Neutral Citation Number: [2020] EWCA Civ 1032

Case No: C5/2019/1971

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
President Lane, Upper Tribunal Judges Wikeley & O'Connor
Appeal No. HU/06110/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/08/2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE GREEN
and
LORD JUSTICE DINGEMANS, VICE PRESIDENT OF THE QUEEN'S BENCH DIVISION

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Between :

Clayton Leslie Johnson	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Ramby de Mello and Tony Muman (instructed by **JM Wilson Solicitors**) for the **Appellant**
Steven Kovats QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing date : 21 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 o'clock on 6 August 2020.

Lord Justice Dingemans:

Introduction and no anonymity

1. This appeal raises issues about the lawfulness of the transfer of data to the British High Commission in Kingston, Jamaica for the purposes of an out of country appeal under Regulation (EU) 2016/679, known as the General Data Protection Regulation ("GDPR"). The appellant, who is the subject of the data, refused to consent to any transfer of data for the purposes of his appeal and maintains that such a transfer of data is not permissible without his consent. The appellant contends that he was therefore unable to have a lawful out of country appeal, and says that the remedy is to grant him leave to enter so that he can have his appeal determined in the United Kingdom.

2. The appeal is from a decision of the Upper Tribunal (Immigration and Asylum Chamber) (Mr Justice Lane, President; Upper Tribunal Judge Wikeley; and Upper Tribunal Judge O'Connor) dated 12 March 2019. The Upper Tribunal dismissed an appeal from the decision of the First-tier Tribunal ("FTT") (Judge Clements President; Designated FTT Judge McCarthy; and FTT Judge Carter) which had heard on 17 July 2018 an appeal by the appellant against the decision of the respondent Secretary of State to refuse his human rights claim.

3. When the appeal was heard the appellant was at the High Commission in Kingston, Jamaica, and the FTT was sitting in Birmingham, UK. They were linked by video-link. The appellant gave evidence by video-link. The appellant did not object to the fact that the proceedings were by video-link (and this appeal, heard under restrictions imposed by the COVID-19 pandemic, was heard remotely by video-link) but objected to the fact that giving live evidence from Jamaica involved a breach of both EU and domestic data protection laws. The appellant also contended that he was the victim of unlawful discrimination.

4. The appellant was granted anonymity before the FTT and the Upper Tribunal. At the beginning of the hearing Lord Justice Lewison raised with the parties whether the appellant should be granted anonymity. No request for anonymity was made by either party. Although anonymity was ordered before the FTT and Upper Tribunal I can discern no current basis for ordering the anonymisation of the appellant's name, and no such order should be made.

The circumstances giving rise to the appellant's deportation

5. The appellant was born on 30 April 1993 and is a Jamaican citizen. He is now aged 27 years. He arrived in the UK in December 2001 when he was aged 8 years on a 6 month visitor's visa, but overstayed when his leave expired on 26 June 2002. His immigration status was never regularised.

6. The appellant was convicted in September 2008 (when he was aged 15 years) of three offences of robbery. The appellant began a relationship with a British national in 2010. He was convicted in 2011 (when he was aged 18 years) of two counts of burglary.

7. The appellant and his partner had a daughter in October 2012, and their daughter is a British citizen.

8. The appellant was convicted in 2013 (when he was aged 20 years) of possession of cannabis for which he was fined. He was served with papers as an overstayer on 14 June 2013 but remained in the UK.

9. The appellant was convicted in September 2014 (when he was aged 21 years) of travelling on the railway without a ticket and he was fined.

10. The appellant was convicted on 14 April 2015 (when he was aged 21 years) in the Crown Court at Winchester of conspiracy to supply class A drugs being crack cocaine and heroin. He was sentenced by His Honour Judge Andrew Barnett to 3 years' imprisonment. HHJ Barnett noted that the appellant had himself been kidnapped by other co-defendants in an attempt to warn him off supplying drugs in Aldershot. The appellant was found to have a lesser role than his co-defendants.

11. On 29 July 2015 the appellant was served with notice of the Respondent's decision to remove him. In August 2015 the appellant served representations to the effect that he should not be removed because of his relationship with his British partner and their child. In March 2016 the appellant applied for further leave to remain ("FLR") on the basis of his family life. On 15 April 2016 the respondent served the appellant with a deportation decision.

