Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number: PA/08242/2017**

THE IMMIGRATION ACTS

Heart at: Field House	**Decision & Reasons Promulgated**
on 14 May 2019	**On 04 June 2019**

Before:
The Hon Mrs Justice Whipple DBE
and
Upper Tribunal Judge John FREEMAN

Between:
DEJ (ANONYMITY ORDER MADE)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Ms Nazimi, counsel instructed by Duncan Lewis & Co.
For the respondent: Ms Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

NOTE: (1) no anonymity direction made at first instance will continue, unless extended by me.

(2) persons under 18 are referred to by initials, and must not be further identified.

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal (Judge Widdup), sitting at Hatton Cross on 30 January 2019, to allow the appeal by a citizen of Jamaica, born on 19 January 1981. Permission was granted by FtTJ Saffer on 25 February 2019. The anonymity order made by the FtT remains in place and the Appellant will be referred to by the intials DEJ.

Background

2. The Appellant, as we shall continue to refer to him even though he responds to this appeal, is the father of two children who are British citizens, namely his son, T, who was born on 17 November 2002 and was 16 at the time of the hearing and his daughter K, who was born on 2 May 2008 and was 10 at the time of the hearing. T and K each has a different mother. Each child lives with their mother. The Appellant is not in a relationship at present with either mother and lives separately from both of them.

3. The Appellant first entered the UK in June 1993 as a visitor with leave to remain for 6 months. In February 1994, the Home Office granted him an extension of his leave to remain. He later applied for indefinite leave to remain, but that application was refused, and the appeal against that decision was dismissed on 24 January 1997. He appears to have been given indefinite leave to remain in November 1997.

4. On 29 July 2015, the Appellant was convicted of possession of a class B drug with intent to supply. He was sentenced to 11 months imprisonment, on the basis that he was a commercial drug dealer, according to the judge's sentencing remarks. On 17 November 2015, the Appellant was served with a notice of intention to make a deportation order under s 3(5)(a) of the 1971 Act. Representations were made by solicitors who then represented him. On 17 May 2016, the Appellant was served with a deportation order on the grounds that his removal from the UK would be conducive to the public good because he was a persistent offender: he had 10 convictions for 21 offences while living in the UK.

5. In March 2017, the Appellant claimed asylum, arguing that he would be at risk in Jamaica from gun violence. That application was considered on human rights and asylum grounds and refused on 11 August 2017. He appealed the human rights aspect of the decision. The appeal was dismissed by FtT Rowlands on 5 October 2017, but a material error was identified in the decision and the Upper Tribunal directed that there should be a fresh hearing.

The FtT's determination

6. The matter thus came before FtTJ Widdup. Judge Widdup determined that the Appellant was a persistent offender [68]. There is no appeal against that finding. It meant that the Appellant's case fell within Rule 398(c) of

the Immigration Rules, where deportation is ordered as conducive to the public good.

7. Judge Widdup considered the Appellant's human rights appeal, first applying the family life exception in para 399(a) of the Immigration Rules which protects family life with children, which provides as follows:

> "**399.** This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; …"

8. Judge Widdup also considered the private life exception in para 399A of the Immigration Rules, which provides as follows:

> "**399A**. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

9. On the family life exception, the Judge found that the Appellant had contact with T in school half terms and holidays only because T lives with his mother, some distance away from where the Appellant lives. Judge Widdup concluded that the Appellant was taking an active role in T's upbringing and that he had a genuine and subsisting relationship with T. In relation to K, Judge Widdup noted that K had particular needs due to a medical condition and that in the past, while the Appellant was with K's mother who worked as a nurse, the Appellant had been K's primary carer; however, the Appellant and K's mother had separated in July 2018 and K's mother was now K's primary carer; moreover, the mother was not co-operating with the Appellant; Judge Widdup found that the Appellant still had some contact with K and he had a continuing active role in her upbringing. (It is to be inferred that Judge Widdup concluded that this

amounted to a genuine and subsisting relationship with K, although this was not stated in terms.)

10. Given that neither child had visited Jamaica except for one holiday in 2008, and neither had any links with Jamaica, combined with the "considerable difficulties" their father would face if he went back to Jamaica having left that country when he was 12, Judge Widdup found that it would be unduly harsh for the children to be expected to live in Jamaica. There is no appeal against those parts of the decision.

11. Judge Widdup next turned to whether it would be unduly harsh for T and K to remain in the UK without their father, if he was deported. Here the judge noted that the Appellant had always been involved in the lives of T and K. The judge referred to the reports of Ms Julie Meek, an independent social worker, who had authored one report in July 2016 (before the Appellant and K's mother separated) and an addendum report dated January 2019 (after the separation). From these reports, Judge Widdup concluded that the Appellant played a "very important role" in the lives of both children.

