Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02548/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 August 2018	**On 1 October 2018**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE O'CONNOR

Between

ENTRY CLEARANCE OFFICE - SHEFFIELD

Appellant

and

DRJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent (the claimant): Mr A Maqsood, Counsel, ICS Legal

DECISION AND REASONS

INTRODUCTION

1. This appeal is against the refusal dated 4 January 2016 by the Entry Clearance Officer to grant the claimant, a citizen of Jamaica where he was born in June 1966, entry clearance as the partner of ED, a British citizen born in 1969 (the sponsor). The refusal was on the basis was that the claimant's exclusion from the United Kingdom was conducive to the public good under paragraph S-EC1.4 of Appendix FM with reference to his conviction of a criminal offence on 4 March 1966 in the United States of America for which he was sentenced to ten years' imprisonment. The Entry Clearance Officer was however satisfied that the relationship, financial and English language requirements of Appendix FM had been met.

2. The Entry Clearance Officer also considered the case under Article 8 of the Human Rights Convention. He accepted there may be family life with the sponsor but nevertheless considered that his decision was proportionate. Although the claimant had previously visited the United Kingdom (in 2014) each application was assessed afresh and on its own merits. No satisfactory reason had been advanced why the sponsor would be unable to travel to Jamaica and why they could not marry in another country. The decision was justified by the need to maintain effective immigration and border control. No exceptional circumstances had been raised and the application therefore did not fall for a grant of entry clearance outside the Rules.

3. First-tier Tribunal Judge R Sullivan allowed the appeal on Article 8 grounds. Judge O'Connor's decision finding error of law is annexed; in essence, he concluded that the FtT had not set out with any or sufficient clarity the path between the findings made and the ultimate outcome of the appeal.

4. The background circumstances are set out in paragraph 12 of the FtT decision:

> "12. The Appellant's claim is set out in the application submitted on a day between 3 July 2015 and 25 August 2015, in the grounds of appeal and in his witness statements dated 25 October 2016 and 24 May 2017. It is supported by the witness statements and oral evidence of the sponsor and her older son. The witness statements and oral evidence of the sponsor and her older son. The claim was amplified by the Appellant's representative's oral submissions. In short the Appellant met the sponsor in 1987 and resumed their acquaintance in January 2011. Since then the sponsor has visited him in Jamaica and he has visited her and her sons in the United Kingdom. The sponsor finds it difficult to support her two sons, one of whom is profoundly death [sic] and both of whom suffer, or have suffered, from mental ill health. Given the lapse of time since the Appellant's conviction, his good record since his release from imprisonment, the education and employment he has undertaken and the strong relationship he has with the sponsor and her two sons he does not represent a risk to the community and should be admitted to the United Kingdom to support the Appellant and her sons. The sponsor cannot join the Appellant in Jamaica because her sons require her support, they are all settled in the United Kingdom and her sons require her support, they are all settled in the United Kingdom and her younger son refuses to travel to Jamaica."

5. The FtT also made findings of fact which have not been disputed by any response Rule 24 of the Tribunal Procedures (Upper Tribunal) Rules 2008. These findings are captured in UTJ O'Connor's decision at paragraph 5:

> "5. The appeal before the First-tier Tribunal was heard by Judge R Sullivan on 12 June 2017 and allowed in a decision promulgated on 7 July. The FtT concluded that the refusal of entry clearance led to a breach of Article 8 and, in so doing, it made the following pertinent findings;
>
> (i) the claimant visited the United Kingdom lawfully between 9 October 2014 and 21 November 2014;
>
> (ii) the claimant and sponsor share a family life, they care for one another and have committed to marry [13];

(iii) the sponsor shares a family life with her two adult children [14];

(iv) both of the sponsor's children have continuing relationships of importance with their father – there having been a deliberate attempt by the sponsor to withhold relevant and important information from the Tribunal in this regard [15];

(v) the sponsor has a history of low mood, anxiety and depression and, as of the date of the First-tier Tribunal's decision, was suffering from anxiety and insomnia for which she has received medical treatment [18];

(vi) the claimant's presence in the UK would not allay the sponsor's anxieties, or solve her insomnia. It would, though, help her cope practically, particularly when she is overtired [18];

(vii) the sponsor's son (AD) has suffered depression in the past, although he currently requires no treatment in this regard. AD does not require the claimant's presence to continue his progress or to support him more generally [19];

(viii) the sponsor's other son (SD) is profoundly deaf and relies on British sign language to communicate. He has suffered from psychosis, anxiety and depression, his symptoms fluctuating from time to time. As of 22 May 2017, he had a diagnosis of 'psychotic disorder'. He receives medical support, has a dedicated support worker and a care coordinator but is, nevertheless, heavily reliant on the sponsor [20];

(ix) the claimant's presence in the United Kingdom is not required for SD's health to improve or for SD to return to education. SD has been making progress and has meaningful support from other sources. The sponsor would find it easier to support SD if the claimant was present [20];

(x) it would be unreasonable and unduly harsh to require the sponsor to move to Jamaica with her children [21]."

