Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08197/2017

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 8th February 2018	**On: 13th February 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

[R R]
~~(no anonymity direction made)~~

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: in person

DECISION AND REASONS

1. The Respondent is a national of Jamaica date of birth [ ] 1976. On the 30th October 2017 the First-tier Tribunal (Judge Evans) allowed his appeal, on human rights grounds, against a decision to deport him from the United Kingdom.

2. [RR] has lived in the United Kingdom since 2002. He was granted

indefinite leave to remain in November 2006. The Secretary of State for the Home Department took the decision to deport, at least in its present form, on the 11th August 2017. The basis of the decision is that in the view of the Secretary of State for the Home Department [RR] is a persistent offender and as such his deportation would be conducive to the public good. Between May 2008 and October 2015 he was convicted of 28 offences. Most of the offences related to possession of cannabis but he has also been convicted of other matters which include dangerous driving (for which he received a custodial sentence of 9 months), assaulting a constable (12 months community order) and affray (4 months imprisonment).

3. [RR] appealed on the grounds that a) he could not be deported because he was at risk in Jamaica and b) the consequences of his deportation would be unduly harsh for his British children.

4. The First-tier Tribunal dismissed the appeal on protection grounds. It did not accept that [RR] faced any risk in Jamaica (he had, somewhat ironically, asserted a fear of criminality in that country). That decision is not subject to challenge and it stands.

5. In respect of the human rights limb of his case, the Tribunal heard that [RR] has four children living in the United Kingdom. They are all British nationals. It was accepted by the Secretary of State for the Home Department that [RR] enjoyed a genuine and subsisting parental relationship with three of those children. It was in addition accepted that he had such a relationship with a fifth child, his stepson. The determination identifies the key tests in the appeal as being a) whether it would be unduly harsh to expect the children to go to Jamaica with [RR], and b) whether it would be unduly harsh to expect them to live here without him. It then went on to make the following findings of fact.

6. [RR]'s daughter S was born in 2011 and the Tribunal accepted that he had been closely involved in her upbringing ever since. The Tribunal heard evidence from the child's mother about how distressed she was when her father went to prison. She expressed missing him, cried, and a social worker had reported how she had periods of bed wetting and nightmares when he 'went away'. At the date of the appeal S had a new baby brother, K, who is suffering from Laryngomolacia, a condition which means he needs close attention and feeding more often that a healthy baby of his age. The Tribunal accepted the evidence of the children's "articulate and generally straight-forward" mother that she had returned to work following the birth and that it was [RR] who was the primary carer for both baby K and S. The Tribunal further accepted that [RR] had been a "surrogate father" to his stepson M since M was around four years old. M's own father had been deported to Jamaica when he was a baby. M has communication and social difficulties (he has been referred for more

treatment by a Senior Clinical Psychologist) but was reported, by his mother and social worker, to have an especially close relationship with [RR]. He is said to confide in him rather than his mother and had difficulties eating when [RR] was in prison. In respect of these three children, all living with their mother and [RR] in the family home, the Tribunal accepted the social worker's assessment that [RR]'s deportation would have a "significant detrimental emotional and physical impact".

7. Having applied those findings to the relevant tests in paragraph 399 of the Immigration Rules the Tribunal found [RR] to have discharged the burden of proof in respect of both matters, and the appeal was allowed.

8. The Secretary of State for the Home Department has permission to appeal on the narrow ground that the First-tier Tribunal erred in its approach to whether the children could be expected to live without their father here. It is contended that what the Tribunal did was to simply apply a 'best interests' test, rather than the appropriate measure of whether the consequences for them would be 'unduly harsh'. The key difference between the two being that the latter required the Tribunal to weigh in the balance, and weigh heavily in the balance, the presumption that [RR]'s deportation would be in the public interest. He is a persistent offender and that had to be taken into account when conducting the proportionality assessment.

