Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/31962/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 December 2014	**On 2 January 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR C S A B
(Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr S Walker a Senior Home Office Presenting Officer
For the Respondent: Mr A B Sesay a solicitor from Duncan Lewis

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Jamaica born on 27 September 1994 ("the claimant"). The Secretary of State has been given permission to appeal the determination of Immigration Judge Braybrook ("the FTTJ)" who allowed the claimant's appeal against the Secretary of State's decision of 20 August 2013 to refuse to vary his leave to remain in the UK and to

remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

2. The claimant came to the UK as a visitor on 23 December 2002. He was subsequently granted discretionary leave as a dependant of his mother for a period from 12 November 2009 to 13 November 2012. On 2 November 2012 he made an application for further discretionary leave. The application was refused. In her refusal the Secretary of State recorded that on 19 August 2010 the claimant was convicted of robbery. On 4 March 2013 he was convicted of supplying controlled drugs and being concerned in the supply of controlled drugs. The Secretary of State was satisfied that it would be undesirable to permit the claimant to remain in the UK in the light of his character, convictions and associations. His application was also considered but rejected on Article 8 human rights grounds under the provisions of Appendix FM.

3. The claimant appealed and the FTTJ heard his appeal on 13 August 2014. Both parties were represented. The judge heard evidence from the appellant, his partner, his partner's sister and his key worker.

4. The FTTJ found that the claimant was not living with and did not have a family life with his mother and her children. She considered whether the claimant had a family life with his partner. They had a child, a son born on 19 February 2013 who was living with the claimant's partner. The claimant and his partner were not living together although they were seeking further accommodation. The FTTJ accepted that the claimant spent "considerable time with his partner and son" although "overall I considered that the family life was limited".

5. The FTTJ found that there was little professional evidence as to the claimant's risk of reoffending. The claimant was very reluctant to accept blame for any part of his offending. He had reoffended despite stating that he had moved away from friends who were leading him astray. He had offended whilst his partner was pregnant and there was nothing to suggest that she was able to help him overcome his propensity to offend. His economic difficulties continued and his drugs offences appeared to have been economically motivated. He was unable or unwilling to obtain employment. The FTTJ found that, even if his immigration status was satisfactorily resolved, pressures to reoffend could resurface. There was little evidence that apart from family contact he had integrated fully into the cultural social or economic life of the UK or had lived in a wholly law-abiding way. His connections in Jamaica were limited. He was young when he first arrived in the UK and although there was a period during which he was not here legally this had been regularised.

6. The FTTJ said that she needed to balance the family life which the claimant had established against the legitimate interest in maintaining a firm and fair system of immigration control and the public interest as set out in sections 117A and 117B of the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014.

7. The FTTJ directed herself that the best interests of the claimant's son had to be taken into account as a primary consideration. In paragraph 31 of the determination she said; "I had also to consider legislation relating to the public interest. As to paragraph 117B I have to have regard to the fact that the maintenance of effective immigration control is in the public interest. As to the other factors in the paragraph, the appellant spoke English. I accept that given his age there was no likelihood of the appellant being financially independent. However I took into account that he had a partner and child and there is little to indicate that the appellant has attempted to obtain employment although Mr G (his key worker) has emphasised the need to do so. This was a consideration which under 117B (3) had to be taken into account. Paragraph 117B (6) states that in the case of a person who is not liable to deportation the public interest does not require the person's removal where (1) a person has a genuine and subsisting parental relationship with a qualifying child and (b) it would not be reasonable to expect the child to leave the UK. The appellant's son was a British Citizen and therefore a qualifying child. I accept it would not be reasonable for the appellant's child to leave the UK for Jamaica where the appellant would not certainly at the outset be able to provide for him. I also considered on the evidence above that whatever the appellant's shortcomings as a father he was in a genuine and subsisting parental relationship. On this basis I conclude that the public interest did not require the appellant's removal. His appeal on human rights grounds is accordingly allowed."

8. The Secretary of State applied for and was granted permission to appeal. There is one portmanteau and formulaic ground of appeal which argues that the FTTJ erred in law by failing to give reasons or adequate reasons for her reasoning and conclusions in relation to the Article 8 grounds. It is argued that the Immigration Rules are a complete code and the FTTJ failed to have proper regard to them. There was no consideration as to whether there were compelling circumstances not recognised by the Rules or exceptional circumstances. The claimant's presence in the UK was not conducive to the public and society as a whole. He had an appalling criminal history. It is argued that paragraphs 117A to 117D of the Immigration Act 2014 reflect the government's view as to where the balance lies between the rights of an individual and the public interest. The FTTJ's assessment of the Article 8 criteria was incomplete.

9. The grant of permission to appeal is more succinct and goes further than the grounds by suggesting that the FTTJ's findings were irrational and that she failed to give adequate reasons for her decision which was inconsistent with the earlier findings in paragraph 25.