12. Judge Widdup then said this:

> "[87] Ms Meeks' conclusion … was that the deportation of the Appellant would have a detrimental impact on the children. With all due respect to her, that is not the question before me. The question under 399 (a) (ii) (b) is whether it would be unduly harsh for them to remain in the UK without him.
>
> [88] I find that the hurdle is overcome in this case bearing in mind the ages of the children, the extent of the Appellant's role in their lives now and throughout their lives and their attachment to him.
>
> [89] I find therefore that the Appellant does meet the family life exception in paragraph 399."

13. Judge Widdup went on to consider the private life exception in paragraph 399A. The decision records, at this point, that the Appellant had entered the UK as a visitor when he was 12 years old. By the time the deportation order was made the Appellant had lived here lawfully for 18 years. His immediate and extended family live in the UK and have done so since 1993. The judge concluded that the Appellant had made the UK his home, and notwithstanding his convictions, he was socially and culturally integrated in the UK. Judge Widdup took the view that, if the Appellant had applied for British citizenship before he acquired a criminal record, then his application would have been granted.

14. The judge continued:

> "[94] I also accept Ms Nizami's submissions on the very significant obstacles he would face in integrating in Jamaica.
>
> [95] I find therefore that the Appellant meets both the family and private life exceptions …"

15. The reference in para 94 to Ms Nizami's submissions would appear to be a reference back to an earlier passage of Judge Widdup's decision, under the heading "submissions", were those submissions were summarised in the following way:

> "[53] So far as the Appellant's private life was concerned he had the support of friends, he had been educated in the UK. He was not now allowed to work in the UK but previously he had done so. He had committed no further offences. …"

Submissions

16. The Secretary of State submits that Judge Widdup erred in law in deciding that the Appellant met the requirements of paragraphs 399 and 399A and thus that his article 8 rights would be breached by deportation. In relation to the family life exception (paragraph 399), in the grounds of appeal, the Secretary of State challenged the conclusion that to remove the Appellant, but leave his children here would be "unduly harsh" citing *KO (Nigeria) v SSHD* [2018] UKSC 53, in particular [23] where Lord Carnwath emphasised that "unduly harsh" introduces a higher hurdle than mere unreasonableness; and that the word "unduly" assumes that there is an acceptable level of harshness in any given context but that the harshness must go beyond that to meet the word "unduly": "*one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent".*

17. At the hearing, Ms Isherwood took us to *SSHD v RA* [2019] UKUT 123 (IAC) where it was held that:

> "[17] … the test of "unduly harsh" has a dual aspect. It is not enough for the outcome to be "severe" or "bleak". Proper effect must be given to the word "unduly". The position is, therefore, significantly far removed from the test of reasonableness …"

18. The Secretary of State argues that responsibility for meeting the children's emotional and physical needs will be met by their mothers in the UK, and that there is no evidence that the children's lives will become chaotic or that their development will be irreparably harmed. There is no evidence, in short, that the Appellant's removal would be unduly harsh in its effect on them.

19. In relation to the private life exception (paragraph 399A), in the grounds of appeal, the Secretary of State challenged the conclusion that the

Appellant would face "very significant obstacles" to his integration into Jamaican society and culture if he was deported. The Secretary of State argued that no clear reasons had been provided for this conclusion which was, in any event, irrational in the absence of any medical condition, language barriers or other impairments. Further, the judge had wrongly left out of account some important factors, for example, the fact that the Appellant had spent his first 12 years in Jamaica, the fact that he had gone back to Jamaica to visit in 2008; and had taken into account some irrelevant matters, such as the fact that the Appellant would have been granted citizenship if he had applied before taking to crime – he did not apply, and in consequence he is not a British citizen, in fact and law.

20. In a skeleton argument submitted in advance of the hearing, the Secretary of State reminded us of the guidance published on 31 January 2019 titled "Criminality: Article 8 ECHR cases" version 7.0 at pages 33-34 which stated:

> "A very significant obstacle to integration means something which would prevent or severely inhibit the foreign criminal from integrating into the country to which they are to be deported. You are looking for more than obstacles … the fact that the foreign criminal may find life difficult or challenging in the county to which they are to be deported does not mean that they have established very significant obstacles to integration there."

21. The Secretary of State goes further. He challenges the FtT's conclusions of the FtT on the additional basis that the public interest factors outweigh any family or private life factors in this case. The Appellant's offending history is serious and there is a high public interest in deportation of persistent offenders such as the Appellant, citing *SC (Jamaica)* [2017] EWCA Civ 2112.

22. For the Appellant, Ms Nizami raises a preliminary issue about the adequacy of the reasons for the grant of permission. In relation to the grounds of appeal, Ms Nizami seeks to uphold Judge Widdup's decision, on the basis that it discloses no material error of law. The reasons given are sufficient and in line with the requirement in *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC). Further, the fact that this tribunal may consider the outcome to be generous is not a basis for allowing the appeal: see *Mukarkar v SSHD* [2006] EWCA Civ 1045 at [40]. On the family life exception, Ms Nizami submits that the Secretary of State is applying the wrong test in law: whether the children's lives will become chaotic, or their development will be irreparably harmed, if their father is removed, is not the test; rather, the test is whether that will unduly harsh, to which Judge Widdup referred in terms at [87] of the decision. On the private life exception, again, Judge Widdup was entitled to reach the conclusion that he did, noting that Judge Widdup referred to the "very

significant obstacles" test in terms at [94]. On the public interest factors, Ms Nizami argues that *SC Jamaica* is distinguishable because it was an automatic deportation case, which this is not.

