



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/32833/2011

THE IMMIGRATION ACTS

Heard at Field House  
On 3<sup>rd</sup> April 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR A B  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood (Counsel)  
For the Respondent: Ms A Fijiwala (Senior HOPO)

DECISION AND REASONS

1. This appeal has a long and protracted history. The Appellant, a male, and a citizen of Jamaica, born on 9<sup>th</sup> August 1959, had arrived in the UK with his family on 29<sup>th</sup> August 1973, and had been granted indefinite leave to remain. Following a series of criminal offences, involving theft, threatening behaviour, possession of Class A drugs, the Appellant served a prison sentence. He was then on 19<sup>th</sup> March 2010 issued with notice of liability to deportation. He appealed that decision whereupon it was heard by Immigration Judge Tiffen, in a panel hearing, on 5<sup>th</sup> October 2010. The Appellant's appeal was dismissed, whereupon on 9<sup>th</sup> March 2011, a deportation order was signed and removal directions were set for 24<sup>th</sup> March 2011.

2. The Appellant, a father of two UK born children, and one granddaughter, subsequently thereafter applied for a revocation of the deportation order, and this came for determination before Judge Rothwell on 19<sup>th</sup> December 2011, who after a panel hearing, rejected the application for revocation on 9<sup>th</sup> January 2012. Permission to appeal against that decision was thereafter granted by the Court of Appeal by Elias LJ at an oral hearing on 13<sup>th</sup> February 2013. The matter returned to the Upper Tribunal where Mr Justice Mitting, following a panel hearing, allowed the Appellant's appeal on 4<sup>th</sup> December 2013.
3. Thereafter the Secretary of State appealed the determination to the Court of Appeal on the basis that the Tribunal had materially erred because it applied the Rules on deportation as a "relevant matter", rather than a "complete code". Tomlinson LJ granted permission to the Secretary of State on 13<sup>th</sup> December 2014, and the appeal was subsequently allowed by consent (see bundle at 1-3). The effect of the consent order was that the Upper Tribunal's determination, allowing the Appellant's appeal was set aside, and the matter was remitted back to the First-tier Tribunal for further consideration.
4. When Judge Malone, heard the appeal on 26<sup>th</sup> October 2017 at Taylor House, the judge went on thereafter to allow the appeal, on the basis that the Appellant had no-one with whom he was in contact in Jamaica, had never been back since coming to the UK in 1973 at the age of 14, was now 58 years old, was particularly vulnerable, and that his mental vulnerability would be exacerbated, in that there was a report by Mr de Moronha to the effect that obtaining medical treatment would be very difficult in Jamaica for the Appellant and there was any risk that he would be overwhelmed by feeling of hopelessness that he might start harming himself.
5. The decision of First-tier Tribunal Judge Malone, promulgated on 23<sup>rd</sup> November 2017, allowing the Appellant's appeal, was appealed by the Respondent Secretary of State, and on 30<sup>th</sup> January 2018, the First-tier Tribunal granted permission, expressly on the basis that the judge erred in concluding that the Appellant was at risk as a perceived homosexual when the evidence of press coverage about his case confirmed the claim that he was gay to be fake. The judge had also erred with respect to the decision in **CP (Vietnam) [2016] EWCA Civ 488**. It is in these circumstances that the appeal now comes before me.

### **Submissions**

6. Ms Fijiwala, appearing on behalf of the Respondent Secretary of State, as Senior Home Office Presenting Officer, submitted that Judge Malone erred on law with respect to his findings. First, he held that the Appellant was an honest and reliable witness (see paragraph 37. However, it was plain that he was not. He claimed to have been reformed. Yet, as the judge recalled, "it was pointed out to the Appellant that he had told this Tribunal at the end of 2011 that he had reformed yet he offended again in 2015" (paragraph 52). This was an Appellant who had reoffended in 2014, 2015, and again in 2017. The PNC Report confirms this. These matters, submitted Ms Fijiwala, had a bearing upon the ultimate findings reached at paragraph 149, where the judge stated that, "I accept he is generally trying to change the direction of his life" because

it was plain that he was not. He had attempted to steal a purse, and got involved in a fight, in order to buy food, whilst he was in a food supermarket (see paragraph 47). Moreover, he had falsely claimed to have been a homosexual, and this was rejected outright by the judge (at paragraph 17) as the Appellant tried to avoid being deported to Jamaica.

