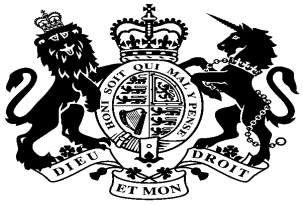

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19957/2016**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On 16th October 2017	**On 12th December 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MAH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Secretary of State: Ms Pal, Senior Home Office Presenting Officer
For MAH: Mr Cross, Counsel instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. MAH is a male national of Jamaica born in 1997. On the 19th July 2017 the First-tier Tribunal allowed his appeal against a decision to deport him. The Secretary of State for the Home Department now has permission to appeal against that decision.

2. The matter in issue between the parties is whether the First-tier Tribunal erred in its approach to the question of whether MAH's deportation would have an "unduly harsh" impact upon his British daughter.

Anonymity

3. This case turns on the presence in the UK of a young child. I am concerned that the identification of the Appellant could lead to the identification of that child. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order 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 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"

The Decision of the First-tier Tribunal

4. MAH faced deportation because the Secretary of State for the Home Department considered that he is a 'persistent offender' and as such his deportation would be conducive to the public good. Between the 11th October 2011 and the 24th December 2014 MAH had amassed 5 convictions for 10 offences including robbery, possession of cannabis, attempted robbery, violent disorder and handling stolen goods. There was evidence that he had been investigated, but not in the end charged, with a series of other offences. These included a violent assault on his sister, possession of cannabis, allowing himself to be carried in a stolen vehicle, drug dealing and burglaries. The Secretary of State believed that MAH is of bad character and that he associates with known criminals.

5. MAH based his appeal on human rights grounds. In respect of his family life he placed particular emphasis on his relationship with his partner, Ms B, and their infant daughter, born only two months before the hearing.

6. The Tribunal heard oral evidence from 6 witnesses. In addition to the Appellant himself, the Tribunal heard from his partner Ms B, Ms B's mother Ms M, his mother Mrs H, his sister Ms F and his brother Mr H. Having heard that evidence, and having regard to the evidence of criminality adduced by the Secretary of State, the Tribunal made the following findings:

    - It had not been shown that MAH was a member of a gang, but it was clear that he did associate with criminals and that he is immersed in drug culture [§ 57]

    - He had not been rehabilitated and his evidence to the effect that his daughter's birth has changed him is rejected [60]

- He is a persistent offender and although he was technically a minor when most of the offences took place, he was over 14 and can therefore be assumed to have understood the difference between right and wrong [69]

- The evidence given by family members that MAH was "kind and caring" was rejected as incompatible with his criminal record [62-67]

- MAH is in a relationship with Ms B [58] but they were not living together permanently in a committed relationship [59]. He had only moved in with her one month before the hearing and this was probably to enhance his chances in his appeal [69]

- He does have a genuine and subsisted parental relationship with his daughter in that he is named on her birth certificate and has latterly been living with her, but there is no other worthwhile evidence that makes any contribution towards her wellbeing [68]

7. Directing itself to apply those findings to the tests in paragraph 399 of the Rules the Tribunal held that it would be unduly harsh for the little girl to go and live in Jamaica with her father, noting [at 72] that she "cannot reasonably be expected" to do so, particularly given that the most recent offending was not deemed serious enough to warrant a penalty, the Appellant having received a conditional discharge. In respect of the second limb, whether it would be 'unduly harsh' for the child to remain in the UK without her father, the determination reads:

> "74….As a general rule of thumb, it is safe to say that it is in the best interests of a child to be brought up by both parents. Given the appellant's habitual use of cannabis and his poor behaviour more generally, [the HOPO] argues that it is not in the best interests of the child that the appellant is allowed to remain in the United Kingdom. If the child remains in the UK without her father she will remain in the full-time care of her mother and other family members to offer support. The appellant makes no financial contribution to the household and is unlikely to do so at least in the near future because he has never had any paid employment and there is no evidence to show that he has any realistic prospect of paid employment in the future. Apart from the appellant's presence in the household, it is hard to see any other specific contribution the appellant makes to the child's welfare and he has been residing with the child's mother for only a very short period of time. It is too soon to say whether that will last.
>
> 75. I strongly suspect as I have indicated that the reason why the appellant moved in with [Ms B] is because having read the reasons why his human rights application was refused, he has contrived a

> family life with his partner in order to try and help his deportation appeal. I reiterate the fact that although the appellant said that he decided to change his life around the day that his daughter was born he was caught in possession of an illegal substance within days of the birth".