6. Neither Ms Isherwood nor Mr Maqsood sought to dissuade us from treating these findings as our starting point. Prior to the hearing the Secretary of State provided material in relation to the decision to grant the claimant a visit visa in 2014 and the information held in the United Kingdom in relation to the claimant's conviction in the United States that was referred to in the refusal decision. The following emerges from this new material:

(i) The claimant disclosed his deportation from the United States in his visit visa application. This is acknowledged in the copy of the decision refusing entry clearance for that visa dated 29 July 2013.

(ii) There may have been a misunderstanding over the effect of the decision of the First-tier Tribunal allowing the appeal against the refusal of the visit visa. An internal minute dated 27 August 2014 picks this aspect up:

> "Nancy, this case was allowed only to the extent that it was remitted back to the ECO for reconsideration and it was this decision that we did not challenge. If you do not wish to issue then you would have the option to re-refuse. But given the judge's recommendation the ECO would now need to consider Article 8. Kind regards Lisa Spoke to ECM – as allowed under Article 8, unable to justify a refusal under Article 8."

(iii) A visa was issued on 27 August 2014.

(iv) The United States Department of Homeland Security (DHS) was contacted after an interview of the sponsor on 5 October 2015 to verify the claimant's immigration history. Their response was in these terms:

> "The Conviction date provided in my initially [sic] response came from the Immigration deportation records. It does not specify which charge it relates to or the state in which the conviction was obtained. He had multiple drug related convictions, one in 1991 in New Jersey; some others in Ohio where he was charged utilizing the name P, M A and P, P. I am not permitted to provide any details so hope this general information helps."

Ms Isherwood confirmed that this was the full response from DHS.

(v) According to one of four case abstracts from the United States the claimant has used an alias M P. His address is given as Dover in New Jersey. A case numbered 92000932 was initiated on 5 July 1992. A despatch date is recorded as 29 November 1995 and the sentence date as 2 August 1996, with the reason added "guilty plea as charg". A further abstract refers to the initiation of another case numbered 92000006 against the claimant on 30 December 1991. The despatch date is given as 9 November 1992 with the same sentence date of 2 August 1996. The reason given is "guilty jury".

(vi) The additional abstracts provide material in relation to the offences. As to case number 92000932 (the charge for which the claimant pleaded guilty) the offence was the manufacture and distribution of CDS-heroin/meth/LSD for which there was an incarceration length of five years and parole ineligibility for three years. As to case number 92000006, (the charge for which the claimant was found guilty by a jury) the recorded offence was distribution on/near school property/bus. The sentence length was five years and again ineligibility for parole for the first three years.

We deduce from the material at (iv) to (vi) above that the claimant was convicted of the manufacture and/or distribution of what would be known as Class A drug offences in the United Kingdom and was found guilty by the jury of distribution on or near school property or a (school bus).

7. The sponsor gave evidence. She was distressed because one of her brothers, a businessman had been shot on 18 July. We ensured that she had a break during the course of questioning by Ms Isherwood and only proceeded with her assurance and confirmation from Mr Maqsood that she was fit and able to give evidence. During

that evidence, she confirmed that she had been told by the claimant that he had used an alias in the United States. She understood the offences led to the one conviction which she saw as cumulative. The claimant had informed her of his convictions from "day one". She was not aware of other convictions.

8. The sponsor further confirmed that when her sons travelled to Jamaica with their biological father they saw the claimant. Her parents live in Jamaica, cared for by one of her surviving four brothers although he is currently in hospital. The sponsor has continued to suffer ill-health attributed to low blood pressure and panic attacks. A further source of stress is her recent understanding that her elder son Alex is no longer attending college. He spends his life on his computer. Her younger son was particularly anxious over the possibility of her going to Jamaica following her brother's death to help her elderly parents. She has no family in the UK apart from her children. The sponsor is employed by the NHS on flexible terms. She has visited the claimant two occasions since their relationship developed from 2011. The first was in January 2013 and the second in August 2016, on each occasion the duration was some three to four weeks. To complete the evidential picture of visits, the chronology by Mr Maqsood in his skeleton arguments shows that the claimant came here on the visit visa on 9 October and left on 21 November 2014.

DISCUSSION

9. As acknowledged by the parties the current Rules are relevant to our consideration of this case under Article 8 in the light of section 85(4) of the Nationality, Immigration and Asylum Act 2002 which provides:

> *"4. On an appeal under section 82(1)… against a decision [the Tribunal] may consider … any matter which [it] thinks relevant to the substance of the decision, including evidence … a matter arising after the date of the decision."*

10. An important issue at the heart of this appeal is the assessment of the public interest in regulating the entry to the United Kingdom of foreign nationals who have been convicted of a crime outside the United Kingdom. At the time of the Entry Clearance Officer's decision of 4 January 2016 paragraph S-EC.1.4. of Appendix FM of the version of Immigration Rules in force since 22 December 2012 (HC 760) provided that:

> *"The exclusion of the applicant from the UK is conducive to the public good because they have:*
>
> *(a) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years; or*
>
> *(b) been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence; or*
>
> *(c) been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 12 months, unless a period of 5 years has passed since the end of the sentence.*

Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."

11. There is no dispute that the Entry Clearance Officer correctly considered that the claimant's offending in the United States was caught by 1.4.(a).

