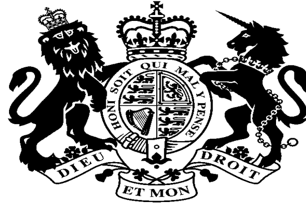

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08449/2019

THE IMMIGRATION ACTS

At Manchester Civil Justice Centre **Decision & Reasons Promulgated**
On 6th March 2020 **On 18th March 2020**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

The Secretary of State for the Home Department

Appellant

And

KH
(anonymity direction made)

Respondent

For the Appellant: **Mr Tan, Senior Home Office Presenting Officer**
For the Respondent: **Mr Greer, Counsel instructed by Kalsi Solicitors (Manchester)**

DECISION AND REASONS

1. The Respondent is a national of Jamaica born in 1980. By its decision dated the 16th December 2019 the First-tier Tribunal allowed his appeal, on protection and human rights grounds, against a decision to deport him. The Secretary of State now has permission to appeal against that decision.

2. The reasons that the Secretary of State wishes to deport the Respondent are many. He is a 'foreign criminal' as defined by s32 of the Borders Act 2007 and as such is liable to automatic deportation. The index offence is the Respondent's

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conviction, on the 18th August 2018, of unlawful wounding contrary to s20 of the Offences Against the Person Act 1861. The circumstances of that offence were that he beat a man about the head with a metal implement believed to be a tyre wrench causing what the trial judge described as "an extremely unpleasant wound" which caused the victim to have 14 stitches in his head. In addition to this the Respondent has a criminal history involving various serious driving offences, possession of a bladed article, one other count of actual bodily harm and possession of Class A drugs. For good measure the public interest also requires the Respondent's removal from this country because he has an appalling immigration history, including the use of false instruments, illegal entry and overstaying.

3. The Respondent did not dispute any of that, but contended that he could nevertheless resist automatic deportation with reference to the two 'exceptions' set out in s33 (2) of the Borders Act 2007: protection and human rights. The First-tier Tribunal found in his favour in respect of both matters, and before me the Secretary of State challenges all of its findings. It is convenient that I deal with each matter in turn.

Protection

4. The basis of the Respondent's claim for protection was that he is a well-known 'MC' in the Jamaican music scene who is from a family with a long association with gang warfare. Several members of his family have been murdered as a result of this violence, and the Respondent himself avers that he has twice been shot. Relying on the country guidance of AB (protection, criminal gangs, internal relocation) Jamaica CG [2007] UKAIT 00018 the Respondent submitted that there was no reasonable likelihood that he would be admitted to the witness protection programme, and thus that he would not receive a sufficiency of protection from the Jamaican state.

5. The Secretary of State refused to grant protection on the basis that the Respondent had not shown himself to face a real risk of harm upon return to Jamaica. The Secretary of State pointed to the Respondent's long record of deception, his delay in claiming asylum and his poor immigration history to conclude that the account was a fabrication. The Secretary of State further had regard to the length of sentence and imposed a certificate under s72 Nationality, Immigration and Asylum Act 2002 on the grounds that the Respondent was a 'serious criminal'. This certificate had the effect of excluding the Respondent from the protection of the Refugee Convention and/or the relevant parts of the Qualification Directive.

6. In respect of the s72 certificate the Judge directed himself that the presumption in the Act that the Respondent has been convicted of a "particularly serious crime" is rebuttable. The decision refers to the sentencing remarks of the trial judge and notes that the Respondent was acquitted of the most serious charges

he had faced. The Judge had noted that there was an "element of excessive self-defence" in the assault and for that reason had given him a sentence at the lower end of the range available to him for this 'Category 1' offence. The First-tier Tribunal concluded:

> "Having taken into account all facts and matters with regard to the nature of the crime, the part played by the appellant, the mitigating factors and the eventual penalty imposed, I find that the appellant has been convicted of a serious crime but he has not been convicted of a **particularly** serious crime. Relevant factors include the element of excessive self-defence the lack of premeditation and intention, and the sentence at the lower end of the range.
>
> Therefore I conclude that the appellant has rebutted the section 72 presumption and thus he may be entitled to refugee status, depending on my conclusions regarding the facts of his case".
>
> (emphasis in original)