12. The appellant was released from imprisonment for his drugs offence in August 2016, but was detained under the Immigration Acts. On 22 September 2016 the respondent refused the application for FLR on the basis of his human rights, made a deportation decision and certified the human rights claim pursuant to section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That meant that the appellant could only appeal out of country, pursuant to section 92(3)(a) of the 2002 Act. The appellant sought permission to apply for judicial review of the decision to certify his claim. The appellant was refused permission to apply for judicial review and an appeal against that refusal was dismissed on 24 October 2017.

13. On 7 April 2017 the appellant was deported. On 5 May 2017 the appellant appealed to the FTT against the September 2016 decision. The issue for the FTT was whether the September 2016 decision was unlawful because it infringed the Human Rights Act 1998. The appellant was a foreign criminal pursuant to section 117D(2) of the 2002 Act. This meant that it was necessary to consider the provisions of section 117C of the 2002 Act.

Proceedings before the FTT

14. The appellant gave notice in skeleton arguments prepared for the hearing before the FTT that he did not consent to giving oral evidence by video-link, and did not consent to the transmission of the electronic bundle to the British High Commission in Jamaica. He produced a witness statement setting out his concerns at that time in the event that information about his activities in the UK came to the attention of certain people. Witness statements were produced on behalf of the respondent setting out the arrangements for the hearing.

15. It was submitted that the appellant should be brought back to the UK so that he could take part in his appeal without transferring his data to Jamaica. It was also submitted that the issues raised should be referred to the Court of Justice of the European Union ("CJEU").

16. The FTT heard the appeal on 17 July 2018. The FTT dismissed the objections to the use of the video-link facilities and the transfer of the bundle in the morning, giving summary written reasons. The summary reasons given on the day were to the effect there either was no transfer of personal data to a third country so that article 46 of the GDPR did not arise, or the derogation under article 49(1)(e) applied because the transfers were necessary for the establishment, exercise or defence of legal claims.

17. In the afternoon the FTT heard the substantive human rights appeal and reserved its decision. On 14 August 2018 the FTT promulgated its decision setting out why it dismissed the complaints about infringement of data protection laws, and giving reasons for dismissing the human rights appeal.

18. The FTT found that the data transferred would include data relating to the appellant and would include his personal, criminal and family history. The data that would be processed would be personal data and would include sensitive personal data. In paragraphs 156 and 157 of its judgment the FTT held that it was necessary and proportionate to override the appellant's right to object for the purposes of or in connection with legal proceedings or establishing, exercising or defending legal rights.

19. In paragraphs 159 onwards the FTT addressed the appellant's right to erasure of the data. The FTT considered and accepted assurances that the data would only be held by Home Office staff in Jamaica and that the data would be retained for no more than seven days after the hearing.

20. The FTT rejected the discrimination argument that there would be a violation of the appellant's rights under article 14 of the ECHR when read with article 8 of the ECHR.

21. The FTT did not decide if the data was transferred to a third party country and held that if it was, it was "necessary for the establishment, exercise or defence of legal claims". The FTT found, in paragraph 177 of the judgment that there was no evidence that Jamaica would seek to interfere in the workings of the British High Commission, and the FTT also found that it was speculative to suggest that the data would be intercepted by anyone else in Jamaica. The FTT was satisfied that even if there was a transfer to a third country the derogation in article 49(1)(e) of the GDPR would apply because the derogation would be necessary for the establishment, exercise or defence of legal rights.

22. The FTT also considered the effectiveness of the appellant's out of country appeal to the FTT from paragraph 184 of the judgment, having regard to the propositions that could be derived from the judgment in *R(Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380. The FTT considered the representation of the appellant, and recorded their thanks to Mr de Mello and Mr Muman who acted, as they have done before us, pro bono, finding that there was proper representation of the appellant and that the video-link facilities were adequate.

23. The FTT then turned to the substance of the appeal on human rights grounds and set out the evidence given by the appellant. The FTT referred to paragraphs A398 and 399 of the Immigration Rules and sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002. It was common ground that in circumstances where the appellant had a genuine and subsisting relationship with a qualifying partner and with a qualifying child, the relevant test was whether it would be unduly harsh for the appellant's partner and child to live in Jamaica and if so, whether it would be unduly harsh for them to remain in the UK without the appellant. The FTT considered the authorities on the meaning of the phrase "unduly harsh".

