IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-004053

First-tier Tribunal No: HU/05183/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

1st March 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

G B
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A Miah of UK Migration Lawyers
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 20 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge Freer promulgated on 1 June 2022 allowing an appeal on human rights grounds against a decision of the Secretary of State for the Home Department dated 30 November 2021 refusing to revoke a deportation order.

2. Although before us the Secretary of State is the appellant and Ms GB is the respondent, for the sake of consistency with the proceedings before the First-tier we shall hereafter refer to the Secretary of State as the Respondent and GB as the Appellant.

3. The Appellant is a national of Jamaica born on 1 January 1977.

4. The Appellant first entered the UK on 1 June 2002 as a visitor. Further applications for leave to remain were made thereafter, and on 18 January 2006 the Appellant was granted indefinite leave to remain. An application for naturalisation as a British citizen was subsequently refused because of the failure to disclose criminal convictions. On 28 April 2014 a notice of liability to deportation on grounds of criminality was issued; notwithstanding human rights-based representations from the Appellant a Deportation Order was signed on 24 September 2014. A subsequent appeal against this decision (ref DA/01849/2014) was dismissed on 6 May 2015 with the Appellant becoming ‘appeal rights exhausted’ on 15 October 2015 following unsuccessful applications for permission to appeal.

5. Thereafter the Appellant made a number of applications and representations seeking to remain in the UK, including pursuing a judicial review application in 2017. The most recent application was made on 9 March 2018, supplemented by further representations made on 12 September 2021. This application and further representations culminated in the Respondent’s decision of 30 November 2021 refusing to revoke the Deportation Order of September 2014, and otherwise refusing what was essentially a human rights claim.

6. The Appellant’s criminal behaviour that informed the decision to make a Deportation Order is summarised at paragraph 2 of the earlier appeal decision (DA/01849/2014), and at paragraphs 3-4 of the decision of Judge Freer. The Appellant was twice convicted of possession of drugs with intent to supply – in 2009 and 2014. There have been no further conviction since this time.

7. In addition to asserting that she is essentially a reformed character, the Appellant has both in the earlier proceedings and in the present case emphasised her family life. She has a partner, R, with whom she has two children: a son, A (born in August 2008) and a daughter, B (born in November 2013). (Fuller personal details of the family members are a matter of record on file but are not repeated here in keeping with the anonymity direction.) The two children are British citizens. Whilst the Appellant’s most recent application was pending R was granted further leave to remain for reasons linked to the Article 8 rights of the children.

8. The Respondent's 'reasons for refusal' letter ('RFRL') of 30 November 2021 acknowledges that it would be unduly harsh for the children to relocate to Jamaica, but does not accept that it would be unduly harsh for the children to remain in the UK with their father in the absence of the Appellant.

9. The First-tier Tribunal essentially reached a contrary conclusion. The appeal was allowed on human rights grounds with reference to Article 8 for the reasons set out in the Decision and Reasons of First-tier Tribunal Judge Freer.

10. The Respondent applied for permission to appeal to the Upper Tribunal. Permission was refused in the first instance on 22 June 2022 by First-tier Tribunal Judge Cox. Upon renewal, permission to appeal was granted on 6 October 2022 by Upper Tribunal Judge Rimington.

11. The Appellant has filed a Rule 24 response dated 7 December 2022 resisting the challenge to the decision of the First-tier Tribunal.

Consideration of the 'error of law' challenge

12. The Secretary of State's Grounds of challenge raise numerous issues in respect of the Decision of the First-tier Tribunal; however, in our judgement, in large part they do not establish material error of law.

13. Whilst we accept that the Judge's language in respect of the guidance in **Devaseelan** – "*I determine that Devaseelan does not apply in this appeal*" (paragraph 75) – is clumsy, it is nonetheless adequately clear that the Judge identified sufficient reasons for departing from the previous appeal decision. In considering delay with reference to **EB (Kosovo)** it is apparent that the Judge appropriately had regard to the strengthening of family life during the passage of time as a relevant factor, and such factor exists irrespective of whether it might be said that delay has been caused by the Appellant's repeat applications and representations rather than by reason of the fault of the Respondent. Criticism of the weight attached by the First-tier Tribunal to the Appellant's rehabilitation amounts to disagreement rather than identification of an error of law. The pleading at paragraph 10 of the Grounds in respect of paragraph 92 of the First-tier Tribunal's Decision appears to be wrongly premised on the notion that the reference to "*the partner's children*" was a reference to A and B, whereas in context it is actually a reference to other children of R from previous relationships. There is no substance to the suggestion that the Judge's comments as to a possible solution to concerns expressed about adequacy of accommodation creates "*an arguable impression of bias*" (Grounds at paragraph 12).

14. However, we do think that there is more substance to the criticisms of the Judge's evaluation of the potential impact on the Appellant's children in the event of her deportation to Jamaica. Further, any error in this regard was plainly material as the Judge placed very great emphasis on the impact on the children in the overall 'proportionality' balancing exercise.

15. Amongst other things the Judge had regard to the report of an independent social worker dated 9 April 2022. The social worker and her credentials are identified at paragraph 16 of the Decision of the First-tier Tribunal - where the Judge also commented that he had "*no issue with her reasoning*", and noted "*It was not directly challenged in the hearing*".

