Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08216/2017

THE IMMIGRATION ACTS

Heard at Cardiff	**Decision & Reasons Promulgated**
On 8 August 2019	**On 22 August 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

RE
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant is a citizen of Jamaica. By a decision which I promulgated on 25 February 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. The appellant, RE, is a male citizen of Jamaica who was born on [~] 1975. On 26 November 2015 at Bristol Crown Court, the appellant was convicted of supplying a controlled drug class A and sentenced to two years' imprisonment. The appellant made submissions on 7 September 2016 in respect of Articles 2, 3 and 8 of the ECHR and asylum. By a decision dated 25 November 2016, the Secretary of State refused the appellant's application. The appellant appealed on asylum and human rights grounds to the First-tier Tribunal (Judge G Andrews) which, in a decision promulgated on 27 June 2018 dismissed the appeal on asylum and Articles 2/3 ECHR grounds and refused humanitarian protection but allowed the appeal on Article 8 ECHR grounds. The Secretary of State now appeals, with permission, in respect of the decision to allow the appeal on Article 8 ECHR grounds. There is no

cross appeal in respect of asylum or Articles 2/3 ECHR by the appellant. Accordingly, those matters will not be revisited by the Upper Tribunal.

2. There are four grounds of appeal.

Ground 1: Section 82 of the Nationality, Immigration and Asylum Act 2002

3. I shall deal with those grounds with which the Tribunal may dispose most readily first. Judge Andrews found that the appellant had rebutted the presumption in respect of Section 72(2) of the 2002 Act. The judge found [40] that the appellant was not a danger to the community. I note that Judge Chohan, who granted permission, purported to refuse permission on this ground. But, in the light of *Safi and others* (permission to appeal decisions) [2018] UKUT 388 (IAC) Judge Chohan's failure to record the "split" grant of permission in the appropriate part of the grant document means that I shall consider all grounds of appeal. I notified the representatives of this decision at the hearing.

4. Having said that, the fact that the judge has dismissed the asylum appeal and there is no appeal from the appellant in respect of that decision renders the Section 72 argument academic. Given the appellant has lost his asylum appeal and is not entitled to humanitarian protection (see paragraph 339D of HC 395) it matters not whether the appellant is excluded or otherwise from obtaining refugee protection. I would note, however, that the judge's findings on Section 72 are particularly detailed and, having read the grounds carefully, I find that these are no more than disagreement with findings which were available to the judge.

Article 8: "Unduly Harsh"

5. The remaining grounds of appeal concern the judge's analysis of the appeal on Article 8 ECHR grounds. The parties were agreed that the correct test is that set out in Section 117C(5):

Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

6. Judge Andrews found that it was not only unduly harsh for the family to relocate to Jamaica but also that it would be unduly harsh on the child C if he were to be separated from the appellant.

7. There are three children of the appellant and CE, his partner but the judge has focused on C because she considered his case to be "the clearest." [81]. The judge recognised that "C is only 5 years old". C has been diagnosed with complex social communication difficulties, expressive and receptive language difficulties and is delayed in his emotional development. The judge noted at [47] that

> "In most areas of learning he was working at an age band very much lower than his actual age. He receives support from a paediatrician and from a speech and language therapist. The appellant is engaged in working with school staff and medical professionals to help C."

8. The judge found that "moving to Jamaica would involve removing C from his school and separating him from his professional support he currently receives" [82]. The judge concluded that "taking all this into account, I find that moving to Jamaica would [be] likely to have a negative impact on C."

9. The question is not whether the removal of the entire family to Jamaica would have a negative impact on C but whether the consequence for him and the other children would be unduly harsh. The Secretary of State submits that the judge's findings fall short of a "unduly harsh threshold".

10. I disagree with the submission that the judge has not made "a rounded assessment of all the factors"; the judge's decision is especially detailed. However, the fact remains that the judge has not considered what help, if any, would be available for C which might replicate the care that he currently receives in the United Kingdom. The judge appears to have assumed (perhaps correctly) that the care would not be at the same level but there does not appear to have been any evidence in respect of that issue. In addition, the family would be together and the problems which the judge identifies with C being separated from the appellant would not be present.

