Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16876/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 June 2019	**On 12 July 2019**

Before

THE HONOURABLE MR JUSTICE FREEDMAN
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F E
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to continue the order. We make clear that the order is not made to protect the appellant's reputation following his conviction for criminal offences but to protect the interests of his children. 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 both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr Z Jafferi, Counsel instructed by Burton & Burton Solicitors

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal, although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The Secretary of State appeals the decision of the First-tier Tribunal Judge Swaney ("the judge") which was promulgated on 9 January 2019. The judge allowed the appellant's appeal against the Secretary of State's decision dated 27 November 2017 to make a deportation order against him from the United Kingdom by virtue of Section 32(5) of the UK Borders Act 2007.

3. The background is set out in paragraphs 1 to 10 of the decision as follows:-

> *"1. The appellant is a citizen of Jamaica born on 9 September 1969. He appeals the decision made on 27 November 2017 to refuse his human rights claim and to maintain the decision to deport him from the United Kingdom.*
>
> *2. The appellant first arrived in the United Kingdom on 12 June 2000 and was granted leave to enter as a visitor until 9 July 2000. On 18 February 2002 he applied for further leave to remain as a student. His application was refused, and he became an overstayer.*
>
> *3. On 22 December 2004 the appellant made an application for leave to remain as the spouse of a settled person. That application was refused on 19 January 2005. On 25 April 2008 the appellant was convicted of conspiracy to supply a controlled drug (class A). He was sentenced to 4 years imprisonment. On 21 November 2008 he was served with a notice of his liability to deportation.*
>
> *4. On 27 March 2009 deportation order was signed. An appeal lodged against deportation was dismissed on 23 June 2009. His appeal rights are recorded as having been exhausted on 21 July 2009 and he was deported to Jamaica on 8 September 2009.*
>
> *5. The appellant attempted to re-enter the United Kingdom in breach of the deportation order on 5 September 2011. He travelled on a British passport of which he was not the rightful holder and was refused entry. He claimed asylum. On 4 May 2012 he was convicted of entering the United Kingdom in breach of a deportation order and possession of identity documents with intent. He was sentenced to 2 years imprisonment. He lodged an appeal against*

conviction, however the Court of Appeal (Criminal Division) dismissed his appeal on 23 January 2013.

6. *The appellant's asylum claim was refused on 15 December 2015. His claim was certified as clearly unfounded under section 94(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). He had also made further submissions pursuant to article 8 of the European Convention on Human Rights (ECHR), which were rejected as not amounting to a fresh claim. The appellant was afforded an out of country right of appeal against the asylum claim.*

7. *On 24 December 2015 the appellant issued a claim for judicial review challenging the refusal of his human rights claim. His judicial review was refused and certified as being totally without merit on 10 February 2016.*

8. *Since February 2016 the appellant has made further submissions on several occasions. They were considered and rejected on 16 August 2016. The respondent did not accept they amounted to a fresh claim within the meaning of paragraph 353 of the Immigration Rules. Removal directions were set for 6 September 2016. Further representations were made on 5 September 2016. They were refused the same day; however, removal directions were cancelled as the appellant had lodged a claim for judicial review and obtained an injunction against removal. Permission to proceed with the application for judicial review was refused on 15 September 2016. The appellant renewed the application and at an oral hearing which took place on 8 December 2016, permission was granted.*

9. *The substantive hearing of the claim for judicial review was listed on 23 August 2016. At the hearing the claim for judicial review was withdrawn by consent upon the respondent agreeing to reconsider the appellant's further submissions, and that if refused, the appellant would have an in country right of appeal, the further submissions amounting to a fresh claim within the meaning of paragraph 353 of the Rules.*

10. *It is the outcome of the reconsideration of those further submissions that is the subject of this appeal."*

4. The nature of the appellant's case is summarised at paragraphs 11 to 12 and that reads:-

"11. The appellant seeks to resist his deportation on the basis that he has a family and private life in the United Kingdom. Although this has previously been considered and refused, the appellant claims that the nature and strength of his claim changed in February 2016 due to a breakdown

suffered by his wife. This led to her being sectioned under the Mental Health Act 1983.

12. *The appellant claims that in the light of his wife's mental health problems the effect of his deportation on her and upon their children is disproportionate."*

5. The family members comprise the following: the appellant who first arrived in the United Kingdom on 12 June 2000 and the circumstances in relation to him are summarised in the background; his four stepchildren, AE, GE, SaE and ShE; his son FE from a previous relationship. His son and all the stepchildren are British citizens. Two of the stepchildren are over 18.

