Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06721/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 October 2018	**On 21 May 2019**

Before

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

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F H B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms C Warren, Counsel instructed by Paragon Law

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also "claimant"). Breach of this order can be punished as a contempt of court. We make this order because the case touches on the mental health of children who might be harmed if their details were in the public domain.

2. The respondent, hereinafter "the claimant", is a citizen of Jamaica. He was born in 1977. He has been deported from the United Kingdom following his conviction at the Crown Court sitting at Nottingham for possession of a controlled drug of class A (in his case heroin) with intent to supply and possession of crack cocaine with intent to supply. In June 2004 he was sentenced to four years' imprisonment and ordered to pay £156,882.00 under a confiscation order or serve a further twenty months imprisonment. He was deported on 5 December 2005.

3. He married in May 2008 and in April 2009 applied for entry clearance as the spouse of a person present and settled in the United Kingdom. The application was refused.

4. On 10 August 2009 he applied for the deportation order to be revoked. That application was refused. In April 2012 he made a further application for the deportation order to be revoked. On 3 July 2013 the respondent decided it would not be revoked. On 10 May 2016 by his present solicitors he made further representations for the revocation of the deportation order. This application was refused on 6 May 2017 and he appealed that decision on human rights grounds.

5. The First-tier Tribunal Judge allowed the appeal mainly because of his statutory obligation to make the best interests of the children involved a prime consideration. For the reasons that follow we had decided that he was wrong.

6. We begin by considering the Secretary of State's reasons for refusing to revoke the order and to refuse him leave to enter on human rights grounds.

7. This notes that the claimant entered the United Kingdom in March 2000 with leave to enter as a visitor for six months. He married and was given leave to remain as the husband of a person present and settled in the United Kingdom and in November 2001 he was given indefinite leave to remain.

8. He then committed the serious criminal offences. The sentencing judge took a very dim view of the claimant's conduct. The judge was particularly concerned that drug trafficking seemed uncontrollable and people such as the claimant, who was described as "a street retailer", were an essential part of the supply chain and it was the conduct of the claimant and people like him that made life difficult for law abiding citizens.

9. On 12 September 2005 he was served with a notice of decision to deport. He lodged an appeal but then withdrew it. The deportation order was signed in November 2005 and that brought to an end his indefinite leave to remain. He was deported on 5 December 2005.

10. On 24 May 2008 he married again. His wife is the mother of his children and is a British citizen. The marriage took place in Jamaica. In April 2009 he applied for entry clearance as a husband and the application was refused. In August 2009 he applied for the revocation of the deportation order. That application was refused. On 10 May 2016 he applied for the deportation order to be revoked.

11. His application particularly relied on his relationship with five children who all live in the United Kingdom. They are identified as CB born in March 2001, RuBB born in

June 2001, RoBB born in February 2004, TABB born in June 2004, and FTBB born in March 2007.

12. The Secretary of State did not accept that there was any family life with the children CB, RuBB and RoBB. He declined even to concede that they existed because so little evidence had been produced about them.,

13. The Secretary of State was satisfied that the children TABB and FTBB are British citizens and live with their mother Mrs ELBB. The Secretary of State accepted that it is in the best interests of children to be raised by both parents but noted that it was open to the claimant's wife to relocate to Jamaica with the children and establish a family there if that is what they wanted to do.

14. There is an independent social worker report in this case. That was considered by the Secretary of State who accepted the competency of the author but found nothing that suggested the absence of the claimant to be "having any exceptional negative effect".

15. The Secretary of State's decision dealt explicitly with the claimant's family life with his wife but this adds little or nothing to the consideration of the family life with his children except that the contention that she could go to Jamaica and establish her family life with him there is, probably, more cogent. She chose to marry a man who was subject to deportation and chose to have his children.

16. The First-tier Tribunal Judge set out in detail in his decision and reasons a summary of the evidence called and of his reasoning.

17. The claimant's wife gave evidence. She said that she was in the "second stage of counselling". The oldest daughter was having counselling at school. Her mother had been diagnosed as a cancer patient. The youngest daughter was being tested for autism. The children were finding life difficult. The claimant's wife was finding her role as a mother difficult. The judge noted her evidence that "she was just in control by the skin of her teeth". In her opinion life would be a lot easier if the claimant was allowed to return to the United Kingdom. The claimant's wife was cross-examined but the judge found nothing that undermined her evidence.

18. The claimant's father-in-law gave evidence. Perhaps rather startlingly he described the claimant as "a highly moral man with high standards" but this has to be set in the context of evidence that he believed the claimant had acknowledged his former wrongdoing and was genuinely remorseful. Broadly, his evidence supported that of the claimant's wife about the involvement of the claimant in the lives of the children and how it would be improved if he were able to live with them in the United Kingdom. He did not see any prospect of his grandchildren establishing themselves in Jamaica. From his own knowledge he knew that the standard of living would be very different. The kind of home they would have would be "more like sheds" and there would be no internal plumbing. The only water supply was a tap stuck in a wall and the sink overflowed into the street.

