Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16765/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2021	**On 23 November 2021**
Extempore decision	

Before

THE HONOURABLE MR JUSTICE SAINI
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OM (JAMAICA)
(ANONYMITY ORDER MAINTAINED)

Respondent

Representation:
For the Appellant: Mr J Rene, Counsel
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

This is an appeal brought by the Secretary of State for the Home Department against a decision of Judge Mehta in the First-tier Tribunal given on 3 March 2021. The judge's decision was given in an appeal brought by the respondent against a decision of the Secretary of State dated 2 October 2019 to the effect that deporting him to Jamaica would not breach the United Kingdom's obligations under the European Convention on Human Rights.

In the Grounds of Appeal, the respondent argues that the judge made a material misdirection of law and/or gave inadequate reasons for his decision. These complaints overlap in the way they are pleaded in the Grounds and developed in the skeleton argument, and we will deal with them together when we address the detail of the decision below.

An anonymity order was made earlier in these proceedings and that is maintained by us. The reason for the anonymity order, which we should explain, is that the appeal both below and before this court concerns a child and there should be no risk of that child being identified.

Turning to the background to the appeal, the ultimate conclusion of the judge was that the deportation of the respondent would be disproportionate and contrary to the United Kingdom's obligations under Article 8 of the ECHR. The immigration history of the respondent can be summarised as follows. The respondent entered the United Kingdom on 20 November 2000 and was granted leave to enter as a visitor for six months. On 6 April 2001 the respondent applied for leave to remain as a student. This application was refused on 18 July 2001. On 4 July 2001 the respondent appealed against this decision and on 3 January 2002 his appeal was dismissed as having been abandoned and the respondent remained in the United Kingdom without authority. In due course the respondent made an asylum claim but that was dismissed and he became appeal rights exhausted on 5 September 2006. On 13 September 2004 the respondent married Denise Mullings, a British citizen, and in due course he made an application for leave to remain on the basis of his marriage to Ms Mullings. That application was refused on 30 May 2007.

On 31 May 2007 the respondent made further representations and on 1 June 2007 the Home Office maintained its decision to refuse the marriage application. On 6 June 2007 the respondent was removed from the UK. On 4 July 2008 the respondent was granted leave to enter the UK on the basis of his marriage to a British citizen. On 15 June 2010 the respondent submitted an application for indefinite leave to remain on the basis of marriage. That application was refused on 13 July 2010 and the respondent was granted discretionary leave to remain until 30 July 2013. On 2 September 2010 the respondent requested the refusal of indefinite leave to remain be reconsidered and in due course he was granted indefinite leave to remain on the basis of his marriage to a British citizen.

On 16 March 2010 the respondent was convicted at Wood Green Crown Court of possession with intent to supply cocaine and on 22 March 2018 he was sentenced to six years' imprisonment. On 23 October 2018 the respondent was served with a Notice of Decision to Deport and he responded to this notice on 9 November 2018, making human rights representations. On 2 October 2019 the Secretary of State refused the human rights claim, which led on 15 October 2019 to the respondent filing the notice of appeal to the Tribunal.

In addition to the conviction at Wood Green Crown Court on 16 March 2018 to which we have already made reference, the respondent has two other convictions. On 5 August 2004 the respondent was convicted at West London

Magistrates' Court of possessing a controlled drug with intent to supply and was sentenced to 30 days' imprisonment and on 20 January 2009 the respondent was convicted at Enfield Magistrates' Court of possessing a controlled drug class C and was given a conditional discharge for twelve months.

Turning to the conviction of 16 March 2018 at Wood Green Crown Court, the respondent pleaded guilty to collecting just under half a kilogram of compressed cocaine of high purity. The sentencing judge remarked that the respondent was close to the original source of the drugs. However the judge said that he was not directly organising the drug dealing operation and therefore his role fell somewhere between a leading and a significant role. The sentencing judge identified the mitigation in the respondent's case as his plea of guilty and his limited criminal record. The respondent was, as we have indicated, sentenced to six years' imprisonment.

The issue before the First-tier Tribunal was the respondent's claims under Article 8. He relied upon essentially three matters: first, his marriage to Denise Mullings, secondly, the fact that he had a son born on 19 September 2004 with Ms Mullings and the parental relationship the respondent said he had with his son, and finally it was submitted that his deportation would have unduly harsh consequences upon his son, who has suffered from mental health issues. Specifically, it was said that the son was at increased risk of suicide.

