Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02138/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Re-promulgated**
On 20th September 2018 &	**On: 14th January 2019**
10th December 2018	

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SB
(Anonymity order made)

Respondent

Representation:

For the Secretary of State: Mr T Lindsay on 20th September and Mr E Tufan on 10th December, Senior Home Office Presenting Officers

For SM: Ms C H Bexson instructed by AJA solicitors

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as SB or his son identified as BB. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

The Secretary of State was both appellant and respondent, as was SB. See below for chronology.

1. On 9th January 2016 SB's human rights claim for leave to remain in the UK was refused by the SSHD. His appeal was allowed by First-tier Tribunal

judge Clarke for reasons set out in a decision promulgated on 22nd February 2017. That decision was set aside by the Upper Tribunal and remitted to the First-tier Tribunal for a fresh decision to be taken. First-tier Tribunal Cohen heard the appeal and allowed the appeal for reasons set out in a decision promulgated on 26th April 2018. The SSHD sought and was granted permission to appeal on the grounds that it was arguable the First-tier Tribunal judge had failed to have adequate regard to the dicta in *Su* [2017] EWCA Civ 1069.

2. SB was sentenced to 3 years imprisonment for drugs offences on 15th February 1996. He was deported on 16th July 1997. He re-entered the UK in breach of the deportation order in March 1998. That date is unsubstantiated.

3. First-tier Tribunal judge Cohen stated ([16]) that he had to have particular regard to *Su* and he found that SB could no longer be classified as a persistent offender. Although that finding is not challenged, the judge has failed to engage with paragraph 399D of the Immigration Rules which, as confirmed in *Su* expressly deals with those who enter the UK in breach of a deportation order. The stringent requirements of that paragraph of the Rules have not been complied with; the judge has not considered whether very exceptional circumstances exist and has failed to consider s117B(4) of the Nationality Immigration and Asylum Act 2002.

4. I set aside the decision of First-tier Tribunal judge Cohen for material error of law. The resumed hearing took place before me on 10th December 2018. AJA solicitors filed a small bundle of documents on behalf of SB, the content of which was not challenged. I heard no oral evidence, it being agreed that because of the retained findings and the recently filed documentary evidence there was no requirement for further evidence. I heard submissions from both representatives.

5. *Su* involved a foreign criminal who had been deported but returned to the UK in breach of the deportation order. At the time of his conviction he had leave to remain in the UK as a spouse; he was sentenced to 42 months imprisonment and recommended for deportation. He was eventually, after an unsuccessful statutory appeal, deported in October 1998. He re-entered the UK in 2000. His marriage was dissolved in January 2002 and he subsequently married a woman who had originally come from Pakistan and then become a British Citizen. He applied for leave to remain as a spouse in June 2004~~23~~; that application was eventually considered by the SSHD who first considered whether to revoke the deportation order that had been made in 1998. The SSHD decided not to revoke the order (February 2014) and it was the appeal against that decision that was before the Court of Appeal, his appeal having been successful before the First-tier Tribunal and the First-tier Tribunal decision being upheld by the Upper Tribunal. The Court of Appeal referred explicitly to paragraph 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.

6. The Court of Appeal held that paragraph 399D encapsulated the public interest in ensuring that a deportation order was fully effective. The First-tier Tribunal and the Upper Tribunal had considered paragraph 391 (revocation of a deportation order after deportation) which provided that for those deported having been sentenced to less than four years imprisonment, continuation of a deportation order would be the proper course unless 10 years have elapsed since the making of the order. The Court of Appeal held that paragraph 399D made clear that paragraph 391 did not apply if a person returned illegally during the 10 years.

7. The appeals landscape has changed somewhat since the respondent's decision in *Su*. In the instant case, the appeal is against the refusal of the human rights claim. But paragraph 399D remains the operative paragraph in the Immigration Rules. Considering "very exceptional circumstances" the Court of Appeal said

> In considering whether there are very exceptional circumstances as required by para.399D, it is necessary to know the weight to be attached to each side of the balance. It was essential to appreciate and apply the statutory requirement to apply "little weight" to the respondent's private and family life developed while unlawfully present in the UK.

8. The Court of Appeal in *Su* also considered the issue of delay and refers to Mr Yeo's submissions:

> where the SSHD delays deportation for many years, it lessens the weight of some reasons for the high public interest in the deportation of foreign criminals. The risk of re-offending had been much reduced during the delay. The deterrent effect on offending was weakened if prompt action to deport is not taken. The expression of society's revulsion at the offender's criminal conduct is blunted. These observations are of course well made, but they were not made in the context of a person who had unlawfully re-entered the country in breach of a deportation order and they clearly do not obviate the need for the decision-making tribunal to apply the relevant provisions and legal principles.