19. The Judge also summarised the evidence of JT who is a friend of the claimant's wife. She gave evidence that chimed with other evidence about the mixed effect of trips to

Jamaica because although the girls enjoyed seeing their father the conflicting emotions of reunion and separation were wearing.

20. The judge considered carefully two reports from Mr Raymond Tansey, an independent social worker. The reports were dated 19 April 2016 and 7 December 2017. The First-tier Tribunal considered the reports and gave a helpful summary at paragraph 19 and 20 of his Decision and Reasons. He said:

> "19. I have been provided with two reports from Mr Raymond Tansey, independent social worker. The first is dated 19 April 2016. I accept that the author is an expert given his qualifications and experience. The author considered that the [claimant] could attempt to support his wife via Skype and telephone calls but such could in no way compensate for his day-to-day absence. I find that this observation has accurately adumbrated the evidence given by the [claimant's] wife which I have set out above in this context. The author states that the [claimant's] wife was finding her circumstances increasingly difficult. She had sought counselling support earlier in the year and she had identified that she was struggling to manage. The [claimant's] wife considered her own circumstances to have deteriorated significantly since the initial report in April 2016. The behaviour of both children was of increasing concern to her. The support which she had received from her parents had diminished due to her mother's ill health and the ongoing work commitments of her father. The author refers to TABB being reviewed medically. Her mother had spoken of how this review given the syndrome which it was considered that TABB may suffer from was a factor in the panic attacks which TABB had recently been experiencing. Her mother described TABB as a 'closed child'. TABB was reluctant to talk openly about her emotions and feelings and was increasingly unwilling to engage directly with the [claimant]. FTBB had been referred to CAMHS [Child and Adolescent Mental Health Services] and the Behavioural and Emotional Health Team. Their mother had reported that FTBB had difficulty managing her emotions and could quickly become angry and frustrated. FTBB is reported to have difficulties in sustaining friendships at school and her behaviour can also be disruptive. Due to her presentation and behaviour FTBB was undergoing further assessment to determine if she could be on the autistic spectrum. This was a further uncertainty presently being faced by their mother. TABB and FTBB had not now seen their father for almost two years. Mrs ELBB could not afford to take the two girls regularly to Jamaica to see [the claimant]. TABB and FTBB attend different schools and their schools' respective holidays do not always coincide. Mrs ELBB, the author states, wishes the [claimant] to have a more significant role in the lives of their two children but her options for this would at present appear limited. The [claimant's] wife is herself in daily contact with the [claimant]. They Skype each other three or four times a day. The [claimant's] wife believes that the children are becoming increasingly reluctant to speak to their father over social medium. The [claimant's] wife is concerned that the relationship between their two children and their father is in danger of 'drifting away'
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> 20. The author states in the analysis at the conclusion of the second report that the circumstances of this family would appear to be of increasing concern. The [claimant's] wife has had to acquire recent psychological therapeutical interventions because of her own issues of loss and anxiety. TABB was receiving counselling and had further potential issues with her physical health. FTBB had

> been signposted to CAMHS and BEHT [Behavioural and Emotional Health Team]. The author states that the [claimant's] wife is having to cope in what appears to be very challenging circumstances. While they remain supportive of the [claimant's] wife the assistance which her parents are now available to provide to their daughter has been compromised because of the unfortunate ill health of the [claimant's] wife's mother and the work commitments of the [claimant's] wife's father. The support available to the [claimant's] wife has thereby been diminished. The relationship between the [claimant] and his two daughters is in danger of drifting. The [claimant] has now been absent from the lives of TABB and FTBB for twelve years. He had been convicted and received a custodial sentence and then deported. The author states that the circumstances of the family would appear to have deteriorated since the initial report in April 2016. The difficulties experienced by TABB and FTBB have become more evident. The [claimant's] wife had herself had to seek the support from Psychological Services. The support which the [claimant's] wife had received from her family had been reduced because of the circumstances referred to. The [claimant's] wife believes that the absence of the [claimant] has impacted only negatively upon the two girls and their self-esteem as they do not understand why their father cannot live with them and be a real part of their lives. The lack of support from the [claimant] has affected the capacity of the [claimant's] wife to parent TABB and FTBB as she is now functioning very much as a single parent to these children. The conclusion of the author was this. The author believed that it could only be in the interests of the two girls to have their father more actively involved in their lives and that they be given the opportunity to develop a much more significant relationship with him".

21. The judge noted that the claimant has not reoffended and the judge found that he had achieved rehabilitation. He was earning his living as a carpenter in Jamaica and keeping in touch with his family as best he could. Although subject to a Deportation Order he had left the United Kingdom voluntarily. The judge clearly saw that as an indication of responsibility on the claimant's behalf. The judge went on to find it unduly harsh for the children to leave the United Kingdom where they were settled to re-establish themselves in Jamaica. At paragraph 33 of his decision the judge directed himself, correctly, that as the claimant had been sentenced to at least four years' imprisonment the public interest required deportation unless there were "very compelling circumstances over and above those described in Exception 2". This is clearly a reference to the requirements of Section 117C of the Nationality, Immigration and Asylum Act 2002.