6. The decision at paragraph 72 refers to his wife who is a British citizen. It is accepted that he and his wife are in a genuine and subsisting relationship. The relationship was formed at a time when his status in the United Kingdom was precarious. The judge said in the same paragraph: "he did not have leave to remain and what is more, they married when he was excluded from the United Kingdom and a deportation order was in force." The judge pointed out that the effect of this was that the appellant did not satisfy the first limb of paragraph 399(b) of the Rules, but that it was nevertheless important to consider the other limbs of paragraph 399(b).

7. The nature of the relationship is considered at paragraph 73. The matter has been considered in two previous appeals. On both occasions the judge found that his circumstances were not sufficiently compelling as to outweigh the public interest in his deportation. Those decisions were the starting point for the judge.

8. At paragraph 71, as Mr Tarlow has drawn to our attention, the judge said as follows:-

"Had the appellant's circumstances remained the same or similar as they were when the deportation order was made or indeed when his asylum claim was refused in December 2015, I would have had no hesitation in finding that they were not exceptional or very compelling. That is not the situation however; as I have found, the appellant's circumstances changed materially in February 2016 when his wife became ill."

9. At paragraph 74 of the decision it was stated that the appellant had been detained under the immigration powers on two occasions in 2015 and 2016. While he was detained his wife was sectioned under Section 2 of the Mental Health Act 1983 on 10 February 2016. She was admitted for assessment and treatment of suspected psychosis. She was diagnosed with a psychotic disorder.

10. The impact of the deterioration of her mental health on the family, and in particular on the children, is referred to at paragraph 75. Consistent with the medical evidence was that their mother neglected not only herself but

them as well, and that they were in a very difficult position and had to try and cope in the absence of the appellant. They were not able to do so and after their mother was sectioned social services stepped in. At least three of the children have required treatment and/or support for mental health issues as a result of what they experienced.

11. The origin of the appellant's wife's diagnosis is unclear. There have been a number of stressors, but one is the uncertainty of the appellant's status in the UK. The finding in that regard is that the judge was satisfied on the balance of probabilities that the appellant's immigration matter and the uncertainty of whether or not he would be permitted to remain in the United Kingdom was one of the factors that contributed to his wife's breakdown. It does not matter that this was not the only or even the main cause (paragraph 76).

12. Evidence was given below from the appellant's children, the independent social worker, his wife's GP and her care co-ordinator that the appellant played an important role in the wife's recovery. He gets through to her and makes sure that she takes medication and attends appointments and takes her to church and does shopping and cooks meals for the family. He meets the children's needs and ensures that the rent is paid on time. The view of the care co-ordinator is that if the appellant were removed from the UK, it is likely that this will lead to his wife being readmitted to hospital (paragraph 79 of the decision). There was evidence to like effect from the GP.

13. The appellant's wife was reported in a bad way in late 2017 and early 2018, rarely leaving the house and hallucinating. She was hearing voices and having intrusive dreams at night. A GP's letter of 4 December 2018 confirmed that she was still taking anti-psychotic medication (paragraph 82 of the decision). Although there is some improvement, she still requires considerable support from mental health services, her GP and the appellant. One of the adult children lives at home but he is only 19. The finding of the judge was that it was unrealistic to suggest that he could assume responsibility for not only caring for his mother, but also maintaining the household and the care of two minor siblings in the event that the appellant was not permitted to remain in the United Kingdom (see paragraph 84 of the decision).

14. The judge found that it would be unduly harsh to expect the appellant's wife to remain in the United Kingdom without the appellant. She could not be expected to go to live in Jamaica. There was no evidence before the Tribunal that she would have access to the support which she required. At the moment she has support from her GP, local mental health service including medical and social support and it would involve separation from some of her children and her church community.

15. The judge went on at paragraph 88 to refer to the difficulties that would occur in the event that his wife were to go to Jamaica and found at

paragraph 89 that in all the circumstances it would be unduly harsh to expect her to go and live with the appellant in Jamaica.

