Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: PA/01808/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 May 2019	**On 17 May 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTHONY [S]

(AKA ANTHONY [W])

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr. T. Lindsey, Home Office Presenting Officer

For the Respondent: Mr. G. Lee of counsel, instructed by Liberty & Co Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Jamaica. He entered the United Kingdom, as a visitor, on 9 February 2002 and was subsequently granted leave to remain, as a student, until 31 May 2003. He married a British citizen on 23 April 2003 and they had three children together. He was initially refused leave to remain as her spouse but his subsequent appeal was successful and he was granted discretionary leave to remain from 28 August 2007 until 28 August 2010. This was then extended until 28 August 2013.

2. On 15 July 2013, the Respondent was sentenced to four years imprisonment on each of two counts of possession with intent to supply a Class A drug, namely crack cocaine. The sentences were to run concurrently.

3. On 5 September 2013 he was served with a notice of liability to automatic deportation and a decision was made to deport him on 18 September 2014. His appeal against this decision was allowed on 3 February 2015 on the basis that the Secretary of State had failed to consider whether he was entitled to a residence card under the Immigration (European Economic Area) Regulations 2006.

4. Meanwhile, in 2012, the Respondent had met and formed a relationship with his present partner, NL. Their first child was born on 14 August 2016. NL also has a son from a previous relationship who was born in 2005 and who has complex special needs.

5. On 29 January 2018 the Respondent's protection and human rights claims were refused and a deportation order was made in relation to him. He appealed and the appeal came before First-tier Tribunal Judge Keith who allowed his appeal on human rights grounds in a decision promulgated on 24 January 2019. On 18 February 2019 First-tier Tribunal Judge Saffer granted the Secretary of State permission to appeal against this decision.

ERROR OF LAW HEARING

6. The Secretary of State filed a skeleton argument on 16 April 20919 and the Respondent had previously submitted a skeleton argument incorporating a Rule 24 Response, dated 2 May 2019. Both the Home Office Presenting Officer and counsel for the Respondent made oral

submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

7. At the hearing before First-tier Tribunal Judge Keith, those representing the Respondent confirmed that the Respondent was no longer asserting that he was entitled to refugee status or Humanitarian Protection or that his deportation to Jamaica would breach his rights under Articles 2 and 3 of the European Convention on Human Rights.

8. He relied on a submission that his deportation would amount to a breach of Article 8 of the European Convention on Human Rights. The Appellant has had children with three women since his arrival in the United Kingdom and he has eight children with whom he plays a parental role, although not to the same extent in relation to his older children.

9. In paragraph 60 of his decision, First-tier Tribunal Judge Keith found that "the appellant has… an on-going parental relationship with children 1 to 5 as a non-resident parent, and whilst it would not be realistic for them to return to Jamaica with him, it would not be unduly harsh on them if the appellant were deported to Jamaica".

10. However, in paragraph 61 of his decision, he also found that "the real focus lay in respect of children 6 to 8 and the impact on NL. As I have already outlined, given child 6's complex behavioural issues and medical needs and NL's own vulnerability, the question whether it was not only unduly harsh, but beyond that that there were powerful and irresistible factors which despite the public interest being clear, it was one of those rare cases where the public interest was outweighed by article 8 considerations".

11. When he gave permission to appeal, First-tier Tribunal Judge Saffer found that it was arguable that the Judge had materially erred in finding that the factual matrix he had determined met the very high threshold required to avoid the consequences of a 4-year prison sentence.

12. However, I note that in paragraph 38 of his decision First-tier Tribunal Judge Keith had reminded himself of the content of Section 117C of the Nationality, Immigration and Asylum Act 2002 which sets out "additional considerations in cases involving foreign criminals" who

have submitted that it would amount to a breach of Article 8 of the European Convention on Human Rights to deport them from the United Kingdom. Its sub-sections state:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where-
>
> (a) C had been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

13. The Home Office Presenting Officer submitted that First-tier Tribunal Judge Keith had in practice not applied the correct test because in paragraph 23 of his decision he had referred to the test being one of "compelling circumstances". However, he was correct to do so when referring to the test contained in paragraph 399A(b)(ii) of the Immigration Rules. Furthermore, when setting out the four legal issues to be addressed in his decision, he was correct to identify that different tests to applied to those who can bring themselves within the exceptions contained in paragraphs 399 and 399A of the Immigration Rules and those who cannot. He also made it clear that where a person did not fall within these exceptions, because

of the length of his or her sentence the test was whether there were "very compelling circumstances over and above those described in paragraphs 399 and 399A".

