Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00419/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 August 2019	**On 9 October 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

RICHARD [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Malik of Counsel, instructed by Freemans Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission the decision of First-tier Tribunal Judge Cohen promulgated on 14 May 2019, in which the Appellant's appeal against the decision to refuse his protection and human rights claims (in the context of deportation) dated 21 December 2017 were dismissed.

2. The Appellant is a national of Jamaica, born on 15 September 1975, who first entered the United Kingdom on 24 June 2002, with leave to enter as a visitor for six months and subsequently with leave to remain as a student

to 31 January 2004. The Appellant was subsequently granted leave to remain as a spouse and granted indefinite leave to remain on the same basis on 1 April 2006.

3. On 27 October 2007, the Appellant was convicted of possession of drugs with intent to supply for which he was subsequently sentenced to 5 years imprisonment. He was served with a notice of liability to deportation and served with a Deportation Order and reasons for deportation letter on 21 July 2010. The Appellant's appeal against deportation was allowed on 2 February 2012 on human rights grounds, further to which the Respondent allowed him to retain his indefinite leave to remain.

4. On 21 July 2016, the Appellant was convicted of possession with intent to supply a controlled class B drug, for which he was sentenced to 3 years and six months' imprisonment. On 5 August 2016, he was convicted of a further offence of concealing, disguising, converting, transferring or removing criminal property and sentence to 4 months' imprisonment.

5. The Respondent issued a further notice of decision to make a deportation order on 6 August 2016, further to which the Appellant made representations and claimed asylum. A decision to deport the Appellant was subsequently made on 20 December 2017. The Appellant's asylum claim was certified by way of a certificate issued under section 72 of the Nationality, Immigration and Asylum Act 2002 on the basis that he had been convicted of a particularly serious crime and continues to constitute a danger to the community. His asylum claim was therefore refused on that basis but in any event, it was considered that the Appellant was not covered by the Refugee Convention and that there was a sufficiency of protection and internal relocation option available to him in Jamaica. In particular, the Appellant relied on threats which had been made as long ago as 2002, since when he had returned to Jamaica for a visit in 2005 and there had been no threats at all since 2007.

6. In relation to paragraph 398 and following of the Immigration Rules, the exceptions to deportation, the Respondent considered that as the Appellant had been sentenced to a term of imprisonment of over four years, he would have to show very compelling circumstances over and above the specific exceptions to outweigh the public interest in his deportation. The Respondent did not accept that the Appellant had a parental relationship with his two children as he was playing no meaningful role in their lives and in any event it would not be unduly harsh for them to remain in the United Kingdom without him. They could remain here with their mother who is their primary carer. Further it was not accepted that the Appellant was in a genuine relationship with his partner given that there was no evidence of cohabitation and in any event, it would not be unduly harsh for her to remain in the United Kingdom without him. The private life exception was not met and overall there were no very compelling circumstances.

7. Judge Cohen dismissed the appeal in a decision promulgated on 14 May 2019 on all grounds; including that the Appellant had not rebutted the presumption under section 72 of the Nationality Immigration and Asylum Act 2002 so as to exclude him from protection under the Refugee Convention and that he was also excluded from a grant of humanitarian protection. In any event, his asylum claim was considered to be incredible given that it related to events of 15 years ago and no earlier claim of asylum had been made. It was concluded that the Appellant was not at risk on return to Jamaica and therefore his claim was also dismissed under Article 3 of the European Convention on Human Rights.

8. In relation to Article 8 of the European Convention on Human Rights, Judge Cohen found that it was in the best interests of the Appellant's children to remain in the United Kingdom with their mother given his limited involvement with them during and after his period of imprisonment. In any event, it was not considered to be unduly harsh for either the Appellant's children or his partner to remain in the United Kingdom without him. Judge Cohen made reference to the requirements of paragraph 398 and following of the Immigration Rules and found that there were no very exceptional circumstances to outweigh the public interest in deportation, such that there would be no disproportionate interference with his and his family's right to respect for family life. It was found that the Appellant has family remaining in Jamaica, that he retains familiarity with the country, is in reasonable health would be able to find employment on return. In relation to private life, it was found that the Appellant would be able to re-establish and reintegrate himself on return to Jamaica.