11. As regards separating C from the appellant by way of deportation, the judge's analysis is characteristically detailed. The judge was aware that CE would remain with the children and would be able to look after C. However, she would have limited support from her other family members in the United Kingdom [83(ii)]. The judge concluded that "the appellant's deportation would be likely to result in a significant diminution in the support that C receives." The respondent does not appear to challenge the judge's finding that the appellant plays a significant part in day-to-day care for C and the other children. I am aware also that CE has a job and that her ability to maintain employment and income for the family and also look after the children and care in particular for C and his special requirements may be put in doubt by the removal of the appellant. Further, the judge whilst noting C's youth (5 years old) and observing that the appellant had been in custody for part of C's life found at [83(iv)] that the appellant has "been in the UK ever since C was born." In assessing the role which the appellant plays in C's life, the Tribunal should not simply take note of the fact that for part of that period the appellant has been in prison. The fact that he has been in prison indicates that there has been a period when the conditions which will exist if the appellant is deported have already been "tested" on the family. While C's considerable problems are documented, the evidence as to how C responded to being separated from the appellant whilst the appellant was in prison is insubstantial. The judge records that "C's school suggests that C fared badly when the appellant was in prison" but it is not clear exactly what is meant by that statement.

12. There is a further difficulty, which is acknowledged by the judge, that the main evidence in respect of C and how he is likely to react to the deportation of the appellant is given by one of C's teachers. That teacher found that it would be "hugely detrimental effect on the whole family – especially C" if the appellant is deported. Quite rightly, the judge treated that last statement "with some caution since it is not

clear that the teacher has the expertise to make this assessment." However, the judge went on to say "I also consider [the teacher's] letter to be consistent with the picture painted by CE's evidence."

13. I am concerned in this appeal that the high threshold of "undue harshness" has not been crossed by the evidence which was before the Tribunal. Judge Andrews is to be commended for the detail of her exhaustive analysis. I acknowledge also the difficulty in determining, on any set of facts, whether the threshold has been crossed. One of the difficulties in this case is that, irrespective of whether the appellant is deported, C will continue to have problems. I am not satisfied on my reading of the decision that the judge has explained why the worsening of C's problems as a result of the appellant's deportation will have an effect on C which is unduly harsh. Some disruption of a child with C's problems is inevitable if a parent is separated from the child. C's problems may magnify the effect of separation but I am not satisfied, in this instance, that the evidence shows any more than that the pre-existing and very real problems of a little boy will not be lessened as a result of being separated from his father. I am also, as I have stated above, troubled by the absence of evidence regarding C's circumstances and those of the family as a whole during the period when the appellant was in prison. I have recorded above that evidence as to how the family coped or did not cope during that period may assist in indicating the likely effect of a future separation.

14. It is with some reluctance, therefore, that I set aside the First-tier Judge's decision which in many respects represents an exemplar of thorough, detailed analysis and clear expression. The judge's findings as regards asylum, Articles 2, 3 ECHR and humanitarian protection are preserved and will not be revisited. I am not satisfied that the Upper Tribunal can remake the decision now on the basis of the existing evidence. I am also bound to say that the quality of representation which the appellant received at the initial was problematic and I am not satisfied that his case was advanced as thoroughly as it deserved to be. For these reasons, the appeal will remain in the Upper Tribunal and the decision will be remade following a resumed hearing before me at Cardiff or Newport.

Notice of Decision

15. The decision of the First-tier Tribunal which was promulgated on 27 June 2018 is set aside. The judge's findings in respect of asylum, Articles 2 and/3 ECHR and humanitarian protection are preserved. The only issue remaining to be decided is in respect of Article 8 ECHR. The Upper Tribunal will remake the decision following a resumed hearing before Upper Tribunal Judge Lane at Cardiff/Newport on a date to be fixed."

2. At the resumed hearing at Cardiff on 8 August 2019, the appellant attended and gave evidence in English. Surprisingly, the appellant solicitors had, in the period since the initial hearing, taken no steps all to update any of the evidence. There was no new witness statement for the appellant or his partner nor was there any medical or other expert evidence at all relating to the children, C and K, even though the appellant claims that C continues to suffer from significant problems relating to his

development and speech. I have expressed my concern with the standard of representation which this appellant has hitherto received in my error of law decision [14].