7. The First-tier Tribunal then considered the facts, and found itself satisfied, to the lower standard of proof, that the account given by the Respondent was true. The account of gang warfare, and in particular the nexus between that violent criminality and the music scene, was all consistent with the country background material. The Respondent had scars which supported his claim to have been shot in the past and newspaper articles confirming his work as an artist in both the United Kingdom and Jamaica. The Tribunal heard and accepted detailed evidence from two additional witnesses, the Respondent's cousin and partner, who both materially corroborated his claim. Having taken all of the evidence into account the Tribunal was satisfied that the Respondent had an uncle who was a 'Don' (a prominent gang leader) in his home area in Jamaica; this man's activities had caused substantial problems for other family members and he himself had been forced to flee Jamaica; the Respondent's uncle and a number of cousins had been shot; the Respondent himself was shot in 2013 as a result of his connection with the 'Don'; the Respondent would face a real risk of serious harm today.

8. The effect of these two findings was that the Respondent succeeded in defeating the deportation action on protection grounds.

9. The Secretary of State has two complaints about that.

The s72 Certificate

10. The first ground of appeal is that it was not rationally open to the First-tier Tribunal to conclude that the s72 presumption had been rebutted. In particular:

    i) The Tribunal did not direct its mind to whether the Respondent was a "danger to the community", the relevant test at s72(6). The Secretary of

State thought the Respondent's lack of remorse particularly relevant to that matter;

ii) The conclusions of the Tribunal were not supported by adequate reasoning. Before me Mr Tan elaborated on this ground to submit that the Tribunal had failed to have regard to the totality of the sentencing remarks, and had misconstrued them to include a reference to a lack of pre-meditation. Further, it is submitted, the First-tier Tribunal failed to weigh in the balance the fact that the index offence was only the last in a long line of criminal offences, each of increasing severity;

iii) Although this point does not feature in the grounds of appeal, Mr Tan submitted that the Tribunal's conclusions are incompatible with the Guidelines of the Sentencing Council, which place unlawful wounding under s20 OAPA 1861 in 'Category 1', meaning that the offence caused greater harm and that the perpetrator had a higher degree of culpability.

11. Mr Greer responded that the decision of the First-tier Tribunal could not be described as outwith the range of reasonable responses. It had before it all of the relevant evidence and it plainly had regard to the nature of the offence, the sentencing remarks and indeed to the Sentencing Council guidelines, since the decision itself refers to the offence as falling within Category 1 (see FTT §60). Mr Greer further submitted that the First-tier Tribunal clearly identified those factors which led it to find the presumption rebutted, and that taken cumulatively these matters could rationally be held sufficient to displace the certificate. The factors were that there was an element of excessive self defence in the assault, that there was a lack of intention/pre-meditation and that the sentence imposed by the trial judge was at the lower end of the range available to him.

12. I am not satisfied that ground (i) as I summarise it above is made out. Although the determination does not actually refer to it, there was clear evidence that the Respondent is remorseful for his offending behaviour. At paragraph 44 of his witness statement he explains what he gained from the victim awareness course that he undertook in prison, and how he has worked with his Offender Manager to understand the impact of the assault on the victim. He says that he had perceived his child to be in danger and reacted wrongly and inappropriately to that situation. All of those matters were pertinent to the question of whether the Respondent continues to present a danger to the community.

13. Nor am I satisfied that ground (iii) above is a good one. The Judge expressly recognises that this was a Category 1 offence and as such he was, it seems, aware of the Sentencing Guidelines and their relevance here.

14. As to ground (ii) I note that before me there was some dispute between Mr Tan and Mr Greer about the rationality of the Tribunal's comment [at its §61] that the Respondent showed a "lack of pre-meditation and intention" in the assault.

Mr Tan submitted that in circumstances where he had beat his victim over the head with a tyre wrench this reasoning was hard to understand. Whilst I have some sympathy with that submission, having had regard to the sentencing remarks of Mr Recorder Biddle I am satisfied that the Tribunal was entitled to frame its reasoning in this manner. As Recorder Biddle clearly sets out, there is no allegation that the Respondent set out that night to assault his victim. An altercation arose between the victim and one of the Respondent's children and matters escalated very quickly. Although the jury did not accept that the Respondent had acted entirely in self-defence – that much was implicit in the verdict of guilty – in sentencing Recorder Biddle held that there had been an "element of excessive self-defence" and for that reason reduced the sentence. It will also be noted that the Respondent was acquitted of more serious charges brought under s18 OAPA 1861, for which the prosecution were required to show he had the *mens rea* to intentionally cause serious injury; by contrast the *mens rea* for s20 can be limited to recklessness, and this would appear to have been the Judge's conclusion here. Accordingly I am satisfied that the First-tier Tribunal was entitled to weigh those matters in the balance when considering whether the certificate should be discharged.