14. I have also noted that First-tier Tribunal Judge Keith referred to the test as being one of very compelling circumstances in paragraphs 11, 20, 32, 33, 36, 62 and 63 of his decision. Therefore, I find that First-tier Tribunal Judge Keith was well aware of the test which he had to apply.

15. It is correct that First-tier Tribunal Judge Keith referred to "powerful and irresistible factors" in paragraph 61 of his decision but this phrase derives from paragraph 28 of Lord Justice McFarlane's judgment in *Secretary of State for the Home Department v Garzon* [2018] EWCA Civ 1225 where he concluded that:

> "The present case is, in my view, different. As Mr Lee rightly submits, an appellant court must afford due deference and respect to the evaluation of an expert tribunal charged with administrating a complex area of law in challenging circumstances (per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [20018] 1 AC 678 at paragraph 30). As Miss Rowlands accepts, in the present case the FTT identified each and every relevant circumstance, both for and against deportation. There is no error of law in terms of the identification of the relevant provisions and the structure of the tribunal's decision making. The appeal solely turns on the attribution of weight. The tribunal had heard oral evidence over the course of 3 separate days from a range of witnesses, including a police officer. As the terms of its decisions demonstrate, at all times the tribunal kept in mind the seriousness of the respondent's criminal behaviour, conducted over a period of years, and had in mind the "great weight" that must attach to the public interest in deporting foreign national criminals. In its final paragraph, the tribunal refers to the phrase "very compelling circumstances", observes that "very" indicates a very high threshold and observes that the word "compelling" means circumstances which have a powerful, irresistible, and convincing effect. It is hard to contemplate how the tribunal could have demonstrated any greater focus on the public policy factors in favour of deportation".

16. It was also a phrase that was very apt to part of the task to be undertaken by First-tier Tribunal Judge Keith in the appeal before him and did not indicate that he had re-formulated the

overall test to be applied. In addition, in a very detailed and cogent decision he gave appropriate weight to the seriousness of the Respondent's offending and the public interest in deporting foreign criminals. For example, in paragraph 59 of his decision First-tier Tribunal Judge Keith stated:

> "I was very conscious that the public interest was unequivocally in favour of the appellant's deportation", which indicated that he had taken into account section 117C (1) of the 2002 Act. He was also aware of the content of section 117C(2) of the Act, as in the same paragraph he noted the seriousness of the Respondent's offence and the fact that he had received two concurrent prison sentences of four years and added that "the seriousness of the offence cannot be overstated in the circumstances. He is not an honest man and seeks to absolve himself from responsibility".

17. However, his finding in relation to the public interest could not be determinative of the appeal, as suggested by the Home Office Presenting Officer in paragraph 29 of his skeleton argument. In paragraph 38 of *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 Lord Reed, giving judgement on behalf of the Supreme Court, found that:

> "… Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words by a very strong claim indeed".

18. He also went on to find that:

> "… The Strasbourg jurisprudence indicates relevant factors to consider, and paragraph 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para.26 above, they can include factors bearing on the weight of the public interests in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life…"

19. In this particular case, these factors related to child 6 and the ability of his mother to care for him as a single mother. As was made clear by Sir Patrick Elias in paragraph 21 of *Forrester v Secretary of State for the Home Department* [2018] EWCA Civ 2653:

> "… in a sufficiently strong case there may be factors relating to a particular exception which can amount to something over and above the exception constituting compelling circumstances within the meaning of the statute. This point was made by Jackson LJ in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 where he explained that circumstances over and above the exceptions do not necessarily mean that the test can only be satisfied where there are circumstances or considerations which are independent of the exceptions. There may be cases where the circumstances are compelling because the exception is not merely satisfied but is engaged in a particularly robust way so as to provide a very strong article 8 claim capable on its own of amounting to compelling circumstances…".

20. In the current appeal, the very compelling circumstances related to the effect on child 6 if the Respondent was deported, which would be triggered by his own special needs and the fact that his mother's mental health would impact on her ability to parent him on her own.

21. The Home Office Presenting Officer also submitted that First-tier Tribunal Judge had failed to give sufficient weight to the Respondent's past immigration history. However, as made clear by the Upper Tribunal in *MS (s.177C(6): "very compelling circumstances") Philippines* [2019] UKUT 00122 (IAC):

> "In determining pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 in subsections (4) and (5), such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interests considerations, the seriousness of the particular offence of which the foreign criminal was convicted; not merely whether the foreign criminal was or was not sentenced to imprisonment of more than 4 years".