The appeal

9. The Appellant appeals on what are essentially two grounds. First, that the First-tier Tribunal failed to apply a structured consideration of the appeal by reference to the Immigration Rules for deportation and the exceptions thereto. In particular, there was no express consideration of paragraph 399 of the Immigration Rules, whether the Appellant's deportation would be unduly harsh on his family members, nor of the recent caselaw of KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. The Appellant identified a number of factual inaccuracies in the decision and also claimed that the First-tier Tribunal erred in failing to assess his claim in accordance with the principles in Devaseelan by reference to his previous successful appeal. Overall it was claimed that there had been no cumulative assessment of the Appellant's circumstances and as to whether they would amount together to very compelling circumstances to outweigh the public interest in deportation. Secondly, that there was a material error of fact in relation to the assessment of the Appellant's asylum claim, in that it was stated that he returned to Jamaica in 2007 whereas in fact his last return was in 2005. It was however acknowledged in the written grounds of appeal that this may not be material in light of the unchallenged findings about the section 72 certificate, but is an issue that goes to the Appellant's credibility overall.

10. At the oral hearing, Mr Malik relied on the written grounds of appeal and emphasise that this was a confusing decision from the First-tier Tribunal which looks very much like a decision in two halves and which contains factual errors. For example, in paragraph 25 of the decision it was recorded that the Appellant was a persistent offender this is not the basis upon which the Respondent sought to deport him and in paragraph 41 it was recorded that the Appellant's children didn't visit him in prison, where is the evidence was that they did so frequently at the beginning of his sentence but then stopped.

11. Mr Malik made an application under rule 15 (2A) of the Tribunal Procedural (Upper Tribunal) Rules 2008 to adduce further evidence on behalf of the Appellant. It was accepted that this evidence was not relevant to the question of whether there was an error of law in the decision of the First-tier Tribunal and no good reason could be offered as to why the evidence was not before the First-tier Tribunal. I refused the application to rely on this further material as the requirements of the procedural rule were not satisfied and the application did not meet the test in Ladd v Marshall [1953] 1 WLR 1489.

12. I asked Mr Malik whether any error of law, if accepted, would be material to the outcome of the Appellants appeal. He submitted that there was a lack of engagement by the First-tier Tribunal with the position of the Appellant's children, dealing with this only a single paragraph without reference to the requirement to consider their best interests in section 55 of the Borders Citizenship and Immigration Act 2009, without reference to the Supreme Court decision in KO (Nigeria) and without clear findings of whether the Appellant's deportation would be unduly harsh upon them. The evidence that was before the First-tier Tribunal in relation to the impact of deportation on Appellant's children was essentially only that contained in paragraph 33 his written statement, which raise a concern about their ability to cope without the Appellant and how his deportation would affect them mentally. This was supported by the Appellant's wife's statement that the children would be emotionally damaged if they had to live a life without their father, who they could only maintain a relationship with in the United Kingdom.

13. The Appellant also relies specifically on his relationship with his wife, who has only ever lived in the same area of the United Kingdom with close family relationships with her own parents she provides care for, daughter and grandchildren. This is supported by evidence from the Appellant's wife as to her situation in the United Kingdom and as to their relationship.

14. It was submitted by Mr Malik that taken cumulatively, the nature of the Appellant's relationship with his wife and children would amount to exceptional circumstances to outweigh the public interest in his deportation, such that if considered properly the errors of law would be material to the outcome of his appeal.

15. On behalf of the Respondent, Mr Jarvis submitted that the Appellant's case could only be considered and the test of very exceptional circumstances to deportation and that he would not be able to benefit from one of the express exceptions to deportation because of his previous sentence of imprisonment of over four years, in accordance with the Upper Tribunal decision in Johnson (deportation – 4 years imprisonment) [2016] UKUT 00282 (IAC). The conviction and sentence was expressly relied upon by the Respondent in the reasons for refusal letter.