12. Mr Maqsood has helpfully charted in his amended skeleton argument the history of changes in the Rules relevant to this case from the date of decision to the present as follows:

> "3. Statement of Changes in Immigration Rules HC 309 dated 07 December 2017 amended para 1.4. from 11 January 2018 above by providing that:
>
> > *"In paragraph S-EC.1.4., delete "Where this paragraph applies, unless refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by compelling factors."*
>
> 4. At the same time the same paragraph was also deleted from paragraph 320(2). Explanatory memorandum to the statement of changes in immigration rules presented to Parliament on 07 December 2017 (HC 309) provides that:
>
> > *"7.5. The last part of paragraph 320(2) in Part 9 was introduced on 22 November 2012 (HC 760). The policy intention was to emphasise the public interest in refusing to permit a person convicted of a criminal offence to enter the UK. That remains an important policy aim, but it was not the intention to create a separate public interest test to the now well established public interest test that must be taken into account in the assessment of human rights claims. This section of paragraph 320(2) is therefore being deleted, together with the other instances of this paragraph in Appendix Armed Forces (paragraph 8(d)), Appendix FM (in paragraph S-EC.1.4) and Appendix V (in paragraph V3.4)."*
>
> 5. Paragraph 6 of the Immigration Rules provides that:
>
> > *""conviction" means conviction for a criminal offence in the UK or any other country."*
>
> 6 Statement of Changes in Immigration Rules HC 290 dated 20 July 2017 inserted exceptional circumstances (including GEN.3.2.) paragraph in general requirements. HC 290 provides that changes set out in this statement shall take effect from 10 August 2017 and will apply to all decisions made on or after that date. GEN.3.2. provides that:
>
> > *"(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.*
> >
> > *(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional*

circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D- LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2."

7. The explanatory memorandum to HC 290 provides that:

7.1. The Supreme Court judgment in MM (Lebanon) & Others upheld the lawfulness under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights of the minimum income requirement for entry clearance or leave to remain as a partner or child under the family Immigration Rules in Appendix FM and of the basis, set out in Appendix FM-SE (specified evidence), on which that requirement must generally be met. However, the judgment found (a) that other reliable sources of earnings or finance, beyond those currently permitted under those Appendices, should be taken into account in circumstances where refusal of the application could otherwise breach Article 8; and (b) that Appendix FM did not give direct effect to the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard, as a primary consideration, to a child's best interests in an immigration decision affecting them.

7.2. The changes set out in this statement are intended to give effect to those findings. In particular, they insert new general provisions in Appendix FM (paragraphs GEN.3.1. to 3.3.) which:

> *Require the decision-maker, in the specified circumstances, to consider whether the minimum income requirement is met if the other sources of income, financial support or funds set out in the new paragraph 21A of Appendix FM-SE are taken into account. The specified circumstances are that, firstly, the minimum income requirement is not otherwise met and, secondly, it is evident from the information provided by the applicant that there are exceptional circumstances which could render refusal of the application a breach of Article 8 because it could result in unjustifiably harsh consequences for the applicant, their partner or a child under the age of 18 years who it is evident would be affected by a decision to refuse the application;*
>
> *Require the decision-maker, where an application for entry clearance or leave to remain made or considered under Appendix FM does not otherwise meet the relevant requirements of the Immigration Rules, to go on to consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of the application a breach of Article 8 because it would result in unjustifiably harsh consequences for the applicant or their family. This brings the test of proportionality under Article 8 into the Rules. That test was previously applied by the Secretary of State (through guidance) in considering whether to grant leave outside the Rules on Article 8 grounds. The substance of the test was upheld by the Supreme Court in Agyarko & Ikuga v the Secretary for the Home Department [2017] UKSC 11. These changes mean that the Immigration Rules now provide a complete framework for the Secretary of*

State's consideration on Article 8 grounds of applications under Appendix FM by a partner, child, parent or adult dependent relative; and"

13. Mr Maqsood has also provided extracts from the respondent's guidance to his caseworkers as follows:

"13. Page 21 of the Appendix FM 1.0 Family Life (as a Partner or Parent): 5-Year Routes October 2017 instructions provides that:

"In considering the suitability criteria under paragraphs S-EC.1.2. to S-EC.1.5. of Appendix FM, decision makers must refer to the Criminality Guidance:

- *Criminality Guidance in ECHR Cases (internal)*

- *Criminality Guidance in ECHR Cases (external)"*

14. Page 14 of 71 of the Respondent's Guidance: General grounds for refusal Section 2 – version 29.0 Published for Home Office staff on 11 January 2018 provides that:

"However, on rare occasions the most compelling circumstances may arise in which it is necessary to consider making an exception despite the mandatory nature of paragraphs 320(2), S-EC.1.4, AF8(d) and V3.4. Exceptions will fall into one of the following 3 categories

- *failing to grant entry would be a breach of the UK's obligations under the European Convention on Human Rights (ECHR)*
- *there are exceptional circumstances that mean entry must be granted despite the conviction*
- *an applicant's conviction is for an offence not recognised in the UK"*

…

16. Page 20 of General grounds for refusal Section 1 – version 29.0 Published for Home Office staff on 11 January 2018 provides that:

"Sentences of 4 years or more imprisonment

If the applicant was convicted of an offence and sentenced to at least 4 years you must refuse entry clearance or leave to enter. You can make a mandatory refusal under paragraph 320(2)(b) and S-EC1.4(a) in Appendix FM and V 3.4(a) of Appendix V of the Immigration Rules, see related links.

