Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11800/2019

THE IMMIGRATION ACTS

Heard at Field House
On 4 October 2020

Decision & Reasons Promulgated
On 07 October 2020

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R C (JAMAICA)
[ANONYMITY ORDER MADE]

Respondent

DECISION AND REASONS

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of R C who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and reasons

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1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 11 March 2005 to deport him from the United Kingdom after he was sentenced to 3 years' imprisonment for supplying a class A controlled drug (cocaine).

2. The claimant is a citizen of Jamaica and is a foreign criminal as defined in section 117D of the Nationality, Immigration and Asylum Act 2002 (as amended). Pursuant to sub-section 117C(1), his deportation is in the public interest, and pursuant to subsection 117C(2), the more serious his offence, the greater the public interest in his deportation.

Background

3. The claimant entered the United Kingdom on 12 July 1998 as a visitor and was then granted leave to remain as the spouse of a British citizen, expiring 27 July 2002. On 15 August 2002, the claimant was convicted on four counts of supplying Class A drugs (cocaine) and on 3 September 2002 he was sentenced to three years' imprisonment on each count, to run concurrently. On 12 September 2003, he was served with a notice of decision to deport.

4. The claimant had, and exercised, an in-country right of appeal against the deportation decision: he was appeal rights exhausted on 25 May 2004. The claimant was then detained under immigration powers following the completion of his prison sentence, but was granted immigration bail on 19 July 2004, subject to reporting restrictions.

5. On 11 March 2005, the deportation order was signed. On 30 December 2005, the claimant failed to report as required and on 2 January 2007 he was listed as an absconder. A visit to his home on 2 September 2007 did not find him at home. The claimant did not embark for Jamaica but remained unlawfully in the United Kingdom.

6. The claimant next came to light when he submitted an application for further leave to remain on 19 October 2012, almost seven years after he had absconded. On 10 June 2013, the Secretary of State sent the application to the Criminal Casework section in Liverpool, to be treated as a request to revoke the March 2005 deportation order.

7. On 13 February 2014, an emergency travel document pack was completed, and on 25 February 2014, the claimant attended a face to face interview at the Jamaican High Commission.

8. On 25 July 2014, the claimant's representatives made further submissions, asserting that his deportation would not be conducive to the public good, and relying on his parental relationship for his son and daughter, both British citizens and both minors. The mothers of both children supported his application. The claimant's case was that he was

the primary carer of his son, and that he shared the care of his daughter with her mother.

9. The claimant's daughter was a minor at the date of application but reached her majority in January 2020. The Secretary of State considered that her mother was her primary carer, although the claimant took an active part in his daughter's life. The claimant also had a genuine and subsisting relationship with his adult stepson from his marriage here (the boy was 26 years old at the date of decision).

10. The claimant's son is now 19 years old, having reached his majority in April 2020. The respondent accepted that the claimant's son lived with his mother and the claimant, but not that the claimant was the primary carer. He no longer lives at home: he has succeeded in obtaining a Tottenham Hotspurs Academy place, against stiff competition, and comes home only at weekends.

11. The claimant's mother also lives in the United Kingdom, as does his sister.

First-tier Tribunal decision

12. The First-tier Judge found that both young people needed their father and that if he were to be removed, there would be a detrimental effect, particularly on his son. The judge found that there were compelling circumstances which outweighed the public interest in the claimant's removal.

13. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

14. In her grounds of appeal, the Secretary of State argued that the First-tier Judge had failed to take the decision of the Court of Appeal in *RC (Jamaica)* [2018] EWCA Civ 1188, a decision concerning this appellant, as the *Devaseelan* starting point in approaching the question of whether removal of the claimant would be unduly harsh for his (then) minor children, an error which had infected the entire decision.

Rule 24 Reply

15. There was no Rule 24 reply on behalf of the claimant.

Further directions

16. On 31 March 2020, the Upper Tribunal sent out triage directions made by Upper Tribunal Judge Keith in the light of the COVID-19 pandemic. The appellant was invited, if so advised, to submit further submissions on the error of law issue, with a right for the respondent to reply, if triage submissions were made, and a further right of reply for the appellant thereafter.