15. That leaves this point arising from ground (ii): did the First-tier Tribunal fail to weigh in the balance the fact that the index offence was only the last in a long line of criminal offences, each of increasing severity? Under the heading 'Immigration History' the Tribunal records the index offence [at its §21]; under the heading 'The Respondent's Case' reference is made to the certificate but not the reasons for its imposition; under the heading 'Exclusion from Entitlement to Refugee Status' the Tribunal sets out the legal framework and the facts gleaned from the sentencing remarks discussed above. Nowhere is any reference made to the 12 offences that the Respondent had already been convicted of prior to 2018. These offences included, in 2008, a conviction for actual bodily harm, and in 2006 possession of a bladed article. Were these earlier convictions not pertinent to the enquiry prompted by s72(6): is the Respondent a danger to the community?

16. The presumption in favour of a certificate excluding a serious criminal from the benefit of international protection is found in section 72(2) Nationality, Immigration and Asylum Act 2002:

> (2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—
>
> (a) convicted in the United Kingdom of an offence, and
>
> (b) sentenced to a period of imprisonment of at least two years.

17. And the provision that it may be rebutted is at s72(6):

> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.

18. On the face of the statute there is a nexus between the danger posed by the foreign criminal and the offence for which he has been sentenced to a period of at least two years. It is therefore arguable that the earlier offences have no part to play in the assessment of whether the Respondent currently poses a danger to the community, since the statute simply invites the decision maker to determine that matter with reference to the index offence. If that is right then Judge Cole cannot be said to have erred in failing to consider those convictions. Attractive as that argument is I am not satisfied that the criminal record of the proposed deportee can be said to be irrelevant. That is because in any forward looking risk assessment the offence must be viewed in context. The context here is that this was not the first time that the Respondent had been involved in violence; this was clearly relevant to the assessment of whether he was likely to offend again.

19. I therefore find that the s72 deliberations in the First-tier Tribunal are flawed for error of law, that being the failure to take material evidence into account.

20. I remake the decision in respect of the certificate as follows.

21. Notwithstanding the clear legislative intent at s72(6) that it is only one limb of the presumption that can be rebutted – "that a person constitutes a danger to the community" - in IH (s.72; 'Particularly Serious Crime') Eritrea [2009] UKAIT 00012 the Upper Tribunal held that the constraints of international refugee and European law were such that the statute must be read to mean that both limbs required to impose the certificate can be rebutted. Accordingly it is open to the Respondent to demonstrate that he had not been convicted of a "particularly serious offence" and/or that he no longer constituted a danger to the community.

22. The crime itself – s20 wounding – is a Category 1 offence. The starting point for sentencing is, as Recorder Biddle notes, three and a half years imprisonment. Parliament legislated to the effect that any sentence of two years or more would carry with it a presumption that it was a "particularly" serious offence. I have taken into account the mitigating factors mentioned by Recorder Biddle, and the remorse expressed by the Respondent in his witness statement. I must however place the offence in the context of the Respondent's behaviour overall. He has consistently shown disregard for immigration control; he has committed no fewer than 12 other offences, including another assault for which he received a sentence of 6 months imprisonment. Whilst there may have been an "element of excessive self-defence" in the index offence, the Respondent still hit someone over the head with a metal implement, causing that man to have 14 stitches in his head. I think it would be fair to draw the inference that the blow must have been struck with some force. Those were the facts that led him to be sentenced to 30 months' imprisonment. On those facts I am unable to find the presumption rebutted. The Respondent has not demonstrated that the assault was not a particularly serious crime, or that he does not constitute a danger to the community.

Risk of Harm

23. The second of the Secretary of State's complaints is that the First-tier Tribunal erred in its conclusions on the risk of harm to the Respondent if he were to be returned to Jamaica. As Mr Tan acknowledged, it was this finding by the First-tier Tribunal that is at the heart of this appeal, since it would prevent the Respondent's removal from the United Kingdom even if the certificate were to be upheld, Article 3 ECHR being a non-derogable, absolute right.