There is no time limit on how long the Home Office will take into account a conviction in this category.

However, you must consider if there are any compelling factors which amount to an exceptional reason why entry clearance should be granted. For further information, see below, exceptional cases."

17. Page 21 of General grounds for refusal Section 1 – version 29.0 Published for Home Office staff on 11 January 2018 provides that:

> *"Exceptional cases*
>
> *Section 117C of the Nationality, Immigration and Asylum Act 2002 provides that the deportation of foreign criminals is in the public interest for the purposes of Article 8 of the European Convention on Human Rights (ECHR). Similarly, it is also in the public interest that foreign criminals are prevented from entering. It is a fundamental aim of Home Office policy to protect the public in the UK.*
>
> *However, on rare occasions the most compelling circumstances may arise in which it is necessary to consider making an exception despite the mandatory nature of paragraphs 320(2), S-EC.1.4, AF8(d) and V3.4. Exceptions will fall into one of the following 3 categories:*
>
> - *failing to grant entry would be a breach of the UK's obligations under the ECHR*
> - *there are exceptional circumstances that mean entry must be granted despite the conviction*
>
> •*an applicant's conviction is for an offence not recognised in the UK"*

14. Mr Maqsood maintains that the claimant is not a foreign criminal as defined in statute and he also provides an extract from further Home Office guidance as follows at paragraph 20 of his amended skeleton:

> "20. The Appellant is clearly not a foreign criminal as defined in the statutes. The Respondent's guidance: Criminality: Article 8 ECHR cases Version 6.0 published for Home Office staff on 22 February 2017 provides on page 13 that:
>
> > *"Deportation on the basis of convictions abroad*
> >
> > *Where deportation is pursued solely on the basis of one or more overseas conviction, the person liable to deportation will not meet the definition of a foreign criminal set out at section 117D(1) of the 2002 act and will not fall within any of the criminality thresholds at paragraph 398 of the Immigration Rules. This means the claim will be considered outside the Immigration Rules, but the rules must be used as a guide, because they reflect Parliament's view of the balance to be struck between an individual's right to private and family life and the public interest.*
> >
> > *Where a subsequent Article 8 claim is successful, because an exception to deportation is met or because there are very compelling circumstances, limited leave will be granted outside the Immigration Rules for a period not exceeding 30 months, subject to such conditions as the Secretary of State deems appropriate. The period of leave to be granted, and any conditions to be attached to that leave, must be determined on a case-by-case basis."*

15. Sections 117A and 117D(2) of the 2002 Act (relevant to this appeal) provide:

> *"Section 117A. Application of this Part*

"*(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –*

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C

…

117D. Interpretation of this Part

…

(2) In this Part, "foreign criminal" means a person –

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

…"

16. In essence, Mr Maqsood's case is that taking the changes in the Immigration Rules, read with the respondent's guidance, a different approach to the weight to be given to the public interest where someone has been convicted abroad from the assessment of the public interest where the conviction has been in the UK is required. Had the intention been to apply the "in-country" deportation standards by an analogy to the admission rules, the amendments to the Rules would have stated so in the accompanying memorandum. He argues that the correct approach is to see whether there are compelling circumstances to outweigh the public interest where there has been foreign offending rather than very compelling circumstances as would be the case for domestic criminal offending.

17. In *Entry Clearance Officer (United States of America) v MW (United States of America) & Ors* [2016] EWCA Civ 1273 the Court of Appeal gave guidance as to the approach to be taken when applying the earlier version of paragraph S-EC.1.4. of Appendix FM (set out in paragraph 10 above). The respondent in the case had been convicted in

2005 of an offence for which he received a sentence of imprisonment of four years. Further offending led to another conviction in May 2008 for which he was sentenced to sixteen months' imprisonment. His application for entry clearance was based on his relationship with a British national whom he met in 2012. The First-tier Tribunal allowed the appeal. The Entry Clearance Officer was unsuccessful on appeal to the Upper Tribunal.

18. The court referred to *Hesham Ali (Iraq) v SSHD* [2016] UKSC 16 and considered that the provisions in the Rules "do represent an authoritative statement of public policy, broadly consistent with the 2007 Act and the "new Rules", and as such must be considered carefully (and expressly) by a Court or Tribunal considering a case to which they apply" (paragraph 35 of the judgment of the court).

19. After expressing concern over the clumsiness of the concluding sentence in the version of S-EC.1.4., the court held at [37]:

> "In our view the intention behind S-EC.1.4. was to emphasise the public interest in maintaining refusal. The intended meaning was that compelling factors will usually be required to outweigh the public interest in maintaining refusal. That is consistent with the approach in deportation cases. In *MF (Nigeria)*, this court emphasised that in considering the deportation of foreign criminals where the provisions of paragraph 399 and 399A do not apply, then "very compelling reasons will be required to outweigh the public interest in deportation" (paragraph 43). We consider that the policy here must carry similar weight, and the emphasis marked by the phrase "very compelling reasons" is appropriate. It would be surprising if the policy in regard to those living abroad but seeking to enter the United Kingdom were to be more liberal than the policy affecting those already resident here."

