Upper Tribunal
Immigration and Asylum Chamber

Appeal Number:
DA/00498/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice
On 2 September 2013

Promulgated on:
On 6 September 2013

Before

Upper Tribunal Judge Kekić

Between

Mr Richard James Anselm Henry
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Determination and Reasons

Representation
For the Appellant: Mr C Jacobs, Counsel
For the Respondent: Mr S Allen, Senior Home Office Presenting Officer

Details of appellant and basis of claim

1. This appeal comes before me following the grant of permission to the Secretary of State, whom I continue to refer to as the respondent in this determination. No anonymity order was granted to the appellant by the First-tier Tribunal and none was requested of the Upper Tribunal.

2. The appellant is a citizen of St Lucia born on 21 April 1967. Although there are claims by his family and by the appellant himself that he is entitled to British nationality on account of his father's patriality or his mother's nationality, the former is unproven and he does not qualify under the latter due to the terms of British nationality law prior to 1 January 1983 and his criminality which invalidates any claim under current law. The case must therefore proceed on the basis that he is a foreign national. He claims to have entered the UK with his father in 1974; no documentary evidence to support this contention has been provided but it appears the respondent accepted this part of the claim at the hearing before the First-tier Tribunal (paragraph 46). The appellant maintains he was granted indefinite leave to remain in 1985 but the determination of the First-tier Tribunal suggests this has not been established. The Secretary of State seeks to deport him as a foreign criminal.

3. The appellant has a long history of offending (which I detail below) but the offences which triggered the notice of liability to deportation on 20 August 2012 were production of a Class B controlled drug and extracting electricity for which, on 11 October 2010, he received an 18 month prison sentence. On 28 February 2013 a deportation order was made under s.32(5) of the UK Borders Act 2007.

4. The appellant's offending commenced in 1982 at the age of 15. Between then and 2 February 2012 he has 25 convictions for 65 offences. Of these, there were 8 offences against the person, one against property, 14 theft and kindred offences, two public order offences, five offences relating to police/courts/prisons, five drug offences, 24 miscellaneous offences (such as drink driving, reckless driving, driving without insurance and driving whilst disqualified) and six non recordable offences. The lengthiest prison sentence received was for seven years with a concurrent six year sentence (in July 1999) followed by a further three year sentence for an offence committed whilst on licence after his release from prison (an additional year was received for breach of his licence).

5. The appellant has four children with three women; Yasmin born in December 1989 and Tanya born in May 1993 to Muvecel Fevzi (referred to as Brenda by the appellant), James born on an unspecified date to Janet Thomas and Lexi-Rose born in February 2012 to Amanda Walker. His most recent estranged partner was said at one stage to be pregnant but no further details are given. There are also adult stepchildren; Brenda has a son from another relationship and Amanda has two daughters.

6. The appeal came before First-tier Tribunal Judge Robinson and a non legal member at Hatton Cross on 5 July 2013. The Tribunal heard oral evidence and found that the appellant had established private and family life in the UK which took priority over the public interest and accordingly, the Tribunal allowed the appeal on Article 8 grounds.

7. The respondent sought permission to appeal and this was granted by First-tier Tribunal Judge Baker on 24 July 2013.

Error of law Hearing

8. The appellant was present at the hearing on 2 September when I heard submissions from Mr Allen and Mr Jacobs.

9. Mr Allen submitted that the determination was flawed in that a reasoned and full assessment of all relevant factors had not been undertaken. He submitted that many of the Tribunal's findings were contradictory and that the public interest element had been minimised. The findings on private and family life were not properly reasoned in that the panel did not explain why it found the appellant had private life given that he had spent most of the last 20 years in prison, or why it found there was family life between the appellant and his children given that three were adults and there was no contact with the fourth. The finding on whether it "may" be in the youngest child's best interests to have contact with her father was unclear.

10. Mr Allen submitted that the Tribunal had wrongly placed weight on the claim of the appellant and his parents that they had always considered him to be a British national. He submitted that such a finding neglected to take account of the evidence before the Tribunal; for example, that as far back as 2002, the appellant had been informed by the Secretary of State that he was not a British national. He also submitted that the Tribunal's reliance upon Ogundimu was inappropriate as that case could easily be distinguished in that Ogundimu had met the Immigration Rules and was not subject to automatic deportation. He submitted that only lip service had been paid to the public interest factors and that, given the long history of offending, it was in the public interest to deport the appellant. Criticism was made of the psychologist's report, the inconsistencies in his opinion and the standard of proof applied. It was further argued that there was an inadequate assessment of the facts and that findings, for example, those at paragraphs 75 and 76 (on the appellant's ties with St Lucia), did not flow from the evidence recorded earlier at paragraph 58. The balancing exercise

had not been properly undertaken and the entire determination needed to be set aside.