The Secretary of State gave the following reasons in her decision letter of 29 September 2019 for the respondent's deportation:

> "(a) Given the length of the respondent's sentence the public interest in his removal was strong and required a very strong Article 8 claim over and above the exceptions to deportation as outlined in the Immigration Rules. The appellant found that he had not shown a strong enough case to outweigh the public interest.
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> (b) It was not accepted by the appellant that he had a genuine and subsisting relationship with his son on the evidence provided.
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> (c) It was not accepted that it was unduly harsh for the respondent's son to relocate to Jamaica if the respondent's wife went to Jamaica too and it was not accepted that it was unduly harsh for the respondent's son to remain in the United Kingdom with his mother while the respondent was deported.
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> (d) It was not accepted the respondent had a genuine and subsisting relationship with Ms Mullings. It was not accepted that it was unduly harsh for Ms Mullings to relocate to Jamaica. It was not accepted that it was unduly harsh for Ms Mullings to remain in the United Kingdom while the respondent was deported.
>
> (e) There were no very compelling circumstances in the respondent's case which outweighed the strong public interest."

> We have quoted the basis for the Secretary of State's decision because one of the main grounds of complaint is that the judge did not engage with the Secretary of State's case. It is clear, however, to us that the Secretary of State's case was very firmly in the mind of the First-tier Tribunal Judge and that is obvious when one comes on to consider the substance of his reasoning.

We turn then to the substance of that reasoning. The starting point is that there is no suggestion on behalf of the Secretary of State that the judge misdirected himself in relation to the legal framework and issues before him, which were set out in some detail at paragraphs 26 to 34. By that we mean that there is no suggestion that the relevant legislative provisions and approach to the issues before him were infected by any legal error. Having set out the relevant legal framework, the judge went on to consider in some detail the applicable requirement, which was Exception 2 drawn from Section 117 of the 2002 Act, which the judge had set out at paragraph 31 of his judgment. In relation to Exception 2, having heard evidence and first of all dealing with the question of credibility, the judge found the respondent and his wife to be credible witnesses and concluded that the respondent had a genuine and subsisting relationship with his son and with his wife.

The judge went on to consider in some detail at paragraphs 40 and following the issue of the interests of the respondent's son. He first considered whether it would be unduly harsh on the respondent's son to relocate to Jamaica. In that regard the judge directed himself correctly in relation to the concept of "unduly harsh" by reference to the well-known judgment of Lord Carnwath in **KO (Nigeria) [2018] UKSC 53** and what was said in the Court of Appeal in **HA (Iraq) [2020] EWCA Civ 1296**. The judge correctly held that Exception 2 raises a factual question and he went on to consider that factual question by reference to the evidence called before him.

He then separately considered at paragraphs 46 to 49 the issue of the best interests of the respondent's son and came to the following conclusion, which we quote from paragraph 48:

> > "I am satisfied that it would be unduly harsh for the respondent's son to be relocated to Jamaica to join his father. He is 16 years of age and is reaching a crucial stage in his education. He has only ever been to Jamaica with his mother on holiday. If he were to relocate to Jamaica then this would also involve separation from his adult sister. The respondent's son is a British citizen who enjoys the rights and benefits of British nationality and he would be deprived of these rights and benefits if he were to relocate to Jamaica."
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> The judge continued then with his conclusion that it would be unduly harsh on the respondent's son in the circumstances to have to relocate.

It was then the task of the judge to consider the separate question of whether it would be unduly harsh on the respondent's son to remain in the UK without the respondent. This issue was given substantial consideration by the judge

and we note his detailed assessment of the psychological assessment report provided by Dr Michele Sandiford. Dr Sandiford is a clinical psychologist registered with the Health and Care Professionals Council who works in West London Mental Health NHS Trust. This witness is an expert who had very substantial experience of working as a clinical psychiatrist within child and adolescent services. Having considered that evidence in some detail, we note that the judge concluded at paragraph 62 that the report of Dr Sandiford was balanced and comprehensive and the judge rejected, as he was entitled to do, the Secretary of State's submission that only limited weight should be attached to it. That submission has in effect been made again before us in the Grounds of Appeal. We reject it. The judge was entitled to give that report weight given the expertise of the witness.

We note also a particular paragraph of Dr Sandiford's report which the First-tier Judge quoted at paragraph 61 as follows:

> "The respondent's son has described his father as a confidante and someone he would look to for guidance. As the only male currently within the immediate family, the respondent's permanent absence would have a significant impact upon him emotionally. His account suggests that from the beginning of his father's custodial sentence his stress levels increased. It is highly likely that a further reduction in his contact with his father to his deportation is likely to be an additional stressor, increasing his depression and his symptoms. Subsequently, his risk to self is likely to increase."