22. First-tier Tribunal Judge Keith had already found that, even if the Respondent had not been sentenced to four years in prison, he would not have been able to bring himself within the

exceptions contained in paragraphs 399 and 399A. It was when considering those exceptions that the Respondent's past immigration history would have been primarily relevant. His serious offending eclipsed his immigration history and, therefore, any lack of reasoning about his past immigration history could not have a material effect on the lawfulness of First-tier Tribunal Judge Keith's decision.

23. The Home Office Presenting Officer also submitted that the evidence before First-tier Tribunal Judge Keith was insufficient to meet the necessary very exceptional circumstances test. However, I have taken into account the wealth of evidence before him and the fact that he had the benefit of hearing oral evidence from the three witnesses about the likely effect of the Respondent's deportation on child 6 and NL and their children. In addition, the evidence supported First-tier Tribunal Judge Keith's findings in paragraph 46 of his decision that Child 6 suffers from dyspraxia, dyslexia and attention deficit disorder and is being assessed as a child who may be on the autistic spectrum. The evidence also indicated that he was at risk of self-harm and going missing and that his behaviour towards NL was increasingly aggressive. This coupled with NL's parents developing medical difficulties indicated that if the Respondent was deported the family would no longer be able to keep Child 6 safe. In this context, it was not merely speculative for First-tier Tribunal Judge Keith to conclude in paragraphs 52 and 62 of his decision that the evidence taken in its totality indicated that the family unit would break down and child 6 may be taken into care.

24. In the light of the evidence when viewed holistically, it could not be inferred that the health visitor was merely referring to the possibility of the family unit being broken up by the Respondent being deported.

25. The Home Office Presenting Officer also noted that NL had coped with child 6 when the Respondent was in prison but the evidence was that at that time she was receiving a level of support from her own mother which was no longer available due to her mother and father's deteriorating health. NL's own evidence also indicated that her depression and anxiety was capable of preventing her from coping with difficult and challenging situations, such as child 6's complex special needs.

26. It is my view that the decision, read as a whole, was well-reasoned and sustainable in law and could not be undermined by concentrating on discrete parts of the decision. I have remined

myself that in paragraph 7 of *VHR (unmeritorious grounds) Jamaica* [2014] UKUT 00367 (IAC) Mr. Justice Haddon Cave found that:

> "In our judgment, the problem with Mr. Chelvan's approach and this appeal is that he has sought to comb through the judgment as if it were a statute and pick bits here and there out of context whilst ignoring the overall findings of the Determination and reasons and the conclusions".

27. In the light of the evidence before the Judge, the fact that child 6 has been referred to CAMHS and that NL's mother may be able to provide her with a small amount of support were not factors which were capable of themselves of ameliorating the serious consequences for child 6 if the Respondent were deported. In addition, there was no evidence to support the contention that the Respondent could be able to provide child 6 with the support he needed by means of telephone calls or social media, given the complex and serious nature of his special needs.

28. It was also not the case that First-tier Tribunal Judge Keith failed to address the tests in paragraph 399 and 399A before considering whether there were very compelling circumstances over and above these exceptions. In paragraph 60 of his decision he found that it would not be unduly harsh on children 1 to 5 for the Respondent to be deported. He also made it clear that the very compelling circumstances related to children 6 to 8 and, in particular, child 6. His findings in relation to child 6's mother concentrated on the impact of her mental ill-health on her ability to keep child 6 safe not on her relationship with the Respondent and any impact on her of him being deported.

29. I have also taken into account the fact that at paragraph 17 of *MS* the Upper Tribunal found that:

> "… the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in each such case…"

30. I find that First-tier Tribunal Judge Keith undertook such an exercise before concluding at paragraph 62 of his decision that "it was one of those rare cases. This was a case that went beyond mere normal distress at the impact on separation which deportation would entail. It also went beyond being unduly harsh, in the sense of being 'bleak'. The impact was factually that child 6 was likely to become unmanageable, with the consequence that that family unit

would simply fragment…The consequences for child 6 would be…catastrophic. The risks, for example, of child 6 going into care or completely running off the rails would be real and the breakup of that family unit…would be so grave as to amount to very compelling circumstances".

31. For all of these reasons, I find that there were no material errors of law in First-tier Tribunal Judge Keith's decision.

DECISION

(1) The Secretary of State's appeal is dismissed.

(2) There were no material errors of law in First-tier Tribunal Judge Keith's decision and his decision is not set aside.

Nadine Finch

Signed Date 16 May 2019
Upper Tribunal Judge Finch