20. The Court of Appeal however explained in [39] that there may be circumstances relevant to a Human Rights Convention claim when applying the policy:

> "39. However, we accept that there may be important distinctions in the application of the policy, as Miss Revill has argued. In a deportation case, the UK conviction and sentence arise within a familiar legal system, and can be taken to be reliable indicators of the severity of the criminality, and thus the degree of public interest in deportation. In cases of application for entry, the same does not apply in all cases. The illustration arose in argument that, in a number of countries, homosexual acts lawful here are regarded as criminal and can be vitiated with imprisonment for four years or longer. Such circumstances might well be relevant to a Convention or asylum claim."

21. As was the position before the Court of Appeal, no such circumstances arise in the case before us. The UK criminalises drug related activities of the kind for which the claimant was convicted.

22. The disappearance of the reference to the Human Rights and Refugee Conventions in the concluding paragraph to S-EC.1.4 in the changes made in December 2017 was matched by it resurfacing in GEN.3.2. with the consequence disappearance of a reference to compelling factors and the substitution of a reference to "unjustifiably harsh consequences". Mr Maqsood argues that the provisions in GEN.3.2. cannot be

construed to be providing a distinct threshold specifically for Article 8 admission cases where criminality is involved compared to the threshold where a non-criminal background applicant fails to meet the requirements illustrated by reference to those who have litigation debt or NHS debt.

23. Mr Maqsood is correct that the claimant is not a foreign criminal as defined in Part 5 of the 2002 Act. He seeks to distinguish *MW (United States of America)* on the basis that the Secretary of State has not, in the revisions to the Rules, expressed the same intention with reference to very compelling reasons. He further argues that the conclusions in *MM (Uganda) & Anor v SSHD* [2016] EWCA Civ 617 exclusively focusses on the situation of foreign criminals liable for deportation. He argues that the same approach is not relevant to cases where a foreign national seeking entry committed crimes abroad.

24. It is correct that the provisions of the Rules considered by the Court of Appeal in *MM (Uganda)* in section 117C and paragraph 399 of the Immigration Rules refer to the phrase "unduly harsh" as to the impact on a partner or child affected by deportation. Laws LJ concluded at [23] to [25]:

> "23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach to the Upper Tribunal in MAB ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is especially vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):
>
> > "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."
>
> 24. This steers the Tribunals and the Court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. In the other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in a given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.
>
> 25. The issue is not advanced with respect either by the terms of the Secretary of State's guidance in the Immigration Directorate Instructions or the learning on the use of the term "unduly harsh" in the context of internal relocation issues arising in refugee law. The IDIs are not a source of law and the asylum context of internal relocation issues is far removed from that of Rules 398 to 399 …"

25. In our judgment the principle established in *MW (United States)* continues to be applicable notwithstanding the changes to the Rules. The reference in GEN.3.2 to "unjustifiably harsh consequences" does not mean that less weight is to be given

where a conviction in a foreign country is the inhibiting factor to entry unless the conviction was in circumstances of the kind considered by the court in *MW (United States)* in [41]. We conclude that, by analogy, the principles established in *MM (Uganda)* apply equally to situations where the public interest is to be evaluated where a foreign national with a conviction is seeking entry. The justification for harsh consequences must be by reference to the conviction in question. Whilst GEN.3.2. applies to all cases where an application for entry clearance or leave to enter or remain which does not meet the requirements of the Rules, it does not follow that a less rigorous approach applies to those seeking entry who have been convicted of crimes abroad when deciding the weight to be given to the public interest in the article 8 proportionality exercise. The Rules read with the guidance to staff and the explanatory memorandum cannot be understood to indicate that the Secretary of State has decided that less weight is to be given to foreign offending when compared with convictions arising in the UK.

26. We turn now to the circumstances of the claimant's offending. We give little weight to the sponsor's confused evidence over her understanding of the claimant's convictions. She was invited to recall what she had been told by the claimant and we accept that he had told her of his conviction at some point prior to his application for a visit visa. Furthermore, we do not give any weight to the claimant's silence in the application under Appendix FM on the fact of his deportation from the United States. This is because he indicated in his earlier application for a visit visa that he had been deported as revealed in the Entry Clearance Officer's decision. The application under Appendix FM required him at question 28 to say whether he had been "… deported, removed or otherwise required to leave any country including the UK in the last ten years?". The claimant's statement dated 24 May 2017 explains that he was returned from the United States to Jamaica in 2006. The application under Appendix FM was made between 3 July and 25 August 2015. It refers to the claimant having been issued with a passport by Jamaica on 10 June 2005. It does not state where the passport was issued. The extracts referred to above indicate eligibility by the claimant for parole after a period of time and it appears to us this is likely to have happened. Taking account of the date of issue of the passport we think it likely that the claimant was returned to Jamaica in 2005 or earlier.

