Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00233/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29th January 2016	**On 4th February 2016**

Before

UPPER TRIBUNAL JUDGE SOUTHERN

Between

OLUMARLON JACKSON

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J. Plowright of counsel, of Karis Law, solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Jamaica, has been granted permission to appeal against the decision of First-tier Tribunal Judge Freestone who, by a decision promulgated on 17 March 2015, dismissed his appeal against a decision that he be deported as a consequence of his conviction before the Leicester Crown Court on 17 July 2013 of 7 counts of possession and/or use of false documents. As we shall see, that was not his only conviction but it followed from his being sentenced to 12 month imprisonment, concurrently, for each of those seven counts that he became a foreign criminal for the purposes of s32 of the UK Borders Act 2007 so that the decision to make a deportation order was mandatory, subject to the exceptions provided by s33 of the 2007 Act, which was the focus of the appeal before the First-tier Tribunal Judge.

2. In granting permission to appeal, Upper Tribunal Judge Bruce said this:

> "It is arguable that in reaching its conclusions at paragraphs 40 and 41, the First-tier Tribunal has failed to take into account the apparently unchallenged evidence recorded at paragraph 23. It is arguable that had it done so, its conclusions as to whether it would be unduly harsh for the Appellant's British child to live without him would have been different."

3. Judge Bruce did not specifically limit the grant of permission to the ground upon which she was persuaded to grant permission, and in fact the grounds went a little further than that. In opening his submissions on behalf of the appellant, Mr Plowright made clear that the appeal was argued on the basis also identified in paragraph 3 of the summary of his grounds:

> "The learned IJ draws an inference from the fact that the appellant's bail address was initially in Leicester, and therefore he enjoyed only a remote relationship with his son. This was not put to the appellant or his partner but had it been, the evidence could have addressed the nature, extent and quality of the relationship the appellant enjoys with his on."

4. The decision of the judge begins by examining the appellant's immigration history, which she described when setting out her findings as an appalling one. There can be no quarrel with that conclusion as the following summary makes clear.

5. According to the sentencing remarks of the judge who passed upon the appellant the sentence of imprisonment that gave rise to the deportation decision, the appellant moved to the United States of America in March 1989. Thereafter:

> "He was arrested three times for firearms and class A drugs offences and used two false names and in 1991 in the USA, for the possession of cocaine and handling stolen property, got 11 years and was deported from the USA on 28 December 2000."

6. Nine months later, on 15 September 2001, the appellant arrived in the United Kingdom and secured entry as a visitor by presenting a false passport in the name of Errol Anthony Walcott. Using the same false identity, he successfully applied for further leave in the same capacity and then applied for that to be varied so that he be granted leave to remain as a student. However, having come to the attention of police following allegations from his then partner of domestic violence, his true identity was discovered and he was removed from the United Kingdom on 7 July 2002 as an illegal entrant.

7. The appellant soon made an application to the High Commission in Kingston for a visa to facilitate his return. This was refused but, undeterred by that, he travelled to the United Kingdom on 13 October 2002 using another false passport, this time in the name of Trevor Alvin Burke, and again was admitted with leave as a visitor. He overstayed that leave and in May 2003 applied for leave to remain on the basis of a

marriage entered into on 3 February 2003 with a person present and settled here. He was granted first a period of leave in that capacity and, following a further application in June 2005, indefinite leave to remain.

8. Each of those applications was made dishonestly, not just because they were made in a false identity and in reliance of false documents but because the appellant answered "No" to the question on the application forms the question asking whether he had "received a prison sentence in the UK or elsewhere".

9. The appellant's antecedents, also record that on 27 November 2007 he was convicted before the Birmingham Magistrates Court of making a false representation to obtain benefits, although he disputes that conviction, as he did when appearing before the Leicester Crown Court in July 2013. Despite that, the conviction remains recorded against him. However, in view of his protestation that this does not relate to him, I leave this out of account, as is apparent did the judge who dismissed his appeal.

