Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11787/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Tuesday 25 June 2019	**On Monday 8 July 2019**

Before

THE HON. MRS JUSTICE THORNTON DBE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GARY [M]

Respondent

Representation:
For the Appellant: Mr Bramble, Senior Home Office Presenting Officer
For the Respondent: Mrs Bhatti, Solomon Solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State for the Home Department against a decision of First Tier Tribunal Judge Andrew, promulgated on 1 February 2019 ("the Decision") allowing Mr [M]'s appeal against the Secretary of State's decision refusing the Appellant's protection and human rights claim in the context of his decision to deport Mr [M] to Jamaica. For ease of reference, we refer below to the parties as they

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were in the First Tier Tribunal, albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal.

2. The Appellant is a citizen of Jamaica, born on 7 July 1973. He arrived in the United Kingdom on 17 June 2002 aged 28 years. He was granted leave to enter for 6 months as a visitor, following which he applied for and obtained leave to remain as a student until 30 September 2006.

3. The Appellant has a wife, a step daughter and four children under the age of 18 years. The children are aged 11 years, 7 years, 6 years, 3 years and just under one year. The Appellant's wife suffers from fibromyalgia, non-epileptic seizures and depression.

4. On 1 February 2013 the Appellant was convicted at St Albans Crown Court of possession of a controlled drug with intent to supply (Class A Heroin and Class A crack cocaine). He was sentenced to a total of 33 months in prison.

5. Following his conviction, the Secretary of State made a decision to deport the Appellant consequent on that conviction. The Appellant's appeal against that decision was dismissed in 2014 and he was refused permission to appeal the decision to the Upper Tribunal. He became appeal rights exhausted on 1 May 2015.

6. Thereafter, the Appellant applied for further leave to remain and to revoke the deportation order. That application was refused and rejected as amounting to a fresh claim. In response to the setting of directions to deport him, the Appellant claimed asylum. Following a judicial review challenge, the Secretary of State interviewed the Appellant in relation to his protection claim and that and his human rights claim were refused by the decision under challenge in this appeal.

THE LEGAL FRAMEWORK

7. As a result of his conviction, as a foreign criminal who had been sentenced to a period of imprisonment of at least 12 months, the Appellant is subject to deportation pursuant to section 32(5) of the UK Borders Act 2007. Under section 33(2) of the UK Borders Act, Exception 1 to the automatic deportation under section 32(5) arises where the deportation of the foreign criminal would breach his Convention rights or the UK's obligations under the Refugee Convention.

8. Part 5A of the Nationality, Immigration and Asylum Act 2002 sets out the considerations to which a court or tribunal is required to have regard when determining whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 European Convention on Human Rights. In the case of foreign criminals, Section 117C applies. In brief summary, the statutory provisions and the relevant Immigration Rules (A398-A399D) create two exceptions to deportation based on Article 8 ECHR (in relation to family

life and private life respectively) and provide that, where those exceptions are not met, a foreign criminal may still succeed where there are very compelling circumstances over and above the exceptions. In that regard, the statutory provisions are not clear in relation to the application of that subsection (Section 117C (6)) to a medium offender (that is to say one sentenced to a period of twelve months to under four years); the statute refers only to those sentenced to four years or more. However, as the Court of Appeal concluded in NA (Pakistan) and another v Secretary of State for the Home Department [2016] EWCA Civ 662 ("NA (Pakistan)"), the provision applies equally to medium offenders (see [24] to [27] of the judgment).

9. The FTT and the Upper Tribunal will respect the high level of importance which the legislature attaches to the deportation of criminals (NA(Pakistan) at [22]).

10. The test in the Rules (and the corresponding test in section 117C) is intended to "provide a structured basis for application of and compliance with Article 8, rather than to disapply it" (NA (Pakistan), at [26]).

11. The relevant exception in this case was Exception 2. It follows that the question which fell to be determined by the FTT was whether the Appellant had a genuine and subsisting relationship with a qualifying child and/or partner and whether the effect of the Appellant's deportation on that child or partner would be unduly harsh.

12. 'Unduly harsh' requires an evaluative assessment on the part of the Tribunal. It does not equate with uncomfortable, undesirable or merely difficult. Rather it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe or bleak. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher (RA (s.117C: "unduly harsh"; offence; seriousness) Iraq [2019] UKUT 00123 citing from KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 and MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) at [7]).

