Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12683/2017 (V)**

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision on Application Promulgated**
On 13 April 2021	**On 20 May 2021**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAJEE JAMIE MCLEAN

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer.
For the Respondent: Mr M. Symes, instructed by Wilson Solicitors.

DECISION AND REASONS

1. This appeal has a long history, as its file number shows. The appellant, a national of Jamaica, appealed against the Secretary of State's decision refusing his human rights claim and maintaining a deportation order which had been made against him. The appeal was heard by First-tier Tribunal Judge Herlihy on 31 July 2018 and she sent out her decision, allowing the appeal, on 29 August 2018.

2. The Secretary of State applied for permission to appeal. There was an application dated 7 September 2020, nearly two years after the time. That application asserted,

however, that a previous application had been made, in time, on 10 September 2018, and had apparently been ignored by the Tribunal. The 2020 application attached a statement from the Presenting Officer who had made the 2018 application, and continued to rely on the grounds said to have been submitted with it.

3. The 2020 application came before Judge Rhys-Davies in the First-tier Tribunal. He accepted the statement of the Presenting Officer, and concluded that the application was in time. His decision was, however, that the application should not be admitted, not because it was out of time, but because in his view it was not appropriate to admit it, given the respondent's conduct in failing to follow up the application by appropriate, and if necessary persistent, inquiries of the Tribunal.

4. On receipt of that decision, the Secretary of State renewed her application for permission, to this Tribunal. The application was determined by Judge Blundell. He decided that Judge Rhys-Davies had not been entitled to act as he did. Having determined that the application before him was in time, he needed to decide whether there was an arguable error of law disclosed by the grounds. He did not at that stage have jurisdiction simply not to admit the application. In view of that conclusion, Judge Blundell thought it right to consider again the evidence as to whether the application was in time. He too concluded that it was. On consideration of the grounds, he granted permission.

5. In preparation for the hearing, Counsel instructed on behalf of Mr McLean, whom we shall call "the claimant", prepared a skeleton argument arguing that "the application for permission to appeal must be excluded". Mr Symes, who appeared for the claimant before us, and who had not drafted that skeleton argument, similarly sought to argue that the grant of permission should be set aside. The basis for that application was, essentially, his submission that there was reason to question the reliability of the statement of the Presenting Officer.

6. It is convenient to set out here the rules relating to issues of timeliness in relation to applications for permission to appeal. In the First-tier Tribunal, rule 33 sets out the time limits for such an application, and requires that the application "include any application for an extension of time and the reasons why such an extension should be given". Rule 34 governs the determination of an application. The options clearly envisaged by the rule are "to give permission to appeal" (Rule 34(2)), and to refuse permission to appeal (Rule 34(4)). Only in the latter case are reasons required. There is no specific power to decline the application for permission on the basis that it has been received out of time, although it may perhaps be the case that such a power can be derived from the requirements relating to time and applications for extension of time.

7. So far as concerns an application made to the Upper Tribunal, rule 21 sets out time limits. Rule 21(6) provides that an application made out of time must be accompanied by a request for an extension of time and the reason why the application was not provided in time, and that "unless the Upper Tribunal extends time for the application … the Upper Tribunal must not admit the application".

8. Rule 21(7) is as follows:

> "If the appellant makes an application to the Upper Tribunal for permission to appeal against the decision of another tribunal, and that other tribunal refused to admit the appellant's application for permission to appeal because the application for permission or for a written statement of reasons was not made in time –
>
> (a) the application to the Upper Tribunal for permission to appeal must include the reason why the application to the other tribunal for permission to appeal or for a written statement of reasons, as the case my be, was not made in time; and
> (b) the Upper Tribunal must only admit the application if the Upper Tribunal considers that it is in the interests of justice for it to do so."

9. It is clear that paragraph (7) applies only in the circumstances there set out, that is to say where the First-tier Tribunal has (i) refused to admit the application (ii) because it was out of time. Paragraph (7) does not apply where either the First-tier Tribunal dealt with an issue of timeliness by admitting the application and refusing it; nor does it apply where the First-tier Tribunal refused to admit the application for a reason other than that it was out of time. The latter was what happened in this case; and it follows that paragraph (7) did not apply to the application for permission to appeal to the Upper Tribunal. Because paragraph (7) did not apply, the only issue of timeliness to be considered by the Upper Tribunal was that of whether the application to the Upper Tribunal was made within the time limited by the Rules. In this case it clearly was.