16. In respect of the children there were findings at paragraphs 91 to 92 and the first four lines of 93 as follows:-

> *"91. Only two of the appellant's other children are minors – ShE and SaE. Both live at home with him. I find that it is in their best interests to remain in the United Kingdom as part of their family unit that includes their mother and the appellant. They were born in the United Kingdom and have lived here all their lives and have undergone all their education here. Although they have visited Jamaica, ShE and SaE must have been very young at the time and are not likely to retain many, if any, memories of this.*
>
> *92. The evidence from the appellant, his wife, the children and the independent social worker is all consistent and confirms that the appellant has a genuine and subsisting parental relationship with ShE and SaE. They are his stepchildren, but he has been involved in their upbringing for a significant period of their lives and it is clear they regard him as their father.*
>
> *93. It is apparent from the evidence of the appellant's children who were living at home when their mother became ill that they were significantly negatively impacted by her illness. This impact was exacerbated by the appellant's absence. ShE and SaE both highlight the emotional impact of being separated from their father. …".*

The minor children were at a vital stage of their education, in the final stage of secondary education undertaking major public exams and it would be very disruptive for them if they were expected to go and live with the appellant in Jamaica.

17. The essential question in this case is whether there are very compelling circumstances, such that the deportation should not take effect. This arose in the following circumstances. The appellant is a 'foreign criminal' as defined in section 32 of the UK Borders Act 2007. He is not a British citizen and he was convicted of an offence and sentenced to a period of imprisonment of at least 12 months. Section 32(4) conclusively treats the deportation order of a foreign criminal as conducive to the public good and section 32(5) provides that the respondent must make a deportation order in respect of a foreign criminal subject to section 33. An exception to deportation is where removal will be contrary to the United Kingdom's obligations under the Refugee Convention, the ECHR or under EU treaties.

18. The question arose because under section 32 of the 2007 Act, the original deportation decision was made under the automatic deportation provisions because the sentence with the index offence was four years. The appellant appealed the deportation decision on human rights grounds.

The appeal was directly against the deportation at the time in 2009, but the appeal was dismissed and he was deported to Jamaica in 2009. The effect of the deportation order was that the appellant was excluded from re-entering the UK for ten years.

19. The judge rightly recognised the weight given to the public interest in the appellant's deportation. She recognised that the public interest included not only protection of the public, but also the need to deter others from committing offences and the social revulsion at the nature of the crime: see paragraph 68-70 of the decision as follows:

> *"68. I must give weight to the public interest in the appellant's deportation. I have taken account of all the evidence before me in carrying out an evaluative exercise in which I have balanced the public interest in the deportation of foreign criminals together with the need to make a proportionate assessment of any interference with article 8 rights. I have had regard to the fact that the public interest includes not only protection of the public, but also the need to deter others from committing offences and the social revulsion at the nature of the crime.*
>
> *69. In this case, the appellant has two convictions that mean he is liable to deportation. The first, which led to the making of a deportation order, is for conspiracy to supply class A drugs. He received a sentence of four years' imprisonment in respect of that offence. The second is a conviction for possessing identity documents with intent. This was a British passport to which he was not entitled, which he used to attempt to re-enter the United Kingdom unlawfully in 2011. He received a sentence of two years' imprisonment for that conviction. The appellant also has a conviction for entering the United Kingdom in breach of a deportation order. The appellant pleaded guilty to entering the United Kingdom in breach of the deportation order but pleaded not guilty to other offences of which he was convicted.*
>
> *70. Both the drugs offence and the document offence are serious. Drugs cause serious harm within the community and are often linked to other criminal activity. The document offence is serious because it undermines the integrity of the United Kingdom's borders."*

20. The judge rightly referred to paragraph 398, 399 and 399A of the Immigration Rules.

> "***Deportation and Article 8***
>
> *398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and*

> *(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;*
>
> *…*
>
> *the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.*

21. At paragraph 61, the judge identified the correct test contained in section 117C(6) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) and paragraph 398 of the Immigration Rules. The judge identified the correct test of whether there were 'very compelling circumstances' to outweigh the undoubted public interest in deportation. At paragraph 97, the Judge quoted *NA (Pakistan)* [2016] EWC Civ 662 at [30] where the Court of Appeal said:

> *"In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8 (emphasis added)."*

22. She came to her conclusion at paragraphs 98 and 99:-

> *"98. I have had regard to what the Court of Appeal said in respect of 'very compelling circumstances' in SSHD v Garzon [2018] EWCA Civ 1225. I consider the circumstances of the appellant's wife and two minor children and the support they require very compelling over and above what is described in the exceptions to deportation and that they can also be properly termed 'exceptional' with reference to paragraph 390A of the Immigration Rules. I have once again turned my mind to the nature of the appellant's conviction that led to his deportation, his conduct since he was deported and his further convictions. These matters are undoubtedly very*

serious, and the starting point is that deportation is appropriate and necessary in the public interest. However, I consider the mental health of the appellant's wife and the impact that her difficulties have had and continue to have on her and the children are especially compelling and that the family's circumstances go well beyond what would be necessary to make out a case under the exceptions.