24. The FTT found that it would be unreasonable and disproportionate for the appellant's partner and child to give up their rights as British citizens to live in Jamaica. The FTT considered the welfare of the appellant's child as of primary importance, albeit not the paramount consideration. The FTT noted, in paragraph 302 of its judgment, that the appellant's partner and child had adapted to his absence in prison, and had done so since his deportation, before concluding in paragraph 302 that the effect of the appellant's deportation was not unduly harsh on the appellant's child.

The decision of the Upper Tribunal

25. The appellant appealed to the Upper Tribunal. In the grounds of appeal the appellant relied on a ground of appeal that he had been discriminated against because there was no justification for treating him differently from an appellant under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1053) who may be admitted to the UK solely for the purpose of making submissions in person at their appeal hearing. It was common ground that this ground had not been fully argued in this manner before the FTT, but the Upper Tribunal granted the appellant permission to rely on this additional ground.

26. The hearing took place on 24 and 25 January 2019. The Upper Tribunal set out the factual background, the issues before the FTT before turning to the framework of data protection law. The Upper Tribunal considered the ground of appeal relating to the right to object under article 21 and the challenge to the FTT's conclusion that relevant restrictions could be applied, and held in paragraph 38 that "the FTT directed itself entirely properly as to the interpretation and application of those provisions".

27. The Upper Tribunal confronted the right of erasure (or right to be forgotten) in article 17 of the GDPR. The Upper Tribunal noted that the FTT had examined and accepted the assurances and found as a fact that the assurances were reliable. The Upper Tribunal noted in paragraph 40 that there was no serious challenge to those findings of fact and concluded that the FTT had properly directed itself as to the right of erasure.

28. The Upper Tribunal then considered the issue of whether there had been a transfer to a third country. The Upper Tribunal noted that the FTT had left open the issue of whether there had been a transfer finding that if there had been such a transfer it was permitted pursuant to article 49(1)(e) of the GDPR. The Upper Tribunal held that if the proper approach to the question of transfer was a simple geographical test, there would be force in the appellant's argument that data was being transferred to a third country. However the Upper Tribunal considered that the data was at all material times under the control of Home Office officials when within the four walls of the

British High Commission and that, adopting a purposive interpretation, there was no transfer to a third country. The Upper Tribunal considered the terms of recital 25, which referred to diplomatic missions, and article 3 of the GDPR, together with section 207(2) of the DPA 2018.

29. In paragraph 53 of its judgment the Upper Tribunal held that transfer of data to diplomatic and consular missions was not a transfer to a third country. However the Upper Tribunal also held that any such transfer would be lawful pursuant to article 49(1)(e) of the GDPR.

30. The Upper Tribunal addressed the discrimination argument, holding that there was no discrimination in protections under the GDPR. However so far as immigration law was concerned the appellant was a third country national, and that while EU citizens had freedom of movement subject to carefully defined restrictions, non-EU citizens such as the appellant did not have such rights. This meant that discrimination on grounds of nationality was fundamental to immigration law. There was no impermissible discrimination in this case.

31. The Upper Tribunal finally dealt with the appellant's human rights grounds. On the procedural aspect of the human rights challenge, the Upper Tribunal noted the findings of fact that the FTT had made that the proceedings were fair, and found no error of law in that finding. On the substantive human rights challenge the Upper Tribunal found that the FTT had made no error of law in its approach to the question of whether it was unduly harsh on the appellant's partner or child to remove the appellant, and dismissed the appeal.

The issues on appeal

32. We are very grateful to Mr de Mello and Mr Muman who appeared pro bono on behalf of the appellant and who have provided every proper assistance to the appellant and the court. We are also grateful to Mr Kovats QC, who appeared on behalf of the respondent, and to the parties' legal teams, for their helpful written and oral submissions.

33. By the conclusion of the appeal it was apparent that the following matters were in issue on the appeal: (1) whether the appellant could object to the processing of his personal data for the purposes of his out of country appeal; (2) whether arrangements for the erasure of the appellant's personal data were sufficient; (3) whether the appellant could object to the transfer of his personal data to Jamaica; (4) whether the provision for an out of country appeal by video-link was discriminatory; (5) whether there was an infringement of the appellant's human rights.

