Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12764/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 1st October 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

M W
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Sanghera (Solicitor), J M Wilson
For the Respondent: Mrs H. Aboni, Senior HOPO

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge J L Bristow, promulgated on 29th March 2018, following a hearing at Birmingham on 19th March 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Jamaica, and was born on 28th August 1980. He appeals against the decision of the Respondent dated 28th May 2014, refusing his application for leave to remain in the UK on the basis of his Article 8 rights.

The Appellant's Claim

3. The essence of the Appellant's claim is that he married a [LW], on [~] 2014. A daughter of the marriage was born on [~] 2014. She is now 3 years of age. There had been a rejection of that claim on 28th May 2014 and on 26th March 2015. That had been appealed. An adverse decision in the First-tier Tribunal had been reversed by the Upper Tribunal on 14th February 2017. Thereafter on 9th March 2018 a second child had been born to the Appellant and his wife. The decision of Judge Bristow was against that background.

4. The Appellant's application had been refused essentially on "suitability" grounds because of his criminal activities, and it was decided that the Article 8 claim inevitably fell to be refused in those circumstances.

The Judge's Findings

5. The judge had regard to the fact that the Appellant admitted that there had been convictions at Birmingham Magistrates' Court in 2012. However, he disputed that he had a caution administered to him for obstructing a police constable on 5th October 2009. He disputed that he was associated with drugs and gangs on the basis that reference had been made to an entirely different person in this regard and that he had been wrongly implicated.

6. The judge went on to consider these matters and observed that the Appellant's assertion that the caution for obstruction of the police constable on 5th October 2009 not being his, was not plausible. This is because the log labelled 20F2606709 clearly set out why the giving of false details did not occur on the same day as the assault. It was not credible that another man was arrested on 5th October 2009 (see paragraph 46). The judge observed that the Appellant was cautioned for the offence on 18th March 2010 (paragraph 47). As for the allegation that there were numerous police intelligence logs (at pages 43 to 59 of the Respondent's second bundle, and pages 39 to 123 of the Respondent's third bundle), confirming that the Appellant was a class A drug dealer known as "Black K", the judge held that this was simply not made out as an allegation, because, for one thing, the Appellant did not have a shaved head when he appeared at the Tribunal and his vehicle was fuller than the one described in the two logs (paragraph 60). The Appellant also had two tattoos, a teardrop under his right eye and the name of his son on his neck (paragraph 63). In conclusion, the judge found that the Respondent had not proved to the civil standard that the Appellant was a drug dealer. It had not been proved that he associated with gang and drug related activities (paragraph 70).

7. However, in relation to the Appellant's Article 8 claim, when it came to considering the family life, the judge was of the view that the Appellant's claim fell to be refused on the grounds that he had not been able to demonstrate that he satisfied the "suitability" requirements under S-LTRP.1.6. He had entered the UK unlawfully on a false passport. He had been cautioned for domestic violence. He had been cautioned for obstructing the police officer in relation to an assault. The judge recorded that "the Appellant sought to mislead the Tribunal by asserting that the caution was not his". It was said that he was then also convicted of offences on 14th March 2012. (Paragraph 73). In addition, the Appellant was expressly asked in his application form of 27th May 2014 (at page 13) whether he had ever been convicted of "any criminal offence in the UK or any other country?". The Appellant had answered "no". The judge observed that "that answer was given after 2010 and 2012 cautions and convictions and was plainly a failure by him to disclose material facts in relation to the application" (paragraph 74). Accordingly, the Appellant could not succeed under Appendix FM (paragraph 75). He could not succeed under paragraph 276ADE (paragraph 76).

8. The judge went on to hold that it was true that he had established a family life in the UK, and he was married, and had two very young children with his wife, together with another child by another woman (paragraph 80).

9. However, in looking at the question of disproportionate interference, given the legitimate public end sought to be achieved, the judge was not satisfied that the Appellant could succeed. This is because in **Hesham Ali [2016] UKSC**, it had been held that the critical issue for the Tribunal will be "the strength of the public interest in the deportation of the offender" and that "in general, only a claim that is very strong indeed – very compelling, as it was put in **MF (Nigeria)** – will succeed" (paragraph 84). The judge recognised that that guidance was given in the context of deportation. However, the judge went on to say that, "the principles are applicable to my decision" (paragraph 85). That being so, because the Appellant could not show that there were "very compelling circumstances", the appeal would fail. The judge set out (at paragraph 86) all the matters that went against the Appellant. He also set out all the matters that were in favour of the Appellant (at paragraph 87). However, in the end, balancing out the two sets of circumstances, the judge was of the view that, "the Appellant has not proved to the required standard that there are very compelling circumstances which outweigh the clear public interest in the maintenance of effective immigration controls" (paragraph 88).

10. The appeal was dismissed.

The Grounds of Application

11. The grounds of application state that the judge erred in applying too high a test when considering the suitability requirements of the Rules. Second, it was said that when assessing proportionality, the judge failed to take into account the Respondent's earlier grant of leave to the Appellant on

very similar facts, such that it must have been well within the knowledge of the Respondent what the Appellant's conduct was. Third, it was said that the judge wrongly took into account an incorrect answer, when the Appellant was asked whether he had ever been guilty of a criminal offence, and he had answered "no", because the Appellant had previously never provided such incorrect information, such that this was a mistake, rather than a deception. Finally, the judge failed to give weight to the rights and best interests of the Appellant's three children and to properly consider Section 117B(6) of the 2002 Act.

12. On 11th July 2018, permission to appeal was granted on the basis that it was arguable that the judge did not consider the best interests of the children as a primary consideration. He misapplied the provisions of Section 117B(6). When considering proportionality outside the Rules, it was arguable that the incorrect test of "very compelling circumstances" was applied (at paragraphs 84 and 88), which was applicable to deportation appeals, which was not the case here.

