Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08055/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2020	**On 14 May 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M J M
(ANONYMITY ORDER IN FORCE)

Respondent

Representation:
For the Appellant: Miss S Jones, Senior Home Office Presenting Officer
For the Respondent: Mr A Osadebe, Solicitor from Zurial Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also "the claimant"). Breach of this order can be punished as a contempt of court. I make this order because the case turns on the welfare of the claimant's son and there is no legitimate public interest in his identity and publicity would not be in his interests.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State on 10 July 2017 refusing him leave to remain on human rights grounds.

3. The claimant was sent to prison for four years on 21 May 2010 for supplying class A drugs. The sentencing judge found that the claimant was not an addict but was dealing solely for financial gain. He was clearly subject to "automatic deportation" but his appeal against deportation was allowed by the First-tier Tribunal (Immigration Judge Rothwell and Mr P Bombas) on human rights grounds on 28 November 2011. The decision to allow the appeal was not challenged by the Secretary of State who granted the claimant periods of limited leave to remain in the United Kingdom. Most recently he was given further leave on 4 March 2014 for six months. On 3 September 2014 he applied for still further leave during the currency of his existing leave. That application led to the decision complained of in July 2017.

4. I find it both regrettable and surprising that the Secretary of State does not seem to have considered the substance of Judge Rothwell's Tribunal's decision in making the decision leading to the present appeal. I have to say that if that Determination and Reasons had been considered it seems to me that the decision to refuse the application could have been reached more securely than proved to be the case. When Judge Rothwell's Tribunal decided the appeal the claimant was living with his wife and son in a nuclear family and the claimant was providing much of the childcare as his wife worked. The child was born in November 2005 and so was then 6 years old but when the Secretary of State made her decision in September 2016 the claimant and his wife had divorced and his former wife planned to take the child with her to Jamaica.

5. There are parts of the Determination and Reasons that are revealing. It must be remembered that part 5A of the 2002 Act was not in force when Judge Rothwell's Tribunal made its decision and so there were no statutory impediments in the way of allowing the appeals of people sentenced to at least four years' imprisonment. Even so Judge Rothwell's Tribunal was very aware of the seriousness of the offence. The Tribunal said at paragraph 61:

> "we find that if the [claimant] was not married to Mrs F and he did not have a son, then we would find there would be no breach of Article 8. However we have to consider the lives of his wife and son. …".

6. It was clear beyond any possible argument that the appeal succeeded in the First-tier Tribunal not because of the impact of deportation on the claimant but because of the impact on deportation on the claimant's immediate family. I realise that I have to decide the case before me and not engage in some homily on deportation appeals generally but in my experience appeals against deportation (in whatever form they are presented) are almost never successful because of the impact on the person to be removed. When they succeed because of impact on close family members. It is therefore slightly surprising to read in the opening paragraph of the Secretary of State's decision that the claimant was "granted limited leave to remain because at the time your right to respect for private and/or family life was considered to outweigh the public interest in deporting you". The comment may be strictly accurate but it really does miss the point.

7. Nevertheless the letter, correctly, refers to paragraph 399C of HC 395 which confirms that the public interest in deporting somebody is not extinguished by reason of his being permitted to remain on human rights grounds, but rather his deportation remains conducive to the public good and in the public interest. I am not sure that the Rules are necessary, in the sense that it is plain from the statute that although the public interest in a person's deportation can, occasionally, be outweighed by other considerations there is nothing there to suggest that it is ever extinguished. Nevertheless the Rule makes the position entirely clear.

8. The letter then rehearsed the claimant's personal history. It shows that he entered the United Kingdom in December 2000 with leave and that he served in the British Army. He appears to have been in the army for only about a year. There was a period when he had no permission to be in the United Kingdom but that was a result of his leave expiring while he was in custody and the police having his passport. Whilst the reasons for not being able to make an application in the usual way are discreditable the fact that he did not in those circumstances was not and should not be held against him.

9. When the Secretary of State made the July 2017 decision the claimant was not living with his wife. Their relationship had broken down but it was his case that he was in frequent contact with his child R and in October 2016 he was preparing to make an application in the High Court for the child to reside with him.