Overview of the relevant provisions

34. The GDPR was made pursuant to article 16 of the Treaty on the Functioning of the European Union ("TFEU"). This provided in article 16(1) that everyone has the right to the protection of personal data, and made provision in article 16(2) for the European Parliament and Council to lay down rules relating to the protection of individuals regarding the processing of personal data.

35. The GDPR was brought into force. There are numerous recitals which set out the background to the GDPR and identify, in general terms, its reach and restrictions. Chapter 1 contains general provisions, Chapter II contains principles for processing personal data and Chapter III relates to the rights of data subjects. Chapter V deals with the transfer of personal data to third countries. In the UK the Data Protection Act 2018 ("the DPA 2018") has been enacted which has effect with the GDPR, at the current time.

36. We have dealt with this appeal by reference to the provisions of the GDPR save where the GDPR has specified that the scope of any exemptions is to be set out in national law. This is because the GDPR has direct effect as a Regulation, see article 288 of the TFEU, and because the DPA 2018 provides for this, see sections 1(2) and (3) and 22 of DPA 2018. It is also because the applicable provisions in this case are mirrored in the GDPR and DPA 2018. This means that there is no need to determine whether the processing of data in this particular case (involving transmission of data to the British High Commission in Jamaica concerning the appellant who was not a citizen of any EU state) fell within the scope of European Union law and I have not done so.

37. It was common ground that the appellant has a fundamental right to protect his data pursuant to the provisions of article 16 of the TFEU, the GDPR and DPA 2018. It was also common ground that the data that was processed was personal data and included sensitive personal data. It was also common ground that the FTT was a controller of the appellant's data and that the Home Office was at times both a controller and processor of the appellant's data for the purpose of the relevant statutory regimes. This obviates the need to refer to the relevant provisions of the GDPR and actions of the FTT and Home Office which have made this so. It was common ground that the appellant's convictions comprised "sensitive personal data".

38. Article 6(1) of the GDPR sets out circumstances in which processing of data may be lawful in the absence of specific consent. Processing of data will be lawful if "(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller". Section 8 of the DPA 2018 provides that lawful processing includes "processing of personal data that is necessary for (a) the administration of justice".

39. Article 9(1) of the GDPR sets out circumstances in which processing of sensitive personal data may be lawful in the absence of specific consent. It will be lawful where "(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity" (article 9(1)(f)). Article 10 of the GDPR provides that the processing of data relating to criminal convictions shall be carried out only under the control of official authority or when the processing is authorised by Union or national law providing for appropriate safeguards for the rights and freedoms of data subjects.

40. It was also common ground that any limitation of the fundamental right to the protection of personal data must be strictly necessary, see *R(Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2WLR 857 at paragraph 9. Necessity should be justified on the basis of objective evidence. The proportionality of the limitation on the fundamental right must also be assessed. If there are less restrictive measures that can be taken, they should be taken. Data can only be

processed lawfully, see article 6 of the GDPR and also the guidelines on derogations set out by the European Data Protection Board which was established pursuant to article 68 of the GDPR.

Whether the appellant could object to the processing of his sensitive personal data (issue one);

41. Article 21 of the GDPR sets out the right to object to the processing of personal data. The data subject has the right to object and the controller shall no longer process the data "unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims".

42. In my judgment the proceedings in the FTT are covered by the words "the establishment, exercise or defence of legal claims". This is because the appellant is contending that his rights to a family life were impermissibly infringed by his removal from the UK. That involved the assertion of his legal claim under the Human Rights Act 1998 and the respondent's defence of that legal claim. This means that the appellant did not have the right to object to the processing of his data for the purposes of hearing the appeal.

43. Further article 23 of the GDPR, headed "Restrictions" provides that Union or member state law may restrict by way of legislative measure, which it is common ground refers to the DPA 2018, the rights provided in article 21, so long as the restriction "respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard … (f) the protection of judicial independence and judicial proceedings … (j) the enforcement of civil claims".

44. The relevant restrictions on the right set out in article 21 of the GDPR provided for by article 23 of the GDPR are set out in the DPA 2018 at section 15 and schedule 2. The parties identified two relevant paragraphs being paragraphs 5 and 14.

