Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/16674/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 July 2016	**On 19 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROMEISH OAVONNI O'SHANE FACEY
(Anonymity Direction Not Made)

Respondent

Representation:

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer
For the Respondent: Mr K Mak, solicitor, of MKM Solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a

decision of First-tier Tribunal Judge Ievins, promulgated on 30 November 2015 which allowed the Appellant's appeal.

Background

3. The Appellant was born on 22 August 1992 and is a national of Jamaica.

4. The appellant arrived in the UK as an 8-year-old child with his mother and siblings. The respondent granted the appellant leave to remain a number of times. On 14 November 2009 he was granted discretionary leave to remain until 3 June 2011.

5. On 3 June 2011 the appellant applied for further leave to remain. The respondent refused that application. The appellant successfully appealed that decision to the First-tier Tribunal. As a result of that First-tier decision, on 21 March 2014 the appellant was granted leave to remain until 21 September 2016.

6. On the same day (21 March 2014) the Secretary of State curtailed the grant of leave to remain in the UK made to the appellant, and gave directions for his removal to Jamaica.

The Judge's Decision

7. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Ievins ("the Judge") allowed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 11 May 2016 Judge Cruthers gave permission to appeal stating inter alia

> "I consider it arguable that the Judge erred in law in his approach to relevant paragraphs of the immigration rules, particularly S-LTR 1.5 and S-LTR 1.6. And arguable that the judge erred in law when finding in the appellant's favour in respect of the relevant tests arising under paragraph 276ADE of the rules. And arguable that matters of public interest (as reflected in part 5A of the Nationality, Immigration and Asylum Act 2002, for instance) mean that the judge was not entitled in law to decide the issue of article 8 proportionality in favour of the appellant."

The Hearing

8. (a) Mr Norton, for the respondent, moved the grounds of appeal. There are three grounds of appeal, but he told me that the second and third grounds of appeal are dependent on the first ground of appeal. The first ground of appeal is that the Judge's interpretation of S LTR 1.5 & 1.6 is wrong. If that is established, the second ground is that the Judge's assessment of paragraph 276ADE of the rules is fundamentally flawed because it does not take proper account of the appellant's offending behaviour; for the same reason he advanced the third ground of appeal, saying that the Judge made a material misdirection of law when considering section 117B of the 2002 act. Mr Norton accepted that,

because this case does not involve a deportation order, section 117C of the 2002 Act is not relevant.

(b) Mr Norton told me the Judge correctly recorded the appellant's criminal offending, and having done so should not have found that S LTR 1.5 of 1.6 do not operate against the appellant. He told me that the Judge's failure to properly apply S-LTR 1.5 and S-LTR 1.6 infect the entire decision. He told me that the decision is undermined by material errors of law and should be set aside. He asked me to remit the case to the First-tier for rehearing *de novo*.

9. Mr Mak, solicitor for the appellant, opposed the appeal. He set out the background to this case reminding me that, following a successful appeal to the First-tier in 2013, the respondent granted leave to remain but curtailed that leave on the same day relying on paragraph 322(5) of the immigration rules. He reminded me that the respondent chose not to appeal the decision of the First-tier from 2013. He also reminded me that this is not a deportation appeal. He told me that the Judge's decision does not contain any errors of law, material or otherwise, and argued that the grounds of appeal amount to little more than an attempt to relitigate this case. He urged me to dismiss this appeal and allow the Judge's decision to stand.

Analysis

10. SLTR 1.5 says

> 'S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law. '

11. SLTR1.6 says

> 'S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.'

12. paragraph 322(5) of the Immigration rules says

> '**Grounds on which leave to remain and variation of leave to enter or remain in the United Kingdom should normally be refused…**
>
> (5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;'

13. Between [19] & [33] of the decision the Judge records the appellant's evidence. It is clear from those paragraphs of the decision that the is no dispute about the appellant's history of offending and the number and

nature of his previous convictions. It is accepted that at the time of hearing the appellant had an outstanding criminal prosecution. It is at [57] that the Judge commences his findings and reasons.

14. At [58] the Judge correctly takes as a starting point the determination of First-tier Judge Jones, and then commences [60] of the determination by asking himself the question “What has changed since then?”

15. At [62] the Judge reminds himself that the respondent relies on paragraph 322(5) of the Immigration rules, and astutely distinguishes that paragraph of the rules from paragraph 322(5A) of the rules. In doing so, the Judge reminds himself that an exercise of discretion is required and that the focus is on the appellant’s conduct (including convictions) character and associations to determine whether it is undesirable to permit the appellant to remain in the UK.

16. Between [66] and [71] the Judge analyses the appellant’s offending behaviour. He then takes guidance from Farquharson (removal – proof of conduct) [2013] UKUT 146(IAC) in which the Tribunal held that (i) Where the Respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UKUT 196 (IAC) etc applicable; (ii) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct; (iii) If the Respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them; (iv) The material relied on must be supplied to the appellant in good time to prepare for the appeal; (v) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond; (vi) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available

17. It is between [72] & [75] that the Judge draws all these matters to the conclusion that finds that the respondent does not discharge the burden of proving that it is undesirable to permit the appellant to remain in the UK in light of his conduct convictions, character or associations. The Judge gives adequate reasons for reaching that conclusion. It is, perhaps, a generous decision but it is nonetheless a decision which is within the range of conclusions open to the Judge on the facts as he found them to be.

18. It is not argued by the respondent that the Judge misdirected himself in law. A fair reading of the decision discloses that the Judge took correct guidance in law after carrying out a careful fact finding exercise and after analysing those facts in order to reach his conclusions.

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief

explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

20. I am grateful to Mr Norton for conceding that if the first ground of appeal does not succeed, then the remaining two grounds cannot succeed. For the avoidance of doubt, on the facts as the Judge found them to be he correctly reached the conclusion that the appellant fulfils the requirements of paragraph 276 ADE(1)(v) because the appellant has lived in the UK for more than half of life and is between the ages of 18 and 25 years.

21. The determination of the First-tier in June 2013 found that the appellant is in a genuine and subsisting relationship with his British citizen child. The undisputed facts are that the appellant has contact to his child. His child lives with her mother, who has a new partner. The third ground of appeal is advanced on the basis that

> "… It is plausible that circumstances may have changed since his appeal was allowed in 2013."

No actual change is plead, and, perhaps unsurprisingly, the respondent leads no evidence to support that ground of appeal.

22. There is nothing wrong with the Judge's fact finding exercise. In reality the grounds of appeal amount to little more than a disagreement with the way the Judge has applied the facts as he found them to be. The respondent might not like the conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. There is nothing wrong with the Judge's fact finding exercise. The correct test in law has been applied. The decision does not contain a material error of law.

23. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

24. No errors of law have been established. The Judge's decision stands.

DECISION

25. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 18 July 2016

Deputy Upper Tribunal Judge Doyle