24. The grounds of appeal submit that the Tribunal failed in its assessment of the claim to weigh in the balance the fact that the Respondent has a long history of deception and that he had delayed in claiming asylum. I reject that ground, since the First-tier Tribunal expressly took both matters into account. At §64 the Tribunal directs itself to section 8 of the Asylum (Treatment of Claimants etc) Act 2004, and weighs against the Respondent the delay in claiming asylum. In the same paragraph the Tribunal notes that he has used multiple identities. At §65 the Tribunal records that it has taken these matters into account, and that they have reduced the Respondent's credibility. This ground is therefore entirely misleading.

25. Mr Tan attempted to salvage the attack on the findings of risk by submitting that the reasoning of the Tribunal at its §75 was flawed. Again this was not a point taken in the grounds but I permitted Mr Tan to argue it. At its §75 the Tribunal placed some weight on the Respondent's behaviour in 2013 when he chose not to travel to the United Kingdom on a passport containing what purported to be an endorsement for valid leave to remain. The Tribunal accepted the Respondent's evidence that he had instead used a different travel document because he was worried about trying to leave Jamaica in that identity:

> "The risk and criminality was unnecessary as the Appellant could have just re-entered the United Kingdom with the leave to remain in the Clive Byfield passport. I therefore find that the only reasonable inference from these facts is that the Appellant was afraid of using the Clive Byfield passport to leave Jamaica"

26. Mr Tan complains, with some justification, that this was not in fact the "only reasonable inference" that could have been drawn. It is possible, for instance, that the Respondent didn't use the Clive Byfield passport because he had lost it, or perhaps sold it on or loaned it to someone else. I am not however prepared to interfere with the First-tier Tribunal's risk assessment for that reason. Whilst this paragraph did contribute in some way to the Tribunal's decision, it was not the only reason it gave for believing him to be at risk. The main evidence that went to that finding was the unchallenged evidence of the Respondent's cousin and partner, both of whom could attest to key elements of his testimony. His cousin confirmed the family history of violence, and the background about the

'Don'. She personally knew of four other people in the immediate family who had been shot because of connections to the Don and in at least one case had newspaper clippings to support her evidence. She and the Respondent's partner both confirmed that to their knowledge the Respondent was shot in 2013 in the circumstances that he describes. The partner's evidence was similarly unchallenged. In those circumstances the comments made by the Tribunal at its §75 added little to the overall conclusions, particularly in respect of the 2013 attack.

27. Accordingly I find that the First-tier Tribunal decision on risk stands and that the Respondent succeeds in demonstrating that he faces a real risk of serious harm should he be deported to Jamaica. Although I have upheld the certificate the Respondent succeeds on Article 3 grounds.

Human Rights

28. The second limb of the Secretary of State's challenge is in respect of the Tribunal's findings that the impact on at least some of the Respondent's 14 children would be unduly harsh. The Secretary of State relies on dicta from the Court of Appeal in a number of cases, such as Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213, to submit that the First-tier Tribunal's reasoning "does not support a findings of the high threshold of undue harshness, as set out in the case law".

29. The higher courts have repeatedly emphasised that although the 'undue harshness' test falls somewhere in the middle of the statutory spectrum – framed on one side by 'reasonableness' and on the other by 'very compelling circumstances' – this should not obscure the fact that the test sets a high threshold. The 'commonplace' distress that will be caused to children if a parent is removed is not sufficient: otherwise any parent facing deportation would be able to succeed. Dicta to this effect can be found not only in PG (Jamaica) but in BL (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 357, Secretary of State for the Home Department v AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012 and NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. It was further underlined in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 where [at §27] the Supreme Court endorsed the dicta of the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) as to what kind of suffering the statute is here concerned with:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant

