Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04478/2019

THE IMMIGRATION ACTS

Heard remotely via Skype for Business	**Decision & Reasons Promulgated**
On 1 March 2021	**On 10 March 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RGW

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: In person

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 1980 and is a male citizen of Jamaica. He first entered the United Kingdom in 1993 as a minor. He was granted indefinite

leave to remain in 1996. On 4 October 2005, he was sentenced to 15 months and 2 weeks' imprisonment for a number of driving offences and assault. A deportation order was signed on 30 August 2006 and the appellant was deported from the United Kingdom to Jamaica on 12 October 2006.

2. In July 2015, the appellant's wife (EW) wrote to the Secretary of State to ask for the appellant's deportation order to be revoked. A decision to refuse to revoke the order was made on 9 February 2016. There then followed a lengthy period of correspondence (including under the Judicial Review Pre-action Protocol) between the Home Office and the appellant's then United Kingdom solicitors which resulted in a supplementary decision on 9 May 2018 reaffirming the Secretary of State' decision not to revoke the deportation order. Almost a year later, in March 2019, the appellant appealed against that decision, the time for appealing having been extended. The First-tier Tribunal (Judge Turnock) in a decision promulgated on 29 January 2020, allowed the appeal. The Secretary of State now appeals to the Upper Tribunal.

3. The initial hearing in the Upper Tribunal took place remotely via Skype for Business. The appellant attended from his home in Jamaica. EW also attended from her home in Hull. The appellant was not legally represented. Mr McVeety, who appeared for the Secretary of State, helpfully informed me that the Secretary of State now accepts that the appellant has a genuine and subsisting relationship with his two biological children, A and Am. Consequently, Ground 1 is no longer pursued. Mr McVeety also said that the Secretary of State accepts that the judge 'made a mistake' at [110] by finding that Exception 1 (section 117C of the 2002 Act) applied; it is clear from the wording of the section that it applies only to individuals resident in the United Kingdom. He did not seek to argue that that mistake amounted to an error of law such that the decision should be set aside.

4. Mr McVeety's submissions focussed upon the judge's assessment at [104-105] that the circumstances were such that it would be unduly harsh for A and Am to continue to be separated from the appellant. Mr McVeety accepted that the judge had identified the correct legal provisions and jurisprudence and had applied the correct legal test of unduly harshness. However, he submitted that, on the evidence, the decision had been perverse; the judge himself had accepted that, whilst the children missed their father (with whom they have internet contact and whom they have visited in Jamaica), there was 'no up to date evidence of ill-effects on the children'. In the absence of the evidence that the children were suffering significant problems as result of the separation from their father, then there was no basis for finding that the status quo required judicial interference.

5. It is indeed the case that the appellant and EW have no provided any independent or expert evidence (e.g. from an independent social worker) dealing with the reaction of the children to the continuing separation but,

given that they are now not represented, that is hardly surprising. Mr McVeety submitted that, on the evidence of EW and the appellant, it had not been open to the judge to conclude that for the children to know that 'the only relationship they will have with their father will be essentially a remote relationship with the possibility of only an occasional visit does fall within the category 'bleak.'

6. The circumstances in this appeal are unusual. The judicial approach required in the case of a family which has endeavoured to maintain a vestige of family life having been separated for a number of years is likely to be wholly different from that concerning a family currently living together in the United Kingdom and facing the prospect of separation and remote contact over the next 10 years. I am not satisfied that, even on the limited evidence available to him, Judge Turnock reached a decision which can accurately be described as perverse. EW moved to live in Jamaica in 2014 but returned to the United Kingdom in March 2015 as the couple were unable to support the family on the low wages available in Jamaica (the respondent no longer argues that the family can enjoy life together in Jamaica – see decision at [101]). EW was pregnant with her son, giving birth on her return so the appellant has never seen his son face to face. To describe the situation of a child who has never met his father but who can only develop a relationship with him via the internet as bleak is not, in my opinion, either unreasonable or inaccurate. I am reminded also of the comment of Underhill LJ in the case of *ZP (India)* [2015] EWCA Civ 1197 which was cited before Judge Turnock:

> I am not sure that every tribunal would have reached the conclusion that was reached in this case, but I am not prepared to say that the Judge's decision was perverse. Mr Biggs reminded us of the authorities which emphasise that proportionality assessments of this kind require a difficult exercise of judgment which can often not be said to be definitely right or definitely wrong, and that an appellate court should not intervene simply because it might have reached a different decision: see, e.g., AH (Sudan) v Secretary of State for the Home Department [2007] HL 49, [2008] 1 AC 678, per Lady Hale at para. 30 (p. 691 C-F).

7. Even if I am wrong and the judge did err in law by making too generous an assessment of the current circumstances of the appellant and his family, I should, pursuant to the discretion afforded to the Upper Tribunal by section 12 (2) (a) of the Tribunals, Courts and Enforcement Act 2007, refrain from setting aside the decision of the First-tier Tribunal. When the appellant first sought the revocation of the deportation order in July 2015, the order still had nearly a year still to run to its expiry on 30 August 2016. Whilst it is disturbing that, in essence, that same application is still the subject of litigation nearly 5 years after the expiry of the deportation order, the fact remains that 10 years have no elapsed since the order was made. If I dismiss the Secretary of State's appeal or if I allow it and remake the decision dismissing the appellant's appeal, the practical effect on the appellant and his family remains the same. Whatever the outcome, the appellant will now be able (indeed, if he seeks to return to the United Kingdom, he will be compelled) to make an application for entry clearance.

Judge Turnock noted this at [112]. The appellant's application to revoke the deportation order is now of academic interest only; as the 10 year period has expired, he has, as the court expressed it in *ZP (India*) at [25], 'served' his time and can apply for entry clearance. The only material difference to the prospects of any application he may now make is that I have upheld the First-tier Tribunal's assessment that the continued separation of the appellant from his children is unduly harsh; that is a matter which the appellant may wish to bring to the attention of the Entry Clearance Officer who considers any future application to readmit him the United Kingdom.

8. For the reasons, I have given above, the Secretary of State's appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

Signed Date 3 March 2021

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.