17. Both parties were directed to say whether they considered that a further hearing, oral or remote, was required. In default, the appeal would be considered on the papers and triage submissions, if any.

18. Neither party responded. On 29 June 2020, Upper Tribunal Judge Gill extended time to give the parties a final opportunity to respond to the triage directions. Both parties responded with written submissions.

Submissions received

19. Triage submissions were received from the Secretary of State. She repeated her *Devaseelan* submission and argued that the judge had failed to consider and apply the unduly harsh test in paragraph 399(1) of the Immigration Rules HC 395 (as amended) and that her reasoning was wholly inadequate. Despite the finding that there were very compelling circumstances, the judge had not specified what these were, nor were any such circumstances identified in the decision.

20. The decision was fundamentally unsound and should be set aside. The Secretary of State considered it likely that a face to face hearing would be required to remake the decision, in the Upper Tribunal.

21. The claimant's solicitors replied, out of time, requesting a further extension of time. The solicitors claimed only to have received the grant of permission on 7 August 2020. There was no explanation for the delay of almost two weeks from 7 August 2020 to 20 August 2020. After setting out the law on *Devaseelan* starting points (but not engaging with the Court of Appeal's actual findings of fact), the claimant argued that on the basis of other evidence before the First-tier Judge, her finding had been open to her.

22. The respondent's triage submissions did not address the issue of whether any hearing was required at the error of law stage. She is taken therefore to concur with the indication in the triage direction that the question of a material error of law would be resolved on the documents and submissions before the Tribunal.

23. That is the basis on which this appeal came before the Upper Tribunal.

Analysis

24. I am satisfied that it is appropriate to make a decision on whether the First-tier Tribunal decision contains a material error of law on the basis of the decisions and submissions before me.

25. The provisions of section 117C(3)-(6) are not triggered, as the sentence was less than four years, but subsections 117C(1) and (2) remain applicable and the claimant is a foreign criminal as defined by section 117D(2). Deportation of foreign criminals is in the public interest and this was a serious offence.

26. The First-tier Tribunal, and the Upper Tribunal, are bound by the judgment of the Court of Appeal in *R C (Jamaica)* when, unusually, the court remade the decision without remitting it. Lady Justice Arden (as she then was), with whom Lord Justice Simon agreed, found as a fact that:

> "I have now to consider whether it would be correct to remit the matter to the Upper Tribunal for further fact-finding … no particular facts have been identified as needing to be reconsidered. …It seems to me therefore that the only matters to be taken into account are those which are already known and are set out in the Upper Tribunal and the First-tier Tribunal's decisions. In the light of the fact that the First-tier Tribunal found that deportation would not have dire consequences for the children but simply that it would not be in their best interest and further that they would be able to have contact with their father even after his removal, either through occasional visits to Jamaica or in other ways, in my judgment there is no doubt about the conclusion to be made in this case on the basis of the correct test. I would therefore not remit this matter to the Upper Tribunal but decide the application in favour of the Secretary of State on the basis that the [claimant] has not satisfied the test of unduly harsh. I am extremely grateful to the submissions that have been made to this court and I would allow [the Secretary of State's] appeal on the basis that I have described."

27. In not taking that factual finding as a starting point in the present decision, there is no question that the First-tier Judge erred in law and the decision of the First-tier Tribunal is fatally tainted thereby and must be set aside and remade.

28. The question then is what should be done after the decision has been set aside. In remaking the decision, the Upper Tribunal must take as its *Devaseelan* starting point the finding of Lady Arden that effect of the claimant's removal would not be unduly harsh for his children, who were then minors.

29. Both are now adults and the issues which were determined in the Secretary of State's favour by Lady Arden in 2018, and by the First-tier Judge in favour of this claimant in January 2020, no longer arise.

30. Nor is there any evidence of *Kugathas* dependency or any exceptional circumstances or new facts capable of displacing Lady Arden's decision that it would not be unduly harsh for these young adults to remain in the United Kingdom without their father if he is deported to Jamaica.

31. The claimant has not asked for a further hearing and I do not consider that one is necessary.

32. The decision of the First-tier Tribunal is set aside and the claimant's appeal is dismissed.

DECISION

33. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Signed Judith AJC Gleeson Date: 4 October 2020
Upper Tribunal Judge Gleeson