Tribunals Service
Asylum and Immigration Tribunal

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07465/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th November 2017	**On 15th November 2017**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ES
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Ms S Ferguson, instructed by Ineyab solicitors

DETERMINATION 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 appellant in this determination identified as ES. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. On 23rd November 2015, a deportation order was signed against ES pursuant to 32(5) UK Borders Act 2007. His protection and human rights claims made subsequent to the deportation order were refused for reasons set out in a decision dated 21st July 2017. He appealed that decision on human rights grounds and, in a decision promulgated on 15th September

2017, First-tier Tribunal judge Ian Howard allowed his appeal 'on human rights grounds and under the Immigration Rules'.

2. The SSHD sought and was granted permission to appeal on the grounds, essentially, that the judge had failed to engage with the immigration rules or the statutory requirements in his assessment of proportionality.

3. The judge set out the oral and documentary evidence before him. He found that ES had returned to the family home in 2015, that prior to that there had been continuing contact and devotion and that he and his partner had made a decision in 2012 that it was in the best interest of the children that their relationship should continue. In paragraph 20 of his decision he states that he has adopted the approach in *MM (Uganda)* [2016] EWCA Civ 450.

4. The judge finds, *inter alia,*:

> "24.The fact of his continued challenge to the findings of the Crown Court informs me as to his true level of contrition. The fact remains he seeks to minimise his involvement. These are serious offences committed for commercial gain and the fact of his continued minimising of his role does not suggest even a partial understanding of the damage the supply of Class A drugs or domestic violence inflicts on society as a whole.
> 25.In his favour it is fair to observe that he has but the one conviction the [sic] drug trafficking. However the OASys Assessment concludes that he presents a high risk of harm to those with whom he is intimate.
> 26.The issue remains whether it is unduly harsh in the context of the family life, as I have found it to be. That is the balancing act I must undertake and the balancing in turn revolves around the possible relocation of the family to Jamaica. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires me to consider the need to safeguard and promote the welfare of all four children and reads:
> …..
> 27.However this requirement cannot be seen as what is sometimes expressed as a trump card in the hands of the appellant……
> 28.The appellant as a feature in the lives of the children with whom he lived immediately before his incarceration was intermittent. He was there between 2009 and 2012. Was absent until 2015 and can have spent no more than three months back in the home before he was imprisoned in March 2015. It is once he is detained that the evidence of a real commitment starts to emerge. As a consequence I am left asking myself whether this rediscovered devotion is genuine or for the benefit of the appeal. I am driven to the conclusion it is genuine. Not because of anything the adults have said, but because of what the children say in their letters…..
> 29.In assessing the unduly harsh test I must look at the totality of family life…..
> 30. The appellant's offending is significant, but his conviction in 2002 for drug trafficking can now be said to have been an isolated offence of its type….the 2015 conviction also stands in isolation, of its type. I remind myself on the conclusions in the OASys Assessment but must see those in the context of the evidence……
> 31. In this appeal the scales are very finely balanced, but given my findings about the nature and extent of the family life extant I am driven to the conclusion the decision of the respondent is not proportionate."

5. Although the judge in his decision set out the principles to be applied, he has failed to apply them. The judge has failed to consider whether and if so why relocation of the family to Jamaica would be unduly harsh on the children/partner, factoring in the criminality, the OASys report and ES'

continued lack of contrition. Further the judge has failed to make findings whether the deportation of ES leaving the children/partner behind would be unduly harsh upon the children/family, factoring in the criminality, OASys report and lack of contrition. It is simply insufficient to state that the decision of the SSHD is not proportionate. Despite Ms Ferguson's valiant submissions that when read as a whole in the light of the references to the relevant caselaw, the judge plainly had in mind the correct test, that is not the case. It is not just the case that there must exist family life and that the family life has not been engineered for the appeal. Not least the judge found that ES has not shown contrition and yet then refers to the offences being 'one-offs'. The remarks of the sentencing judge for the 2015 conviction do not appear in the determination. It is hard to see how those remarks[1] have been considered by the First-tier Tribunal judge, never mind factored into his decision.

6. I would almost go so far as to say that the decision by the First-tier Tribunal judge that the SSHD's decision was not proportionate was perverse although it was not pleaded on that basis and I do not make a finding that the judge made a material error of law on that basis.

7. The First-tier Tribunal erred in law in its decision and I set it aside in total. None of the findings are preserved. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal and, in accordance with the Practice Statement I remit the appeal to the First-tier Tribunal.

8. Although I have continued the order for anonymity, I did not hear submissions in this regard. It may be that the First-tier Tribunal will consider this afresh, especially given the numerous aliases used by ES.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision and remit the appeal to the First-tier Tribunal for hearing.

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 14th November 2017

[1] "…So this is a category one case of sustained assault with a higher culpability. I need go no further than the use of the foot…There are the additional aggravating features that it was in her own home and her child had to come back and find her and let the police in and you kicked her four times…"

Upper Tribunal Judge Coker