Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04923/2018

THE IMMIGRATION ACTS

Decided at Field House	**Decision & Reasons Promulgated**
On 2 July 2020	**On 20 July 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RW
(ANONYMITY DIRECTION MADE)

Respondent

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also "the claimant"). Breach of this order can be punished as a contempt of court. I make this order because the case turns of the welfare of children, and particularly one child who has special needs. Publicity is not in their interests.
2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against a decision of the Secretary of State on 27 March 2018 refusing him leave to remain on human rights grounds and indeed on asylum grounds but that decision was not challenged.
3. By way of introduction, and at the risk of oversimplification, the claimant is a foreign criminal subject to a deportation order but who has lived in the United

Kingdom for many years. The appeal was allowed for the sake of his children and particularly for one child who, the judge found, has special difficulties.

4. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Kekić. In due course Upper Tribunal Judge Bruce gave special directions suggesting a disposal without a hearing in view of the well-known national "lockdown". Managing the consequences of lockdown has placed great strain on the Tribunal's resources and "remote" or "socially distanced" hearings require more resources than an ordinary oral hearing. Where it is appropriate, determination without a hearing gives effect to the obligation Under Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to avoid delay.

5. In response to those directions both parties served further submissions. In the case of the Secretary of State the submissions do little more than emphasise an intention to rely on the existing grounds. That is an entirely appropriate response because the grounds were drawn carefully drawn but the Secretary of State did, again appropriately, draw my attention to the decision in **RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC)** and particularly paragraph 33 to support the contention that good behaviour following release from prison is unlikely to be of any assistance to a person seeking to avoid deportation. According to the further submissions the First-tier Tribunal erred by being impressed by the claimant's more recent good behaviour.

6. The submissions from the claimant have been considered. I mean them no disrespect when I say they follow predictable lines. This is really a case about whether the judge was entitled to conclude for the reasons given that the effect of removal would be unduly harsh.

7. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rule 2008 provides:

> Decision with or without a hearing
>
> 34.(1) Subject to paragraph (2), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.

8. The claimant has asked for an oral hearing but in the context of anticipating further evidence being called. Neither party expressed a view on the need for a hearing to decide if there had been an error of law.

9. In the all the circumstances I have decided that a determination without a hearing is the just way forward.

10. This is a case where the claimant's criminal behaviour is serious. He has already been the subject of a deportation order for some years and an attempt to remove him but he appealed successfully.

11. He was born in 1984 towards the end of the year and is a citizen of Sierra Leone. He arrived in the United Kingdom in 1993 when he was about 8 years old and has remained in the United Kingdom since then. He came to join his

parents, who were present in the United Kingdom, and on 7 December 1998 he was given indefinite leave to remain.

12. I note that when Upper Tribunal Judge Bruce gave the special directions she invited the Secretary of State "to clarify whether she regards the vulnerabilities identified in respect of T to be *rationally incapable* of amounting to factors that elevate his case above the 'commonplace'."

13. As far as I can see the Secretary of State had not taken advantage of the opportunity to address specifically what Judge Bruce recognised may well be the main point in the appeal.

14. The judge summarised the appellant's criminal record. He has nine court appearances for 23 convictions. His criminal career appears to have begun with an attempted robbery leading to four months detention. He was later sentenced to four years in detention for another robbery and then detained for offences of burglary and driving offences. Surprisingly, the Secretary of State does not refer to the 4 years sentence in the decision of 27 March 2018 and the grounds do not criticise the First-tier Tribunal Judge for not considering the provisions of section 117C(6). The outcome of the appeal may have been different if she had but it is not my role to make the primary decision or to draw the grounds of appeal. It may be that the is some good reason for the decision to have been made without reference to the 4 years sentence.

15. The claimant was in trouble most recently for an offence committed in May 2012. This was just three months after his appeal against deportation had succeeded. Although it was not the Upper Tribunal Judge's reason for allowing the appeal the judge did note then that he thought that the appellant had learnt his lesson. The most recent offences were involved with possession with intent to supply of heroin and crack cocaine and he was sentenced to two years' imprisonment.