27. The claimant's statement dated 24 May 2017 explains that in 1994 he was living in Columbus, Ohio. He frequented a Caribbean restaurant/record store. In February or March 1994 he agreed to accompany the restaurant managers to a play after closing hours. On reaching their home address where the managers planned to get dressed, he was surrounded by the police, ordered out of his car, handcuffed and placed in one of the escort cars. The same happened to his co-accused after the police had gone into their house. At no time were any drugs or its paraphernalia found on him nor was he part of any sale or of distribution of drugs. The claimant was later informed that undercover agents and informants had purchased drugs from the restaurant/record store which had been made whilst he was there on numerous occasions. He was charged with conspiracy to possess and distribute "a control substance" and initially pleaded not guilty. The indictment stated that he had known about the activities at the store and had not reported it. Further he was a look-out person. He was refused a plea deal offered by the prosecutor but changed

his mind on appointment of the jurors in the light of the government's conviction rate. He pleaded guilty and was sentenced to 10 years imprisonment at a minimum security facility.

28. In a further witness statement dated 10 October 2017 (in anticipation of his appeal in the Upper Tribunal), the claimant refers a case against him in February 1993 and to legislation described as mandatory sentencing guidelines which the sentencing judge was required to use without discretion suggesting a minimum of ten years.

29. It appears to us that the date in the abstract (at [6(v)] above) is a reference to earlier proceedings in New Jersey (with case initiation dates of 30 December 1991 and 7 May 1992) in which the claimant is recorded to have pleaded guilty to the first indictment for the manufacture or distribution of CDS-heroin/meth/LSD. It is also recorded that he was found guilty by the jury on a second indictment of distribution on or near a school property or bus. He was sentenced for both of offences on 2 August 1996.

30. The position is not entirely clear but we find that the claimant was convicted of drug related offences on two occasions; once on his own evidence when he was living in Columbus, Ohio and on earlier occasion in New Jersey when he was living in Dover. We are certain that he was sentenced to 5 years on each indictment in New Jersey in 1996 although it is not clear whether the sentences were concurrent or consecutive. We do not have independent evidence of the sentence passed in relation to the admitted Ohio convictions when it is possible the claimant was already serving these earlier sentences. In any event we find that the claimant has not been candid about the extent and nature of his offending during his time in the US. The time that has passed since the claimant's offending is considerable but nevertheless he is still caught by S-EC.1.4. in the light of the length of imprisonment of over four years. In our judgment the absence of candour by the claimant reduces the weight to be given to the passage of time in the proportionality exercise. The public interest in excluding him from the UK remains high reflected in the sentences passed.

31. The finding by the First-tier Tribunal that the sponsor shares a family life with the claimant has been preserved. The intensity of the family life needs to be considered in the context of the proportionality exercise. The claimant and sponsor have seen little of each other since 2011. We consider it significant that the claimant did not stay for the duration of the period for which his visit visa was granted in 2014 although we accept that it may have been work commitments that required him to return to Jamaica. All in all, they have seen each other for a total of some eleven weeks since 2011. We are in no doubt however that the sponsor is fond of the claimant but although his presence in the United Kingdom would be ideal to help her and the sponsor's sons lead their lives, it cannot be said that his presence is essential. The relationship between the claimant and sponsor is one which has developed over a distance with occasional meetings; we expect would flourish were the claimant be granted entry clearance. It is very different however from a relationship between a cohabiting couple.

32. The First-tier Tribunal did not find family life between the claimant and the sponsor's two children. We are bound to give weight to the sponsor's deception in respect of the role of their biological father in their lives. We do still do not have as full a picture as we would like. Whilst we are considering proportionality on the basis that the claimant has a good relationship with the two sons we also consider proportionality on the basis that it is not open to the sponsor to relocate to Jamaica in the light of the continuing demands that her sons make on her as well as her own career as found by the First-tier Tribunal.

33. All the above factors need to be considered in the context of the familiar *Razgar* steps. We are satisfied that family life remains engaged between the claimant and sponsor in this case to a degree of private life between the claimant and her adult children. Although we have expressed reservations about the intensity of that family life nevertheless we are satisfied that the decision of the Entry Clearance Officer was sufficient for the Convention to be engaged. There is no dispute that the decision is lawful and for the legitimate aim of maintaining immigration control. In the light of the acknowledgment by the Entry Clearance Officer of the eligibility requirements of the Rules having been met, the proportionality exercise must therefore focus on the suitability requirements owing to the criminal offending. That offending was very serious having regard to its nature and the length of sentences passed. There is a strong public interest in excluding someone with such a background from the UK.