10. It appears that although the appellant had secured a grant of indefinite leave under the false name of Burke, he wished also to acquire that status in his real name of Marlon Jackson. On 16 October 2008 the appellant submitted an application founded on rights protected by article 8 of the ECHR. This was refused on 21 September 2009 with no right of appeal. He was served with notice of his liability to be removed.

11. Despite this, the appellant remained. He retained, of course, the grant of indefinite leave to remain in the name of Trevor Burke. In March 2003 he made an application for indefinite leave, again in his real name of Jackson. That was refused but, because his former partner and their two children had been granted discretionary leave to remain, he also was granted a period of discretionary leave, until 6 July 2014. Two observations might be made about that. This was the partner whose complaints to the police that the appellant had been violent towards her led to his removal from the United Kingdom in July 2002. Secondly, this application, although made in his own name, was also a dishonest one because he failed to disclose that he had made an earlier application, successfully, in a false identity and that he had served a lengthy prison sentence in the USA for involving dishonesty and Class A drugs.

12. Before this period of leave expired, as I have observed above, the appellant was convicted of seven counts of possessing and/or using false documents and was sentenced to a total of 12 months imprisonment.

13. In setting out her reasons for rejecting the appellant's claim that there would be an impermissible infringement of rights protected by article 8 of the ECHR, so that the appellant could not bring himself within one of the exceptions to automatic deportation provided by s33 of the UK Borders Act 2007, the respondent conducted a careful review of all that was known about the appellant's asserted private and family life. She examined separately the appellant's relationship with his former partner

and their two children and with his current partner and their two year old son. She considered also the private life the appellant had built while living in the United Kingdom. She then concluded that:

> "The nature of your offence weighs heavily in favour of the public interest in securing your deportation. It is clear that your offences are representative of your willingness to ignore the criminal and immigration laws of this country and to exploit a source of negative impact on the community of the United Kingdom. In the light of the above it is concluded that there are no exceptional circumstances in your case which would outweigh the public interest in your deportation. It is also noted that you was convicted for drugs offences in the name of Peter O'Neal Brown and sentenced to 10 years and deported from the United States of America to Jamaica in 2000. You also failed to note this conviction on any of the application forms you completed to regularise your stay in the United Kingdom. You have also admitted to using a number of other alias names in the past and your long criminal history demonstrates your willingness to reoffend. It is therefore considered that deportation would be proportionate response to your offending."

14. It should be noted that the conclusion that the appellant did not stand to benefit from exceptions to deportation set out in the immigration rules concerning his parental relationships was reached with reference to the earlier version of para 399(a) then in force. As each of the three children lived, and would continue to live, with their respective mothers, it could not be said that there was no other family member able to care for the child in the United Kingdom. As we shall see, and as was recognised by all concerned, before the judge the relevant rules were those in force at the date of the hearing: see *YM (Uganda) v SSHD* [2014] EWCA Civ 1292.

15. That, then, was the position at the commencement of the hearing before the First-tier Tribunal Judge. She directed herself correctly in terms of the deportation provisions of s32 of the UK Borders Act 2007, s117 of the Nationality Asylum and Immigration Act 2002 as amended by the Immigration Act 2014, and the burden and standard of proof in determining a claim under article 8 of the ECHR. She heard oral evidence from the appellant and from his current partner, Ms W, who is the mother of his 3 year old son.

16. At paragraph 23 of the decision the judge said this:

> "In his oral evidence the Appellant said he has been with Ms W for six years. The Appellant takes his youngest son to nursery three days a week. Ms W works part time as a care assistant. When she is working the Appellant looks after (their son) full time. The Appellant provided a birth certificate for (his son) which appears to indicate that he and Ms W were not living together at the time he was born. In his oral evidence the Appellant said that his youngest son is hyperactive. He is currently being assessed although the GP said he is so young they may have to *"wait and watch him"* The couple have to be careful who they leave him with. He wants to be a good father to him"

17. The judge's summary of the evidence continued. She noted the appellant's evidence that it would be very hard for him to support himself in Jamaica so he would be unable to send financial support for his three children here. The judge noted also that the mother of the appellant's youngest child had said in her written evidence that their son's behaviour had improved since the appellant had returned to live with them and it would be hard for her to care for her son alone. She confirmed that she herself had come to the United Kingdom from Jamaica ten years ago and, although she had taken her son there last Christmas for a two month long visit, she would not want to move back there because she did not want her son to grow up "with the violence in Jamaica".