45. Paragraph 5 of schedule 2 of the DPA 2018 is headed "information required to be disclosed by law etc or in connection with legal proceedings". Paragraph 5(3) provides that the "the listed GDPR provisions do not apply to personal data where disclosure of data- (a) is necessary for the purpose of, or in connection with, legal proceedings … (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights" to the extent that the application of those provisions would prevent the controller from making disclosure. In my judgment the transfer and disclosure of the data was necessary for the legal proceedings, being the appeal to the FTT. Further the transfer and disclosure of the data in the bundle was necessary for the purpose of establishing the appellant's human rights claim and for the respondent's defence of that claim.

46. In my judgment this restriction of the right to object is necessary and proportionate because it permits the appeal to take place. Mr de Mello made the point that the appeal need not take place if there was an in country right of appeal, and that would be a less intrusive and therefore proportionate way of protecting the appellant's legal rights. However the scheme of section 94B of the 2002 Act provides for an out of

country appeal. Proceedings by way of judicial review to challenge the respondent's decision to certify under section 94B of the 2002 Act were dismissed.

47. The out of country appeal is the mechanism by which the appellant may seek to establish that removal infringed his human rights, protected by the Human Rights Act 1998 which gave domestic effect to the European Convention on the Protection of Human Rights and Fundamental Freedoms ("ECHR"). The fact that an appeal to the FTT could take place in the UK does not mean that the out of country appeal to the FTT ceases to be judicial and legal proceedings, or that it becomes disproportionate to permit the transfer of data. This is because the legal proceedings must be fair, the data is needed to ensure that.

48. Further paragraph 14(3) of schedule 2 provides "as regards personal data … the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice … judicial proceedings". In my judgment preventing the hearing of the appeal would prejudice judicial proceedings, and the restriction of the right to object is necessary and proportionate for the same reasons. Therefore, in my judgment, the appellant is not entitled to object to the processing of his data in the use of video link, and by transferring a bundle to the British High Commission.

The arrangement for erasure of personal data (issue two)

49. Article 17 of the GDPR provides a right to erasure of personal data, which is sometimes known as the right to be forgotten. There must be proper protection of personal data, see generally the discussion at paragraph 122 of *C-2013/15 Tele2 Sverige AB v Post-och telestyrelsen* [2017] QB 771, in the context of data retained by providers of electronic communications services.

50. In this case there were assurances that the data which was transferred to the British High Commission in Kingston, Jamaica would be destroyed after seven days. The FTT considered these assurances and found them to be reliable. The Upper Tribunal noted that there was no serious challenge to these findings by the FTT. I can see no basis for finding that there is any infringement of the appellant's rights to erasure. It appears from the evidence before the FTT that there was proper protection of the appellant's data.

Whether the appellant could object to the transfer of his personal data to Jamaica (issue three)

51. So far as transfer to a third country is concerned, article 44 of the GDPR provides that data transfers "to a third country … shall take place only if … the conditions laid down in this Chapter are complied with by the controller and processor …". Article 45 of the GDPR provides that transfer to a third country may take place if an adequacy decision has been made by the European Commission in relation to that third country. It was common ground that no such adequacy decision had been made in relation to Jamaica.

52. Article 49 of the GDPR provides that in the absence of an adequacy decision or of other safeguards (which include binding corporate rules) the transfer can take place if "(d) the transfer is necessary for important reasons of public interest" or "(e) the transfer is necessary for the establishment, exercise or defence of legal claims".

53. We note that the FTT left open the issue of whether there had been a transfer of data to a third country. The Upper Tribunal however found that a transfer to the British High Commission in Jamaica did not involve such a transfer because the British High Commission was inviolable and protected by public international law and treaties. Mr Kovats recognised that this did not mean that the territory of the British High Commission in Jamaica became part of the UK, but he submitted that the GDPR required transfer of data to another person in the third country rather than transfer by the Home Office to the Home Office because the critical issue was to have a controller or processor in the EU.

54. I can see real difficulties with accepting Mr Kovats' proposed approach to the interpretation of article 44 of the GDPR. This is because such an approach might leave unprotected data subjects where there were insolvent controllers or processors located in the EU who had transferred data to third countries in circumstances where because it was considered not to be a transfer to a third country the data subject had no right to object on that ground. In my judgment, however, it is much better to leave this issue to be determined in a case where it is critical to the outcome. In this case it is not critical to the outcome because I agree with both the FTT and the Upper Tribunal that if the transfer of data to the British High Commission did amount to a transfer to a third country for the purposes of article 45 of the GDPR, it was justifiable pursuant to article 49(1)(e) of the GDPR. This is because the transfer was necessary for the establishment and defence of legal claims, and it was proportionate to make the transfer for the reasons given in relation to issue one above.

