



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006389
On appeal from:
HU/14539/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

RICARDO MARLONDO SIMMS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the Respondent: Ms Sonia Ferguson, of Counsel, instructed by Blackfields Solicitors

Heard at Field House on 27 April 2023

DECISION AND REASONS

Introduction

- 1.** The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 9 August 2019 to deport him to Jamaica as a foreign criminal, pursuant to section 32 of the UK Borders Act 2007 with reference to section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended).
- 2.** The claimant is a citizen of Jamaica. He is a foreign criminal. On 23 March 2018, he was convicted of two counts of possessing a controlled Class B drug (cannabis valued at £260) with intent to supply. His sentence was reduced on appeal to 18 months but was sufficient to trigger the

automatic deportation provision in section 32(5) of the 2007 Act.

- 3. Mode of hearing.** The hearing today took place face to face.
- 4.** For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal must be dismissed.

Background

- 5.** The claimant came to the UK in October 2001 as a visitor, with his stepmother and brothers and sisters. He was 20 years old. Their visit visas expired in November 2001 but the claimant did not embark and remained in the UK without leave. The claimant has been operating a market stall at Camden Market since approximately 2004.
- 6.** In May 2009, the claimant sought leave to remain based on his relationship with a British citizen partner. He was given discretionary leave instead, valid until January 2013. He submitted an in time application for leave to remain on Article 8 grounds which was granted until 19 October 2016. On 11 October 2016, the claimant applied for indefinite leave to remain.
- 7.** In 2004, the claimant met his current partner. They did not marry until 2016. She is a British citizen and they have a daughter together, born in September 2012 who is 10 years old. The claimant also has a son born in October 2003, from his previous relationship, who is 9 years old. The claimant's wife has three sons from a previous relationship who are all young adults. All five children are British citizens.
- 8.** The claimant's daughter with his wife is registered disabled. She has a medical problem, in that she walks on the sides of her feet, rather than the soles. The claimant's daughter uses walking aids and is now having therapy. She wears splints, and special shoes. She gets night cramps in her legs, falls often, and needs assistance to use the toilet. The claimant massages her cramps, picks her up when she falls, and helps her to go to the toilet when necessary. He takes her to her medical appointments. The evidence before the First-tier Judge was that the claimant is his daughter's main carer and that his support is needed, both practically and for his daughter's confidence.
- 9.** The claimant maintains his relationship with his son from his earlier relationship, who visits the house regularly at weekends and holiday times. The relationship between the claimant and his former partner is good, and she is supportive of his appeal.
- 10.** On 23 March 2018, he was convicted of two counts of possessing a controlled Class B drug (cannabis valued at £260) with intent to supply. The amount of cannabis was relatively modest: he was supplying it to acquaintances of his for use in Rastafarian rituals. The claimant was of good character until his conviction and was described as an exemplary prisoner. He learned construction work in prison, and when released he got a job as a landscape gardener which he lost in 2020 when his right to work ceased. He has committed no further offences.
- 11.** While he was in prison, the claimant's wife found it difficult to cope with her daughter. She developed mental health problems, fell into debt, and had to take two months away from her Local Authority managerial role,

putting her job at risk. The claimant's wife is also assisting her elderly mother, who is immobile, and needs help with all household tasks and personal care. She is registered disabled, has arthritis in her legs and feet, and relies heavily on her daughter and on the appellant for her day to day care needs.

First-tier Tribunal

- 12.** The First-tier Judge Dineen allowed the appeal principally because he considered that the claimant could bring himself within Exception 2 in section 117C(3) of the Nationality, Immigration and Asylum Act 2002 (as amended) in that it would be unduly harsh for the claimant's wife and daughter for him to be removed to Jamaica. The reason for that finding was the daughter's disability, her need for enhanced attention, and the dependence on her father which that involved. The need for extra care would fall on her mother's shoulders if the claimant were removed, which the Judge found would be unduly harsh.
- 13.** The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

- 14.** Permission to appeal to the Upper Tribunal was granted on the basis that the First-tier Judge had not applied properly the relevant tests for 'unduly harsh' in *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53, and in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, although the latter would not have been available to the First-tier Judge at the date of hearing.
- 15.** There was no Rule 24 Reply.
- 16.** That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

- 17.** The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.
- 18.** I remind myself that, applying *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden Agreed, an appellate Tribunal may interfere with findings of fact only where the First-tier Judge's finding is rationally insupportable.
- 19.** The question is not whether the appellate Tribunal would have reached the same factual conclusion on the evidence: nor should it permit the losing party to seek to retry the case afresh, reattribute weight to different strands of evidence, evaluate witness evidence for itself, or concentrate on particular verbal expressions rather than the substance of the First-tier Judge's findings. Lewison LJ cautions against grounds of appeal resting on a selection of evidence rather than the totality of the evidence ('island hopping').
- 20.** For the Secretary of State, Mr Avery argued that in the absence of express

reference to relevant Supreme Court decisions, the First-tier Judge could not be considered properly to have directed himself on the 'unduly harsh' test. The Judge had not considered all of the evidence in the round and had given too much weight to the Independent Social Work report.

Conclusions

- 21.** The Secretary of State's challenge to the finding of fact that removing this claimant would be unduly harsh does not meet the *Volpi* test. The finding is not rationally insupportable: the Judge was entitled to give weight to the independent social worker report and to the evidence of the claimant and his wife about the difficulties experienced by their daughter.
- 22.** The Secretary of State's appeal is dismissed.

Notice of Decision

- 23.** For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 22 May 2023