7. Second, the judge was wrong, having rejected the Appellant's claim to have been homosexual, to then conclude that the false claim that he was gay was enough to bring him within Article 3 protection. The judge put this down to Jamaican attitudes against perceived homosexuality, and the press coverage that was given to the Appellant's case in 2015, but in doing so, the judge completely failed to address that the news items were concentrating on the Appellant's criminality and fake claims, in respect of his sexuality, in order to avoid deportation, and none of the press reports in Jamaica actually confirm that the Appellant is indeed gay. In fact, they confirm the opposite. If there was a backlash to the Appellant, it came from the British public's outrage at the Appellant's behaviour. It did not come from the Jamaican public. Yet, the judge went on to say that the fact that the Appellant continued to maintain that he was gay would probably arouse suspicion, that he really was gay, and make him vulnerable to violence in Jamaica. This, however, is entirely speculative. It is also speculative to suggest that the Appellant would be disadvantaged in the labour market because he would end up with no shelter or food. This was a case where the Appellant was plainly able to work and to form interpersonal relationships upon return. There was no adequate evidence to support a sustainable finding that he was at real risk of destitution. No evidence had been cited in the determination. Moreover, the Appellant's son, W, had confirmed that he would continue to help the Appellant if he was deported (see paragraph 98). Accordingly, as far as the judge's findings in relation to Articles 3 and 8 ECHR were concerned, he had plainly fallen into error.
8. Third, in coming to the conclusion that the refusal letter of 21<sup>st</sup> September 2011 had relied only on the 2009 convictions, without drawing attention to the previous offences which could not be taken into account, the judge had failed to give proper weight to Section 117C(6) of the NIAA 2002 which makes it clear that,
 

"... 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".
9. This was a case where two of the Appellant's sentences were for over seven years. As the judge was aware of the Appellant's criminality, and he had the Appellant's PNC Report before him, he was duty bound by the legislation to take into account all the matters that were in evidence and relevant not the public interest. The Appellant had clearly failed, within Section 117(C)(6) to show that there were any very compelling circumstances over and above those described in Exceptions 1 and 2.
10. Fourth, although the judge had found that the Appellant was integrated into UK society, he failed to take into account the fact that the Appellant had been convicted of offences, that had an adverse effect on those residing in the UK, such as to demonstrate a lack of social and cultural integration in this country. In the case of **SSHD v MG (Portugal) (C-400/12)**, it was stated in relation to an EEA national (which the Appellant

was not but the analogy applied) that, “whilst in prison a person cannot be a useful member of society at large; during that time such a person cannot as a general rule show integration into society” (at paragraph 31). In this case, the Appellant had contributed nothing to society, had spent a substantial period of time in a UK prison, with the number of convictions, and the finding of the judge must therefore be unsafe.

11. Finally, Ms Fijiwala submitted that the only Article 8 claim which would outweigh the public interest in a deportation case such as at present, where the Appellant had been sentenced to at least four years’ imprisonment, would be one which was exceptionally strong. This is clear from the fact that in **Hesham Ali [2016] UKSC 60**, it was confirmed that the passage of time does not dilute the seriousness of the offence or the public interest in deportation. Accordingly, the judge had erred in stating that, “the seriousness of the offences the Appellant has committed has diminished over the years” (paragraph 149), and provided no evidence for this assertion. The finding, in any event, failed to take into account the fact that there were older offences which had to be placed in the context of the Appellant’s continuing criminality, and his more recent offending. It also failed to take into account the full scope of public interest as set out in **AM [2012] EWCA Civ 1634** and in **N (Kenya) v SSHD [2004] EWCA Civ 1094**, which places an emphasis, as far as public interest is concerned, on the deterrent value, with respect to foreign criminal, and the maintenance of public confidence in an effective system of immigration control.
12. All in all, therefore, submitted Ms Fijiwala, the decision reached at by Judge Malone was unsafe, because the deportation of this Appellant was in the public interest, the judge had erred in holding that Rule 399A is capable of applying to this case, the finding by the judge that the Appellant was socially and culturally integrated into the UK was unsafe, the finding that there will be very significant obstacles to the Appellant’s integration into Jamaican society was unsafe, and that the finding by the judge that there would be a real risk to the Appellant of serious harm or destitution was also unsafe.
13. For his part, Mr Haywood relied upon his extensive and well-crafted skeleton argument. The overarching point, submitted Mr Haywood, was that there was no challenge to the judge’s findings in relation to matters in the expert report of Luke de Noronha (see paragraphs 30 to 42 of the skeleton argument). In addition, Mr Haywood made the following submissions. The Appellant was a man who was nearing the age of 60 years. He had spent 44 years of his life in the UK, 37 of which were with settled status. He had arrived in the UK in the last part of his teenage years lawfully on 29<sup>th</sup> August 1973, at the age of 14, in order to join to his mother, and was granted indefinite leave to enter, remaining in the UK permanently ever since, and never having visited Jamaica again. He had spent his entire adult life in this country. On any view, he would not have any meaningful connection with Jamaica.
14. Second, his entire family were in the UK, he had no family or social connection with Jamaica, was particularly vulnerable, and given the length of residence in this country, deportation was likely to have a particularly serious effect on him. It was more akin to exile, given his length of residence in the UK and the lack of any effective familiarity with Jamaica. He was also mentally vulnerable and had contact with mental health