9. First-tier Tribunal judge Cohen found:

- SB has a genuine and subsisting relationship with his wife and children (son and stepson);
- He has not offended since 1996 and can no longer be considered to be a persistent offender;
- He is at low risk of re-offending and at low risk of causing serious harm in the future;
- He has shown remorse;
- He has significant responsibility for his son BB who is challenging.
- He has assisted BB through his schooling, frequently attending meetings with the head and teachers of his school;
- His wife, despite health problems, is the sole breadwinner;
- He and his wife have a long term relationship;
- Relocation of his wife and children to Jamaica would be disastrous; their happiness and school performance deteriorated when he was in

Jamaica and there has been a dramatic improvement in their psychological and physical wellbeing after his release from detention.

10. These findings were not challenged by the SSHD and are retained. It is necessary to consider the circumstances and immigration and criminal history of SB and his family in more depth.

11. SB arrive in the UK on 27th June 1994 as a visitor. He and his wife[1] married and on 16th December 1994 he applied for leave to remain as a spouse. That application was refused on 11 October 1996 and he was served with a decision to make a deportation order against him following his conviction for drugs offences and a sentence of 3 years imprisonment. His appeal against that decision was dismissed on 4 June 1997 and a deportation order was signed on 25th June 1997; he was deported to Jamaica on 16th July 1997. His wife and their oldest son (born July 1995) followed the next day. They remained living with him in Jamaica for 2-6 months (It was unclear how long she was there, but it seems to have been roughly that amount of time) and then returned to the UK. SB returned illegally to the UK on an unconfirmed date but said by him to be March 1998. There was no corroborating documentary evidence that he had arrived then. In 2001 SB was fined £100 for possession of cannabis.

12. On 17th June 2004 he made an application for leave to remain as a spouse. A second son, BB, was born in September 2004. That application by SB was treated by the SSHD as an application to revoke the deportation order in addition to being an application for leave to remain. The SSHD refused both for reasons set out in a letter dated 3rd April 2008. Between the making of that application and the SSHD decision, SB was convicted of possession of a bladed weapon in 2006 and fined £300. SB appealed the SSHD's decision. His appeal was dismissed by the First-tier Tribunal in a decision promulgated on 10th June 2008.

13. He did not leave the UK; the SSHD does not appear to have taken any steps to remove him.

14. On 27th October 2015 he applied for leave to remain on human rights grounds – family and private life. That application was refused on 9th January 2016. his appeal against that decision was allowed on 22nd February 2017 by First-tier Tribunal judge Clarke. That decision was set aside by Upper Tribunal Judge Kebede on 20th November 2017 and remitted to the First-tier Tribunal. First-tier Tribunal Judge Cohen allowed the appeal on 26th April 2018. The SSHD was granted permission to appeal and I found a material error of law and set aside the decision.

15. The youngest son, BB, has behavioural problems. Included in the bundle of documents before me are various letters and reports. BB has been excluded from primary and secondary school. In October 2015 Family Solutions Key worker said that she had been liaising with BB's school because the school had grave concerns that his behaviour was "spiralling

[1] She has two children from an earlier relationship who are both adults. There was no significant evidence of any role they play within the family unit now.

out of control" and he was in danger of being permanently excluded from school. She writes of the intention of both ~~the appellant~~ SB and his wife to attend a parenting programme. She writes:

> …if SB were to be removed from his family the outcome would be devastating for the family but especially for BB who is a young child who has emotional and challenging needs. SB plays a pivotal role in his children's life, especially in BB's life. SB takes and collects BB from school, he attends all professional meeting with the school, Social Services, Child and Adolescent Mental Health Services "CAMHS" as stated previously SB is a "main Carer for the children".

16. A letter dated 2nd February 2017 from Family Solutions states that due to the positive interventions which took place with professionals and family, the case was closed with them on 17th March 2016. There continue to be concerns about BB's behaviour. A letter from the school dated 17 October 2018 details an exclusion for 2 days in October 2018 and that this has been the second exclusion since he joined the school. The school refers to BB having received internal seclusions, alternative provision at Right Track, being on a behaviour Support plan and on report to his Learning Advisor and Year Team Leader and having a mentor to help support his needs. There were no reports from any of these individuals. There is reference in that letter to a reintegration meeting scheduled to take place on 29th October 2018 but the letter from the Year Team Leader dated 9th November 2018 makes no mention of this. Nor does it make any mention of what he has been doing with BB. He confirms that SB has been an active parent and has a positive impact on BB's learning. This is difficult to reconcile with the letter written less than a month earlier which refers to the involvement of the Team Leader with BB at the school.