Having made these apparently damning findings the Tribunal noted that the Appellant has managed to qualify as a level 2 football coach and that he is now making some contribution towards his community, before concluding:

> "When deciding whether it is 'unduly harsh' for the appellant's child to remain in the United Kingdom without her father I again take into account the gravity of the appellant's latest offence which was not deemed worthy of any penalty, and the length of time since his last conviction. Though the appellant was found in the company of other drug users or suppliers in 2016 he has not been convicted since 2014 when he was under the age of 18. The decision on this point is very marginal indeed, but weighing these considerations I conclude on balance that it is unduly harsh for the appellant to be removed and for the child to remain in the UK without him".

The Secretary of State's Appeal

8. The grounds are unnecessarily long and repetitive but in essence they boil down to this central complaint: although the Tribunal has purported to have applied the guidance in KMO (section 117 – unduly harsh) [2015] UKUT 543 it cannot realistically be said to have done so, given that it has not identified any adverse consequences for the child. Insofar as the Tribunal finds that as a general 'rule of thumb' that it will be in a child's best interests to live with both parents, in this case, given the findings, such a conclusion would appear to be perverse.

The Response

9. For the Appellant Mr Cross pointed out that the Tribunal clearly had the public interest at the forefront of its mind throughout the decision-making process. The determination refers extensively to the Appellant's criminality. Having directed itself to the best interests 'rule of thumb' he was not satisfied that the offending behaviour was of sufficient weight to justify deportation, particularly having regard to the fact that the Appellant was a youth offender.

Discussion and Findings

10. I have considerable sympathy with the position of the First-tier Tribunal in this matter. Having conducted a careful review of the Appellant's criminal history,

and made what appear to be eminently sensible findings on the evidence, it is now criticised for its conclusions on what might be described as a matter of weight, namely the weight to be attached to the family life shared by father and daughter. I therefore set aside this decision with considerable reluctance, given that matters of weight are, absent perversity, matters for the judge. I am however satisfied that the Tribunal did err in its approach to the impact upon the child, for the following reasons.

11. This case involved the application of a specific test in the Rules, ie whether it would be unduly harsh for the baby to live here with her mother. It is not possible to discern, from the passages I have cited, what the actual impact of the Appellant's deportation might have been on this child. The test requires appellants to demonstrate that the impact would be "severe", or "bleak" *and* that it would be "unduly" so, meaning "excessively" or "inordinately" so. The Tribunal in this case appears to have considered the latter issue, but not the former. Although paragraph 74 (set out above) does refer to the 'rule of thumb' that a child's best interests will be served by having two parents, it is by no means clear from the rest of the paragraph whether the Tribunal found that matter proven. If it did, it is hard to see why, given the way that the Tribunal expressed itself about the Appellant's contribution thus far. I am therefore satisfied that the findings in respect of whether it would be 'unduly harsh' for the child to live in the UK without her father must be set aside.

12. The second limb of the Secretary of State's appeal concerns the findings that it would not be "reasonable" for this British child to go and live in Jamaica. Although I think that it is a finding that no-one takes issue with (given the terms of the Secretary of State's policy) it is of course an application of the wrong test. The test was, as discussed above, whether it would be unduly harsh.

13. It follows that the decision must therefore be set aside and the Secretary of State for the Home Department succeeds in her appeal.

14. A final issue arose before me, although not raised by the Respondent: Mr Cross pointed out that another element of the Appellant's case is the extent to which the deportation might interfere with his private life. Submissions were made on whether the exception in paragraph 399A of the Rules might apply, and no findings were made. I am told that the Appellant has had indefinite leave to remain in the UK since he was three years old.

15. Given the extent of the judicial fact finding required I therefore consider it appropriate that this matter be remitted to the First-tier Tribunal.

Decisions

16. The determination of the First-tier Tribunal contains material errors of law and it is set aside.

17. The decision will be re-made in the First-tier Tribunal.

18. There is an order for anonymity.

Upper Tribunal Judge Bruce
9th December 2017