Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11925/2016**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 23 May 2017	**On 15 June 2017**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms Ratherford, Counsel

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as RA.

1. I have made an anonymity order because this decision refers to the circumstances of RA's minor children.

2. This is an appeal by the Secretary of State for the Home Department ('SSHD') against a decision of the First-tier Tribunal ('FTT') dated 30 September 2016, in which it allowed the appeal of RA, a citizen of Jamaica, on Article 8 grounds only, against the

SSHD's decision dated 26 April 2016 to refuse his human rights claim.

Background

3. The FTT correctly set out the lengthy background to this case at [5] and it is only necessary to summarise it in this decision.

4. RA has been in the UK continuously since June 2002. On 28 January 2011 he was sentenced to two years' imprisonment for supplying cocaine. He has not re-offended since that time.

5. On 27 February 2012 a deportation order was signed against RA and he appealed this to the FTT. In a decision dated 1 June 2012, the FTT allowed the appeal on Article 8 grounds. At this point RA relied upon his relationship with a British citizen together with his relationship with his step-daughter (born in 1998), his two younger children (born in 2007 and 2008) and another child from a previous relationship (born in 1997). The FTT accepted the findings contained in a report dated 24 May 2002, prepared by an independent social worker, to the effect that the relationship with his children would be terminated and this would have devastating effects upon the lives of the children, for the reasons identified in the report. RA was granted leave, in line with this decision until 23 April 2014.

6. RA made an in-time application for further leave to remain. After giving him an opportunity to make further submissions, the SSHD signed a deportation order against RA dated 26 April 2016 and refused his human rights claim. This decision relied upon the 2011 conviction and the change in the legal framework relevant to the consideration of Article 8 applications of foreign national offenders.

FTT decision under appeal

7. RA appealed against the SSHD's 2016 decision to the FTT. It is the FTT's decision dated 30 September 2016 that forms the subject-matter of the instant appeal.

8. The FTT directed itself to the relevant legal framework at [8-14]. In so doing, the FTT expressly reminded itself that a foreign criminal will only be granted further leave on the basis of Article 8 if he qualifies under the Immigration Rules in force at the date of decision, even if his first period of leave was granted before those provisions came into force. The FTT made clear findings at [18] that since the 2012 FTT decision, RA had strengthened his

family relationships. In 2013 a son was born. He has secured full-time employment and committed no further offences.

9. The FTT correctly directed itself that the 2012 FTT decision must be the starting point [19] and set out two material changes to be taken into account. First, some family relationships had strengthened but the two older children had reached the age of 18 and led independent lives [20]. Second, the applicable legal framework had become "*significantly more exacting*" [21].

10. After referring to the findings of fact contained in the 2012 FTT decision at [22-24] the FTT again reminded itself that reasonableness is clearly not the same or as rigorous as the unduly harsh test but that the devastating effects identified "*are the equivalent of being unduly harsh for the children to remain in the UK without [RA]*".

11. The FTT then turned to the circumstances of the children at [26]. The FTT noted that the children are British citizens who have been resident in the UK for a lengthy period, and as such they "*should not be removed, unless there are substantial countervailing reasons to the contrary. I find no such countervailing reasons in this case*". The FTT went on to find that it would be unduly harsh to expect the children to relocate to Jamaica, and allowed the appeal.

Hearing

12. At the hearing before me, Mr McVeety focused upon the FTT's failure to consider all the relevant circumstances including RA's criminal history, when making its findings at [26]. Ms Rutherford relied upon her Rule 24 reply and acknowledged that the FTT had not taken into account RA's offending or immigration history. She however asked me to note that RA had not reoffended and the FTT plainly had this in mind when making its findings on undue harshness.

13. After hearing from both representatives I indicated that the FTT had made an error of law such that the decision should be set aside and remade. I give my reasons for this below.

14. Both representatives also agreed that the material in this case relevant to the children's circumstances requires substantial updating and further comprehensive findings of fact are required both in relation to their circumstances and the updated position of RA (in relation to risk etc.). In these circumstances both representatives agreed that given the nature and extent of the

factual findings required, this should be done in the First-tier Tribunal.

Error of law discussion

15. It is agreed that the two central issues which had to be determined by the FTT was whether or not it would be unduly harsh for the children to remain in the UK without RA and relocate to Jamaica with RA – the unduly harsh questions. It therefore follows that the FTT should have had regard to the cases which had been involved in the proper construction of what is meant by unduly harsh within the context of the Rules. Those authorities are unanimous in emphasizing that the unduly harsh test is a rigorous and exacting one. The FTT correctly directed itself in relation to this aspect of the test.

16. The authorities have not been as clear as to the proper factors to be taken into account when applying the test i.e. in assessing undue harshness should the circumstances of the children alone be assessed or should all the relevant circumstances including the claimant's criminal and immigration history be taken into account? This has been resolved by the Court of Appeal in the case of MM (Uganda) v SSHD [2016] EWCA Civ 617. The Court observed that the more pressing the public interest in removal the harder it was to show its effects would be unduly harsh. The relevant circumstances therefore included the deportee's criminal and immigration history. It follows, and Ms Rutherford accepted, that in determining whether deportation was unduly harsh the FTT had to have regard to all the circumstances including RA's criminal and immigration history.

17. It is clear from MM (Uganda) that it is not appropriate to consider the unduly harsh question solely from the perspective of the impact which deportation would be likely to have upon the children or partner involved. When [26] is read together with the entirety of the FTT decision, the FTT's approach was based exclusively or almost exclusively on an assessment of the potential consequences to the children. The FTT found no such countervailing reasons relevant to the children but failed to take into account other factors, including the criminal convictions of the appellant, when addressing the two central issues before it predicated upon the undue harshness questions. This error of law has played a material role in the overall assessment of the undue harshness questions.

Remittal

18. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT. Both representatives agreed that extensive fact finding is necessary regarding the current circumstances. The evidence before the First-tier Tribunal in 2016 was dated, and relied in large part upon a social worker's report from 2012. The family dynamics have substantially changed since 2012. In addition, Ms Rutherford pointed out that there had been a recent death in the family, and the impact of this upon the children needed to be addressed. It may also be relevant for the First-tier Tribunal to make findings upon RA's rehabilitation and risk of re-offending.

Decision

19. The FTT decision contains an error of law and is set aside.

20. I remit the appeal to the FTT to remake the decision.

Signed:
Ms M. Plimmer
Judge of the Upper Tribunal

Date:
15 June 2017