THE FIRST TIER TRIBUNAL DECISION

13. FtT Judge Andrew considered the medical condition of the Appellant's wife and the evidence of a social worker, Diana Harris. She allowed the Appellant's appeal on human rights grounds. Her reasons included the following:

> "64 However I am satisfied that this is one of the few cases in which it would be unduly harsh to separate the appellant from the children. His wife, because of her illnesses and unable to care for them and all the caring responsibilities for on the appellant. As Ms Harris says in her report if the appellant was not there then referral would have to be made to the local authority as it is no one who can help and

> support the appellants wife. She has little to do with her step sister who lives in Bristol and her brother is in prison. There is no one else. This may ultimately mean that the children will be taken into the care of the local authority because of their mother's inability to care for them. That cannot be in the best interest of the children.
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> 65 In saying this I take into account the ages of the children. There is a baby and it will be a very long time before he is able to care for himself. Harmony, who is just eleven, has health problems of her own and cannot be expected to assist in caring for her younger siblings. Divine, who is just three also has health problems. These are detailed in the report of Ms Harris.
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> 66 This is not a conclusion I have come to lightly. I am satisfied however that this is one of the few cases in which I find that the Appellant benefits form the exceptions specified in paragraphs 398 to 399D of the Immigration Rules.
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> 67 I am not ignoring the premise that the deportation of foreign criminals is in the public interest and I have had regard to the risk of re-offending, deterrence and public revulsion. I recognise that the Appellant has no other convictions and I am satisfied that, on the balance of probabilities, his risk of reoffending is low. However I find that in this case the strong public interest there is in refusing to revoke the deportation order is outweighed by the Appellant's family life in the UK. In saying this I recognise that the relationship between the Appellant and his wife was formed when he was present in the United Kingdom precariously but I am satisfied also that the effect of the Appellant's deportation on his wife and children would be unduly harsh for the reasons that I have given."

DISCUSSION AND CONCLUSIONS

14. On behalf of the Respondent, Mr Bramble submitted that the Judge failed to give adequate reasons for her conclusion that the test of 'unduly harsh' was met. She placed too much weight on the suggestion that the children might have to be taken into care in the event that the Appellant is deported, given the absence of any evidence from Social Services. Furthermore, the Judge did not give any indication that the wife's health issues post-dated the period of the Appellant's imprisonment when alternative care arrangements must have been in place for the children. Despite being aware of the prior Tribunal finding that the best interests of the children were served by remaining with their mother, absent their father, the Judge only identified the passage of time and additional children as relevant additional factors. There was no suggestion that the partner's health had deteriorated further.

15. We are entirely satisfied that there was ample evidence before the Judge to justify her decision that it would be unduly harsh to separate the Appellant from his partner and the children. Mrs Bhatti referred the Tribunal to the relevant evidence, on which the FTT Judge based her decision. The Appellant's wife had been diagnosed with her medical conditions in July 2016, which post-dated the period of the Appellant's imprisonment. The Appellant's wife requires morphine to control her

pain on a daily basis. The Appellant is the only source of practical support to the Appellant's wife, who is reliant on the Appellant for personal care and care of the children. Two of the children have medical problems.

16. The Judge correctly treated the previous decision of the FTT Tribunal in 2014 as the starting point for her assessment before identifying the developments which changed matters including the addition of two more children into the family. This is against the backdrop of the medical diagnosis of the wife's medical conditions in July 2016.

17. Caselaw on reasons makes clear that there is no obligation on a Tribunal to deal with each and every point raised in an appeal process. Unless a matter is a substantial issue or a 'principal controversial issue' then generally it cannot fall within the ambit of the duty to give reasons. Even if the matter relates to a substantial or principal controversial issue, it is essential for the Respondent to show that the Judge has simply failed to resolve that dispute or, if the issue has been dealt with, the reasoning is so unclear that the Respondent can show a 'substantial doubt as to whether the decision maker erred in law' and 'such inferences will not readily be drawn' (South Bucks v Porter (No 2) [2004] 1 WLR 1953 and Save Britain's Heritage [1991] 1 WLR 168). The Respondent's challenge on reasons fails. The Judge addressed the principal controversial issues before her. Her reasoning is entirely adequate. The Judge does not overstate the position with respect to Social Services, saying simply that "a referral would have to be made to the Local Authority as there is no-one else who can help and support the Appellant's wife" ([64]).

18. The Decision acknowledges that deportation of foreign criminals is in the public interest but concludes that this strong public interest is outweighed by the Appellant's family life in the United Kingdom ([67]). That was a conclusion to which the Judge was entitled on the evidence before her and for the reasons she gives.

CONCLUSION

19. The Secretary of State has failed to establish that the Decision contains any error of law. For the above reasons, we therefore uphold the decision.

NOTICE OF DECISION

We are satisfied that there is no material error of law in the decision of First-tier Tribunal Judge Andrew, promulgated on 1 February 2019. We therefore uphold that decision with the consequence that the Appellant's appeal remains allowed.

Signed The Hon. Mrs Justice Thornton Dated: 4 July 2019