10. It follows from that that Judge Blundell should not, we think, have considered again the question of whether the application to the First-tier Tribunal was made in time. The First-tier Tribunal's decision was not a grant of permission. There was therefore the right to renew the application for permission to the Upper Tribunal. The structure of the Upper Tribunal's rules is such that only in the limited circumstances set out in rule 21(7) is the Upper Tribunal concerned in a formal sense with the timeliness of the application to the First-tier Tribunal.

11. There remains of course the question of whether the Upper Tribunal should concern itself with such delay as a substantive matter that might cause it to decline to exercise its discretion to grant permission to appeal even in a case where it thought there was an arguable error of law. It seems to us that that possibility cannot be ruled out; but we think that circumstances where the facts are so clear at the application stage that such a reaction to them is appropriate will be rare indeed.

12. Mr Symes's submission was that the Tribunal has power to set aside its grant of permission, and that in the circumstances of the present case it should do so. As we said at the hearing, we have considerable doubt whether the power exists, and under what circumstances it should be exercised. So far as the present case is concerned, the application made to the Upper Tribunal for permission to appeal was made in time, and, as Judge Blundell's decision indicates, clearly indicated arguable errors of law. Although Judge Blundell did enquire into the timeliness of the application to the First-tier Tribunal, that was not a matter that was strictly before him. In any event, the conclusion that he reached on that issue was entirely justifiable on the

evidence before him; and could not by any stretch be regarded as so clearly wrong that he should have considered, instead, whether to refuse permission on the arguable grounds because of the history of the applications.

13. We therefore decline to enquire further into, or to interfere with, the grant of permission to appeal. We proceed to consider the Secretary of State's grounds of appeal, as argued by Mr Lindsay.

14. As we have said, the claimant is a national of Jamaica. Some precision on the facts of his immigration history is desirable. He was born on 2 December 1997. He came to the United Kingdom with his mother on 30 June 2002. Following further grants of leave, he had leave to remain in the United Kingdom until 31 March 2005. There had been an application for a further grant of leave made on 30 March 2005, that is to say within the currency of existing leave. The application was refused, but there was an appeal against the refusal, which was finally determined on 31 August 2005. By the operation of s 3C of the Immigration Act 1971, the claimant's leave therefore expired on 31 August 2005, by which time it had run for three years and two months.

15. The claimant's mother made a number of further applications for leave in the following years. One of them was successful. On 16 February 2010 the claimant was granted leave to remain, which, following an extension expired on 30 January 2017, a total period of six years, eleven months and fourteen days of leave. The claimant was convicted on 16 March 2016 and 18 August 2016 of possession of heroin, cocaine and cannabis with intent to supply. He was sentenced to eighteen months detention in a young offenders' institution. These were not his first offences. He had been convicted in October 2016 of possessing heroin, and on 16 August 2012 of common assault and possession of an offensive weapon on school premises. Following his most recent conviction, the Secretary of State gave consideration to his deportation. After taking into account submissions made on his behalf, the Secretary of State rejected the claim that his removal would infringe article 8. She therefore concluded that the relevant provisions of the UK Borders Act 2007 applied to the claimant and that she was required to make a deportation order against him. The order was made on 19 January 2017 and communicated to the claimant on 11 February 2017 (by which time his leave had expired) together with a notice of the Secretary of State's decision, which included certification under s 94B of the 2002 Act that the removal of the claimant from the United Kingdom whilst the appeal was pending would not be a breach of his human rights. The effect of that certificate was that that any appeal by the claimant could be brought only from outside the United Kingdom.

16. The claimant responded to that with further submissions. Those submissions were dealt with in a decision made on 6 June 2017, declining to revoke the deportation order and again concluding that the claimant's deportation would not breach article 8, but withdrawing the certification. It was against that decision that the claimant appealed.

17. The grounds of appeal to the First-tier Tribunal were that the claimant should not be deported because s 117C of the 2002 Act demonstrated that the public interest did not require his deportation. That section is as follows:

> "117C. Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal
(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where –
    (a) C has been lawfully resident in the United Kingdom for most of C's life.
    (b) C is socially and culturally integrated in the United Kingdom, and
    (c) There would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

18. The claimant argued that Exception 1 applied to him, and he sought to demonstrate by evidence that that was so; he also argued that if Exception 1 did not apply to him, there were very compelling circumstances countering the public interest: that is to say that sub-s (6) as interpreted by the Court of Appeal in NA (Pakistan) [2016] EWCA Civ 662 at [25]-[27] as applying to those sentenced to lesser terms of imprisonment, applied to him.