10. The appellant did not attend the hearing before me. Mr Sesay told me that he was expected but did not object to proceeding in his absence on an error of law hearing. He submitted a skeleton argument and a number of authorities.

11. Mr Walker relied on the grounds of appeal and emphasised paragraph 6 where it is submitted that the FTTJ failed to provide adequate reasons why the claimant's circumstances were either compelling or exceptional. Her conclusion in paragraph 25 that family life was limited conflicted with the conclusion in paragraph 31 that there was a genuine and subsisting parental relationship between the claimant and his son. He accepted that this was not a deportation appeal and that the FTTJ was correct to apply paragraphs 117A and 117B but not 117C. There had been no proper consideration of the public interest element. Overall the assessment was unbalanced and the law was not correctly applied to the findings of fact, which were not disputed. If the FTTJ had properly applied the law to her findings she could not have reached the conclusion to allow the appeal.

12. Mr Sesay relied on his skeleton argument. He rehearsed a number of the findings made by the FTTJ, which are not disputed. He referred to the offer made by the claimant's partner's father to provide the couple with accommodation but accepted that this did not appear to have been taken up. He submitted that the FTTJ properly dealt with the question of the public interest in paragraph 31. There was evidence that the claimant had turned his life around. Even though it was said to be "limited" the FTTJ had concluded that there was a family life between the claimant, his partner and his son. I was asked to find that there was no error of law and to uphold the determination.

13. I reserved my determination.

14. Whilst the grant of permission to appeal says that it is arguable that the FTTJ's findings were irrational and there is inconsistency between the reasoning and conclusions in paragraph 25 and 31, this is not one of the grounds of appeal. The closest the grounds get to this is the submission that the reasoning is inadequate, although this is put forward in the context of whether the claimant's circumstances were either compelling or exceptional.

15. Nevertheless, there is at first sight a possible inconsistency between the finding in paragraph 25 that "overall I consider that the family life was limited" and the conclusion in paragraph 31 that the

claimant was in a genuine and subsisting parental relationship with his son. It is not disputed that his son is a qualifying child or that it would be reasonable to expect him to leave the UK. The fact that the family life is limited, to some extent because of the fact that they are not living together, has to be weighed against the important conclusion in paragraph 25 that; "I accept on the basis of the consistent evidence of all the witnesses that he (the claimant) does spend considerable time with his partner and son and spent a lot of time with them (sic)." I find that the FTTJ assessed the factors on both sides of the question whether there was a genuine and subsisting parental relationship before reaching the conclusion in paragraph 31 that; "I also considered on the evidence above that whatever the appellant's shortcomings as a father he was in a genuine and subsisting parental relationship." After a close examination of the findings and reasoning, in particular in paragraphs 25 and 31, I find that on all the evidence it was open to the FTTJ to conclude that the claimant was in a genuine and subsisting parental relationship with his son. In this regard there is no error of law.

16. It is important to emphasise that this is not a deportation appeal. It is no part of my task to consider whether the Secretary of State could have or may still make a deportation order. No automatic deportation provisions apply and the claimant is not a foreign criminal as defined in the Immigration Rules.

17. The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

> 117A Application of this Part
> (1) This Part applies where a court or tribunal is required to determine
> whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must
> (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
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> 117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.
(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part
(1) In this Part—
“Article 8” means Article 8 of the European Convention on Human Rights;
“qualifying child” means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
“qualifying partner” means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(2) In this Part, “foreign criminal” means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.
(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
has not been convicted of an offence.
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being

sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

18. The FTTJ was correct to apply 117A, 117B and the definitions in 117D but not to apply 117C which applies only to foreign criminals.

19. The grounds of appeal argued that the FTTJ should have applied paragraphs 117A to 117D which set out the government's view as to where the balance lies between an individual's rights in the public interest. I find that this is exactly what the FTTJ did, excluding 117C which did not apply.

20. I also find that the FTTJ correctly applied paragraph 117B(6). The claimant was not a person who was liable to deportation and I note that the Secretary of State has not suggested otherwise. For the reasons I have already given it was open to the FTT to find that he was in a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. In these circumstances the Act, which is primary legislation, states in the clearest of terms that the public interest does not require the claimant's removal. Paragraph 8 of the grounds of appeal supports rather than calls into question the FTTJ's reasoning and conclusions.

21. By whatever route the FTTJ reached her conclusion, whether under primary legislation, the Immigration Rules or outside the Rules I cannot see how, against the background of a correct interpretation of paragraph 117B, it can be argued that there has been an incorrect assessment of the public interest.

22. I have not been asked to make an anonymity direction but consider it necessary to do so in order to protect the interests of the claimant's partner and son. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the claimant, his partner, his son, or any member of their families.

23. I find that there is no material error of law and I uphold the determination.

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Signed Date 3 December 2014

Upper Tribunal Judge Moulden