Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08117/2017

THE IMMIGRATION ACTS

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

Before

THE HON LADY RAE
(sitting as a judge of the upper tribunal)
UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H D G
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer
For the Respondent: Ms T Murshed, Counsel instructed by Lonsdale Mayall Solicitors

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 appeal raised issues about the welfare of children who might be harmed by publicity.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State to refuse him leave to remain on human rights grounds after deciding to deport him.

3. It was the First-tier Tribunal's conclusion that the effect of removal on the claimant's partner and children would be "unduly harsh given the unusual facts in his case" and permission to appeal that decision was given to the Secretary of State by a First-tier Tribunal Judge because it was considered arguable that the case was reasoned inadequately and showed insufficient regard to the public interest.

4. We begin by considering carefully the First-tier Tribunal Judge's decision.

5. The claimant was born in October 1975 and is a citizen of Jamaica. He entered the United Kingdom as a visitor in September 2000. His leave expired in October 2000. In July 2001 he applied for leave to remain as a student but the application was refused and he had no right of appeal. In December 2001 he claimed asylum. The application was refused and certified as clearly unfounded in February 2002. He entered an appeal but then withdrew the appeal in June 2002. In October 2009 he was given indefinite leave to remain on an exceptional basis outside the Immigration Rules. On 16 October 2015 at the Crown Court sitting at Portsmouth he was sentenced to 42 months' imprisonment for possessing controlled drugs of class A. Although not clear from the judge's decision it is clear from other papers that the offence was involved his being concerned in the supply of controlled drugs of class A, in that case heroin, and possessing cocaine and possessing heroin with intent to supply.

6. The grounds of appeal to the First-tier Tribunal are slightly concerning because they criticise the Secretary of State's application of the Rules. This is not irrelevant because the proper application of the Rules illuminates an Article 8 balancing exercise. The remedy for criticising a decision under the Rules is by way of judicial review but that is rarely appropriate because there is usually a right of appeal against a decision to refuse leave on human rights grounds. It would have been more helpful if, rather than criticising the Secretary of State's decision, the grounds had directed the Tribunal to the requirements of Part 5A of the Nationality, Immigration and Asylum Act 2002 and explained how the Tribunal should allow the appeal under the Act.

7. Be that as it may, it is quite plain that the claimant's case before the First-tier Tribunal is that the decision was unduly harsh because of its consequences for the claimant's family in the United Kingdom.

8. There are aspects of the claimant's case that puzzle us. For example, although NB and the claimant describe each other as "partners" and NB is the mother of three of his children, he has a fourth child, D, who was born on 16 February 2011. Her mother is TM. The claimant has relied in part on his relationship with this daughter but TM did not give evidence. Given

the child's date of birth it is plain that the claimant's relationship with NB is not characterised by complete faithfulness. Further there is a puzzling entry in the Reasons for Refusal Letter to the claimant having another daughter born in May 2002 but the claimant did not rely on that relationship in these proceedings.

9. The claimant's sometime partner TM did write letters of support to the Secretary of State before the decision was made.

10. However there was clear evidence that each of the three children of his relationship with NB have significant health and associated difficulties. We summarise them from the witness statement of the claimant but we make it plain that this evidence was accepted by the First-tier Tribunal. It was supported by other evidence including the evidence of Ms Bunting and the evidence of social workers and medical practitioners who had written to the Tribunal. We have taken the dates of birth from copy birth certificate in the bundle.

11. His daughter TE was born in November 2003. She has Down's syndrome and autistic spectrum disorder. She does not have insight into emerging danger and cannot deal with her personal hygiene. She cannot be left alone with strangers as she does not protect her personal decency in public places. She suffers from severe developmental delay and severe learning difficulties.

12. His daughter TJ was born in May 2010. She has "extreme problems with social communication". She is described as "a child with special needs and challenging behaviour" and had taken to reacting violently to anything that disquieted her. The claimant was seen as particularly adept at calming her.

13. His son TM was born in October 2015. He has been diagnosed with autistic spectrum disorder.

14. The older children were each subject to an education and healthcare plan.

15. Clearly, and with respect to the children who cannot help being as they are, parenting any of these children will make exceptional demands and to have all three children in the same family can be expected to be challenging.