17. An undated letter, although written after 1st February 2018 given the content, from the Commanding Officer of the 406 Willesden RAF Air Cadets is of more assistance in that it says that since BB became involved with the cadets, he has "turned his behaviour round significantly", "that there are still some discipline issues", he is "taking more responsibility for himself" and that BB "responds better in his behaviour" when his father is involved.

18. There is some reference in the papers to SB's wife having had a suspected stroke. There is no medical evidence to support this, but on the basis that this did occur there was no evidence of any long-term health problems. SB's wife continues to work full time.

19. There is also reference to their older son having been identified as requiring special needs assistance at school and that this was only obtained after lengthy argument and intervention by both parents and that SB played a significant role in this achievement. Again, there is no corroborative evidence of this or whether that young person has any continuing difficulties. That son is an adult, but I have taken at its highest the suggestion that he has special needs and continues to need support from his parents.

20. The difficulty with the evidence before me is that nowhere is there any clear exposition of exactly what problems and behavioural difficulties BB has. It

seems that over the years there may have been CAMHS and social services involvement, that there are detailed school records of the interventions undertaken by the school and there has been some one-to-one involvement of mentors/teachers. In the absence of this detailed information it is simply not possible for me to reach a conclusion as to the effect on BB of the departure of his father. That it will have an effect is evident – the departure of a father is bound to have an effect, particularly where the father has been closely involved with his son as appears to be the case here. But for that departure to amount to very exceptional circumstances ~~needs~~ more than just an adverse effect <u>is required</u>. There is no significant evidence before me what the effect would be on BB if he and his mother were to move to Jamaica with the appellant. I acknowledge that there were some difficulties some 10 years or so ago, but those difficulties are not very specific, may not be apparent now and in any event staying for only 2 to 6 months does not seem a very long period within which to determine whether a move was the correct process or not. There is a lack of significant and detailed evidence of the effect on BB of separation, of the effect on SB's wife on her employment and ability to continue to deal with one, possibly two vulnerable people in her family in the absence of <u>SB</u> ~~the appellant~~ and a lack of evidence from individuals with whom the family have a close connections of what they would do, or not do, if SB was deported.

21. I note that SB has been before the criminal courts on two occasions since his unlawful entry to the UK after deportation. I also note that an earlier appeal was dismissed, and he became appeal rights exhausted in June 2008 yet the SSHD did nothing to remove him despite knowing where he lived. I note that paragraph 399D states that a person "will" be removed. The failure on the part of the SSHD to remove SB indicates a diminution in the public interest in deporting him, but the fact remains that taking that factor into account together with the lack of evidence before me of the necessity of the relationship with BB and the consequences of its fracture, there are inadequate compelling circumstances to find in SB's favour.

22. On the evidence before me I am not satisfied that there are very compelling circumstances. SB does not meet paragraph 399D of the Immigration Rules.

23. I have considered ss117B and C of the Nationality Immigration and Asylum Act 2002. Although the First-tier Tribunal has found that SB is not a persistent offender, such a finding has little bearing, now, on the questions to be considered namely the proportionality of the decision to refuse his human rights claim. The factors in ss117B and C are factors to be considered; they are not the only matters in contention. He is a foreign criminal and although it may not be reasonable to expect BB and/or his mother to leave the UK (and the evidence upon which to make such a finding is sadly lacking) there is no particular up to date evidence as to the possibility of significant obstacles to reintegration to Jamaica and no particular evidence that the effect of SB's deportation would be unduly harsh on BB.

24. SB was in the UK lawfully during his visit visa and during the time his application for leave to remain as a spouse was being considered. He was never given leave to remain as a spouse. His application for leave to remain as a spouse was made whilst he was lawfully in the UK and there is no doubt but that it is a genuine and subsisting relationship. Although it cannot be said that the relationship was entered into when his immigration status was unlawful, and it is to the couple's benefit that it continued after his deportation, upon his return to the UK it continued whilst his status was unlawful. His extended family and private life has strengthened during that lengthy period of unlawful residence and little weight can be given to that development. It may well be different if there were strong evidence as to why the couple had allowed that unlawful residence to continue, particularly after he lost his appeal in 2008, but there is no such relevant evidence before me.

25. Taking all these matters into account, I dismiss SB's ~~the~~ appeal against the decision of the Secretary of State ~~respondent~~ to refuse the human rights claim.

Conclusions:

I set aside the decision of the First-tier Tribunal. The findings of fact are retained.
I dismiss the appeal by SB against the decision of the Secretary of State ~~respondent~~ to refuse the human rights claim.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 11th December 2018
Amended by slip rule 9th January 2018

Upper Tribunal Judge Coker