Discussion and Findings

9. [RR] plainly is a 'persistent offender': see Chege ('is a persistent offender') [2016] UKUT 187 (IAC). I entirely agree with the First-tier Tribunal's assessment that his lack of offending for the past couple of years does not negate that fact. As such his deportation is conducive to the public good. I have kept that at the forefront of my mind when assessing the merits of this appeal.

10. Having done so I am however unable to find that the Secretary of State for the Home Department has identified material error in the approach of the First-tier Tribunal. The grounds are long and detailed but for the most part consist of a rehearsal of the facts plainly known to the First-tier Tribunal; in other words they amount to submissions as to why the Secretary of State believes that the appeal should have been dismissed. Mr Diwnycz did not rely on any of these paragraphs. He instead adopted (and it is fair to say without much enthusiasm[1]) the only two points capable of raising an 'error of law'.

[1] A realistic approach shared by his colleague in the First-tier Tribunal: see paragraph 64 of the determination which records that the HOPO Mr Richardson "accepted that the Article 8 arguments might well be resolved in [RR's] favour".

11. The central argument made is that the Tribunal allowed this appeal simply because it would be contrary to the children's best interests if their father were to be deported. As a finding of fact that was actually uncontentious, since that much had been accepted by the Respondent, if not explicitly in her 'reasons for refusal' letter, in her general statements of policy. The Secretary of State rightly submits that 'best interests' is not the determinative test in such appeals. Had that been the extent of the Tribunal's finding, there would certainly be an error. I cannot however sensibly construe the determination in that way.

12. The narrow test of 'best interests' is the starting point for any tribunal faced with a case involving children. It requires the decision-maker to evaluate the life of the child in question both before and after the potential interference and for an assessment to be made as to when the child would be better off. The test of 'undue harshness' requires an altogether different approach. The starting point is that on one side of the scales must be placed the weighty presumption in favour of deportation. Against that the decision-maker must place any positive findings about the deportee's relationship with his or her children, stand back and see if those findings can tip the scales away from the public interest. In this appeal the Tribunal reminded itself throughout its assessment that [RR]'s deportation would be in the public interest, as a matter of fact and law: see for instance paragraphs 4-7, 28-29, 54, 88-93, 104, 109, 111. More significantly it is clear from the way that the conclusions are expressed that the Tribunal took the 'balance sheet' approach recommended by Lord Thomas in Hesham Ali [2016] UKSC 60. At paragraph 109 the determination sets out the reasons why it would *not* be 'unduly' harsh for the children if their father were to be removed: he is a foreign criminal and his deportation is in the public interest; he committed 28 offences in seven years; he is not financially independent. At paragraph 110 the determination sets out the reasons why it *would* be 'unduly' harsh: it would generally be contrary to the children's best interests to lose their face-to-face and regular contact with their father, but in the particular circumstances it can also be said that it would be *strongly* contrary to their best interests, given his heavy involvement in their upbringing and his "positive and caring influence" in their lives. The Tribunal here further had regard to its finding that [RR] has now stopped using cannabis (a feature in most, if not all, of his criminal offending) and that he has taken a rehabilitation course. It also noted that [RR] has had indefinite leave to remain in the UK since 2006. At paragraph 111 the Tribunal reaches an "overall" conclusion. In light of that structure Mr Diwnycz agreed that it was hard to justify the suggestion that the Tribunal did not have appropriate regard to the public interest.

13. The second point made in the grounds is that the Tribunal failed to give 'clear reasons' for its conclusions in respect of [RR]'s other son,

N, with whom he has only weekend and holiday contact. I would agree that the global conclusion at paragraph 111 – expressed in relation to all of the children – is not prefaced by any clear balancing exercise in respect of N. The determination finds, at paragraph 96, that it would be contrary to N's best interests to lose face-to-face contact with his father. I cannot see where that finding has been balanced against the public interest in deportation. This ground is therefore made out, but given the First-tier Tribunal's conclusions, clearly expressed, in relation to the children S, K and M, this error is not such that the decision must be set aside.

Decisions

14. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

15. There is no order for anonymity.

Upper Tribunal Judge Bruce
9th February
2018