16. It is plain that the sentencing judge was concerned about the claimant's domestic circumstances. The judge said in his sentencing remarks:

> "I have read the letter from your wife indicating the severe disabilities of your children and of course, your acts have caused and will cause untold misery for them because your wife will have to cope on her own with those children for a period of time."

17. The judge continued:

> "Bearing in mind the personal mitigation that applies because of your children I will reduce the sentence that I am going to impose but a custodial sentence and an immediate custodial sentence is inevitable. Anyone who deals in class A drugs must expect to go to prison. The minimum sentence I can, therefore, impose is not the starting point of four and a half but I will reduce it to three and a half years, concurrent on each count."

18. In other words the trial judge, like the First-tier Tribunal Judge, was satisfied that the claimant was needed in the family home and reduced the necessary prison sentence accordingly.

19. The First-tier Tribunal Judge did not allow the appeal out of a sense of pity or desire to somehow compensate the claimant for his difficult family circumstances. Rather the judge accepted the claimant's evidence was that he "had put his family through a phenomenal amount of hardship and that his family had suffered whilst he had been in prison".

20. The claimant's partner suffered a mild stroke in 2010 that was "stress related". NB suffered from depression and said that the claimant's imprisonment "had a catastrophic effect on her" because she had been "unable to cope and to look after the children". The local authority had become involved and the children had been placed on a child protection plan because of her depression. The claimant gave a lot of support and with him she could manage.

21. The short point is that the First-tier Tribunal Judge found the effect of deportation to be "unduly harsh given the unusual facts in his case".

22. The grounds in various guises challenge the finding that the effects of removal would be unduly harsh. They make much of the public distaste for drug-related offences and the harm that they do to society. We do not see anything in that point, not because it is other than a legitimate concern but because it was in the mind of the First-tier Tribunal Judge. He reminded himself expressly that the appellant is a foreign criminal and that the public interest lies in his deportation. Whilst it is right that section 117C(2) of the 2002 Act provides that the more serious the offence committed the greater the public interest in deportation it is also right that the statute created two distinct categories of foreign criminal. It is extremely difficult for a person sentenced to four years' imprisonment or more to succeed on a deportation appeal. It is difficult but less difficult for a person sentenced to less than four years' imprisonment and this claimant is in that category. This claimant falls into the less serious category where and the test is whether the effect is unduly harsh.

23. We do not see any need for additional self-directions in which the judge reminds himself expressly of the seriousness of the offence and the public interest in removal. The point is clearly made and there is no need for it to be laboured. The judge knew perfectly well that he was conducting a balancing exercise where the material things were the clear public interest

in deportation which is established by statute and recognised by the judge and the particular effects of deportation in this case.

24. The judge's findings that the claimant was indeed an important and beneficial presence in the family, however undesirable his conduct might be in other aspects of his life, have not been challenged and, as indicated above, were supported by diverse sources going far beyond the evidence of the claimant and his partner.

25. The First-tier Tribunal did not dwell on the claimant's good conduct in prison and fall into the error of suggesting that that somehow entitled him to avoid deportation. The point is that an appeal that might well satisfy the "unduly harsh test" can be allowed with more confidence when there is no reason to suspect the claimant will get into further trouble and this is such a case.

26. Mr Bramble argued that the decision was unsatisfactory and that conclusion was not explained adequately. This is a decision that could have been written better. That is an observation that can probably be made with some justification about almost every decision that has ever been made including no doubt this one. The judge has given proper reasons for finding that the effect of removal would be unduly harsh. The claimant was removed when he was in prison and that has given insight into how the family might cope. His absence led to predictable strains and local authority involvement. It is unlikely that there will often be a bright line between an unpleasant decision that has bad effects on family members but is not unduly harsh, because deportation is a harsh sanction, and the effects becoming unduly harsh. The judge was clearly of the view that the claimant's partner was pushed to her absolute limit if not beyond it when the claimant was in custody and continuing separation would be unduly harsh. There is a whole package of obvious reasons to see why the claimant's removal is particularly hard hitting in its effects in this family and we are satisfied that the judge's conclusion was open to him.

27. We therefore dismiss the Secretary of State's appeal.

28. In short, the Secretary of State's grounds identify no material error.

Notice of Decision

29. We dismiss the Secretary of State's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 20 May 2019