Whether there was impermissible discrimination against the appellant (issue four)

55. Mr de Mello identified that the appellant was treated differently from an appellant under the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) who he described as the EEA criminal for these purposes. Mr de Mello also relied on article 14 of the ECHR when read together with article 8 of the ECHR to submit that there was impermissible direct and indirect discrimination, noting that Jamaica was a non-white country when compared with EEA countries.

56. The difficulty with these submissions is, as was pointed out by the Upper Tribunal, that the appellant is a non-EU national and so he is not in a similar position to the comparators on whom he seeks to rely. This is because they are persons who can take advantage of the EEA Regulations, so there was no direct discrimination. Further there was a justifiable basis for treating non-EEA persons differently from EEA citizens, because this is a basis on which the UK is permitted to impose immigration controls. I could discern no basis for finding that there was any impermissible direct or indirect discrimination in this case. The Upper Tribunal was right to dismiss this claim.

Whether there was an infringement of the appellant's human rights (issue five)

57. It is plain that an out of country appeal may be fair, and the question is whether it was fair, see *R(Kiarie and Byndloss)*. In this case the FTT considered carefully whether the out of country appeal was fair to the appellant. The FTT considered the quality of the video hearing and held that the proceedings were fair. The Upper Tribunal could discern no error of law in the approach taken by the FTT, and neither can I. The

finding that the out of country appeal procedures in this case were fair was a finding that was properly made.

58. The FTT's finding that it would not be unduly harsh on the appellant's partner and child to remove the appellant was a finding which was open to the FTT on the materials before it. The FTT directed itself by reference to the appropriate authorities. The FTT carefully considered the best interests of the appellant's child as a primary consideration, noting that it was not the paramount or only consideration. The Upper Tribunal could discern no error of law in the approach of the FTT to the findings that were made, and in my judgment the Upper Tribunal was right in that finding.

Other matters

59. For the reasons set out above in my judgment the FTT and the Home Office were entitled to transfer a bundle containing the appellant's personal data to the British High Commission in Jamaica for the purpose of hearing the appellant's out of country appeal. I note that the FTT specifically recorded in paragraph 146 of their judgment that they understood the appellant's reluctance to trust or co-operate with the respondent, given that the appellant had been deported. It is obvious that in such circumstances the appellant is unlikely to be well-disposed to the respondent. The FTT also went on to find, in the circumstances of this particular appeal, that the appellant had good reason to object to the processing of his personal data. I say nothing more of the appellant's situation in the light of that finding of fact by the FTT.

60. However even if there had been no lawful basis, in the absence of specific consent from an appellant, to transfer a bundle for the purposes of hearing an out of country appeal, it should not be thought that the inevitable remedy will be an adjournment of the appeal so that the appellant may apply for leave to enter the UK to take part in the appeal in person. This is because even if the appeal is heard in the UK, it will involve the processing of the appellant's data. If an appellant objects to the processing of his data for the purposes of his appeal overseas it would be difficult to see why the appellant should not object to the processing of his data in the UK. In these circumstances it is not immediately apparent what would therefore be gained by adjourning the appeal so that the appellant could return to the UK. Further if an appellant objects to the processing of his data for the purposes of frustrating the appeal hearing and there is no lawful basis by which the appeal may otherwise be heard using the appellant's data, the FTT may consider that the appellant is deliberately frustrating and therefore abusing the appeal process. The FTT may in those circumstances consider whether to continue with the hearing, making it as fair as the appellant permits it to be.

Conclusion

61. For the detailed reasons given above I would dismiss this appeal. I also agree with the judgment of Lord Justice Green.

Lord Justice Green:

62. I agree with the judgment of Lord Justice Dingemans and I would also dismiss the appeal. I wish to make some additional observations about two issues arising relating

to (i) the nature of the reasons behind the right to object under article 21 GDPR and (ii) the scope and effect of articles 44 – 49 GDPR on transfers of personal data to third counties.