10. The Secretary of State also considered supporting evidence from friends and associates tending to show that the claimant was established and respected in the community. He had not reoffended. At that time his former wife intended to return to Jamaica with their son. Clearly that rather weakened his claim that he would be separated from his son by being deported to Jamaica.

11. By the time the case came before the First-tier Tribunal the basis of the case had changed. The claimant's former wife no longer planned to return to Jamaica because of a change in circumstances there and she intended to remain in the United Kingdom with the claimant's son. Broadly she supported the claimant's appeal. The claimant's removal would affect the stability of the family. She was glad that the claimant provided their son with a home for much of the time. It would be difficult for her to establish her new family with her new partner if their son lived with her permanently.

12. The First-tier Tribunal's crucial findings are at paragraph 15 where the judge said:

> "He has a business and plays a full role in R's life. It is a genuine and subsisting relationship. R is British. R has lived here continuously for at least seven years prior to the deportation decision as I accept that he only in fact spent four weeks in Jamaica in 2016 when [his mother] took him, and other holiday periods. It is in R's best interest to remain here as he is now 14, at an important stage of his education, has almost always lived and been educated here, and has a full and active life outside school. I am satisfied it would be unduly harsh for R to have to leave everything he has here to live in Jamaica, as while he can go to school there, speak the language used, and has family there, his whole life and many family members are here. It would plainly be more difficult for [the claimant] and R to maintain their current relationship if MJM was deported as contact by means of modern communication is no substitute for the daily hands on involvement and support MJM provides. The lack of 2019 documentary evidence does not undermine the oral evidences as I have no reason to disbelieve RM or [the claimant]. I consequently accept that he has

> another relationship and child in whose life he plays a full part. I am satisfied that, despite MJM's imprisonment, his subsequent behaviour indicates he is socially and culturally integrated and that he never lost it during his imprisonment. His ability to speak English and lack of reliance on the state are neutral factors."

13. However the judge also rejected any contention that the claimant could not get work in Jamaica and provide for himself there. He clearly had transferable skills and energy. The judge finished by saying:

> "This case is very unusual, and the factors identified above are exceptional and compelling reasons over and above those considered in the Rules and are reasons which tip the balance in [the claimant's] favour and means it would be a breach of his Article 8 rights to deport him."

14. I mean no disrespect to the Secretary of State's grounds of appeal by summarising them as follows:

> 1 the fact that an earlier appeal has succeeded does not extinguish the public interest in deportation;
>
> 2 when a person has been sentenced to at least four years' imprisonment in order to avoid deportation that person must show that there are "very compelling circumstances" "over and above" those set out as exceptions 1 and 2 in part 5A of the 2002 Act;
>
> 3 the First-tier Tribunal's conclusion that there are "exceptional and compelling circumstances over and above those considered in the Rules and are reasons which tip the balance in the [claimant's] favour" is reasoned wholly inadequately;
>
> 4 the facts do not support such a conclusion.

15. There is reference in the grounds to well-known cases. There is a quotation from the very short supporting judgment of Hickinbottom LJ in **SSHD v PG (Jamaica) [2019] EWCA Civ 1213** where he said at paragraph 46:

> "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in Section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are 'unduly harsh' will deportation be constrained. That is entirely consistent with Article 8 of the ECHR. It is important that decision makers and, when their decisions are challenged, Tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness."

16. With respect to Hickinbottom LJ that is a timely reminder of the importance of giving the weight Parliament requires to the public interest in deporting foreign offenders when conducting an Article 8 balancing exercise. There the Court of Appeal was concerned with people subject to less than four years' imprisonment. This claimant is in a still more serious category. Section 117C(6) provides that:

> "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."

17. I pressed Mr Osadebe to identify the "very compelling circumstances over and above" that could possibly justify the decision to allow the claimant's appeal. It was not his fault that he could not do that.

18. There is no basis for challenging the First-tier Tribunal Judge's findings about the claimant's present circumstances and his relationship with his children. Any deficiency in the details of the younger child reflect the very limited information that was before Tribunal.