or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

30. The First-tier Tribunal's findings are set out from its §101. The Respondent has 14 children, all of whom are "qualifying" according to s117D Nationality, Immigration and Asylum Act 2002. He also has two stepchildren with whom he has a genuine and subsisting parental relationship. The majority of these children being British, it does not appear to have been advanced that they could reasonably be expected to relocate to Jamaica with the Respondent. The key issue, identified the First-tier Tribunal, was whether it was unduly harsh to expect any of them to remain in the United Kingdom without their father. Three children became the focus for the Tribunal, all older boys. The evidence indicated that in each of these cases, the behaviour of the boys had been extremely challenging during the period that the Respondent was absent from their lives (ie when he was in prison and immigration detention). In the case of Child A the Tribunal heard from his mother, who explained that his behaviour had worsened when his father went away, and how the Respondent was able to get that behaviour back under control after he was released. Child A's mother expressed concerns that he would "slip back into poor behaviour" if the Respondent were to be deported. The Tribunal found that it had no reason to doubt this evidence. In the case of Child B his mother (a different woman) gave evidence to similar effect and said that her son's behaviour had "massively improved" since his father came back into daily contact with him. The same could be said for her younger son, Child C. This witness has six children to cope with and the Tribunal noted that the challenging behaviour of these two children, in particular Child B, made in particularly difficult for her to manage. Her evidence was supported by a letter from an 'Early Help Practitioner'. The Tribunal found this evidence to be "compelling" and found it to elevate the distress felt by these children to the level of undue harshness. It described the circumstances faced by these mothers in dealing with their sons as "specific, unusual and exceptional" factors which meant that the appeal fell to be allowed.

31. The Secretary of State points to the guidance in PG (Jamaica), and submits that this reasoning was inadequate.

32. I am not satisfied that this ground is made out. This was not simply a family facing commonplace distress. The Tribunal identified three children for whom the impact of the Respondent's decision would be, for specific reasons, unduly harsh. Those reasons turned on the very challenging behaviour of these children, and the Respondent's key role in improving it.

33. It is true that the reasoning in the decision is brief. The Tribunal could no doubt have spent a little more time setting out the evidence. In respect of Child B, for instance, the letter from the 'Early Years Practitioner' explained that he has been placed in a 'referral unit' and that he is subject to an Education and Health Care Plan, with a focus on his difficulty in speaking. His mother was struggling to

get him up and off to school and she was met with intransigence and on occasion violence in her attempts to ensure he attended: the bundle contained photographs of injuries to her said to have been caused by this child. Other photos show the damage he caused to the family home during a tantrum. In addition to refusing to attend school Child B also repeatedly ran away from home, resulting in police involvement on multiple occasions. The Early Years Practitioner goes on to say that since the Respondent's return to the family home, Child B's behaviour has improved to the extent that he now has a 92.59% attendance rate at school and there has only been one recorded instance of "unmanageable behaviour". Having visited the family at home the Practitioner recorded that the children, including Child B, are "relaxed and happy" around the Respondent, who responds to their needs appropriately. This was the evidence which led the Tribunal to its conclusions that there were specific circumstances relating to Child B which merited a finding of undue harshness. It would no doubt have assisted the Secretary of State in understanding the decision if this evidence had been set out in more detail, but I am satisfied that the reasoning, scant as it is, was adequate.

34. I should add for the sake of completeness that in respect of Child B the evidence also included his 'Education Health and Care Plan', details of the 'Team Around the Family' discussions, a Psychological Assessment Report and a reference from his school, all consonant with the letter from the Early Years Practitioner I have summarised above. In respect of Child C the bundle contained a letter from 'One Education' Emotional Trauma Support service setting out the behavioural challenges that he faces, and the level of intensive therapy that he is being offered. All of this evidence supports the First-tier Tribunal's conclusions that these were not 'ordinary' children.

35. I therefore dismiss ground (iii).

Anonymity Order

36. The Appellant is a foreign criminal and as such he would not ordinarily have the benefit of an order for anonymity. This decision is however concerned with a number of children. I am concerned that identification of the Respondent could lead to identification of those children. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that it would be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him, any of his witnesses or any member of his family. This direction applies to, amongst others, both the Appellant and the

Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

37. Ground (i) is made out. The decision of the First-tier Tribunal to uphold the certificate imposed under s72 Nationality, Immigration and Asylum Act 2002 is set aside. I remake that part of the decision by upholding the Secretary of State's decision to certify.

38. The remaining grounds are dismissed and the decisions of the First-tier Tribunal to allow the appeal on human rights and protection grounds are upheld.

39. There is an order for anonymity.

Upper Tribunal Judge Bruce
10th March 2020