The context of this observation by Dr Sandiford was the evidence of the suicidal ideation on behalf of the respondent's son. That matter was dealt with also in some detail in the First-tier Tribunal Judge's decision at paragraphs 59 and 61.

In relation to the issue of separation, the judge concluded at paragraph 64, based essentially upon the evidence of Dr Sandiford, that it would be unduly harsh for the respondent's son to remain in the UK without the respondent. He went on to find that it would be contrary to the best interests of the respondent's son for him to be deported. The Judge came to essentially the same conclusion as to relocation of the respondent's wife to Jamaica by concluding at paragraph 66 that given the duties of the respondent's wife caring for her mother, it would be unduly harsh for her to relocate to Jamaica.

At paragraph 68 the judge concluded that were the respondent a medium offender, (that is referring back to Exception 2) the public interest would not require his deportation. That led to the crux of the decision, which is that given the period of time to which the respondent had been sentenced, the public interest would require his deportation unless there were very compelling circumstances over and above those described within the Exceptions.

The judge correctly directed himself by explaining that this is a wide-ranging evaluative exercise taking into account all relevant factors including those mandated by the Strasbourg case law and Part 5A of the Act and that includes

those matters already singled out for description in Exceptions 1 and 2 (which had been addressed in more detail as we have described). The judge divided the relevant factors into pros and cons on a "balance sheet" between paragraphs 70 and 76.

The judge correctly set out the factors that weighed in favour of the deportation. In particular, and contrary to the submission made to us this morning by the appellant's representative, it is clear to us that the judge was very well aware of the strong public interest in deportation and of the nature of the offending that was in issue. As to the factors in favour, that is the pro factors weighing in favour of family life, the judge identified the matters already discussed within the Exceptions which we have touched upon but then went to refer to the fact that the respondent had undertaken certain courses in prison.

The judge also returned to the effect of deportation on the respondent's son in the detailed manner which we have already described. He explained correctly that the son's best interests are a primary consideration when considering proportionality and carry appropriate weight. The ultimate conclusion then was follows at paragraph 80. The judge found, having weighed the strong public interest in deporting criminals against the factors on the respondent's side of the balance sheet, that there were very compelling circumstances over and above those in Exceptions 1 and 2. The judge found that the best interests of the respondent's son and other factors the respondent relied upon outweigh the strong public interest in deporting a foreign criminal and the seriousness of the respondent's offence.

In our judgment, there is no error of law or misdirection in the judge's approach. We have considered each of the grounds of appeal which are in substance an attack on factual conclusions and evaluations of weight "dressed up" as points of law. The point that has been focussed upon in the submissions this morning is one we have already touched upon. It is argued that the judge did not give appropriate weight to the background offending and the public interest factors which generally determine that the public interest is served by deportation. We reject that: it is not a fair reflection of what one sees in the carefully prepared decision of the judge. Subject to a wholly perverse allocation of weight to a particular factor, a balancing exercise is the prerogative of the first instance judge where this Tribunal should not interfere.

Equally, we note that the overriding factor in this case was the position of the respondent's son and the report of Dr Sandiford, which the judge accepted should be given substantial weight. In both the written submissions and the oral submissions we heard this morning no convincing case has been put forward to show that there was any error of approach such as to amount to an error of law or a misdirection in the judge's appreciation of his expert evidence. Indeed, on the material before the judge and in particular this expert report it is hard to see how in all the circumstances the best interests of the son were not a consideration of very substantial weight.

As we indicated at the start of the hearing to the representative on behalf of the Secretary of State, it is difficult to identify, even looking with a beneficial eye upon the grounds of appeal, what the precise error of law is.

This appeal is in effect an attack upon a balancing exercise conducted by the judge and factual findings. Each of his findings was justifiable on the evidence and his balancing exercise was informed by reference to the appropriate case law. Crucial to this case was expert evidence which the judge was entitled to accept. It was not “irrational” as argued in the appellant’s skeleton argument for the judge to accept that evidence.

We accordingly reject the appeal and uphold the decision of the judge.

Notice of Decision

The decision of Judge Mehta did not involve the making of an error of law.

The appeal is dismissed.

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

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

Signed Date 18.11.2021

Mr Justice Saini
Mr Justice Saini