services, describing feelings of hopelessness, and of harming himself, and presented with features of psychotic depression.

15. Third, it was accepted that the Appellant had a long history of offending. But the earlier panel who heard the Appellant's original revocation appeal, noted that there had been a failure by enforcement units to take action when he committed the most serious offences, and a considered deportation now to be draconian.
16. Fourth, if the Appellant were returned, then given his lack of familiarity with Jamaica, and having been in the UK for 44 years, his assimilation and familiarity with UK culture and the use of English has spoken in London, would make him stand out in Jamaica, a country where he lacks any family network to assist him. The evidence suggested that deportees risked stigmatisation and were vulnerable to targeting and criminal action against them, finding it difficult to secure employment (with around 10% of them being street homeless) and this was not considered controversial. The evidence also shows that employers conduct background checks, and with the Appellant, he had no background history in Jamaica, arriving there at the age of 60, such that employers would take to him.
17. At his age, he would find getting employment difficult any way, having no detailed knowledge or familiarity or connections with Jamaica. He was returning, after all, to a country with relatively high unemployment any way, and his prospects of "integrating" and supporting himself in Jamaica were clearly poor. Moreover, the previous proceedings in the UK were well publicised in the UK and the Jamaican main press, and they included detailed reference to his convictions and status as a deportee, all of which was readily revealed by a simple Google search against his name. The judge was right to refer to these matters. The judge was also right to conclude that the news articles disclose the suggestion that he claimed to be gay. The suggestion here was not that he needs to demonstrate that he is openly gay. The report simply suggested that he made a claim to be gay and this was enough to expose him to risk (a matter that had been adverted to by Diane Abbott MP, in *The Jamaican Observer*). What is significant is the perception that an individual might be gay. An accusation that he is gay, whether true or not, would be problematic for him. There would be a lack of "sufficiency of protection" for him.
18. In summary, all of the facts above are "exceptional" and this is what the judge found, and was entitled to find. The Appellant had been lawfully resident in the UK for most of his life, was clearly assimilated here, and lived here all his adult life, had no connections in Jamaica, and would clearly encounter very significant obstacles on return.
19. In her reply, Ms Fijiwala, submitted that the judge had given only fleeting consideration to the relevant issues, as is clear from the statement that the Appellant had satisfied "the criteria set out in paragraph 339A/Exception 1" (at paragraph 152) where no adequate reasons were given for this finding. It is not acknowledged in that paragraph that the Appellant had served two sentences of seven years which should have weighed heavily in any calculation by the judge. Moreover, it was significant that the four year threshold for a prison sentence, did not exist in 2011 when the

decision to deport her had been made, but it does exist now, and the judge should have taken care to point out that this aspect of the claim now excludes the Appellant from the Exceptions (see paragraphs 74 to 75). The judge did not conclude that the Appellant was a changed man. That made a difference.