22. The difficulty we have is that although the First-tier Tribunal Judge has directed himself to the appropriate statutory test and has clearly found the test to be satisfied, we are not able to ascertain his reasons. He says at paragraph 34 having confirmed that he has found "undue harshness" that there are additional reasons for finding the consequences to include very compelling compassionate circumstances over and above that due harshness. He says that the claimant's wife's mother has been diagnosed with cancer and therefore the support available to the claimant's wife has been diminished. He says that the claimant's wife's father has had to reduce the support he has been able to offer because of his circumstances and:

> "The [claimant's] wife has now reached the point of being in that knife edge situation which she has described in contradistinction to approaching it for the reasons which I have explained above in reaching the conclusion that the Immigration Rules are met at the date of decision".

23. He continues that:

> "The fundamental irony which has developed is that the very success of the [claimant's] wife in achieving the maintenance of her family unit has entailed such expenditure of emotional energy that the fate of her family now rests upon the same knife edge as the wellbeing of the [claimant's] wife herself. I find that these factors are the essence of the very compelling circumstances which have now arisen as at the date of the hearing before me in terms of the nature of them as I described them at the date of the hearing before me having found that they had already come into existence at the date of decision for the reasons which I have set out above".

24. We have reflected carefully on these things but we cannot agree with the judge. Breaking up a nuclear family or, in this case, preventing it reuniting, is a serious sanction that can be expected to cause considerable distress to those most directly affected by it. This, presumably, is why the legislation emphasises that deportation of a foreign criminal is in the public interest, subject to certain qualifications, unless the consequences would be "unduly harsh". It is expected to be harsh. It is only if that harshness becomes "undue" that the harm to the individuals outweighs the benefit to the public interest in foreign criminals being deported and not allowed to return to the United Kingdom. We do not have to decide the point but we incline to the view that the judge was entitled to regard the high degree of harshness that can be anticipated as a result of further separation to be the kind of harshness that might be described as "undue" although that is by no means necessarily the only conclusion on the facts. However, as the judge well recognised that is not relevant here. Before the appeal can be allowed lawfully the evidence has to support a conclusion that "there are very compelling circumstances, over and above" those that would support a finding of undue harshness. They are simply not here. It is a very high threshold and it cannot be discharged on these facts.

25. We have considerable sympathy for the judge who was clearly motivated by his statutory obligation to make the best interests of the children a primary consideration but they are not a determinative consideration. If that were the test it would be difficult to deport a family man.

26. We have reminded ourselves of Ms Warren's submissions. We do not agree with her that this is a "knife edge" case. The fact is the children are already losing interest in their father and his place in their lives is diminishing. In many ways that is very sad to read but that is what happens when a person is required to leave United Kingdom in circumstances where his is very unlikely to return.

27. Ms Warren did not argue the point but for the sake of completeness we have reminded ourselves of the decision of this Tribunal in **Williams (scope of "liable to deportation") [2018] UKUT 00116 (IAC)** and are satisfied that the fact the claimant has been deported from the United Kingdom and is seeking to return does not

prevent him from being a "foreign criminal" and a person "liable to deportation" within the meaning of Section 117B of the 2002 Act and therefore able to avoid the stringent requirements of Section 117C.

28. We have reminded ourselves of the decision of the Court of Appeal in **BL (Jamaica) v SSHD [2016] EWCA Civ 357**. There, the Upper Tribunal had allowed an appeal against deportation by a person who had a sentence of four years for the sake of the children of the family. The Upper Tribunal was applying a test under the Rules which required deportation unless there were "exceptional circumstances". It is not an entirely similar test. It is nevertheless we find illustrative of the correct approach. The Court of Appeal noted at paragraph 55 that the Upper Tribunal had said:

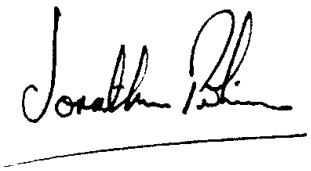
> "The best interests of the affected children will undeniably be served and fortified if [BL] is not deported. [W]e conclude that there are particularly compelling reasons sufficient to outweigh the public interest in deportation ... [w]e are mindful of the central importance of the family in British society. Strong and stable families make important contributions to the maintenance of a prosperous and law abiding society ... The effect of our main conclusion is that the family unit under scrutiny in this case will be fortified and stabilised. The alternative conclusion would result in the family unit being severely weakened and destabilised ...".

29. These findings which were not criticised in a decision described as "detailed and no doubt conscientious" were *not* sufficient to justify the decision to allow the appeal and the decision of the Upper Tribunal was overturned.

30. Although this is an agonising decision for the people most closely involved it is in reality a short point. The very high test imposed by statute cannot be satisfied on these facts. The decision has to be wrong. The First-tier Tribunal erred in law. We substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Notice of Decision

31. The First-tier Tribunal erred in law. We set aside its decision and substitute it with a decision dismissing the claimant's appeal against the Secretary of State's decision.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 20 May 2019