34. We have considered how the public interest is to be assessed in the light of the grant of the visit visa. Mr Maqsood submits in his skeleton that the claimant had a legitimate expectation that his application would not be jeopardised by his history which was "previously known" and did not result in a refusal. Ms Isherwood submits in her skeleton argument that the visa grant did not create a legitimate expectation that the "current" application would be granted. In our view the evidence does not establish that there was a misunderstanding by the Entry Clearance Manager of the effect of the FtT decision allowing the appeal. We cannot rule out that he or she considered the offending was not sufficient to refuse the visit application. Nevertheless we have found that the claimant has not been honest about the extent of his offending and this case concerns an application for settlement in the UK rather than a temporary visit. The lack of candour by the claimant and his evidence that seeks to diminish the seriousness of his offending are relevant to the weighing of positive pull of the grant of the visit visa. We do not consider that any legitimate expectation was created by the visit decision and, in our judgment, whilst some weight should be given to this aspect, overall it does not materially affect matters. This remains a case where there is an absence of very compelling circumstances sufficient to defeat the public interest. We give due weight to the nature of the family and private life at stake in this case however for the reasons we have given above, these are not strong components. The potential for the passage of time since offending to be a positive factor is counteracted by the claimant's lack of candour and his downplaying the extent and nature of his offending. Even if we were persuaded that the lower standard for the assessment of the public interest that Mr Maqsood has argued applies is the right approach, we would come to the same conclusion. Either way we are satisfied that on any analysis the decision to refuse the claimant entry clearance is proportionate and does not breach article 8.

DECISION

By way of summary therefore the decision of the First-tier Tribunal is set aside for error of law. We remake the decision and dismiss the appeal by the claimant against the refusal of entry clearance.

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

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

Signed Date 24 September 2018

UTJ Dawson
Upper Tribunal Judge Dawson

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/02548/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 3 November 2017
Dictated: 3 November 2017

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

ENTRY CLEARANCE OFFICER – SHEFFIELD

Appellant

and

DRJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Mr I Khan, instructed by ICS Legal

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

Unless and until a Tribunal or court directs otherwise, the claimant herein is granted anonymity. No report of these proceedings shall directly or indirectly identify the claimant or any member of the claimant's family. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department. I refer herein to DRJ as 'the claimant'.

2. The claimant is a citizen of Jamaica, born on June 1966. He appealed to the First-tier Tribunal against a decision of an Entry Clearance Officer dated 4 January 2006, refusing him entry clearance - such application having been founded on his relationship to ED ("the sponsor"), a British citizen.

3. The Entry Clearance Officer ("ECO") provided the following summary of the reasons for refusing entry clearance:

> "Your exclusion from the UK is conducive to the public good under S-EC1.4 of Appendix FM because:
>
> - Records held in the United Kingdom indicate that you have been convicted of a criminal offence on 04.03.1996 in the United States of America for which you were sentenced to imprisonment for ten years.
>
> - You have therefore been convicted of an offence for which you have been sentenced to a period of imprisonment of at least four years, I therefore refuse your application under paragraph EC-P.1.1(c) of Appendix FM of the Immigration Rules (S-EC.1.4.(a))."

4. The ECO also considered Article 8 ECHR, concluding that the application did not identify any exceptional circumstances requiring entry clearance to be granted.

Decision of the First-tier Tribunal

5. The appeal before the First-tier Tribunal was heard by Judge R Sullivan on 12 June 2017 and allowed in a decision promulgated on 7 July. The FtT concluded that the refusal of entry clearance led to a breach of Article 8 and, in so doing, it made the following pertinent findings:

   (i) the claimant visited the United Kingdom lawfully between 9 October 2014 and 21 November 2014;

   (ii) the claimant and sponsor share a family life, they care for one another and have committed to marry [13];

   (iii) the sponsor shares a family life with her two adult children [14];

   (iv) both of the sponsor's children have continuing relationships of importance with their father – there having been a deliberate attempt by the sponsor to withhold relevant and important information from the Tribunal in this regard [15];

(v) the sponsor has a history of low mood, anxiety and depression and, as of the date of the First-tier Tribunal's decision, was suffering from anxiety and insomnia for which she has received medical treatment [18];

(vi) the claimant's presence in the UK would not allay the sponsor's anxieties, or solve her insomnia. It would, though, help her cope practically, particularly when she is overtired [18];

(vii) the sponsor's son (AD) has suffered depression in the past, although he currently requires no treatment in this regard. AD does not require the claimant's presence to continue his progress or to support him more generally [19];

(viii) the sponsor's other son (SD) is profoundly deaf and relies on British sign language to communicate. He has suffered from psychosis, anxiety and depression, his symptoms fluctuating from time to time. As of 22 May 2017, he had a diagnosis of 'psychotic disorder'. He receives medical support, has a dedicated support worker and a care coordinator but is, nevertheless, heavily reliant on the sponsor [20];

(ix) the claimant's presence in the United Kingdom is not required for SD's health to improve or for SD to return to education. SD has been making progress and has meaningful support from other sources. The sponsor would find it easier to support SD if the claimant was present [20];

(x) it would be unreasonable and unduly harsh to require the sponsor to move to Jamaica with her children [21].

6. At [24] of its decision the First-tier Tribunal concludes that the claimant does not meet the suitability requirements of Appendix FM. In doing so the tribunal identified that it had not been provided with a complete account of the offence that had led the claimant to be given a sentence of ten years' imprisonment in the United States. It further concluded that the claimant does not represent a high risk of reoffending, and that the sponsor has sufficient financial resources to ensure that the claimant would not need to call on public funds whilst in the United Kingdom.

