Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA 06816 2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 August 2017	**On 13 November 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SHAWN SIMPSON
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E W Daykin, Counsel instructed by DWFM Beckman Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for and do not make any order restricting reporting about this appeal. Although the decision touches on the welfare of a child I see no risk of harm to that child if the details are known.
2. This is an appeal brought with the permission of First-tier Tribunal Judge Shimmin against the decision of the First-tier Tribunal (First-tier Tribunal Judge P S Aujla) who dismissed the appellant's appeal against the decision of the respondent on 12 May 2016 to refuse him international protection and leave to remain on human rights grounds. It is a feature of the case that the appellant

is subject to deportation proceedings. The Secretary of State has decided that his presence is not conducive to the public good under Section 5(1)(a) of the Immigration Act 1971.

3. It was made clear before the hearing before the First-tier Tribunal that the appellant was not maintaining his asylum claim. As the First-tier Tribunal Judge explained at paragraph 13 of his decision, the appeal before him was based on two grounds. It was said that the respondent had no power to deport the appellant for the reasons given because the requirements of paragraph 398(c) were not satisfied and, secondly, that even if there was power to deport the appellant his deportation would interfere disproportionately with the appellant's private and family life particularly the private life the appellant had established in the United Kingdom and his relationship with his daughter.

4. Although I do not criticise the First-tier Tribunal Judge for considering the Immigration Rules his primary attention should have been on Section 117 of the Nationality, Immigration and Asylum Act 2002 because Parliament requires this to be considered where a court or Tribunal has to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8 of the European Convention on Human Rights.

5. The Act prescribes various ways in which a person can be a foreign criminal. Probably the most common way, that the person has been sentenced to a period of imprisonment of at least twelve months, does not apply here, but a person is a foreign criminal if he has been convicted "of an offence that has caused serious harm" or if he is a "persistent offender".

6. The First-tier Tribunal found that the appellant was a foreign criminal in two ways. He had been convicted of an offence that caused serious harm and he is a persistent offender.

7. The First-tier Tribunal concluded clearly that the appellant had caused serious harm when he engaged in sexual activity with a female under the age of 16 years. The appellant was 23 years old when he committed the offence so he was eight years older than his victim. Clearly it was not the very worst example of that kind of offence because the sentence of nine months' imprisonment was suspended but the sentencing judge outlined the circumstances of the offence which involved touching a 15-year-old girl and the judge said of the offence that it "was unpleasant and she was frightened". It was on that basis that the First-tier Tribunal decided that the offence caused serious harm and whilst it is right that the harm was not particularised or expressly evidenced, for example by a statement from the victim, Judge Shimmin refused permission to appeal the finding that the offence was one that caused serious harm. It follows therefore that that point was not challengeable before me, there being no application to the Upper Tribunal to extend the scope of commission, and that the appellant is therefore a foreign criminal.

8. It follows therefore that the challenge to the finding that he is also a persistent offender rather loses its force. Even if he succeeds on that point he is still a foreign criminal. Nevertheless it was arguable before me that the First-tier Tribunal had erred in regarding the appellant as a persistent offender.

9. The First-tier Tribunal summarised the appellant's criminal record at paragraph 4 of its decision. This shows the following convictions and punishments which I outline below:

   (1) September 2004, Robbery, Detention and training order for six months;

   (2) November 2008, Theft from employer, Community service order for 80 hours;

   (3) February 2012, Sexual activity with a female child under the age of 16, Nine months' imprisonment suspended for twelve months;

   (4) March 2012, Driving a motor vehicle with excess alcohol, Disqualified and fined

   (5) May 2013 For offence of battery, Fined

   (6) July 2013 Failing to comply with a sex offender's notification requirement, Fined

   (7) March 2017 Driving a motor vehicle with too much controlled drugs, Fined and disqualified from driving.

10. It is a requirement of the Immigration Rules, although not Section 117, that in order to qualify for deportation the foreign criminal must not only be a persistent offender but a persistent offender who shows a "particular disregard for the law". I have read the decision of this Tribunal in **Chege ("is a persistent offender") [2016] UKUT 00187 (IAC)**. It is not clear to me precisely what the words "particular disregard for the law" add to the requirement that a person is a persistent offender because, as is clearly the case, being a persistent offender at the least implies a particular disregard for the law. The First-tier Tribunal was satisfied that the appellant was described properly as a persistent offender with particular disregard for the law and I see no sensible basis for challenging that finding. There are breaks in the appellant's criminality, in particular there is a significant break between the convictions in 2008 and 2012 but the offence was committed at the end of 2010 and so the gap there is shorter than it seems. The appellant's conviction in March 2017 for an offence committed in September 2016 kills off any suggestion that he had finally learnt his lesson and I find reinforces the legitimacy of the finding that the appellant is somebody who keeps getting into trouble. I also take a particularly dim view of his being convicted of failing to comply with his obligations under the sex offender's notification requirements. This is I find a clear indication of someone who does not appreciate the importance of obeying the law and puts beyond argument any lingering concerns that he might be a persistent offender who does not show a particular disregard for the law. He does show a particular disregard for the law.