11. In response, Mr Jacobs submitted there had been no error of law. The respondent's challenge amounted to a disagreement of the outcome of the appeal. The panel had taken account of a large bundle of documentary evidence and substantial oral evidence. The facts upon which the decision was based were set out at paragraphs 32-51. The Tribunal found that the appellant had established a private and family life and set out reasons for that finding at paragraphs 63 and 70. The issue of citizenship was a relevant factor as the appellant had grown up thinking he was British and the Tribunal was entitled to take this into account. He had not applied for Indefinite Leave to Remain; it had been granted to him at the airport in 1985. The Tribunal had considered whether the appellant could return to St Lucia. The appeal was allowed on the basis of private and family life. This was a long residence case and the Maslov principles applied. The best interests of the youngest child had been considered. It was accepted that the rules had not been met in this case. There was nothing in the determination which conflicted with the principles in Ogundimu.

12. It was accepted that the appellant would need to have a strong Article 8 case to succeed in the appeal given his history of convictions; the Tribunal found that he did. It was not correct to say that the public interest factors had not been considered. The Tribunal commenced its analysis with the appellant's history of offending and noted that there was a medium risk of re-offending. The case law had been properly applied and the decision was not confused. The panel had considered the close and strong ties between the appellant and his daughters; they had given evidence as to how their lives would be affected by his removal. There would be dependency between him and his mother if he remained. If he lived with her, she would be able to influence his behaviour and he would be able to assist with her needs. Various case law was referred to. In conclusion, Mr Jacobs submitted that the balancing exercise had been properly undertaken and the determination should be upheld.

13. Mr Allen replied. He submitted that there were material errors in the determination which might have led to a different outcome had they not been made. As per Kugathas, the court was required to scrutinise the relevant factors particularly where relationships between adult rather than adults and children were involved. This was not to say there should be a blanket finding that there could never be family life between adults but there had to be a case sensitive balancing exercise; that had not been done in this case. There was no detailed analysis of the family circumstances.

The findings were scant. The appellant had spent the best part of the last 20 years in prison and in those circumstances the panel had to explain what it was about his private and/or family life that was deserving of protection. The conclusions were inadequately reasoned and the determination was unsafe.

14. At the conclusion of the hearing I reserved my determination.

Findings and conclusions

15. I have taken full account of the submissions made, the case law referred to, the facts of this case, the evidence and the determination in reaching my conclusions.

16. The following cases were relied upon by the parties:

Gul v Switzerland [1996] ECHR 5 (for the principle that a child born of a marital union is *ipso jure* part of the family and has a bond with his parents which subsequent events cannot break save in exceptional circumstances; paragraph 32).
Maslov v Austria [2008] ECHR 1638/03 (for guidance on long residence cases).
EB (Kosovo) [2008] UKHL 41 (for confirmation that courts must undertake a careful and informed evaluation of the particular facts of a case; at paragraph 12).
ZH (Tanzania) [2011] UKSC 4 (for the principle that where a decision affects a child, a primacy of importance must be accorded to his or her best interests; paragraph 46).
Kugathas [2003] EWCA Civ 31 (for the principle that neither blood ties nor the concern and affection that ordinarily go with them are by themselves enough to constitute family life and the requirement that relevant factors must be scrutinised by the court; paragraphs 14, 16, 19, 24 and 25).
SS (Nigeria) [2013] EWCA Civ 550 (for the principle that the more pressing the public interest in deportation or removal, the stronger the Article 8 claim must be for it to prevail; at paragraphs 46 and 54).
Rai and Others [2013] EWCA Civ 8 (for endorsement of the approach of the Upper Tribunal in Ghising; paragraph 46).
Ghising (family life – adults – Gurkha policy) [2012] UKUT 00160 (IAC) (for its analysis of Kugathas and other case law on family life and the guidance that Article 8(1) if highly fact sensitive and that rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts to decide whether or not family life exists; at paragraphs 52-62).

Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) (on the best interests of the child having to be a primary consideration; at paragraph 96).
Farquharson (removal – proof of conduct) [2013] UKUT 146 (IAC) (on the standard of proof; at paragraph 24).
Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC) (on the approach to deportation).

