



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/09530/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 26 September 2018**

**Decision & Reasons  
Promulgated  
On 31 October 2018**

**Before**

**THE HONOURABLE LADY RAE  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**O J R  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr P Deller, Senior Home Office Presenting Officer  
For the Respondent: Ms C Bexson, Counsel, instructed by Mordi And Co

**DETERMINATION AND REASONS**

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal promulgated on 23 May 2018 allowing the appeal of R against the Secretary of State's decision of 18 August 2017 refusing his human rights claim and maintaining the decision to deport him. An anonymity direction was made. We shall refer hereafter to R as the

appellant, as he was before the judge, and to the Secretary of State as the respondent, as he was before the judge.

2. On his account, the appellant has been in the United Kingdom since 2000, initially on a student visa. He has a series of convictions, mainly for possession of cannabis/cannabis resin, between 2006 and 2015. On 14 May 2009 he was issued with a certificate of approval for marriage and granted discretionary leave to remain until 20 May 2013. He was thereafter granted further leave to remain which was granted until 2 July 2016. He was served with a decision to deport on 6 February 2015 and a human rights claim was refused on 7 April 2015 and certified, but subsequently on 18 August the respondent withdrew her decisions and reconsidered his human rights claim and the subsequent refusal decision is the decision that was under appeal to the First-tier Tribunal.
3. The appellant has three children, AR, CR and SR. AR and CR are his children by IH, his former partner, and SR is his daughter with his wife, SH.
4. The judge observed that the only issue in the appeal was whether it would be unduly harsh for the appellant's British citizen children (all three of them) to leave the United Kingdom or for them to remain in the United Kingdom without their father.
5. The judge heard evidence from the appellant and from SH, both of whom she found to be credible. She also found credible evidence submitted in the form of a statement from IH. The judge accepted that the appellant had shown that he had a genuine and subsisting relationship with AR and CR, and the Secretary of State had accepted that it would be unduly harsh for AR and CR to leave the United Kingdom. The judge was satisfied that remaining in the United Kingdom and losing direct regular contact each week would be contrary to their best interests. She noted that their best interests were not decisive but were a primary consideration.
6. The judge was satisfied that SR had a genuine and subsisting relationship with her father and was deeply attached to him and that it would be contrary to her best interests to be separated from him. The judge noted medical evidence about SR, who was said to have appeared "in a highly anxious and indeed traumatised state with comments of self-blame, the fear of and thoughts of a bleak future" and having spoken of killing herself. She was also assessed by a psychologist as suffering from a moderate level of depression, a mild level of anger and irritability and severe levels of anxiety and the risk of her acting on suicidal thoughts and ideation was high. The judge was satisfied that the appellant's incarceration had a serious detrimental impact on all three children and also had a very negative effect on SH.
7. The judge also considered medical evidence concerning SH. A specialist nurse said that SH's condition would become slowly worse, set out details of the assistance SH required with daily living tasks and confirmed that she relied on her husband for assistance for herself and their child. The

nurse considered that SH's dependency on others might become greater over time and she was currently obviously unable to manage in the kitchen and concluded that it was not unreasonable to anticipate that she would need assistance up and down the stairs and even out of the bath. The judge considered that whilst SH might be able to access some medical treatment in Jamaica, it would be unreasonable to expect her to leave the support network she had established in the UK and also her family. She was born in the UK and is a British citizen. The judge was satisfied that without her husband's daily help SH would not be able to maintain her lifestyle and independence. There was no evidence that Social Services or the NHS could replace his assistance, which was available 24 hours a day, and she did not find it reasonably likely that they could do so. There was a strong possibility that SR would become her full-time carer. On the evidence as a whole the judge found that it would be unreasonable to expect SH to leave the UK or remain in the UK without the daily assistance provided by the appellant, on which she had come to rely. The judge was entirely satisfied that it would be unreasonable to expect SR to leave the United Kingdom and make a new life in Jamaica. The judge had no doubt that the appellant's continued presence was very significant for the support and development of each of the children.

8. The judge gave full consideration to the appellant's history of offending and his immigration history. She accepted that the appellant was a persistent offender and accepted evidence that he had finally rehabilitated. She noted also that his offending did not escalate and his offences were relatively minor. She took into account of the guidance in NA (Pakistan), in Hesham Ali [2016] UKSC 60 and MM (Uganda) [2016] EWCA Civ, and noted also from ZH (Tanzania) [2011] UKSC 4 that the best interests of the children were a primary consideration but not decisive in the balancing exercise and had to be weighed against the respondent's important public duties of punishing crime, protecting the public, expressing society's revulsion at crime and maintaining effective immigration control and attached importance to all of these weighty matters. Balancing the competing interests of the appellant against the public interest in removing him, she found that Exception 2 under section 117C(5) of the 2002 Act applied because the appellant had genuine and subsisting relationships with his wife and three children and his removal would be unduly harsh for each of them. The appeal was therefore allowed.
9. The Secretary of State sought and was granted permission to appeal on the basis first that the judge had failed adequately to reason her findings in respect of the conclusion that it would be unduly harsh for the children to remain in the United Kingdom without the appellant, having focused, it was said, solely on the best interests of the child, and having failed to make a finding on the undue harshness threshold in respect of the child in order to satisfy the test. It was said that there was no suggestion that the appellant's wife would be unwilling to care and provide for their child and no indication that it would not be possible to care for the child on her own and that as a consequence the circumstances of the case failed to meet

the undue harshness high hurdle. It was noted that in a deportation context the splitting of families might well be proportionate, however contrary to the best interests of the children.

10. It was also argued with respect to the appellant's wife that there had been a conflict in the evidence which the judge had not resolved as regards to her family members' support and support networks, the fact that she could use DLA to continue with her lifestyle and independence as currently in place and noting the fact that she works four days a week. It was also argued that the judge had found the appellant to have been rehabilitated and that was not a matter upon which weight was to be placed.
11. In his submissions Mr Deller adopted and relied on the grounds of appeal. We are grateful to him for taking matters as carefully and thoroughly as he did and placing the arguments for an error of law as highly as they could be put. We are also very grateful to Ms Bexson for her Rule 24 response. In the event, we did not find it necessary to call on Ms Bexson. We are satisfied that the grounds of appeal are a matter of disagreement only. The judge clearly gave very careful and thorough attention to the evidence in the context of the appropriate legal tests. She did not treat the best interests of the children as dispositive of the appeal but rightly noted that it was a matter of primary significance only. It is not possible to equate impossibility with undue harshness. The test is not so high as to require it to be impossible for a person to manage. Clearly, deportation does involve the splitting of families, however the law does allow, as the Rules and the terms of the Act make clear, for extreme cases where an appeal may be successful because of the significance of the impact on the family members of the split. We are satisfied that the judge properly identified those circumstances in this case. She correctly balanced the circumstances of the appellant's wife and child, both of whom have significant medical difficulties, against the public interest in this case, properly bearing in mind the appellant's criminal and immigration histories. She applied the correct tests to the case and came to a conclusion that was fully open to her. Accordingly, the Secretary of State's challenge to the judge's decision fails, and the decision allowing the appeal under Article 8 is maintained.

### **Notice of Decision**

The appeal of the Secretary of State is dismissed.

### **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 his 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.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 12 October 2018

Upper Tribunal Judge Allen