16. The report identifies particular issues relating to the Appellant's son further to a diagnosis of ASD: it is said that he finds it difficult to cope with change and that separation from his mother will impact his mental health and well-being (paragraph 17). It is to be noted that there was also evidence to the effect that he had "*spiralled downhill*" whilst the Appellant was in prison (paragraph 34).

17. In respect of the Appellant's daughter, the social work report identifies her as having "*an unpredictable type 1 diabetes which has life-threatening incidents of ketoacidosis*". It is then stated in the Decision "*Teachers have insulin training but are not allowed to administer medication if the ketoacidosis levels have risen*" (paragraph 18).

18. The Judge does not cite any further evidence in respect of the health conditions of the children.

19. The Judge additionally notes in the Decision references in the evidence to the Appellant's role as mother and carer, including her engagement in managing the particular health conditions of her children: e.g. see paragraphs 19, 33, 40.

20. We note that there is nothing in the challenge before us that undermines the essential facts of the children's respective health problems, or that the Appellant is engaged as a mother in their care including management of their health.

21. However, ultimately what we are troubled by are the references at paragraphs 67 and 70 to the potential impact on the children's health conditions in the event that they were to remain in the UK with their father in the event that the Appellant were removed to Jamaica.

22. Paragraph 67 states:

> "*I find that as a result of the refusal decision on human rights, with an outstanding deportation order still enforceable, the very life of her British national daughter is at risk. The social worker gave evidence that teachers are not allowed to administer medication to her. It must follow that while a minor (and possibly longer than that) she needs rapid access to a parent. Her father works long hours driving buses. It is conclusive that her mother must be accessible at all times.*"

23. Paragraph 70 states:

> "*It is very clear that removal of the Appellant is completely opposed to the best interests of the two children of the family. It is not at all*

clear that either would survive for long without their mother. Her son could suffer a severe long term mental breakdown due to extreme prolonged anxiety and her daughter could die from lack of emergency medical treatment. These are unacceptable risks and they factor into a proportionality assessment (see EB Kosovo)."

24. We pause to note that it is apparent from paragraph 67 that the Judge considered the risk to the life of the Appellant's daughter was determinatively in favour of allowing the appeal: "*It is conclusive…*". See further and similarly at paragraph 71: "*The compelling evidence of the need for 24/7 care of two children requires the presence in the UK of no less than two adults with parental responsibilities and the ability to administer first aid. The last criterion excludes teachers.*"

25. In our judgement there is no support in the materials on file for the Judge's conclusion that there was a risk to the lives of either or both children – "*the very life of [B] is at risk*", "*it is not at all clear that either would survive for long without their mother*".

26. In this context and generally we accept the observation of the Respondent to the effect that the social work report is to some extent an exercise of worst-case scenario involving speculation as to the likely breakdown of the marital relationship between the Appellant and R, to which catastrophisation the Judge appears to have added of his own motion that it is "*almost inevitable that the Appellant's two children would be taken into care*" (paragraph 69).

27. Be that as it may, more particularly we cannot identify anything in the evidence that the impact of the Appellant's removal on her son might threaten his 'survival'.

28. Further, we do not accept that there is anything in the evidence that suggests the removal of the Appellant would exacerbate her daughter's health condition or leave her without adequate support and management. In this context it seems to us that without evidence or reason the Judge has emphasised the inability of the school to do anything other than administer insulin. The fact that the social work report indicates that the teachers are not to administer insulin when ketoacidosis levels have risen does not mean that there is not a care plan in place in school to manage such an event. We do not accept that if the mother were not available the school - or anybody else looking after B if the ketoacidosis level should rise outside school - would not be able to take the necessary steps, which might include having B admitted to hospital. Contrary to what is implicit in the Judge's analysis, there is absolutely no evidential foundation that the school would not act appropriately in the event of ketoacidosis levels rising.

29. Indeed it is be noted that there is an observation in a consultant paediatrician letter dated 13 January 2022 that suggests control of B's diabetes at that time had been better during term time than holiday time

(when she would have been at home), noting that the Appellant had allowed the monitoring of blood sugar levels to lapse because she had not replaced a missing laptop charger.

30. In all the circumstances we cannot find any sound evidential basis, and as a corollary we could not identify any sound reasoning on the part of the First-tier Tribunal, to support a conclusion that the lives of either or both the Appellant's children would be at risk by reason of their medical conditions in the absence of the Appellant. This amounts to an error of law.

31. For the reasons identified above, plainly this was a material error.

32. Be that as it may, and for the avoidance of any doubt nothing in the foregoing should be taken as a denial that the Appellant's children have medical difficulties, and would face difficulties in the event of being separated from their mother. The Appellant's case may well have merit on this basis – and on proper evaluation it may have such merit as to entitle her to succeed on an appeal. Whether or not that is the case requires to be determined on a proper evaluation of the evidence. The instant decision is not such a proper evaluation and it is for that reason that it must be set aside.

33. Because the appeal will require to be reconsidered in its entirety we conclude that the appropriate course of action is to remit the case to the First-tier Tribunal. We do not propose to issue any specific directions: standard directions will likely suffice, but we leave this as a matter for the First-tier Tribunal alongside other aspects of case management.

Notice of Decision

34. The decision of the First-tier Tribunal contained a material error of law and is set aside.

35. The appeal is remitted to the First-tier Tribunal (Birmingham hearing centre) for decision to be made afresh by any Judge other than First-tier Tribunal Judge Freer or First-tier Tribunal Judge Cox, with all issues at large.

Ian Lewis

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

22 February 2024