17. The panel found that the appellant did not meet the requirements of the Immigration Rules because under paragraph 399a(ii)(b) the minor child was cared for by another family member and under paragraph 399(b) he had no subsisting relationship with a partner and had sufficient knowledge of and connections to his country of origin to be able to form an adequate private life there (paragraphs 54, 55, 57, 58 and 59). For the appellant, Mr Jacobs accepted that the rules could not be met. Only Article 8 was pursued and it is the panel's findings in that respect that are challenged by the Secretary of State.

18. The first two points raised in the grounds take issue with the positive findings in respect of the appellant's private and family life. These were amplified by Mr Allen at the hearing and his submissions are summarised above. Essentially, it is argued that the panel made conflicting findings, disregarded certain facts and inadequately reasoned its conclusions some of which did not flow from the evidence set out.

19. At paragraph 58, when considering human rights under the rules, the panel noted that the appellant had made frequent visits to St Lucia and, indeed, had often taken his two older daughters there. It found that notwithstanding the present absence of relatives there, the appellant continued to have social and cultural ties to his country of origin and that the country and its culture are very familiar to him. It concluded that the appellant had sufficient knowledge of, and connections to, his country of origin to be able to form a private life there. These findings, however, do not appear to factor at all in the panel's second stage assessment of Article 8 where it is concluded that the appellant has ties and connections to the UK which make it necessary to protect his private life in the UK.

20. At paragraph 63 the panel found that the appellant enjoyed family life with all his four children as well as with his mother and his sister. The facts (as set out at paragraphs 32-51) on which the conclusions are based do not engage at all with the nature of the relationship the appellant enjoys with his mother and sister. The determination is silent on why a family life is said to exist between them and the appellant. Whilst there is

a brief reference to an offer of accommodation from his mother, the issue of whether any interdependency exists or has existed between them is not explored. The evidence from the appellant's mother was that he had lived with her "on and off" in the past. Her testimony was that she had mobility problems and hoped the appellant would help; his evidence did not make any reference to any willingness or ability to assist. Mr Jacobs submitted that Mrs Henry would be able to exert some influence over the appellant's behaviour if he lived with her; it is difficult to see how such a suggestion can be realistic. The mother is elderly and was unable to exert any influence over her son in the past when she would have been younger and fitter. It is difficult to see how she would be able to do so now and indeed she did not suggest she could.

21. Even less is known about the appellant's sister. Her evidence did not even touch upon any relationship between herself and the appellant (paragraph 18). The same difficulty exists with regard to the children. It is difficult to see how family life can be said to exist between the appellant and James (his adult son) when in the same paragraph 63 the panel noted that it had little information about their relationship, that they had lost contact for some time but had resumed some contact. Such vague findings do not come anywhere near the detailed scrutiny or fact finding that the cited cases demand in adult relationships.

22. Family life was also found to exist between the appellant and his two adult daughters. They attended the hearing and gave evidence but the testimony recorded at paragraphs 15-17 is brief and gave no indication as to the frequency of their face to face contact given the appellant's frequent sojourns in prison. There was nothing to indicate where or with whom they live, whether they had formed relationships of their own, whether they led independent lives or were employed. Nor was there any explanation for why, if regular visits to St Lucia were possible previously, they would not be possible now. Mr Jacobs stressed that the panel was impressed with the evidence of the witnesses and I accept that is so, however little is said about the content of the evidence given or why it led to the findings made in paragraph 63. The witness statements of the daughters give the impression that the appellant was always around; we know from his prison record and the OASys report that this was not the case. There is no information whatsoever about contact during the appellant's various periods of imprisonment other than a visit having been made during the current sentence. The panel does not appear to have had any appreciation of the fact that these children, along with James, the appellant's mother and sister are all adults and that in those circumstances more is needed than mere blood ties.

23. There are also difficulties over the finding of family life between the appellant and his youngest daughter. They do not appear to have lived together at all and the appellant's relationship with her mother broke down some time ago. A non molestation order was taken out by her which, it is now said in her brief letter, she is seeking to remove. At the date of the hearing before the First-tier Tribunal there was no update to her letter (written several months earlier), no indication that steps had been taken and the evidence of the appellant was that this had not been done. Despite the panel's conclusion that family life was enjoyed between the appellant and this child, the basis for such a conclusion where there was no contact either during or prior to the appellant's imprisonment with her or her mother, is unclear. It is even more puzzling when one takes account of paragraph 69 where the panel finds it cannot assess the relationship between the appellant and the child because there is no information about her. I have taken note of Gul upon which Mr Jacobs relied but note that case deals with a child born of a marriage and the bond that must in that context be assumed to exist between parent and child. As far as I can tell, the appellant and Ms Walker were never married and there is scant, if any, information as to the nature and duration of their relationship. There is no analysis of what role it is proposed the appellant would play in the child's life or how often or in what circumstances he might see her. Ms Walker's apparent willingness to let the appellant back into her life so that he can see the child has to be approached with caution given the past history of domestic violence. Although this was acknowledged by the panel at paragraph 69, it appears then to be completely put to one side. Plainly the child's welfare is a primary consideration but the panel's finding that some face to face contact between the appellant and the child "may" be in both their best interests is rather unclear.

