activity in 10 years, yet he completely ignored the fact that he had re-entered the UK in breach of the deportation order on two occasions, that he had used a false passport in 2010 when he returned to the UK and that he was arrested in January 2015. Whether or not those incidents led to criminal convictions, the fact remained that they were significant matters which completely undermined the judge's assessment of weight at [104]. In the light of such significant issues the judge's conclusion, that the circumstances of the two boys was sufficient to amount to exceptional circumstances outweighing the public interest, lacks any proper basis and is simply unsustainable.

21. For all these reasons we find that the judge made significant and material errors of law in his decision and that his conclusions with regard to family life under Article 8 cannot stand.

22. As for the re-making of the decision, Mr Wilding asked that that could be undertaken on the basis of the evidence before us without the need for a further hearing. Ms Revill asked that there should be an opportunity for further oral evidence to be given. However she confirmed that there was no further documentary evidence and that the witnesses would adopt the statements previously made. In the absence of any indication that there was a change in circumstances, and given that there was no further documentary evidence to be produced, we saw no need for there to be a further hearing and we have therefore proceeded to re-make the decision on the evidence before us, as we advised the parties we would do in the event of us setting aside the First-tier Tribunal's decision.

Re-making the Decision

23. In the light of our findings above there is little more that we need to add in re-making the decision as it is clear from our conclusions on the error of law that the appellant's appeal must fail.

24. The appellant falls within paragraph 399D of the immigration rules, having entered the UK in breach of a deportation order previously made against him, and therefore has to demonstrate very exceptional circumstances justifying why the deportation order should not be enforced. The provisions in paragraphs 390 and 390A also apply to the appellant as his application has been considered as an application to revoke the deportation order and that in turn leads to a consideration of paragraph 398. In light of the length of his sentence the appellant cannot benefit from the exceptions in paragraphs 399 and 399A, and has to show very compelling circumstances over and above the those described in paragraph 399 and 399A. Accordingly, under 399D and 398 the appellant has to meet an equivalent test of very exceptional/ compelling

circumstances. In considering whether he could demonstrate such circumstances over above those in paragraph 399 and 399A the starting point has to be a consideration of those paragraphs.

25. The First-tier Tribunal's findings on paragraph 399A have not been the subject of a challenge and were properly made. They therefore stand.

26. With regard to paragraph 399(a) and a consideration of the children, we note the following unchallenged findings of the First-tier Tribunal which we adopt: The boys do not live with the appellant but with their mother. T is not the appellant's biological son or step-son, but is the son of his former partner CO. There is regular contact between the appellant and both boys, albeit that the evidence in that regard is not consistent. The appellant has no parental responsibility for T and is not named in T's Education, Health and Care Plan (on the basis of his autism) as one of his supporters, but D is named as one of his supporters.

27. We consider it clearly to be in the best interests of both boys to remain living in the UK with their mother CO and we accept that it would be in their best interests for the appellant to remain in the UK to continue the level of contact they currently have. We also accept that, for the reasons given by the First-tier Tribunal at [95], it would be unduly harsh to expect D to relocate to Jamaica with his father. None of those findings are controversial.

28. However, turning to paragraph 399(a)(ii)(b) we do not accept that it would be unduly harsh for D or T to remain in the UK without the appellant. We take account of the fact that T is not the appellant's child or step-son and that the appellant is not named as one of his supporters or a person with any parental responsibility over him. We take account of the fact that the appellant and D do not live together and that evidence of the level of contact between them is inconsistent. Even accepting the level of contact claimed, we note that the appellant has been in and out of D's life owing to his previous periods of imprisonment and living in Jamaica following deportation. There is no independent evidence from a professional about the nature of the relationship between the appellant and D and the impact that separation would have upon him. Therefore, even though we accept that it would be in D's best interests to have his father in the UK, his best interests carry only limited weight. Balancing that weight against other factors, we consider that the significant public interest in the appellant's deportation far outweighs the children's best interests when considering the nature and seriousness of the appellant's offending and his appalling immigration history. We consider that the appellant cannot meet the requirements in paragraph 399(a).

29. The focus of the evidence and the appellant's case was on his relationship with the two children and, in light of our findings on paragraph 399(a), there is in reality nothing further to consider. There is no evidence at all to demonstrate anything approaching compelling or exceptional circumstances, let alone very compelling or exceptional circumstances, outweighing the public interest in the appellant's deportation. Accordingly the appellant is unable to meet the requirements in paragraph 398 to demonstrate that his deportation would be in

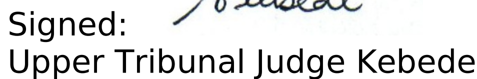
breach of Article 8. His deportation is entirely proportionate and there are no compassionate or other circumstances justifying revocation of the deportation order under paragraph 390 and 390A of the immigration rules. The appellant has failed to show that paragraph 399D does not apply to him. His deportation is plainly in the public interest and his appeal against the refusal of his human rights claim is dismissed on all grounds.

DECISION

30. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and the decision of the First-tier Tribunal is set aside. We re-make the decision by dismissing SH's appeal.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. We continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.



Signed:
Upper Tribunal Judge Kebede Dated: 4 October 2018