Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09428/2017 (V)

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 2 September 2020	**On: 07 September 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DELONA KEON BENNETT

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms C Hulse, instructed by A & A Solicitors

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. In addition to the above-mentioned parties, the appellant was present, remotely, as was his instructing solicitor.

2. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Bennett's appeal against the

Secretary of State's decision to refuse his human rights claim following the making of a deportation order against him.

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

4. The appellant is a citizen of the USA born on 2 January 1990 in Jamaica. He first entered the United Kingdom, aged 13 years, on 11 August 2003 on a visit to see his mother and on 7 January 2004 he applied for indefinite leave to remain as a dependant relative of his mother. The application was initially refused but the appellant was subsequently granted indefinite leave to remain on 10 May 2004.

5. Between 29 May 2013 and 17 March 2015 the appellant received 4 convictions for 16 offences, including making false representations, possessing controlled drug – class B cannabis, using a vehicle whilst uninsured, burglary and theft and breach of a conditional discharge. On 14 April 2015 he was sentenced to a total of 2 years and 10 months imprisonment.

6. On 26 May 2015 the respondent made a decision to deport the appellant. In response the appellant made written representations on human rights grounds, on 15 June 2015, followed by further representations on 8 January 2016, 8 March 2016 and 15 February 2017. He relied upon his family life with his mother, his sister and his partner and daughter. It was claimed that his absence was having a negative impact on his daughter, with whom he was involved on a day to day basis prior to being imprisoned. It was also claimed that he had a close relationship with his mother and sister and that his mother relied on him a lot owing to her medical condition (lupus). It was claimed that his father lived in the USA, but he had had no contact with him for many years. As for the appellant's private life, he had left the USA at the age of 7 and had attended school in the UK and had developed a strong private life here. Evidence of the appellant's subsequent marriage to his partner, on 22 December 2016, was submitted.

7. On 27 November 2017 the respondent signed a deportation order against the appellant under section 32(5) of the UK Borders Act 2007 and on 30 November 2015 made a decision to deport him and to refuse his human rights claim and certify his human rights claim under section 94B of the Nationality, Immigration and Asylum Act 2002. Following the judgment of the Supreme Court in Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 42 the respondent withdrew the certified decision and made a fresh decision refusing the appellant's human rights claim, on 14 August 2017.

8. In that decision the respondent noted that the appellant and his wife had had a second child, born on 10 June 2017. The respondent accepted that the appellant had a genuine and subsisting relationship with his two British children and his British wife but did not accept that it would be unduly harsh for

them all to relocate to the USA with him, or to remain in the UK without him. 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 the USA. The respondent considered that the appellant's mother's medical condition and his claim in regard to his responsibility for his half-sister and care for his daughter were not sufficient to amount to very compelling circumstances and that there were no such circumstances outweighing the public interest in deportation and that his deportation would not breach his Article 8 human rights.

9. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 17 December 2019 by Judge Davey. The judge heard from the appellant and his wife and mother. The judge did not accept that the requirements of paragraph 399A were met, as the appellant had not lived in the UK for most of his life, there was little evidence of his integration into the UK, and no very significant obstacles to his integration into the USA. As for the appellant's family life, the judge had before him an independent social worker's report and concluded that it was in the children's best interests for the children to remain in the UK with the appellant as a family unit. The judge noted that the appellant and his wife had not looked at the options available if they moved to the USA, but he concluded that it would be unduly harsh to expect his wife and children to leave the UK. The judge found that the appellant could not succeed under the immigration rules, but, in light of the fact that his offending was in 2014 and that he had not re-offended since then, and given that he had completed his rehabilitation and was unlikely to re-offend, concluded that his deportation would be disproportionate. He therefore allowed the appeal on Article 8 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 take account of paragraph 398 of the immigration rules and to make any findings on whether there were very compelling circumstances preventing the appellant's deportation.

11. Permission to appeal was refused by the First-tier Tribunal but was subsequently granted by the Upper Tribunal on 20 April 2020. The matter then came before me for a remote hearing by way of skype for business.

Hearing and Submissions

12. Both parties made submissions before me. Mr Melvin submitted that Judge Davey had materially misdirected himself in law and made confused findings in regard to the immigration rules relating to deportation. He made no findings on the second part of the "unduly harsh" test, but went on to find that the requirements of the immigration rules had not been met, and then considered Article 8 outside the rules without any reference to "very compelling circumstances" and paragraph 398 of the immigration rules. Mr Melvin

submitted that any rational Tribunal, accepting the judge's findings that the requirements of the immigration rules were not met, would have to conclude that there were no very compelling circumstances and dismiss the appeal.