3. The appellant was asked in cross-examination about evidence which he had given the First-tier Tribunal (see First-tier Tribunal decision at 18(i)). He said that he had not known his mother but had been brought up by another woman in Jamaica who had recently died. He could not say when exactly she had died. He had not been in touch with her, in any event, in recent times. He was also unable to explain why it had been claimed at his criminal trial that he had dealt in drugs in order to pay for an oxygen cylinder for his mother. He was also asked about the description of his occupation on the birth certificate of one of his children and on which he is described as a 'builder.' He denied that had worked as a builder but the appellant could not explain why the entry had been made on the birth certificate. The certificate shows that the appellant himself had applied for the registration.

4. The appellant said that C is at present in mainstream education but arrangements have been made for him to attend a special school as from September 2019. The appellant could not explain why there was no updating school or social worker report or evidence from any medical practitioner regarding C's problems with development, any treatment proposed and probable prognosis.

5. I reserved my decision.

6. Although there is no new evidence, I had the documentary evidence which had been before the First-tier Tribunal. This evidence includes a letter from a teacher of C which notes that C's parents 'work together' to support him and that the appellant's deportation would have a 'hugely detrimental effect on the whole family – especially C.' In common with the First-tier Tribunal judge, I treat this last statement with some caution given that it is unclear why the teacher believes that she possesses the expertise to make such an assessment. In oral evidence, the appellant himself was singularly unhelpful in providing any detailed up-to-date evidence of C's condition. He said no more than that the child struggles to express himself in speech and that he will attend a special school later this year. No evidence whatever was provided which might illuminate the possible effect which the deportation of the appellant may have upon C or other members of the family. I have considered the evidence which is detailed by the First-tier Tribunal in its decision at [25-30]. However, much of that evidence is now 2 years old and I am reminded that the Tribunal is dealing with young children whose capabilities and needs are likely to alter significantly over such a period of time. I am prepared to accept that the children C and K are likely to continue to suffer from emotional and behavioural difficulties which may or may not have their origins in the appellant's offending and subsequent imprisonment. Beyond that, there is no evidence at all upon which I might base any detailed assessment of the likely impact of deportation on the children. I am reminded that this

appeal must be determined on the basis of the evidence and not upon speculation by the appellant, his representatives or, indeed, the Tribunal as to the possible effect of separation upon children who clearly are to some extent (although it is completely unclear to what extent) vulnerable.

7. The appellant falls to be considered under section 117C of the 2002 Act:

> Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

8. For the effects of deportation on a partner or upon children to be accurately described as 'unduly harsh,' evidence must be adduced which is capable of showing that this high threshold has been crossed. A degree of harshness is to be expected in any case of separation so it is important for the Tribunal to examine how, in any part case, the effects may extend beyond 'due' harshness (see *KO (Nigeria)* 2018 UKSC 53). In the present case, I accept that the appellant's children experience difficulties in development (in the case of C) and emotional and behavioural control (in the case of K). I accept that C will begin attending a special school from September 2019 but it is entirely unclear what kind of special school he will attend or how that school may seek to address his problems with communication. The child K was not referred to at all by the appellant at the resumed hearing. The appellant's partner CE did not attend to give oral evidence nor did she submit any fresh witness statement. Given that such evidence as we have from school suggests that CE and the appellant

jointly shoulder the burden of caring for children, the fact that there was no evidence from the source is particularly surprising.

9. I repeat that I can only determine this appeal and the basis of the evidence actually adduced. It is not for the Tribunal to 'fill in the gaps' in the evidence or to speculate about the possible effects of deportation when no evidence exists to indicate those likely effects. That is the case even where that Tribunal accepts that there are children involved in an appeal who may be struggling in terms of their development and behaviour. I find that there is simply no evidence sufficient to show that the effects of deportation upon any member of the appellant's family are likely to be so severe as to merit being described as unduly harsh. I have no evidence to show the extent to which separation from the appellant will make the problems of the children worse; the children have experienced problems even when under the daily care of the appellant and his partner. In circumstances, I find that the appellant has failed to show that he should fall within the provisions of Exception 2 of section 117C. He has failed to show that the effects upon the children or upon the partner of his deportation are likely to be unduly harsh. In the circumstances, the appeal is dismissed.

Notice of Decision

The Upper Tribunal has remade the decision. The appellant's appeal against the decision of the Secretary of State dated 25 November 2016 is dismissed.

Signed Date 15 August 2019

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.