Conclusion

23. On the preliminary issue raised by Ms Nazimi, we are satisfied that Judge Saffer gave adequate reasons for the grant of permission. There was nothing wrong in simply saying that the grounds advanced by the Secretary of State were arguable. There is no basis for Ms Nizami's preliminary challenge which we dismiss.

24. Turning to the substantive appeal, we have examined Judge Widdup's decision in some detail. We deal first with the conclusion on family life. We note the absence of any reference in the decision to the case law on the "unduly harsh" test in paragraph 399 (see the cases relied on by the Secretary of State noted above; there are other cases which have similarly emphasised the high threshold set by that test). The failure to refer to those cases would not, in and of itself, necessarily be fatal if the decision contained an analysis of the facts and evidence which demonstrated that the test had been correctly understood and applied. That is not the case here.

25. The factors which are cited at [88] are rather ordinary: the children's ages were, at the time of the decision, 16 and 10 and would not without some further explanation militate towards removal of the Appellant being unduly harsh; the extent of the Appellant's involvement in their lives now and throughout their lives, as described, would seem entirely normal for a non-resident parent; and the children's attachment to him would similarly be as expected. The judge's given reasons might be sufficient to support a conclusion that his removal would be difficult, even harsh; but the unanswered question is why his removal would be "unduly harsh" on the children.

26. We cannot be confident that the judge appreciated the nature of the test being applied under paragraph 399; certainly, the reasons given do not justify the conclusion reached under paragraph 399. We conclude, with regret, that that conclusion cannot stand.

27. We turn next to the private life exception. There is no analysis in the decision of the meaning of "very significant obstacles" for the purposes of paragraph 399A(c). Again, that would not be fatal, in and of itself, if it was clear from the decision that the nature of that test had been understood and correctly applied. The point is that the existence of obstacles, even significant obstacles, is not enough; only "very significant obstacles" will be sufficient to meet the test. The judge referred to the fact that the Appellant has been in the UK since he was 12 years old, that he appears to have no connections to Jamaica and that his family are all here: those points may demonstrate that the Appellant would not find it easy to leave

the UK, but none of them, taken singly or collectively, logically support the conclusion that he would face "very significant obstacles" if he returned to Jamaica. The Secretary of State is right to assert that the facts that he had in fact spent his first 12 years in Jamaica, so that that country was not wholly unknown to him, and that he would face no language difficulties if he was to be returned, were relevant points which were wrongly left out of account. Further, the points made by Ms Nazimi as they are recorded at [53] could have little if any bearing on the prospects for the Appellant's reintegration in Jamaica, and we are unsure why the Judge accepted them as supporting the conclusion under paragraph 399A.

28. Thus, we cannot be confident here either that the judge appreciated the nature of the test or applied it correctly. The reasons given do not support the conclusion reached. With regret, we conclude that the decision under paragraph 399A cannot stand.

29. It is not necessary for us to deal with the remaining challenge by the Secretary of State, relating to the public interest factors. On the basis of our conclusions thus far, the decision must be set aside.

Disposal

30. The issue which next arises as to how we should dispose of this appeal: should we re-take the decision ourselves based on the facts as found by Judge Widdup, or remit the matter to a different FtT for a fresh hearing? We invited brief submissions on that matter at the hearing.

31. Ms Isherwood did not express a view either way.

32. Ms Nizami invited us to remit the appeal to a different tribunal, preserving Judge Widdup's findings of fact. She noted that there had been some recent developments which may yet bear on the outcome of this appeal.

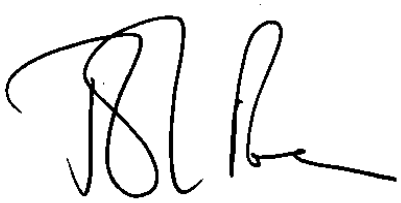
33. It is, in our judgment, appropriate to remit this appeal to a different FtT for a fresh hearing. We decline the invitation to direct that any of the facts as found should be preserved: that would not be an appropriate course in circumstances where we have set the decision aside for lack of reasons. It remains possible that there might be reasons in existence, beyond those found by Judge Widdup, which would be capable of supporting a conclusion that this Appellant should not be deported. In fairness, the Appellant should have a further opportunity to put his full case before the FtT.

Conclusion

The Home Office appeal is allowed.

The appeal is remitted to the First-Tier Tribunal at Hatton Cross for a fresh hearing, not before Judge Widdup

(drafted by Whipple J and signed on behalf of both of us by)



(a judge of the Upper Tribunal)

Date: 28.05.2019