18. There was no real evidence at all from the appellant's former partner who is the mother of his two elder children. A document was produced that was said to be "an unsigned statement" of this lady saying that the appellant had been "a wonderful father to his children" and that there was no possibility of them visiting the appellant in Jamaica.

19. Finally, the judge noted that the evidence from the Probation Service produced in October 2013 was that the appellant had been assessed as posing a low risk of serious harm based on his lack of convictions for violent offences or domestically abusive behaviour. It appears that the author of that report was unaware of the accusations of domestic violence against the former partner that led to the appellant's removal from the United Kingdom in 2002.

20. As Mr Plowright quite properly conceded, there can be no challenge to the findings of the judge concerning the appellant's two children from his earlier relationship, that being that his relationship with them and their mother was not such as to bring about any impermissible infringement of rights protected by article 8 of the ECHR should the appellant be deported. The judge observed at paragraph 42 of her decision:

> "… On the Appellant's own evidence he is now conducting the relationship with his two eldest children from afar…"

21. The reasoning and findings of the judge are distilled into paragraphs 39-41 of her decision:

> "39. In her refusal letter the Respondent accepts it is in the best interests of the Appellant's children to remain in the UK. Whilst I accept the Immigration Rules have changed I am satisfied that this is still the position. In those circumstances the question is whether it is unduly harsh for them to remain in the UK with their mothers after the Appellant has been deported (paragraphs 398 and 399 of the Immigration Rules and section 117C of the 2002 Act."

Mr Plowright accepts, realistically, that neither the appellant's relationship with his elder two children who continue to live with his former partner nor that with his current partner is sufficient, in itself, to

bring about any breach of rights protected by article 8. Therefore, the focus of the appeal is upon the genuine and subsisting parental relationship presently enjoyed by the appellant with his three year old son. The judge continued:

> "40. The Appellant's youngest child is aged 3 years. He was born on the 21st October 2011. The Appellant was not living with Ms W (his mother) at the time. The Appellant was convicted on the 17th July 2013 and was sentenced to a term of imprisonment. He was eventually released on bail in May 2014 (oral evidence). I note that the address he provided for his Home Detention curfew was his mother's address in Leicester and not Ms Ws' address in Oxford (J3 of the Respondent's bundle). The address in Leicester is the same address that is given for the Appellant on the birth certificate of (his youngest son).
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> 41. It seems to me that whilst it is conceded by the Respondent that the Appellant has a genuine relationship with his son he was conducting it from afar when (his youngest son) was born and whilst he was in prison. By intending to live in Leicester on his release it would appear that he was still prepared to conduct that relationship whilst living apart from his son. Accordingly, whilst I accept that the Appellant's deportation to Jamaica would be harsh on his youngest son, I do not find it to be unduly harsh being in mind his age and the fact that for nearly a significant part of his son's life the Appellant has not been living with him. I also note that the Appellant's partner returned to Jamaica recently with their son and remained there for two months. In those circumstances it seems to me that their relationship can continue after the Appellant's deportation to Jamaica."

22. In my judgement it plainly cannot be said that in reaching her conclusions concerning the appellant's youngest son, the judge had simply left out of account what she had recorded at paragraph 23 of her decision. First, there is no reason at all to suppose that she had forgotten what she had just written in the earlier paragraph. Secondly, it is clear from paragraph 39 of the decision that here the judge is addressing specifically the issue of whether the separation caused by deportation would be unduly harsh upon the child and at paragraphs 40 and 41 the judge is explaining why, despite that which she had recorded at paragraph 23, it would not be. The fact that the judge concluded that the effect upon the child would be harsh but not unduly harsh is plainly illustrative of the fact that the judge was, specifically, drawing together all of the evidence, including that which she had recorded as speaking in favour of the need to avoid a separation, and reaching a judgement upon the issue that she had to resolve. Clearly, it could not be accepted to be "harsh" for a child to be separated from a father whose relationship was in any event presently "being conducted from afar".