13. Ms Hulse submitted that Judge Davey had carefully considered all the evidence and had noted that there was no challenge to the report of the independent social worker in regard to the effect of the appellant's deportation on the appellant's children. The judge properly found that the Secretary of State had not considered the social worker's report and had failed to provide any addendum to the refusal decision after the report had been submitted. The appellant's deportation would be unduly harsh on the children, as he played a central role in their lives. Their mother worked full-time and it was the appellant who looked after the children. The appellant was a low risk of re-offending and had not re-offended since his release from detention. He had completed his licence and had rehabilitated himself. Judge Davey's decision should be upheld.

Discussion and Findings

14. Ms Hulse's submissions, as I put to her and as Mr Melvin submitted in his reply, failed to address the matters of law in the grounds of challenge and were simply a re-statement of the appellant's case. Her submissions focussed on the unduly harsh consequences of the appellant's deportation, given the central role he played in the lives of his children, yet Judge Davey had found that the requirements of the immigration rules were not met and, as such, that it would not be unduly harsh for them to be separated. Although he did not make a specific finding on that basis, it is clear that that was his conclusion, having found that it would be unduly harsh to expect the appellant's wife and children to leave the UK with the appellant. Accordingly, by focussing on the question of undue harshness and, as part of that question, the independent social worker's report, the best interests of the children and the appellant's role in the children's lives, Ms Hulse was herself going behind Judge Davey's decision and failed to address the actual challenge in the respondent's grounds, namely the judge's failure to consider the "very compelling circumstances" test in paragraph 398 of the immigration rules, above and beyond the question of undue harshness.

15. As Mr Melvin submitted, Judge Davey, having found that the requirements of the immigration rules had not been met, went on to embark upon a general Article 8 evaluation and proportionality assessment without any regard to the relevant considerations in deportation cases. He referred, at [33], to the provisions in section 117A and 117B of the NIAA 2002, but made no mention of section 117C relating to deportation and did not refer to paragraph 398 or the test of "very compelling circumstances". The bases upon which the judge found, at [35], that the respondent's decision was disproportionate, was the fact that the appellant had not re-offended since 2014 and had completed his rehabilitation, that he posed a low risk of re-offending and that the best interests of the children lay in the family remaining in the UK. There was no explanation by the judge as to how any of those factors amounted to very

compelling circumstances and Ms Hulse did not make any submissions in that regard. I agree with Mr Melvin that, having found that the requirements of the immigration rules were not met, and, as such, that the appellants' deportation would not be unduly harsh on his wife or children, the judge did not identify any circumstances that could be considered as compelling. The fact that the appellant had not offended since 2014 could not possibly be considered as a very compelling circumstance, and Ms Hulse did not suggest that it was.

16. Accordingly, it is undoubtedly the case that the judge materially erred in law in his decision and that the decision must be set aside.

17. Mr Melvin submitted that, on the judge's own findings, the only conclusion that could be reached was that the appeal could not succeed and he therefore invited me to re-make the decision by dismissing the appeal. Ms Hulse objected to the decision being re-made without a further hearing, in the event of Judge Davey's decision being set aside. She requested that, if an error of law was found, the appeal ought to be remitted to the First-tier Tribunal to be heard afresh, in the interests of fairness. However, when I asked her if there was any intention to produce further evidence, she replied that there was not, and that she simply required the appeal to be re-heard. In the circumstances, I see no reason why there is a requirement for a further hearing. There is no challenge to Judge Davey's record of the evidence or his findings on the evidence, and the challenge lies only in his failure to make findings on whether the appellant's circumstances, as evidenced before him, amount to very compelling circumstances. On the evidence available, and on the basis of Judge Davey's own findings, and his conclusion that the requirements of paragraphs 399 and 399A were not met, there is plainly nothing approaching "very compelling circumstances" to outweigh the public interest in the appellant's deportation. Ms Hulse's assertion, that the role played by the appellant in his children's lives was material, is completely addressed by the unchallenged, and properly made, finding that the requirements of paragraph 399(a) were not met. In any event, there is nothing in the report of the independent social worker to indicate any circumstances other than those that would be expected to arise through separation of a deportee from his children and the consequential responsibilities and difficulties faced by the remaining parent.

18. Accordingly, I agree with Mr Melvin that the re-making of the decision could only be on the basis that the appeal is dismissed and I do not agree that that gives rise to any unfairness as Ms Hulse submits.

DECISION

19. 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. I re-make the decision by dismissing Mr Bennett's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 2 September 2020