16. In relation to the Appellant's previous successful appeal in 2012, it was submitted that there had been material changes in both the law and the Appellant circumstances, including amendments to the Immigration Rules and the introduction of section 117C of the Nationality, Immigration and Asylum Act. The allowance of the previous appeal was generous but in any event the Appellant had gone on to commit further serious offences, in particular drugs offences which are significant impact on the public and the weight to be attached to the public interest. For these reasons the First-tier Tribunal was correct not to attach any greater weight to the earlier decision in 2012.

17. Although Mr Jarvis accepted that the structure and reasoning of the First-tier Tribunal's decision was poor, it was possible to understand the reasoning given and in any event taking the Appellant's claim at its highest, in relation to his family and private life, it could not legitimately establish very compelling circumstances to outweigh the significant public interest in his deportation. It was further submitted that the Appellant could not even succeed on establishing one of the exceptions to deportation that this would be unduly harsh on either his children and/or partner.

Findings and reasons

18. The decision of the First-tier Tribunal is not well structured or easy to follow in relation to the Article 8 aspects and generally, and does give the distinct impression that it was written in two halves given that the layout and paragraph numbering changes halfway through at the beginning of the section containing the findings. However, despite the lack of structured approach and assessment of the facts following paragraphs 398 to 399A of the Immigration Rules and/or section 117C of the Nationality, Immigration and Asylum Act 2002, I find that the correct provisions have been referred to and adequate findings made on the key issues, albeit they could have been expressed much more clearly and by reference to the language used in the Immigration Rules and statute.

19. In relation to the Appellant's relationship with his children, the findings made in paragraph 41 are that the Appellant has not had significant contact with his children or input into their daily lives during or after his most recent imprisonment and that it was in their best interests to remain in the United Kingdom with their mother, who is their primary carer and who has looked after them for all of their lives. It was found that contact

could be maintained with the Appellant after deportation through modern means of communication and visits if desired, but that the children would be adequately cared for in his absence from the United Kingdom. There is no express reference to whether it would be unduly harsh on the children to remain in the United Kingdom without the Appellant, or whether it would be unduly harsh for them to relocate to Jamaica with him. However, given the nature of the findings made, it can readily be inferred that the First-tier Tribunal did not consider it to be unduly harsh on the children to remain in the United Kingdom.

20. As to the Appellant's relationship with his wife, it was accepted that his wife had a close family in United Kingdom including with her ill, elderly parents, her daughter and grandchildren but that she could choose to relocate to Jamaica to continue family life with the Appellant if she so wished. There was an express finding that it would not be unduly harsh for the Appellant's wife to relocate to Jamaica with him and in the alternative, she could remain in the United Kingdom and maintain contact with the Appellant in Jamaica. Again, although there is no express finding as to whether be unduly harsh for the Appellant's wife to remain in the United Kingdom without him, reading the paragraph as a whole, this can also be readily inferred and in any event it is sufficient that it would not be unduly harsh for her to relocate for the exception against deportation not to apply.

21. The First-tier Tribunal also makes express findings about the Appellant's relationship with wider family members, including with his stepdaughter in paragraph 44; his grandchildren through marriage in paragraph 45 and with his parents-in-law in paragraph 46. Those relationships were not accepted to constitute family life for the purposes of Article 8 and in relation to the grandchildren, it was in their best interests to remain in the United Kingdom with their immediate family members. The Appellant's relationship with these extended family members is relevant to his overall circumstances, but could not, on the basis of the extended nature of the family relationships, fall within the specific exceptions to deportation.

22. In paragraph 50 of the decision of the First-tier Tribunal, paragraph 398 of the Immigration Rules is quoted and it is identified that the relevant test for the present case is that the Appellant would need to show very compelling circumstances (expressed in paragraph 51 as exceptional circumstances, with no material difference in the application of the test as to what is required) to outweigh the public interest in deportation. In accordance with Johnson, this is the correct test to be applied given the Appellant's earlier conviction and sentence of over four years' imprisonment.