63. First, as has been set out above (see paragraph [1]), the appellant objected to the transfer of his personal data to Jamaica. He argued that such a transfer was not permissible absent his consent and that in consequence the only way to ensure that he could exercise his rights was to permit him to exercise an in-country right of appeal.

64. The FTT recorded (paragraph [145]) that the right to object to processing of his personal data was based upon article 21 GDPR which confers a right of objection "*on grounds relating to his or her particular situation*". The right can be exercised "*at any time"* and relates to "*processing of personal data concerning him or her*". One consequence of such an objection is that it compels the data processor or controller, as the case might be, to justify the processing on criteria set out in the GDPR.

65. The personal data in question was the hearing bundle and the transfer of data by video link. The bundle included details of the appellants prior convictions which, it was common ground, constituted "*sensitive personal data*" under the GDPR.

66. In its judgment the FTT recorded the following at paragraph [146]:

> "We understand that Appellant's reluctance to trust or cooperate with the respondent. He has no reason to believe the respondent is acting benevolently or in his interests because the respondent ordered his deportation and removed him from the UK against his wishes. We accept the Appellant has good reason for exercising his right to object to the processing of his personal data in the circumstances of this appeal".

67. The FTT went on to find that the respondent had met the criteria in the GDPR for the processing of this personal data. On appeal the Upper Tribunal proceeded upon the basis that the FTT's conclusion on this was correct and did not analyse the issue (Upper Tribunal judgment paragraphs [27ff])

68. I would, in such circumstances, limit myself to one observation. The purpose of the appeal was to enable the appellant to seek to vindicate his rights, in particular based upon his family circumstances under Article 8. In *R(Kiarie and Byndlos)* (see paragraph [22] above) the Supreme Court made clear that any person deported in a case such as this, before having been granted a right to appeal, had to be accorded an effective and fair appellate procedure for the exercise of that person's rights. In determining whether the appeal right was effective and fair the Supreme Court adopted a hands-on practical test focusing upon such matters as: the availability of legal aid and the right or ability of the deportee to obtain representation; the ability of that person to obtain access to all relevant documents and evidence; the ability of the person to access relevant video link facilities and its intrinsic quality and whether the link was sufficient to permit effective cross examination, etc.

69. I appreciate why the appellant might, understandably, feel antipathy towards the respondent and, indeed, this might be a common sentiment shared with the vast majority of deportees. The objection in this case however was not based upon

considerations such as those identified by the Supreme Court. It was based, as observed, upon the appellant's suspicion of the respondent. It is worth observing that had the appellant been accorded an in-country right of appeal all of the material that amounts to personal data and/or sensitive personal data could have been referred to in open court.

70. I do not express any definitive view given the absence of detailed argument upon the point. Nonetheless, I have some difficulty with the conclusion of the FTT that the appellant's hostility towards the respondent amounted, in context, to a good reason. This is because it is the duty of the tribunal to ensure, quite irrespective of the appellant's stance towards the respondent, that a deportee receives a fair and effective hearing. The Appellant's lack of trust in the respondent has nothing to do with the fairness and effectiveness of the proceedings or the duty of the tribunal to provide such a hearing and ensure that, so far as is necessary, the respondent cooperates to meet that standard.

71. It is the duty of the tribunal to ensure that the appellant is properly heard and given a fair hearing, including if appearing as a litigant in person; and it must ensure that the respondent discloses all relevant documents and that the video and other digital equipment is sufficient to ensure that the proceedings are conducted in a fair and effective manner.

72. In this case nothing has ultimately turned upon the acceptability of the reasons behind the appellant's refusal of consent. In particular there has been no discussion or analysis of the phrase "*on grounds relating to his or her particular situation"* in article 21 GDPR and nor has there been any consideration of the relevance of the basis of objection to the application of the GDPR more generally. It therefore seems to me that insofar as this might be an issue in another case it is a point which warrants closer analysis.

73. The second point concerns the conclusion arrived at by Lord Justice Dingemans at paragraphs [51] – [54] of his judgment concerning the scope and effect of articles 44-46 GDPR on transfers of personal data to a third country. It is common ground that because the controller and processor (ie the Home Office) was in the UK (cf Article 3 GDPR) that the GDPR regime applied. The issue is whether the transmission of the court papers and bundles to Jamaica and the transmission of data via video link to and from Jamaica amounted to the transfer of personal data to a third country. If it did then the processing of that data was required to meet the ***additional*** requirements of Chapter V GDPR.

