Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02138/2016

THE IMMIGRATION ACTS

Heard at : Field House	**Decision and Reasons Promulgated**
On : 6 November 2017	**On: 10 November 2017**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms K Pal, Senior Home Office Presenting Officer
For the Respondent: Mr A Burrett, instructed by AJA Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing SB's appeal against the respondent's decision to refuse his application for leave to remain on family and private life grounds.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and SB as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Jamaica born on [ ] 1963. He initially entered the United Kingdom on 27 June 1994 with limited leave valid until 27 December 1994. On 24 September 1994 he married AT, a British citizen. On 15 February 1996 he was sentenced to three years imprisonment for Class A drugs offences and on 25 June 1997 a deportation

order was signed against him. On 16 July 1997 he was deported from the UK. He re-entered the UK in breach of the deportation order and claims that that was in March 1998.

4. On 18 June 2004 the appellant applied for leave to remain in the UK as the spouse of a British national. His application was refused on 6 July 2004. On 15 July 2006 he applied again on the same basis. His application was refused on 3 April 2008 with a right of appeal. His appeal was dismissed on 11 June 2008 and he became appeal rights exhausted on 19 June 2008. On 16 October 2015 the appellant was served with removal papers. On 27 October 2015 he made another application for leave to remain, on the basis of his family and private life. His application was refused on 9 January 2016.

5. In refusing the appellant's application, the respondent noted that he had been convicted of six offences between February 1996 and April 2006: on 15 February 1996 he was convicted of possessing a Class A controlled drug (cocaine) and was sentenced to a period of imprisonment of three years; on 25 July 2001 he was convicted of possessing a Class B controlled drug (cannabis) and was fined £100; on 27 April 2006 he was convicted of possessing a Class B controlled drug (cannabis) and was fined £100 and possessing an article with a blade or point in a public place for which he was fined £300. The respondent noted that the appellant had previously had a deportation order made against him following the three year prison sentence for possession of Class A drugs and considered that his presence in the UK was not conducive to the public good because he was a persistent offender. He therefore failed to meet the suitability provisions of the immigration rules, in S-LTR.1.2, S-LTR.1.4 and S-LTR.1.5 of Appendix FM and, as a result, he could not benefit from the criteria in EX.1 as a partner or parent, and neither could he meet the criteria in paragraph 276ADE(1). The respondent considered that there were no exceptional circumstances justifying a grant of leave outside the immigration rules.

6. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Clarke on 17 February 2017 and was allowed in a decision promulgated on 22 February 2017. Judge Clarke noted that the appellant had two children with his wife, the youngest of whom was a minor aged 13 years for whom the appellant was the main carer since his wife worked. The judge accepted that the appellant had changed since his convictions and had been rehabilitated and did not pose any risk of serious harm to the public. She noted that more than ten years had passed since the deportation was made, that there had been a very significant change of circumstances since 2006 when the last conviction occurred and that the most serious offences were committed in 1995. She concluded that it was not in the public interest for the appellant to be removed and that this was an exceptional case with very compelling circumstances. She accordingly allowed the appeal.

7. Permission to appeal to the Upper Tribunal was sought by the respondent on the grounds that the judge was wrong to consider revocation as that was not a matter before the Tribunal and that even if she was correct to consider revocation she was obliged to undertake a full assessment of the public interest as advocated in Quarey, R (on the application of) v The Secretary of State for the Home Department (Rev 1) [2017] EWCA Civ 47.

8. Permission to appeal was granted in the First-tier Tribunal on 4 September 2017.

9. At the hearing before me I referred the parties to the recent judgment of the Court of Appeal in The Secretary of State for the Home Department v SU [2017] EWCA Civ 1069 which involved very similar circumstances. Ms Pal relied on the case of Smith (paragraph 391(a) - revocation of deportation order) [2017] UKUT 166 in submitting that the judge failed to give appropriate weight to the public interest in a case where the appellant had returned to the UK in breach of a deportation order. Mr Burrett submitted that the judge had given adequate consideration to the public interest and that it was relevant to note that the respondent had not taken action against the appellant subsequent to the dismissal of his appeal in 2008. The respondent had failed to identify what the judge had not taken into consideration. I advised the parties that, in my view, and given the judgment in SU, the judge's decision could not stand and that the decision in the appeal had to be re-made afresh.

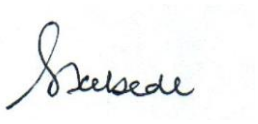
10. It is the case that the respondent's decision was not made with reference to paragraph 399D of the immigration rules and that it was instead based upon the suitability provisions in Appendix FM. Nevertheless, the Court of Appeal made it clear in SU that a failure to have regard to paragraph 399D in any event was a material error of law. It is also clear that, as in SU, Judge Clarke accorded significant weight to the fact that more than 10 years had elapsed since the deportation order was issued against the appellant, rather than approaching the matter in the manner set out at [64] of SU. Indeed, aside from the fact that ten years had elapsed, the judge provided limited and, it seems to me, inadequate reasons for concluding that the appellant's case was an exceptional or compelling one and failed to conduct a full and proper assessment of the public interest in accordance with the relevant factors in section 117B of the 2002 Act.

11. For all of these reasons the judge's decision is unsustainable and must be set aside in its entirety. The appropriate course, as accepted by the parties, is for the matter to be remitted to the First-tier Tribunal to be heard afresh.

DECISION

12. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside.

13. The appeal is remitted to the First-tier Tribunal pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), to be heard before any judge aside from Judge Clarke.

Signed: 

Upper Tribunal Judge Kebede Dated: 6 November 2017