11. There are, no doubt, worse examples of persistent offenders than is this appellant but despite the careful grounds and realistic submissions by Ms Daykin I see no fault in the First-tier Tribunal's finding that the appellant is a persistent offender and that is sufficient for the purposes of Section 117C.

12. I also accept that he is a persistent offender with a particular disregard for the law.

13. Before me Ms Daykin concentrated her challenge on grounds 4 and 5 which are related. In summary the appellant maintains that the First-tier Tribunal was wrong to decide that there was not a "genuine and subsisting parental relationship with a child under the age of 18" and wrong to decide that it would be unduly harsh for the child to remain in the United Kingdom without the appellant.

14. I set out below paragraph 47 of the First-tier Tribunal's decision:

> "The appellant claims that he was seeing his daughter regularly. He was not living in the same household as his daughter. He was living with his sister for the last five years. He was no longer in a relationship with his ex-partner, the child's mother. He stated that the child loved him and he loved her. He saw her every week. Those were his bare assertions. I remind myself that Appellant had every reason to frustrate the Respondent's efforts to remove him from the United Kingdom. In view of that, I am not prepared to place undue weight on his bare assertions. I needed something more than that. Whilst I accept that his ex-partner had provided a written statement dated 26 May 2017, that in my view was not sufficient. Her evidence and the assertions made by the Appellant could only be tested and scrutinised if she attended the hearing to give evidence and was cross-examined in my presence. She did not attend the hearing. Having considered the totality of the evidence in this respect, I am not prepared to accept the appellant's uncorroborated account that he was in a genuine and subsisting relationship with his daughter. I find that the appellant was not in a genuine and subsisting parental relationship with his daughter."

15. I remind myself that a judge has considerable discretion in finding facts and it is hard to say that a decision could not have been reached on the evidence. For all of that, the finding that there was no parental relationship is at least surprising. The claim was made clearly by the appellant and by the child's mother and supported in part by other witnesses and referees.

16. I find paragraph 24 of the appellant's witness statement dated 25 May 2017 particularly significant. It says there:

> "I see my daughter weekly supervised but I speak to her every single day and we look forward to seeing one another. She is 4 years old and we are very close. She fully knows who her father is and if for whatever reason I am unable to visit her, her mother informs me that her behaviour changes and that she becomes very withdrawn and low in her mood. She keeps going to the window and the door and even wets herself and doesn't tell anyone."

17. The mother's witness statement was dated 26 May 2017. It is in some ways perhaps surprisingly supportive of the appellant given his criminal past and that one of the criminal offences involved an attack on her and I can understand the judge's reluctance to accept all of it without hearing from the witness. However it wrote in tender terms about her desire for the appellant to have a relationship with his daughter for the sake of his daughter, commenting that there was "no way I am going to be able to facilitate trips to Jamaica". However although that statement refers in some detail about her aspirations for the future relationship between the appellant and their daughter, all of it entirely plausible and responsible if truthful, the statement does not have much to say about the present relationship. As far as I can make out it consists of weekly contact at the home of the claimant's sister.

18. Nevertheless the judge was only deciding the case on the balance of probabilities. The paragraph set out above reads to me as if he had in mind the criminal standard of beyond all reasonable doubt. With respect to the First-tier Tribunal Judge I find the conclusion that there was not an existing parental relationship on this evidence to be perverse.

19. It follows therefore that I set aside the decision of the First-tier Tribunal.

20. However this criticism, although significant, is related only to one part of the decision and it is the finding that there was no parental relationship. I am prepared to accept on the evidence before me that there is a parental relationship but it is a parental relationship that consists of frequent contact usually every week albeit supervised and additional communication. This is important in the life of a little girl but it is not the same as the contact that comes with living together in a nuclear family. Parliament recognises that deportation has harsh consequences. These only become a reason to avoid deportation when the consequences are "unduly harsh". I bear in mind that the appellant can continue to be in touch with his daughter regularly by electronic means. I am not so crass as to equate communication by Skype (or similar). The appellant can talk to his daughter and show an interest in her progress and her activities easily and frequently and it is not unrealistic to think that on some future occasion she may even be able to visit him in Jamaica. I am not so crass as to think that this is in any way comparable to the fun and hugs that can come with even weekly contact but the harshness of separation is not in my judgment unduly harsh. Rather it is the likely natural consequences of deporting a man who has children and it is not the law that a father cannot be deported.

21. I see no need for a further hearing although that is something I have considered. For the purposes of this decision I am prepared to accept the evidence that was before the First-tier Tribunal. I conclude that there is occasional contact albeit regular and that removal will be upsetting for the child but her father can still have a place in her life and that the evidence does not support a conclusion that the consequences of removal are unduly harsh.

22. This is not in the child's best interests. As far as I can see they would be best served by preserving the status quo but the best interests of a child are frequently incompatible with the greater public good and this is such a case.

23. It follows therefore that although I see error in the First-tier Tribunal's decision so I have to set it aside, I can remake the part of the decision that is decided unsatisfactorily and having remade it I dismiss the appeal.

Notice of Decision

24. The appeal against the Secretary of State's decision is DISMISSED albeit for not all the same reasons given by the First-tier Tribunal.

Signed

Jonathan Perkins, Upper Tribunal Judge Dated: 10 November 2017