99. I am satisfied that the effect of the respondent's decision on the appellant, his wife and his two minor children is unjustifiably harsh and accordingly that the decision is disproportionate. I find the decision is unlawful under section 6 of the Human Rights Act 1998 as being contrary to the United Kingdom's obligations under the ECHR."

23. We now refer to the grounds of appeal. It was asserted that there was an error of law because the judge was wrong to find that there were very compelling circumstances. It was submitted that the wife's condition does not satisfy the high threshold of very compelling circumstances and that great weight should be given to the public interest and required more than identifying factors over and above the exceptions 1 and 2 in order to satisfy very compelling circumstances.

24. In our judgment this was a thorough and well-reasoned decision that went through the relevant provisions in a logical way and with reference to the relevant legal framework and the evidence. As noted above, the Judge made clear at paragraph 71 referred to above that the appeal would have been dismissed if the circumstances had remained as they were at the end of 2015. The only issue that could justify a finding of very compelling circumstances was the wife's mental health following the breakdown in February 2016 and the effect on both the wife and the children. The only question in our judgment was whether the judge's findings were outside a range of reasonable responses to the evidence.

25. The judge appeared to take into account all the relevant evidence and was entitled to consider the interests of the wife and was obliged to consider the interests of the minor children. The judge gave detailed reasons for the findings with reference to the evidence. In taking into account any relevant exceptions as part of the overall assessment the judge followed the approach recommended by the Court of Appeal in *NA (Pakistan)*. As part of the overall balancing exercise conducted under section 117C(6) NIAA 2002 and paragraph 398 of the Immigration Rules the judge made clear that she had given significant weight to the public interest in the deportation of a foreign criminal who had been sentenced to a period of at least four years' imprisonment. She took into account the serious nature of the offences and directed herself properly to the relevant aspects of the public interest. Although the test of 'very compelling circumstances' is stringent in order to reflect the significant weight that must be placed on the public interest in deportation, it would not comply with Article 8 if it were wholly insurmountable. The evidence in this case showed that the

appellant's absence from the family when he was detained in 2016 had a significant impact on his wife and a corresponding and lasting impact on his children when she was sectioned. The compelling nature of their circumstances was supported by evidence from relevant professionals working with the family. The children had already suffered as a result of past events. The evidence indicated that events were likely to be repeated if the appellant were to be deported. The serious nature of his wife's mental health problems and the likely effect of deportation on her and the children could reasonably be described as very compelling. We conclude that the judge's findings were open to her and were well within a range of reasonable responses to the evidence. In our judgment paragraph 2 of the grounds does therefore not assist the respondent and we reject it.

26. Paragraph 3 of the grounds is that the wife's condition was not as serious as at the time when the appellant was imprisoned and was released from detention on 4 November 2016. There is very limited information to support this. However earlier in this judgment we have referred to how the condition of the appellant's wife was not good as at the end of December 2017 and the beginning of 2018 as referred to in paragraph 82 of the judgment and to the GP's confirmation in December 2018 that the appellant's wife was taking additional anti-psychotic medication (see paragraph 83 of the judgment).

27. In our judgment the evidence is that based upon the findings which were made and which were available to the Tribunal. On the evidence the following was established. First, there is evidence at paragraph 76 that the appellant's immigration matter and uncertainty of whether or not he will be permitted to remain in the UK was one of the factors contributing to the breakdown of the wife of the appellant. Second, at paragraph 77, the Judge said that only the appellant was able to get through to his wife to encourage her to be treated and to take medication. Third, at paragraph 79, the Judge said that the view of the care co-ordinator is that his removal would be likely to lead to his wife being readmitted to hospital. That is an important paragraph in the context of the suggestion that her condition, that the effect of some improvement of her condition, is such that her reliance on the appellant is less great. Fourth, at paragraph 83, the Judge said that despite the improvement, the effect of the appeal has caused her increased anxiety and she is concerned about relapsing. All of that was clearly accepted because as a result of all of that the judge found that it would be unduly harsh to expect the appellant's wife to remain in the United Kingdom without the appellant: see paragraph 85. It was also unduly harsh for her to go and live in Jamaica for the reasons set out in paragraphs 86-89.