7. The Tribunal, at [30] of its decision, found as follows:

> "This is a difficult case. I have no doubt that the sponsor would benefit from the appellant's presence and that they very much wish to be together. I have no doubt that the sponsor would find it easier to cope with daily routines and to support her two sons with the appellant present to support her. On the other hand the significant sentence imposed on the appellant in 1996 is suggestive of serious offending; I acknowledge a public concern about the admission of those who have committed serious offences while recognising that the appellant is not at high risk of reoffending. I am not satisfied that either the sponsor or the appellant has been completely candid about relevant matters; that is of some concern. Neither [SD] nor [AD] requires the appellant's presence to continue progress in health or education. All of the sponsor, [SD] and [AD] have the

support of medical and other services in the United Kingdom. Paragraph 391 of the Rules provides a useful analogy; had the appellant been deported from the United Kingdom the continuation of the deportation order would have been the proper course unless that course breached the 1950 Convention or there were exceptional circumstances meaning that continuation was outweighed by compelling factors. On balance I am satisfied that there are compelling factors in this case to outweigh the public interest in the refusal. I have particularly been influenced by [SD's] ill-health and the difficulties the sponsor has in coping with that.

31. I find that the refusal was disproportionate and breaches Article 8."

Discussion and Decision

8. First-tier Tribunal Judge Farrelly granted permission to appeal in a decision of 29 August, in the following terms:

> "(4) The respondent sought permission on the basis that inadequate reasons have been given. This was against the background of the finding that the sponsor had not been frank with the Tribunal and in reference to parity with provisions for deportation. These grounds and other grounds advanced indicate an arguable error of law."

9. At the outset of the hearing before the Upper Tribunal Mr Khan accepted that the First-tier Tribunal's decision contains two errors of law capable of affecting the outcome of the appeal and that as a consequence it ought to be set aside. Given this concession, I need only briefly set out the reasons why I conclude that it was appropriately made.

10. The First-tier Tribunal fails to identify the particular features of the case which, despite the claimant not meeting the requirements of the Immigration Rules, are sufficiently compelling to lead to the conclusion that Article 8 would be breached by a refusal of entry clearance. For the most part the findings made by the First-tier Tribunal lead a reader of the decision down the path towards a conclusion adverse to the claimant. The FtT does not set out with any, or sufficient, clarity the path between the findings made and the ultimate outcome of the appeal.

11. The one feature of the case which is seized upon by the First-tier Tribunal, at paragraph 30 of its decision, is "*[SD's] ill-health and the difficulties the sponsor has in coping with that.*" However, when viewed in the context of the findings made by the Tribunal elsewhere in its decision, particularly those relating to the assistance SD gets from the state and from her father, the prominence this aspect of the case attracts in the Tribunal's ultimate conclusion is baffling. It may well be that the "*sponsor would find it easier to support SD if the appellant was present*", but that is a long way from being sufficient of itself to rationally lead to the conclusion that refusal of entry clearance would breach of Article 8. No other compelling factors are identified in the concluding paragraphs of the decision, nor can they be easily identified from the rest of decision itself.

12. There are further areas of concern within the FtT's decision. For example, at [21] the First-tier Tribunal concludes that it would be unduly harsh to require the sponsor to move with her adult children to Jamaica. It is readily apparent from the FtT's decision, however, that this conclusion was reached absent an analysis of all material circumstances – including the claimant's offending. In MM (Uganda) [2016] EWCA Civ 450, the Court of Appeal concluded that consideration must be given to the wider circumstances of the case and not focus entirely on the interests and circumstances of the children when an assessment is being undertaken of whether it would be unduly harsh to require family members to leave the United Kingdom or remain in the United Kingdom without the applicant. It may well be that the approach taken by the Court of Appeal in MM (Uganda) is not to be taken in cases where the decision under challenge is made by an Entry Clearance Officer, but this is not something the FtT gave any consideration to.

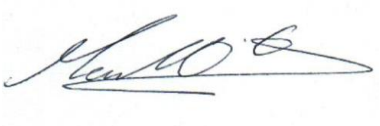
13. Further concern arises from by the FtT's consideration of the risk of the claimant reoffending. Whilst the First-tier Tribunal concluded that the claimant was not at a high risk of reoffending, there is no consideration of, or conclusion on, the risk that is in fact posed by the claimant. This is clearly a matter relevant to the proportionality assessment.

14. For all these reasons, I conclude that it is appropriate to set aside the First-tier Tribunal's decision. The parties agreed that the Upper Tribunal should remake the decision, and I concur. In doing so, the Tribunal will need to consider the correct approach to appeals in which it is said that the suitability requirements under the Rules are not met because the applicant has a conviction outside of the United Kingdom. The Secretary of State posits that a similar approach should be taken in such cases to that which is taken in appeals against refusals to revoke deportation orders. The claimant is yet to formulate his position on this issue. It is also likely that the Tribunal will need to consider the correct approach to be taken to the issue of whether it would be unduly harsh for the sponsor and/or the sponsor's children to move to Jamaica to engage in family life with the claimant there, and in particular whether the approach identified in MM (Uganda) applies in the circumstances of the instant appeal.

Notice of Decision

The decision of the First-tier Tribunal is set aside. The Upper Tribunal will re-make the decision on appeal.

Signed:



Upper Tribunal Judge O'Connor dated 27 September 2018