13. On 13th September 2018, there was a Rule 24 response by the Respondent Secretary of State. This made two points. First, that the judge did not err in relation to the "suitability" assessment. However, it was stated, secondly, that the reference to "very compelling circumstances" in an Article 8 assessment outside the Immigration Rules, was a mistake because the Appellant was not liable to deportation. Accordingly, the Secretary of State accepted that the judge had erred in law. The Upper Tribunal was invited therefore to remake the decision.

Submissions

14. At the hearing before me on 1st October 2018, Miss Sangera, relied on the grounds of application. First, she submitted that the judge had applied too high a threshold in relation to suitability. When the Appellant had answered "no" to whether he had been guilty of criminal offences in the past, this was plainly a mistake, because in a previous application the Appellant had disclosed everything and had been granted leave to remain. Indeed, even in the current application, what the Appellant had done was to have to set out at the outset his entire history, which did not set out to in any way to deceive the Respondent authority, which was telling as to his good faith in this matter.

15. The Appellant had been granted leave already outside the Rules on 3rd December 2014. His conduct, such as it was, was entirely known to the Respondent. Everything had been disclosed in the application. The Respondent had not found it disproportionate to refuse the Appellant leave in the light of his conduct previously. In any "suitability" assessment, the essential question was whether there was an attempt to mislead the Respondent, and this was a mischief that was targeted at SLTR.2.2, which is not what the Appellant had set out to do here. He had previously disclosed his conduct. There had previously been no attempt to mislead. This ought to have raised in the proportionality balance. It was wrong to simply isolate a particular answer, such as "no" and to conclude that on

this basis alone the Appellant was judged to have failed the "suitability" threshold.

16. If, submitted Miss Sanghera, she succeeded in demonstrating that the Appellant satisfied the "suitability" test, then, given the accepted the error by the Respondent Presenting Officer today, in relation to a very high test of "very compelling circumstances" having been applied by the judge in the proportionality exercise, the appeal must stand to be allowed, and she urged me to allow the appeal.

17. Second, and in the alternative, however, if this Tribunal was not so satisfied, then regard should be had to the fact that the matter should be remitted back to the First-tier Tribunal to consider the position of the children, of which there were three in this case, as well as a Section 117B(6) statutory requirement. The Appellant's witness statement makes it clear that family law proceedings were in process in relation to the first child (see the Appellant's bundle at page 19, paragraph 67, as well a paragraph 73) which described these proceedings, this matter had simply not been referred to by the judge, even though it was in the documentation. It had to be remembered that the best interests of the child was a primary consideration. A failure to even refer to the first child in this respect was an error.

18. For her part, Mrs Aboni relied upon the Rule 24 response. She submitted that it was accepted that there was a material error in relation to Article 8, when the judge applied a test, which was applicable to someone subject to deportation, namely, the "very compelling circumstances" test (see paragraph 88), which the judge had said did not outweigh the clear public interest in the maintenance of effective immigration control. However, the judge did not misdirect himself in relation to "suitability" considerations. The Appellant had not merely ticked the box saying "no". He had even denied that the criminal activities referred to were attributed to him. The Appellant had attempted to mislead. It was not material that the judge did not make findings here that the Appellant had set out to mislead. It was enough for the judge to say that the Appellant had disputed that the record in question related in him. Second, having said that, the matter needed to be remitted back to the First-tier Tribunal so that the best interests of the children could be considered, and the proceedings in the Family Court in relation to the first child could be looked at more specifically.

19. In reply, Miss Sanghera submitted that one had to look at paragraphs 55 to 70 of the determination, to note that the judge had considered the allegation against the Appellant of "association with drugs and gangs", only to throw that out, as being something which the Respondent has simply not been able to prove. In the same way, the caution that had been handed to him, was dated 5th October 2009 (see paragraphs 46 to 47) but it had not been administered until 18th March 2010, and this was expressly recognised by the Respondent herself (see C5 at R1). Therefore, when the Appellant said that he had not been cautioned on 5th October 2009, he was entirely right, because the caution had not been

administered until 18th March 2010. Accordingly, he would succeed on the basis of "suitability" assessments.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. Whilst Miss Sanghera has sought to persuade me that the Appellant did not attempt to mislead when he answered "no" in relation to a very specific question that, whether he had any criminal offences, I am satisfied that this is not the case. The judge was entitled, as a fact-finding Tribunal, to conclude that giving a wrong answer to a question as simple as this, would have a tendency to mislead. This is despite the fact that other allegations, such as in relation to the Appellant's association with drugs and gangs, were not accepted by the judge, as being wrongly levied at the Appellant.

21. Second, however, that leaves the question, of the Article 8 assessment outside the Immigration Rules. Both sides are *ad idem* that the judge erred in applying the standard applicable to deportation cases of the need to show "very compelling circumstances" to a case where the Appellant here was not facing deportation. In these circumstances, the judge's conclusion (at paragraph 88) that, "the Appellant has not proved to the required standard that there are very compelling circumstances which outweighed the clear public interest in the maintenance of effective immigration controls", was unsustainable. This is especially in the light of what the judge set out (at paragraph 87) in relation to the position of the children, which it was recognised was one where the best interests would be served by there being able to live with their father, and the Appellant's relationship with his wife, Mrs [W], who the judge recognised "will need support" in that her latest child is only a few days old.

Notice of Decision

22. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed to the extent that it is remitted back to the First-tier Tribunal pursuant to practice statement 7.2(b) of the Procedure Rules, to be heard by a judge other than Judge Bristow, for the reasons that I have set out above.

23. An anonymity is order is made.

24. This appeal is allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 22nd October 2018