28. There were also findings about the impact on the children, ShE and SaE, to which we referred above. In that regard the judge said at paragraph 94 of the judgment:-

> *"ShE and SaE are of course older than they were when their mother first became ill. They are approaching adulthood given*

> *that they are nearly 18, however I note that there is no bright line between childhood and adulthood marked merely by the fact of turning 18. Both children are still in education and are not yet leading independent lives. I note the evidence of the care coordinator about their ongoing need for counselling. SaE provides clear evidence in his more recent statement as to the ongoing impact the appellant has on his education and his ability to manage his emotions. In her more recent statement ShE gives clear evidence about the impact her mother's mental health, the appellant's absence and the ongoing uncertainty about his status has had on her education. She found it difficult to concentrate and is retaking maths for the third time. She wishes to go to university but is unsure if it will be possible for her given her difficulties."*

29. We have already referred to paragraphs 98 and 99. The suggestion in the light of that in the grounds that the appellant's wife's condition was not as serious as in 2016 is not an answer to this matter because there was ample evidence to the effect that her condition still remained serious and to the effect that she was very dependent upon the assistance of her husband. It was also suggested in paragraph 3 of the grounds that the Tribunal did not give sufficient weight to the adult son aged 19. We have referred above to paragraph 84 of the judgment in relation to the son. The suggestion that the Tribunal was wrong to form the view that it was unrealistic to suggest that a 19 year old boy could assume responsibility for not only caring for his mother but also maintaining the household and looking after the two minor children is one with which we disagree. The Tribunal was entitled to come to the conclusion that it did.

30. It was suggested also in the grounds that the role of the social services was such that in the event that the appellant was deported to Jamaica they could be relied upon to provide support. That submission in our judgment the Tribunal was entitled to find that whilst some support from social services could be envisaged, it had a plethora of evidence of dependency on the applicant including evidence from people within or connected with social services. We refer to the independent social worker, to the wife's GP and to the care co-ordinator. This was all consistent with the role of the appellant and with the dependency of the wife in relation to her health and wellbeing. The care co-ordinator was of the view that the appellant's deportation was likely to lead to a deterioration in his wife's mental health condition leading to a further readmission to hospital. This would result in social services needing to find 24 hour supported accommodation because in the past she was not able to care for herself or the children. The evidence showed that, even with the support of health and social services, the appellant's deportation was likely to have a further significant negative impact on the appellant's wife and children. The provision of such services would and could not act as an adequate replacement for the care and stability that the appellant currently provides to the family. As such, we conclude that the Tribunal did not err in assessing the potential role of health and social services.

31. It was suggested that as a matter of case law, by reference to *BL (Jamaica)* [2016] EWCA Civ 357 and *OP (Jamaica)* [2018] EWCA Civ 316 that the Tribunal erred in finding very compelling circumstances in this case. The facts in both of those cases were very different from the instant case. In this case we are talking about the mental wellbeing and ability to cope of the wife and the impact of that on the household. In our judgment all the points in paragraph 3 of the grounds are met by the fact that there was here a very well-reasoned judgment which correctly identified the high threshold and the supporting evidence and came to a conclusion that was reasonably available to the Tribunal. In our judgment, the very compelling circumstances were evident by the evidence relating to the breakdown suffered by the appellant's wife in February 2016 and her condition thereafter, coupled with the conviction of not only the family but also people within or connected with social services that the appellant played an important role in the wife's recovery and that without him, it is likely that that a removal of the appellant would lead to his wife being readmitted to hospital. It was also proven that the deterioration of the wife's condition would impact on the household generally and especially on two minor children within the house at an important stage of their teenage years. There were therefore established very compelling circumstances. Paragraph 4 is in effect a repetition of this, that the very compelling circumstances test has not been met, and the same conclusion applies as in respect of paragraph 3 of the grounds. Those grounds amount at highest disagreements with the judge's findings, but we conclude that the judge's findings were within a range of reasonable responses to the evidence.

32. Finally, in the fifth ground it is suggested that there is a reference to the fact that there is a drain on the public purse and that that should attract little or no weight in deportation cases. It is right to say that the judgment did say that treatment would be required at public expense. There is no reason to say that that is a matter of no weight at all. There is nothing to suggest that the judge placed undue weight on the issue. In any event, in our judgment the other findings were to the effect that the role of the appellant was pivotal (without him, the wife would be likely to be admitted to hospital) and could not be replaced by public bodies.

33. For the same reasons as given above we are of the view that the test has been defined and for all the reasons given in a full and very well-reasoned judgment, the Tribunal was entitled to come to the judgment there were very compelling circumstances that outweighed the public interest in maintaining the deportation order.

Notice of Decision

34. Each of the grounds of appeal are rejected and should be dismissed.

35. The First-tier Tribunal decision did not involve the making of an error on a point of law.

Signed: MR JUSTICE FREEDMAN Date: 09 July 2019