Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09347/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 2 August 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OAD

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms Warren, instructed by Dicksons, solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born in 1974 and is a male citizen of Jamaica. He entered the United Kingdom in 1998 as a

visitor. He subsequently changed his name and worked illegally under a false identity. He made a claim for asylum in 2001 which was refused but he succeeded in an appeal before an adjudicator. On 9 July 2002, the appellant was granted exceptional leave to remain until 9 July 2006. The applied for and was granted indefinite leave to remain in May 2007. On 17 January 2014, the appellant was convicted of manslaughter and sentenced to 12 years imprisonment. On 12 July 2018, the appellant was served with a deportation order and a decision refusing his human rights claim. The appellant appealed against that latter decision to the First-tier Tribunal which, in a decision promulgated on 19 April 2019, allowed the appeal and Article 3 and humanitarian protection grounds but dismissed it on Article 8 grounds. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. At the initial hearing at Manchester on 2 August 2019, Ms Warren, who appeared for the appellant, told me that the appellant opposed the respondent's appeal but also challenged the judge's findings as regards Article 8.

3. I shall deal first with the appellant's challenge regarding the judge's Article 8 decision. The appellant is still in prison but is due to be released in September 2019. The appellant's children are aged respectively 17 years, 16 years, 15 years, 11 years 10 years. The judge found that the appellant does not have a continuing relationship with the mother of the children he does have as genuine and subsisting relationship with the five children who are all, for the purposes of the 2002 act, qualifying children. Judge found that the appellant has 'the most significant relationships' with C (17 years) and K (15 years). The judge considered written evidence [122] which C and K had submitted to the Tribunal in support of the appellant's appeal. The judge noted that the appellant, sentenced to more than four years' imprisonment, had to show that there are very compelling circumstances over and above those described in the Exceptions in section 117C of the 2002 Act which outweighed the public interest concerned with his deportation. At [126], the judge wrote;

> "As a result of his criminal action the appellant has been separated from the children for appeared of some six years. I have no doubt that period of separation has been difficult both for the appellant and the children and that the children would have benefited had the appellant not been imprisoned and had been able to play a guiding role, particularly in regard to C and K. However, is a result of his criminal behaviour, he has not been able to be present during key years and that is a factual situation which existed (sic). Their education is now nearing completion as they approach adult hood."

4. Ms Warren submitted that the judge had given insufficient reasons for concluding [124-126] that the appropriate test could not be satisfied. The judge should have looked at the future in the period following the appellants projected release from prison in 2019. I disagree. The judge has applied the correct test and the observations which he makes at [126] (see above) are wholly appropriate. The judge has applied the correct jurisprudence [124: *KO (Nigeria)* 2018 UKSC 53]. There is nothing at all in the evidence which compels a different outcome from that reached by the judge; the findings which he has made were all available to him on the evidence.

5. The First-tier Tribunal considered previous findings in an immigration appeal dating from 2001 in which an Adjudicator had found as a fact that the appellant had been involved in a violent incident in Kingston Jamaica which is left two of his friends dead and his sister injured. The Adjudicator found that the criminal gangs who had perpetrated the attempt on his life and murdered his friends remained, at that time, a real and significant threat to the appellant should he return to Jamaica. Neither party suggested that the First-tier Tribunal should go behind those previous findings of the adjudicator. Accordingly, the judge took those findings as the starting point for his own analysis.

6. The appeal before the First-tier Tribunal turned on the likelihood or otherwise that the appellant would be able to participate in the Witness Protection Programme (WPP) operated by the Jamaican government. Country guidance indicates that, if an individual is admitted to the WPP, he/she will be afforded sufficient protection and will not be exposed to a real risk on return to Jamaica. The Secretary of State's challenge to the judge's findings on Article 3 ECHR are that (i) the judge has not made unequivocal findings regarding the appellant's ability to access the WPP; (ii) has failed to make clear findings as regards the internal flight alternative available to the appellant within Jamaica.