23. That analysis is reinforced by examining precisely how the judge expressed herself. She said that in "intending" to live in Leicester rather than Oxford:

> "… it would appear that he was still prepared to conduct that relationship whilst living apart from his son…"

From which it can be seen that the judge is expressing herself in the past tense, speaking here not about the current circumstances, which she had described earlier at paragraph 23, but about the position as it was when the appellant was contemplating his release from prison.

24. The second challenge being pursued is that if the judge was to draw the inferences she did about the significance of the appellant providing an address in Leicester, his mothers, address, rather than the address in Oxford where his son lived with his partner for his bail/curfew address on release from prison, then she should have put that to the appellant so that he had an opportunity to deal with it. Mr Plowright pointed out that, in any event, the document to which the judge referred appears to be a *request* for post release bail/curfew rather than a certificate of what happened as the date upon it does not chime with the known date of release.

25. I am entirely satisfied that the judge made no error of law in this regard for two reasons. First, the judge spoke of this in terms of what the appellant was *intending* on release rather than whether or not that intention was given effect. In any event, there was nothing at all offered to suggest that this is not what did in fact occur.

26. The issue of where the appellant chose to live or did in fact live during the life of his three year old son was plainly at the heart of this appeal and as both the appellant and his partner gave oral evidence before the judge they had every opportunity to deal with it. he appellant was fully aware that there was before the judge documentary evidence from several sources that indicated that the appellant had not consistently lived in the same house hold with his son:

a. The child's birth certificate discloses that the appellant was living at a different address than the mother of the child and so, plainly, he was not cohabiting with the child and his mother when the birth was registered;

b. It can be seen from the sentencing remarks of HHJ Head that the appellant was not living in Oxford with his partner and son immediately before he was sentenced to 12 months imprisonment. The judge said:

> "… he returned to Leicester to care for his elderly mother who is 78 and I'm told his case has been adjourned for him to make arrangements for care for his mother."

c. The evidence indicates that the appellant, before being sentenced to imprisonment, had been running a barbers shop and, as was confirmed at the hearing by the appellant, that barbers shop was in Leicester and not Oxford. In his sentencing remarks, HHJ Head observed that the appellant had been running that barbers shop "until shortly before his arrest" which was October 2012;

d. Then, of course, the appellant was unable to live with his child and his partner while imprisoned between July 2013 and May 2014;

e. The evidence indicates that on release from prison the appellant lived, at least initially, at his mother's address in Leicester.

27. Even now it is unclear when the appellant returned to live in Oxford with his son and partner.

28. On the basis of the written and oral evidence the appellant chose to put before the judge, she was plainly entitled to reach the conclusion that, although by the date of the hearing the appellant was living with his partner and son, performing a significant role in his daily routine, including taking him to nursery school three days a week and looking after him while his partner was engaging in her part-time employment, the appellant had chosen to organise his life in a way that meant that the role he had played in his son's life, and the role he was performing by the date of the hearing, was not such as to mean that the effect of his deportation would be unduly harsh upon his son.

29. This was, ultimately, a fact based assessment for the judge to make and, having heard oral evidence, she was best placed to do so. As was observed by Carnwath LJ (as he then was) in *Mukarkar v SSHD* [2006] EWCA Civ 1045 about the assessment of article 8 claims generally:

> "Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain's decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected."

In this case the judge did not reach "an unusually generous view of the facts" but the principle is the same one. It was for the judge to assess the evidence and to make of it what she could as she struck a balance between the competing interests in play. In so doing she had regard to all, that spoke in the appellant's favour as well as all that added weight to the public interest in the deportation of foreign criminals. She left nothing material out of account and reached a conclusion that was unquestionably open to her for the reasons she has given.

30. For all of these reasons, I am satisfied that the First-tier Tribunal Judge made no error of law. Therefore, the appeal to the Upper Tribunal is dismissed.

Summary of decision:

31. First-tier Tribunal Judge Freestone made no error of law.

32. The appeal to the Upper Tribunal is dismissed.

Signed

Date: 1 February 2016

Upper Tribunal Judge Southern