23. The findings which follow in paragraphs 52 to 55 consider cumulatively the Appellant's various family relationships, likely circumstances and connections in Jamaica, the Appellant's private life in the United Kingdom and the strong public interest in deportation.

24. The conclusion follows in paragraph 56 that there is nothing in support of the Appellant's appeal which has been raised which gets close to the threshold required in order to amount to exceptionality so as to find that the Appellant's removal would be disproportionate in all of the circumstances. Although this conclusion is poorly expressed as against the language used in paragraph 398 of the Immigration Rules and section 117C of the Nationality, Immigration and Nationality Act 2002 (which are materially identical), I find that the meaning and effect is sufficiently clear that the Appellant has not established any very compelling circumstances to outweigh the significant public interest in his deportation. I do not therefore find any error of law on the first ground.

25. In any event, even if, contrary to the above, I had found that the decision of the First-tier Tribunal did not consider or make findings with sufficient clarity in accordance with paragraph 398 and following of the Immigration Rules which amounted to an error of law, such an error could not on the facts and evidence before the First-tier Tribunal have been material to the outcome of the appeal.

26. In his written statement, the Appellant states that his deportation would have a devastating impact on his wife, a British citizen, and her family. He says that whilst he was in prison she suffered from depression and was struggling to cope but since his release he has shared the burden of caring for her parents and grandchildren, practically as well as emotionally. He also states that his deportation would have a devastating impact on their grandchildren, to whom he is more of a father figure as own father only season rarely and on a practical level he helps provide childcare and support for them. The Appellant's wife's entire life and family is in the United Kingdom, where she has a home, a job and provides care for her elderly and sick parents as well as for grandchildren. The Appellant's wife's written statement is in very similar terms. There is no supporting medical or other evidence, for example about care provided for her parents or otherwise.

27. In relation to his children, the Appellant states that he speaks to them regularly, sees them when he can, provides financial support and takes decisions together with their mother on key matters. In the future he would like them to come and stay for weekends and school holidays and meet other family members. The Appellant does not want his daughters growing up without their father because of his actions and has seen the impact on other children who have grown up without both parents which he doesn't want for his own children. He is concerned about the impact mentally on his children if he is deported, where they would not be able to visit him and their relationship could not continue to develop. There is no evidence from the children themselves or their mother and no external assessment of the impact on them arising from the Appellant's deportation.

28. The evidence from the Appellant in relation to these key family relationships can at best be described as thin, with no real engagement in

substance of any claimed adverse impact on either his wife or children by relocating to Jamaica with him or of their circumstances remaining in the United Kingdom without him. There is nothing to suggest that the impact of deportation is anything other than the normal consequences of families relocating or being separated by deportation. The evidence set out above, even together with that in relation to the Appellant's extended family relationships and private life in the United Kingdom, could not on any legitimate view amount to very compelling circumstances to outweigh what is in this case a very significant public interest in deportation of the Appellant, following two convictions with lengthy sentences of imprisonment for serious drugs offences. On the evidence, it could not even be legitimately found that either of the exceptions to deportation were met in relation to the Appellant's partner or children, that it would be unduly harsh for them to relocate and/or remain in the United Kingdom without him. For these reasons there is no material error of law in the decision of the First-tier Tribunal dismissing the appeal on human rights grounds.

29. As accepted on behalf of the Appellant in the written application for permission to appeal, the second ground of appeal, even if made out, could not be material to the outcome of the appeal. The factual discrepancy as to whether the Appellant returned to Jamaica only once in 2005 or twice in 2005 and 2007 has no material bearing on the dismissal of the appeal on asylum or humanitarian protection grounds, both of which the Appellant is excluded from because of his criminal conduct and the section 72 certificate; neither of which have been challenged in this appeal. For these reasons there is no material error of law identified in the second ground of appeal either.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed  Date 3rd October 2019

Upper Tribunal Judge Jackson