7. The judge has produced an extremely thorough conscientious and detailed decision. At [101], the judge discusses the evidence, noting that there is unlikely to be any police investigation or prosecution ongoing in respect of the violent incident involving the appellant in Kingston. The judge noted that 'it may well be that the police consider the matter to be cleared up' that it was 'not clear… That the appellant would be eligible for inclusion in the WPP'. Judge also noted that, 'if [the appellant] were to give evidence and the police reopen the case, and admittance to the WPP might be possible.' At [102], the judge observed that 'there may well no longer be any interest in the appellant so he would not be at risk anyone connected to the original shooting incident.' Judge concluded that 'there remains a considerable degree of uncertainty as to what would await the appellant and his return.'

8. The Secretary of State submits that the judges failed to make unequivocal and firm findings as to whether the appellant could access the WPP. I agree that the use of language ('*may'; 'may well be'; 'not clear'*) by the judge in [101-102] seems to indicate that he was uncertain as to whether the appellant could access the WPP. Less equivocal, contingent findings of fact would have been helpful. However, at [103], the judge considers the relevant country guidance cases of *JS* and *AB* and, significantly, noted that there was background material postdating those cases which cast doubt upon the effectiveness of the WPP and which also showed that gangs in Jamaica 'continue to run amok.' In the following paragraph the judge states, 'on the information before me I cannot conclude that the appellant will be admitted to the WPP.' That conclusion, reached by application of the appropriate standard of proof, is unequivocal and, in my opinion, is supported by the judge's observation that access to the WPP in any given case cannot be guaranteed.

9. The judge had before him evidence from an MP and member of an NGO. He discusses this evidence at [107]. He notes that 'the good faith and impartiality' of those witnesses was not challenged but, equally, he did not find that either witness 'dealt specifically with the question of the WPP.' The grounds wrongly assert that the judge found that the evidence of the two witnesses undermined the existing country guidance and had been taken by the judge as a reason for departing from it. I disagree. The judge's assessment of the witnesses's evidence is even-handed and, in my opinion, legally sound. There is no suggestion that the judge has found that the evidence of the two witnesses justifies departure from the country guidance. Indeed, the judge has not departed from the country guidance; rather, he has, quite correctly, sought to determine whether this particular appellant would be able to access the WPP. It was open to the judge on the evidence to conclude that he would not. That conclusion is unequivocal. Unlike the judge, I have not heard the evidence or have I been required to make findings of fact. For that reason, if for no other, the Upper Tribunal should hesitate before interfering with the considered findings of the First-tier Tribunal. I find that the judge's conclusion that the appellant cannot access the WPP is sound in law.

10. It follows from the judge's finding that the appellant would not be safe outside the WPP but living within his home area of Jamaica. The judge concluded that would be the case notwithstanding the passage of time since the violent incident in which he was involved. The question remains whether the appellant could avail himself of internal flight within Jamaica. The Secretary of State complains that the judge has not made any proper finding as regards internal flight. I disagree. At [109], the judge observed that, 'in the absence of admittance to the WPP, the appellant would be left to his own devices to relocate and change his identity. I find that would pose a number of problems for him. He would be lacking the support which would be necessary to be able to create a false identity which would be likely to require a set of documents and he would not easily obtain access to a safe house and the ability to be able to relocate at short notice. He would have to create a false history.' The judge observed that even attempting to contact his mother might expose the appellant to risk. He concluded that, 'the appellant would find considerable difficulty in keeping his return secret and containing that fact from becoming widely known.'

11. In the light of those findings, I do not agree with the assertion made on the grounds of appeal [7] that 'the judge has failed to make clear findings regarding the appellant's ability to relocate internally…' I consider his findings to be clear. He has not departed from the country guidance but rather has determined that, on the particular facts, this appellant would not be admitted to the WPP. It is against that factual background that he has assessed risk when and he has reached findings available to him. I find that the judge's conclusions as regards Article 3 ECHR and humanitarian protection are sound and there is no reason for me to interfere with them.

Notice of Decision

The Secretary of State's appeal is dismissed. The appeal of the appellant in respect of the First-tier Tribunal's dismissal of the Article 8 ECHR appeal is also dismissed.

Signed Date 2 September 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.