### No Error of Law

20. I am satisfied that the making of the decision by the judge did not involve 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.
21. First, in a detailed and comprehensive determination, the judge was fully aware of the applicable legal provisions. He states, that in an Article 8 appeal, the relevant Rules are those that appear at paragraphs 390, 390A, 396, 397, A398, 398, 399 and 399A. He observes that the general Rule is that for “the public interest requiring deportation” to be outweighed, the Appellant, if he cannot bring himself within paragraph 399 or 399A of the Immigration Rules and Exceptions 1 and 2 in Sections 117(C)(4) and (5) of Part 5A of the 2002 Act, must show very compelling circumstances over and above those described in paragraphs 399 or 399A or Exception 1 or 2 (see NE-A (Nigeria) v SSHD [2017] EWCA Civ 239 explaining Hesham Ali v SSHD [2016] UKSC 60). The judge goes on, moreover, to state that in SS (Nigeria) v SSHD [2013] EWCA Civ 550, an automatic deport case, Laws LJ stated, at paragraph 54 that it would take a “very strong claim indeed” to outweigh the public interest in deportation. He goes on to record that at paragraph 58, the Learned Lord Justice identified there “public interest in the Appellant’s deportation” as “extremely pressing”. He also stated that he had borne in mind the *dicta* of Sales LJ in AJ (Angola) v SSHD [2014] EWCA Civ 1636 to the effect that the seriousness of the offence must not be brushed aside.
22. Second, the judge then set out the Appellant’s entire circumstances (see paragraphs 83 onwards) observing that his son, “Wesley” had told him that he would do the best for his father, and provide him with food, money and clothes when he could (paragraph 19). The evidence of others were also taken into account (paragraph 104). The submission of the Presenting Officer, that the Appellant could not demonstrate that he was socially and culturally integrated into the UK, was considered and rejected, with the judge observing that the Appellant could have undoubtedly had a hard upbringing. His mother came to the United Kingdom, leaving him in the care of his stepfather. He was then evicted, at a very young, by his stepfather. He lived on the streets here” (paragraph 115). The judge also concluded that “all those who currently fund him in this country confirmed to me that they would be unable to continue doing so, were he to be deported to Jamaica. The money they provide him with here would constitute ‘pin money’ in Jamaica” (paragraph 119).
23. Third, with respect to the question as to whether the Appellant was socially and culturally integrated in the UK, the judge was clearly of the view that he was. Faced with the argument from the Presenting Officer that the Appellant, because of his criminality was not, the judge observed that, “however, there are other matters to take into account. He has undergone virtually all his education here. All his social life is here. For all intents and purposes, his entire family is here” (paragraph 120). The

judge went on to observe that the Appellant has “worked in numerous jobs”. He has been a polisher, cobbler and driver. The Appellant had connections with no-one in Jamaica and he had never been back ever since the age of 14 (paragraph 137). Without any social connection, and given his condition, he “would be particularly vulnerable” (paragraph 138). A finding was made that “there would be a real risk that his mental vulnerability would be acerbated” (paragraph 139). Due regard was given to the expert report of Mr de Noronha (see paragraphs 139 to 140), and referring to paragraph 129).

24. Fourth, the judge did not find that the Appellant was gay. He did find, as he was entitled to that, “the chances of the Appellant being exposed as gay or as someone perceived as being gay is heightened by the ease with which Google searches can be made.” The judge stated that “the Appellant’s ... case was given considerable media coverage in Jamaica only a couple of years ago. Jamaica is a small country” (paragraph 143). The judge went on, from this, to conclude that, if is perceived to be gay, “he will be at real risk in Jamaica” (paragraph 144). This conclusion follows on from the recognition earlier on that Diane Abbott MP had written an article specifically on the Appellant in The Jamaica Observer, which had stated that, “Brissett may or may not be homosexual” (paragraph 134).
25. Finally, it is only having considered all of the aforesaid, that the judge eventually comes to the conclusion that he does, which is that the Appellant’s offending “was essentially caused by his drug addiction” and that “he is genuinely tried to change the direction of his life” and that “the evidence of his witnesses that his express contrition for his criminal past is genuine.” The judge also concluded that the Appellant “is ashamed of what he has done and wishes he could undo the harm he has caused to communicate and, in particular, his victims” (paragraph 149). These conclusions the judge was entitled to reach. The conclusions were reached in full appreciation of the public interest because as the judge said, “I am acutely aware that deportation of foreign criminals is in the public interest” (paragraph 150).
26. Accordingly, the judge was entitled to conclude that the Respondent’s decision not to revoke the deportation order was disproportionate because the Appellant had demonstrated “very compelling circumstances” as required by paragraph 398 and Section 117C(6) of Part 5A of the 2002 Act. The Appellant would be at real risk, as the judge found of a violation of his Article 3 rights and “he would be unable to survive in Jamaica” (paragraph 154). The decision not to revoke the deportation order infringed the Appellant’s Article 8 and Article 3 rights (paragraph 145). None of these conclusions were perverse or not open to the judge.

### **Notice of Decision**

There is no material error of law in the original judge’s decision. The determination shall stand.

The Secretary of State’s appeal is dismissed.

An anonymity direction is made.

**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

14<sup>th</sup> May 2018