IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00010/2014

THE IMMIGRATION ACTS

Heard at Manchester Upper Tribunal	**Decision & Reasons Promulgated**
On 14 July 2015	**On 18 August 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

G B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr Nicholson, instructed by Greater Manchester Immigration

DECISION AND REASONS

1. The respondent, G B, was born in 1982 and is a citizen of Jamaica. I shall hereafter refer to the appellant as the respondent and to the respondent as the appellant (as they appeared respectively before the First-tier Tribunal).

2. On 10 December 2013, the respondent made an order to refuse the appellant's application to revoke a deportation order. The appellant appealed against that decision to the First-tier Tribunal (Judge Levin)

which, in a determination promulgated on 10 September 2014, allowed the appeal. The respondent now appeals, with permission, to the Upper Tribunal.

3. In a long and very detailed decision, Judge Levin has set out the appellant's immigration history [4] and his findings [18-65]. The grounds of appeal do not challenge those findings of fact. Rather, the respondent challenges the decision on the basis that the judge used an incorrect version of the Immigration Rules in his analysis. The judge had found that the Immigration Rules for those pertaining as at the date of the decision; however, the grounds assert that the judge should have determined the appeal having regard to the new provisions in paragraphs 398 and 399 as per the changes to those provisions put into effect on 28th July 2014. Before me, Mr Nicholson, Counsel for the appellant, accepted that the grounds were correct in that the judge had applied the incorrect rules. He argued, however, that any error of law was entirely immaterial in the light of the judge's detailed findings and his conclusions on the evidence.

4. In short, the appeal turns on the situation of the son of the appellant, J. The judge found that J would "have to go into residential care if the appellant were removed". J is a British citizen who has resided in the United Kingdom continuously for the last seven years (at the date of the hearing before the First-tier Tribunal, he was aged 12 years). There was medical evidence before the First-tier Tribunal to indicate that the mental condition of J's mother was "brittle". The judge found that J's mother was not able to care for J by reason of her history of depression and her medical condition at the time of the hearing. Incorrectly, as it transpired, the judge considered whether or not it would be reasonable for J to leave the United Kingdom to live abroad with the appellant. It is clear that, had he applied the correct version of the Immigration Rules, the judge should have considered whether or not it was "unduly harsh" for J to leave the United Kingdom to live with the appellant in Jamaica. The judge clearly found that J and the appellant enjoyed a genuine and subsisting parental relationship [58]. Moreover, in the light of his findings regarding J's mother, the judge had found that only the appellant was able to provide a stable home for J and would, if the appellant were removed, have to live in foster care or a residential home. The evidence indicated that J himself would be likely to experience a number of behavioural and other difficulties including soiling himself, behaving badly at school. The judge accepted expert evidence indicating that improvement in these behaviours have been "all down to his father". The judge concluded that only the appellant was in a position to care for J; his partner was, as a result of her mental condition, incapable of caring for him whereas J's birth mother had handed him over to Manchester Social Services in November 2013. The judge's finding [61] that neither the appellant's partner nor J's biological mother were either willing or able to care for J in the event of the appellant being deported has not been challenged in the grounds of appeal.

5. In the light of these various findings, the judge concluded that it was "out of the question for J to move to Jamaica [without the appellant's partner]

given his severe behavioural problems previously identified. I therefore find it would not be reasonable to expect J to leave the UK." The judge accepted (also a finding not challenged in the grounds of appeal) that the appellant's partner was either unwilling or unable to travel with the appellant and J to Jamaica.

6. Mr Nicholson referred me to the Immigration Directorate Instructions (Chapter 13: Criminality Guidance in Article 8 ECHR Cases) dated 28 July 2014 a copy of which had been before the First-tier Tribunal. At paragraph 3.5.14 it is stated:

> "If the only way a child could remain in the UK if a foreign national is deported would be in the care of social services or foster care that is not already in place (excluding care provided by a family member or a private fostering arrangement) it will usually be unduly harsh for the child to remain in the UK without the person who is to be deported, unless there was evidence that the child's best interests would be better served in such care than in the care of the foreign criminal. However consideration must be given to the age of the child or how long he is likely to remain in care."

7. It is true to say that Judge Levin did not investigate in any detail the probable length of time J might remain in foster or other local authority care in the event that the appellant were deported. However, it is clear from any reading of his determination that the judge believed that, on the evidence and given the incapability of those individuals who might otherwise care for J, the child would remain in local authority care for the remainder of his minority. Mr Nicholson submitted that, in the light of the instructions from which I have quoted above, the judge would, on the evidence, have reached exactly the same conclusion had he applied the correct version of HC 395.

8. I accept Mr Nicholson's submissions. As I have noted, Judge Levin's decision and reasons is extremely detailed and his analysis thoughtful and thorough. It was unfortunate that neither he nor the professional representatives appear to have been aware of the change from the provisions of HC 395. However, because his analysis and reasoning is so thorough, I am satisfied that, even if the judge had applied the relevant law, he would have reached the same decision. Indeed, such a decision would have been in line with the respondent's own instructions for its officers applying the new (i.e. "*unduly harsh*") provisions. In the circumstances, whilst I find that there has been an error of law, I have chosen to exercise my discretion to refrain from setting aside the decision of the First-tier Tribunal which I direct shall stand.

Notice of Decision

This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant

and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 4 August 2015

Upper Tribunal Judge Clive Lane