16. That said, there was nothing since then and the offences are now more than eight years ago.

17. The judge looked at the claimant's present domestic circumstances. He is living in a family unit with his partner and children. He started his relationship with his present partner in 2012. The claimant's partner said how she was the biological mother of the claimant's two children and in addition she had a son from a previous relationship, whom I identify as "T" but the witness statement also referred to the claimant's partner and claimant having "one biological child together". The other child is identified by name, she was born in July 2015.

18. The claimant's partner spoke in supportive and appreciative terms of the role the claimant had in the lives of the children and also in his role in the home enabling her to work. She also explained how the child T, born in 2005, had suffered the trauma of his natural father dying. T had never lived with his natural father and mother in a family unit but his natural father had been very much part of his life and the judge accepted evidence that on the one occasion T's father had visited the family home he invited the claimant to take care of T.

19. Although permission to appeal was given on the first ground identified as "material misdirection of law on a material matter" I find no merit in it.

Basically the ground complains that, having identified the "unduly harsh" test the judge failed to apply it properly and I find ground 1 adds nothing to ground 2.

20. Ground 2 is headed "failure to provide adequate reasons on a material matter".

21. The main reasons for allowing the appeal begin at paragraph 49. The judge found that T had never had a father figure living with him. His father was in touch with him and had visited once before his death. His death caused T to undergo "many breakdowns". He suffered from anxiety and became very close to the claimant, who came into his life when he was aged 6 years. He was adversely affected by the claimant's imprisonment. He said that the claimant had a "very reassuring effect" on T and that T was "currently undergoing counselling" apparently because of the trauma of his father's death in about March 2018.

22. The judge accepted evidence from the partner that the claimant and T "are very close." The child was anxious and scared that he was going to lose his second father and T's mother was concerned for his mental health.

23. The judge explained at paragraph 53 that he had come to the conclusion that the effect of deportation on T would be "unduly harsh". He made it plain that this was the result of a specific evaluative assessment and the facts had achieved an elevated threshold. He believed that in the event of the claimant's deportation T "would, in all likelihood, find himself in a downward spiral which would arise from the [claimant's] absence coupled with the recent experiences endured and his resulting insecurity."

24. This explanation is thin. It depends on two things, namely the judge believing what he was told and applying his experience of life to the likely consequence of removal on the already damaged child.

25. The judge was entitled to believe what he was told. There has been no reason advanced at any stage to challenge the credibility of the claimant's mother and although the claimant has a criminal record for which he ought to be ashamed it does not follow that he cannot be believed about anything. T has clearly had some very bad experiences in his life. The unsatisfactory but real relationship with his natural father was a poor start. Becoming fond of the claimant and the claimant going to prison could not have helped. His natural father dying led to counselling. The judge decided that taking away a father figure against this background was just too much.

26. Of course it is, in a sense, a speculative finding. It has to be because the judge is predicting what the effect is going to be.

27. This is not a case where there is, for example, where there is social worker evidence or evidence from a child psychologist. It is a case where a judge has listened to parents and formed a view.

28. No doubt Judge Bruce had similar thoughts in mind when she gave the directions that she did.

29. I cannot say that this finding is perverse. The directions of law are right, the findings are sourced and are within a scope of decisions open to a reasonable decision maker properly directed.

30. I would have preferred it if the judge had said more. Perhaps there is not very much more that could have been said. Children are not laboratory experiments that can be subjected to tests by trial and error and put right if they go wrong afterwards. The judge's analysis was open to him. He distinguished between the consequence of removal to the other children, who would not be happy, and to T who was already damaged by losing his natural father.

31. For completeness I look back at the Secretary of State's additional submissions. I just do not agree that the claimant's keeping out of trouble has really much to do with the reasoning of the First-tier Tribunal's decision at all. Paragraph 22 is concerned with the claimant getting into trouble after the last appeal and then keeping out of trouble since 2012. These are no more than facts. Paragraph 40 refers to the claimant finding peace and happiness with his partner. I cannot read any of these things as a finding that shows that inappropriate weight was being given to professions of good behaviour. If a judge is going to allow an appeal on deportation grounds, he (in this case) has to consider the prospects of further convictions. It may be that there is every reason to believe the claimant would get into trouble again and it may not be right to allow such an appeal.

32. In short, the decision is not perverse and I dismiss the Secretary of State's appeal. No error of law is found. I uphold the decision of the First-tier Tribunal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 6 July 2020