19. This is the Secretary of State's appeal against Judge Herlihy's decision, and there is no complaint about her conclusions of primary fact. The difficulty arises from her apparent confusion and arguable inaccuracy in applying the law to the facts she found. She found as follows:

> "[35] … I find that the Appellant has not lived in Jamaica since he was aged 4 ½ and I accept that he has no ties or family contacts upon whom he could rely upon on his return and accept the evidence of his mother that his family live in the UK or the USA and thus would have no support on his return. I find he is not living independently and lives with his mother and stepfather. He has spent all his formative life in the United Kingdom where he has attended school and college and has not returned to Jamaica since coming to the United Kingdom and has spent all his adult life here (three years). … I also find that the Appellant is a vulnerable young man and has a diagnosis of AHDH [sic] which has been long suspected but only very recently confirmed and in respect of which he is now prescribed medication. I found him to be a credible witness and find it likely that some of his offending was possibly linked to his own cannabis use which he said he had taken to alleviate his symptoms. … [there is also evidence of]

symptoms suggestive of an autism spectrum diagnosis [and] possibly undiagnosed special educational needs.

[36] I have also noted the report from Mr de Noronha which deals generally with the position of deportees from the Untied Kingdom to Jamaica. This finds that those returning without family support, tend to be deportees who left Jamaica as children and did not maintain contact with their country of birth and end up homeless and face myriad difficulties on return as they do not know how to operate practically or culturally in Jamaica. At section 2 of the report Mr de Noronha refers to the evidence of the high violent crime rate (among the highest in the world) and the evidence that deported persons are especially vulnerable to crime as victims of extortion and robbery and that they are instantly recognisable as foreign; are stigmatised and at increased risk of becoming a victim of crime. The author refers to the Home Office guidance for deportees indicating that deportees should use local accents and dialects and try to lodge in safe areas. Mr de Noronha also states that only 1% of Jamaicans speak English and most use Patois, Creole or Afro-English and that this is what is spoken by most Jamaicans and that the inability to speak and use the local dialect exposes deportees as it identifies them as potential targets. Further the author notes the very high rate of youth unemployment."

20. The judge had recorded and apparently accepted the claimant's mother's evidence that the claimant speaks only English and has no knowledge of any Patois. The judge also made a number of comments on the level of the claimant's sentence and his history apart from his offending. Her conclusions are as follows:

"[38] The Appellant is a vulnerable individual who would be returning without family support with a diagnosis of ADHD and a possible autism disorder to a country where deportees face a risk of violence and exploitation. I note that the Appellant is currently undergoing follow up treatment from Croydon Adult ADHD services and is prescribed medication for his condition. The Dr's report clearly referred to the Appellant's chronic issues with social interaction and communication which I find would render him additionally vulnerable on return to Jamaica. His vulnerability is evidenced by the bullying he sustained whilst imprisoned.

[39] However it is apparent that the Appellant has spent a significant period of time lawfully in the UK where he has lived since the age of 4 ½; has not left the UK and is now aged 20 having spent well over half his life living here. The respondent does not dispute that the Appellant has spent a significant period of time lawfully (although finding that only 8 years and 1 month of his residence was lawful) in the UK and that he is socially and culturally integrated. At the date of the decision it was accepted that the Appellant had been in the UK for 14 years and 7 months of which 8 years and 1 month of his residence was lawful and the Appellant satisfies paragraph 399A (a) and (b) and section 117 (C) (4) (a) and (b). Much of the period of time where the Respondent disputes that the Appellant was living in the UK without leave was when the Appellant was a minor living in the care of his mother.

[40] In considering all the evidence in the round, I find that the Appellant has established that there are significant obstacles to his integration to Jamaica and that the Appellant satisfies the requirements of paragraph 399A and section 117 C (4) and that the public interest does not require his [deportation] as Exception 1 applies. I further find that very compelling circumstances exist which outweigh the public interest in deporting him. To rebalance the scales in favour of the Appellant against deportation there must be very compelling reasons which must be exceptional and I find that in

> weighing up all the relevant factors that the Appellant has established that very compelling reasons exist to outweigh the public interest."