24. Also at paragraph 63, the panel found that the appellant would be separated from his close friends and that would interfere with his right to a private life however there was no evidence before the panel from any friends and I cannot see that any was provided in oral testimony by the appellant.

25. No findings are made on any family life between the appellant and his 'stepchildren'.

26. The Secretary of State also criticises the panel's failure to explain why the extent of the appellant's offending, which Mr Jacobs fairly accepted was extensive, did not justify deportation. There is some reference by the panel to attempts being taken by the appellant to address offending. The panel

does not, however, engage with the fact that the appellant had been in prison numerous times before when he would also have had opportunities to address his offending behaviour but plainly did not do so or, if he did, did not benefit in any way from such opportunities. Nor does the panel engage with the fact that despite a warning in 2002 that continued offending may well result in deportation, the appellant continued with his criminal conduct and without any regard for the impact of that upon his children who would have been minors at that time. the very persistence of the appellant's offending and his blatant disregard for the laws of the UK and the affect of his criminality upon his victims, many of whom were elderly and vulnerable, was not adequately balanced in the proportionality exercise.

27. It is established in the case law to which I was directed by both parties that where there is a strong public interest in removal, as there plainly is in this case given the appellant's extensive criminality since the age of 15, the Article 8 claim must be very strong if it is to prevail. Mr Jacobs submitted that it was. He emphasised the substantial bundle and length of the hearing before the First-tier Tribunal. Whilst he may be right in that, the determination does not reflect that submission. It presents an average Article 8 case where the long residence of the appellant is rather undermined by lengthy spells in prison over the last 20 years and where elements of any private and family life that may be enjoyed in that context has been inadequately explored and assessed. Indeed at paragraph 71, the panel appears to adopt the sentencing judge's description of the appellant's private life as consisting of a criminal lifestyle.

28. The Secretary of State has also taken issue with the panel's reliance upon Ogundimu pointing out that the appellant's offences continued into adulthood, that he did not meet the requirements of the rules, as Ogindimu did and that he was subject to the provisions of automatic deportation whereas Ogindimu was not. Those differences are valid. They have not been appreciated by the panel.

29. Finally, there is criticism of the panel's approach to the claim that the appellant and his family all believed he was a British citizen. At paragraphs 47 and 68 the panel regarded this as a "significant" factor to be weighed in the balance when proportionality was considered. It has to be said that the panel's approach and findings in this regard are somewhat confused. It is not explained why the appellant's father's registration in 1987, twenty years after the appellant's birth, should have led the appellant and his family to believe he (the appellant) had any entitlement to citizenship himself. No explanation appears to have been provided as

to why no application for registration was made by the appellant at any time. Most puzzling of all is the failure to take account of the fact that in 2002 the appellant was told in no uncertain terms by the Secretary of State that he was not a British national. Quite why he and his family continue to maintain that he has such an entitlement, even when it must be clear that any such entitlement would not succeed on account of his inability to meet the good character requirements, is not explained and the panel's consideration of this as a factor in his favour is not sufficiently reasoned.

30. For all these reasons, therefore, and after careful consideration of all the submissions made and the evidence before the Tribunal, I conclude that the First-tier Tribunal made errors of law such as to make the determination unsafe. The determination is set aside except as a record of the evidence before the Tribunal and of the proceedings which took place. No findings are preserved. The matter is remitted for re-hearing afresh to another panel of the First-tier Tribunal at Hatton Cross.

31. I was informed by Mr Allen that the Secretary of State seeks to make an application under Rule 15 to adduce a substantial amount of additional documentary evidence. It was agreed with the parties that this should be compiled and served upon the Tribunal and the appellant with a written application prior to the next hearing. I direct that all such evidence should be served no later than ten working days prior to the hearing. It shall then be for the panel with conduct of the appeal to consider the application and decide whether or not the evidence should be admitted. Should the application be successful, it is anticipated that the hearing would proceed without any adjournment as the appellant would have had sight of the evidence well in advance of the hearing.

Decision

32. The Tribunal made errors of law and the determination is set aside. The appeal is remitted to a panel of the First-tier Tribunal for re-hearing afresh.

Signed:

Dr R Kekić
Judge of the Upper Tribunal

4 September 2013