19. However the First-tier Tribunal Judge lost sight of section 117C(6). The plain fact is that the provisions of the statute have either been ignored completely or applied wrongly. Notwithstanding the length of his residence in the United Kingdom and the ten years or so that has lapsed since he committed the offence that led him into this trouble the claimant is in a very difficult position and I have no hesitation in saying the First-tier Tribunal Judge did not explain at all adequately how the claimant met the statutory requirements necessary to avoid deportation now.

20. I reject as well any lingering suggestion that it is somehow improper to reconsider deportation after the appeal has succeeded. Judge Rothwell's decision was right when it was made. It dealt with the law as it then was and the facts as they then were. As was surely apparent from the grants of limited leave the claimant's position remained precarious and was subject to review. The facts have certainly changed and the law, if it has not changed, has certainly been clarified and made prescriptive in a way that was not when her tribunal made its decision.

21. Certainly there is evidence that the claimant plays a big part in the life of his son and that arrangement is beneficial to the child and both parents but they do not live in a nuclear family so his removal will not create the jolt of family separation. I must however emphasise that I do accept the evidence that the claimant's son spends roughly half of his time with him and that the claimant supports him in his sports, particularly athletics. This involves a big commitment that cannot be replicated. It is important "father and son" time and undoubtedly in the child's best interest that his father remains in the United Kingdom so that it can continue.

22. The clear fact that the claimant is important in the life of the child, indeed both children, does not assist him much in the appeal. This is the sort of case which would have been difficult to allow if the test was "undue harshness" but it is not, it is an "over and above" test. There is nothing in the judge's decision that justifies it. I therefore set aside the decision of the First-tier Tribunal.

23. I must now consider how to dispose of this appeal. In my judgment, although I think the claimant would have liked it, there is no justification in returning the case to the First-tier Tribunal. I know very little about the claimant's present circumstances. There has been no request to admit new evidence although I think there was a suggestion that some was going to be obtained. Certainly a signed witness statement dealing the claimant's present domestic arrangements would have been interesting but that should have been done for the appeal in the First-tier Tribunal. If there are better points to be made on new evidence then the remedy lies in a new claim.

24. The skeleton argument provided by the claimant makes some reference to the "**Devaseelan** principle" but I have already indicated that there are obvious significant changes and I have rejected the contention that the public interest in his deportation is somehow diminished by reason of his earlier appeal having been allowed.

25. I have considered the evidence that was before the First-tier Tribunal. I see no point in setting it out in detail.

26. I could only repeat as I have indicated, that there is nothing I can see which comes near to establishing the "over and above" consequences that are necessary. There are perfectly proper reasons to accept that the claimant plays an important part in the life of the older child and although particularised much less clearly like the First-tier Tribunal I can accept that he plays an important part in the life of the other child. I accept too the evidence in the bundles about his being settled and having contacts in the community. The evidence is believable and not controversial. I also accept that the claimant facilitates developing the relationship between his son and Mrs PR (page 83 in the bundle) who is an "honorary grandmother". These relationships are important. Interrupting them is unlikely to be unduly harsh there is nothing to support such a finding. Interruption is clearly not "over and above". I decline to remit the case. There has been no application to adduce new evidence and there is nothing in the evidence here which would justify a decision to allow the claimant's appeal, even if everything was taken at its highest.

27. I respectfully echo the observations of Hickinbottom LJ. Deportation appeals have unpleasant consequences for children and other people. Parliament has decided that these consequences do not normally attract sufficient weight to counterbalance the public interest in removing a foreign criminal and they are insufficient on their own when that foreign criminal has been sentenced to at least four years' imprisonment. The flexible nature in Article 8 balancing exercises means that decision makers, perhaps especially judges, should be alert to the possibility of a truly exceptional case. There is nothing before me to suggest that this is such a case.

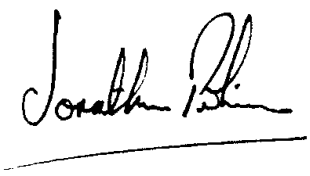
28. The claimant's appeal cannot succeed on the evidence provided if the law is applied properly.

29. It follows that as well as setting aside the decision of the First-tier Tribunal I substitute a decision dismissing the appeal against the Secretary of State's decision.

Notice of Decision

30. I allow the Secretary of State's appeal against the decision of the First-tier Tribunal and I dismiss the appeal against the Secretary of State's decision.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 1 May 2020