74. Article 44 is found in Chapter V of the GDPR entitled "*Transfers of personal data to third countries or international organisations*" The basic premise behind this chapter is that if personal data flows from the EU to a third country or international organisation then the safeguards applicable within the EU, including access to remedies to protect rights, might not exist or may be much weaker. Hence there is a need for additional protection of the data subject. The basic point is well made by recital [101] of the GDPR

> "Flows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international

> cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data. However, when personal data are transferred from the Union to controllers, processors or other recipients in third countries or to international organisations, the level of protection of natural persons ensured in the Union by this Regulation should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers, processors in the same or another third country or international organisation. In any event, transfers to third countries and international organisations may only be carried out in full compliance with this Regulation. A transfer could take place only if, subject to the other provisions of this Regulation, the conditions laid down in the provisions of this Regulation relating to the transfer of personal data to third countries or international organisations are complied with by the controller or processor."

75. Article 46(1) provides that a controller or processor can transfer personal data "*to a third country*" only if the controller or processor has met certain conditions which include the putting into place of adequate safeguards. Lists of safeguards are then set out in the remainder of the article and conditions are referred to in article 49. In the present appeal the respondent argues that article 46 does not apply because there was no transfer to a third country but if it does then adequate safeguards were in place. I agree with Lord Justice Dingemans that if the article applies then adequate safeguards were put in place. I also agree with him that the better provisional view is that there was a transfer of personal data to a third country in this case. The provisional view that we both express is contrary to that expressed by the Upper Tribunal (see paragraphs 48ff of its judgment).

76. As to this Mr Kovats accepted that there had been a geographical transfer of the personal data in this case, but he argued that this was not what articles 44ff were aimed at. He argued that since the only people in Jamaica that received and handled the data were Home Office officials and that there was no risk of that data being leaked or hacked or otherwise finding its way into the hands of third parties, this was not, in reality, a transfer of personal data to Jamaica. It never left the control of the Home Office. He referred, by way of support for his argument, to recital 25 GDPR which refers to the application of the laws of Member States by reference to public international law and he cited the Vienna Convention on Diplomatic Relation of 1961 and the Vienna Convention on Consular Relations of 1963 both of which highlight the inviolability of a state's consular and diplomatic premises and documents.

77. Again it is not necessary to express a definitive view on this point, but I favour the conclusion that there was a transfer to a third country. The Upper Tribunal recited in some details the background that I have summarised and, having recognised that the GDPR did have significant extraterritorial effect, concluded (paragraph [53]) that it made good sense for the GDPR to apply to a EU Member State's diplomatic and consular premises overseas, rather than to treat any data transfer to such premises as a transfer to a third country. Echoing Mr Kovats' argument, this was "*because for all practical purposes the data remains under the sole control of the Member State*". I

agree with the Upper Tribunal that the GDPR exerts significant extraterritorial effect but, with respect, I disagree that one can, in effect, read into article 46 a complex limitation based on consular and diplomatic premises and a test based upon the "*sole control*" of a Member State. That is simply not what the GDPR says and there is in my view no basis upon which this can be inferred from the much broader words "*transfers of personal data to third countries".*

78. The transfer of data to an embassy or consulate is an illustration of such a transfer but it is not its defining parameter. The policy underlying Chapter V GDPR is that, in principle, once outside of the jurisdiction of the EU the personal data is subject to greater risk necessitating greater safeguards. The nature and extent of that risk will of course vary enormously from case to case and in the circumstance of a transfer to a foreign consulate the risk might be relatively low. In this case the data did arrive in Jamaica. The fact that it was received in the British High Commission and was handled only by Home Office officials and was subject to protections afforded under international law and was to be destroyed after the hearing, adds significant force to the respondent's argument that there were sufficient safeguards in place to protect the personal data in this third state. It does not, in my view, mean that the data never passed onto the territory of that third state. At the end of the day whilst expressing this view since this point was not determinative of the appeal, like Lord Justice Dingemans, I leave it to be resolved fully upon another occasion.

Lord Justice Lewison:

79. I agree with both judgments.