21. It appears to be clear that the judge found that the requirements of s 117C(4) were met, and that, in addition, there were very compelling circumstances over and above those described in Exception 1. The Secretary of State argues that neither sub-s (4) nor sub-s (6) applies to this claimant. Both sub-s 4(c) and sub-s (6) require a measure of assessment, and the judge failed to show how the circumstances she identified, including in particular the claimant's vulnerability, demonstrated either very significant obstacles to his integration into Jamaica or very compelling circumstances outweighing the public interest in deportation. Further, the judge's conclusions on s 117C(4)(c) were flawed on their face, because she had undertaken an inappropriate calculation in para [39], and in para [40] she had referred not to "very significant obstacles" but to "significant obstacles", an obviously less rigorous test.

22. These are formidable arguments. In the circumstances of this case, however, it seems to us that the issues on appeal now are best addressed by examining the statutory requirements in the context of the evidence before the First-tier Tribunal Judge.

23. The first requirement is that "(a) C has been lawfully resident in the United Kingdom for most of C's life". According to the Secretary of State's calculations as set out in the decision letters, this requirement was not met. As is apparent from the passages of the determination we have set out, the judge does not seem to have concerned herself very much with the relevant calculation. We set out above the relevant dates and periods. The period of the claimant's lawful residence in the United Kingdom totals 10 years, 1 month and 14 days. At the date of the notification to him of the deportation order he was aged 19 years 2 months and 9 days: at the date of the decision following further representations he was aged 19 years 6 months and 4 days. In either case he had been in the United Kingdom for more than half of his life. The judge was wrong to think that the claimant met this requirement on the basis of her calculation, but, as Mr Lindsay accepted before us, it does appear that that requirement was met.

24. The second requirement is "(b) C is socially and culturally integrated in the United Kingdom". The judge's conclusion in favour of the claimant on this point was challenged by the Secretary of State in her grounds of appeal. Judge Blundell declined to regard that point as arguable, because it was clear to him that the position before Judge Herlihy after reviewing the file that the position before Judge Herlihy was that the respondent accepted that this requirement was met. That is clearly right, and before us, Mr Lindsay did not suggest that any other conclusion was appropriate.

25. That leaves "(c) there would be very significant obstacles to C's integration into [Jamaica]". The first question is whether the judge applied this requirement at all, or whether, as her words in para [40] suggest, she applied a lower test of merely "significant" obstacles. There is no doubt that the wording of this paragraph is extremely unfortunate, and quite properly gives rise to concern from the Secretary of State on behalf of the public. Nevertheless, it appears to us that it is simply a typographical error. The judge had throughout the rest of her decision correctly

referred to "very significant" obstacles. And it is also perfectly clear that she regarded the requirements of sub--ss (4) and (6) as in some sense flowing into one another. We doubt whether she was right about that; but she seems certainly to have treated the circumstances of which she was aware as constituting "very compelling circumstances" and falling within sub-s (6). So far as her assessment is concerned, therefore, we reach the view that, despite the way in which she expressed it, she did decide that there would be very significant obstacles to the claimant's integration in Jamaica, and that she applied that test despite the omission of the word "very" in her expression of it at that single point.

26. If that be the case, the respondent's attack has to be on whether she was entitled to reach that view, or alternatively whether she gave sufficient reasons for it. The grounds allude only to the claimant's vulnerability and to the time spent in the United Kingdom. They wholly omit the important matters set out in para [36] of the decision, which we have cited above and which the judge obviously regarded as important. The evidence taken as a whole, as it seems to us, is amply sufficient to entitle a judge to conclude that the claimant, as a young deportee without any family or other support, standing out by his language (if not for other reasons) as a recent arrival, being liable to stigmatisation and victimisation on that ground, and in addition suffering from social disadvantages, would face very significant obstacles in integration in Jamaica. We do not say that the judge was bound to reach that conclusion: it is sufficient that she was entitled to reach it.

27. Our conclusion is therefore that the judge was entitled to find that the claimant met the requirements of Exception 1. As we have said, her route to that conclusion appears to lack rigour; but in our judgment there is no good reason to set it aside for error of law. The Secretary of State's appeal is accordingly dismissed.

C.M.G. Ockelton

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 May 2021