IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01129/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Skype	**On 21st December 2020**
On 1st December 2020	

Before

THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

'MS'
(ANONYMITY DIRECTION CONTINUED)

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of her family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the respondent: *Ms G Loughran*, instructed by Wilson Solicitors LLP

DECISION AND REASONS

Introduction

These are the approved record of the decision and reasons which were given orally at the end of the hearing on 1st December 2020.

Both representatives attended the hearing via Skype and the Tribunal panel attended the hearing in-person at Field House. The parties did not object to attending via Skype and we were satisfied that the representatives were able to participate in the hearing.

The Secretary of State appeals against the decision of First-tier Tribunal Judge Welsh (the 'Judge'), who, following a hearing at Taylor House on 24th February 2020, allowed the appeal of the respondent, a Jamaican national, (hereafter, 'Claimant') against the Secretary of State's refusal on 10th June 2014 of her human rights claim. That refusal was in the context of the Secretary of State having made a deportation order in respect of the Claimant on 4th June 2009, and Secretary of State previously refusing the Claimant's application to revoke that deportation order.

The deportation order was made under the automatic deportation provisions of Section 32 of the UK Borders Act 2007. The Claimant's most recent offending had resulted in a sentence of 24 months' imprisonment, for conspiracy to steal (shoplifting). Her conviction for the index offence was on 16th February 2009, with 13 previous convictions for 19 offences. Following her release from prison for the index offence, the Claimant continued to offend and by the date of the Secretary of State's decision in 2014, had 24 convictions from 32 offences, and her offending had begun almost immediately after she entered the UK in 2001, aged 26.

In the context of the Claimant's human rights application, the Secretary of State accepted that the Claimant had a genuine and subsisting parental relationship with her daughters, both British citizens, 'KS', born in May 2003, and 'ZS', born in February 2007. Both children were in the care of Waltham Forest Children's Services pursuant to a Family Court order. Whilst the Secretary of State accepted that it would not be reasonable to expect either child to leave the UK and return with the Claimant to Jamaica, the Secretary of State did not regard the effect of the Claimant's deportation, while her daughters remained in the UK, as being unduly harsh. In refusing the Claimant's application, the Secretary of State noted that the Claimant did not have a partner; and she also rejected the Claimant's appeal on the basis of right to respect for her private life in the UK.

The Judge's decision

The focus of the case before the Judge was whether the Claimant met the criteria of 'Exception 2' of Section 117C(5) of the Nationality, Immigration and Asylum Act 2002, namely whether the effect of the Claimant's deportation would be unduly harsh, in the context her family life with her two British national daughters.

The Judge provided detailed reasons for concluding that the Claimant did meet the criteria of Exception 2, at paragraphs [21] to [48] of her decision. The Judge summarised the reasons why the Claimant met the criteria, at paragraph [21], by reference to the Claimant's children:

"(1) they are children in care, with a past history of neglect and as such are very vulnerable;

(2) the only parent with whom they have ever had any contact is the [Claimant];

(3) though she was the cause of the neglect, there has been a noticeable change in the attitude of the [Claimant] over the course of the past 4 to 5 years. She is now a crucial source of support for the children, without which the emotional effect on them will be of such significance that it would have a devastating and permanent effect on [the] [sic] lives."

The Judge based her analysis, in part, on the reports of two independent social workers, whose expertise she accepted, based on their qualifications; their experience; the thoroughness of their reports; and the critical approach of the authors to the evidence before them (paragraph [22]). The Judge allowed the Claimant's appeal against the refusal of her human rights claim.

The grounds of appeal and grant of permission

The Secretary of State raised the following grounds in her appeal:

1.1. The Judge had failed to consider that the deterioration in the behaviour of the eldest child, KS, had been caused by previous unauthorised telephone contact by the Claimant with KS, rather than the absence of contact with the Claimant.

1.2. The Judge had erred in her reliance on the expert report of one of the independent social workers, Mr Horrocks. His conclusions were based on no more than generalisations and speculations. The Claimant was not, in any way, a positive role model for her daughters.

1.3. At paragraph [48], the Judge had offered no further reasons for her finding about the effects of deportation being unduly harsh, other than the weak evidence of Mr Horrocks. The Claimant's children could continue to live in the supportive environment provided by their foster carers, with assistance of Childrens' Services, as they had done for a number of years.

1.4. The Judge had failed to have regard to the high threshold for what was "unduly harsh" and in particular, had failed to consider that children would naturally be distressed by a removal of a parent.

1.5. The Judge had failed to consider that the Claimant could maintain contact with her daughters by modern means of communication, following her deportation.

First-tier Tribunal Judge O'Garro granted permission to appeal. She regarded the Judge's reasons for concluding that the effect of deportation would be unduly harsh as arguably wrong in law, as the case of Imran (section 117C

(5); children, unduly harsh) [2020] UKUT 83 (IAC) suggested that the level of emotional harm might need to rise to the level of causing diagnosable psychiatric injury to a child in order to meet the high "unduly" harsh threshold. She granted the Claimant permission to appeal on all grounds.

The hearing before us

The Secretary of State's submissions

First, Ms Cunha asserted that the Judge had failed to provide adequate reasons for why she concluded that the effects of the Claimant's deportation would be unduly harsh. She reiterated the Judge's failure to consider that the secret telephone contact by the Claimant some years earlier, as recorded at paragraph [31], had had an adverse impact on 'KS', which had resulted in problems in KS's education. This on the face of it appeared inconsistent with the importance that Mr Horrocks had placed on the security and stability of the childrens' arrangements (paragraph [38]). When we asked Ms Cunha for her submissions on paragraph [43] of the Judge's decision, and in particular, the Judge's findings, based on the report of another expert, Dr Boucher, of a significant improvement in the Claimant's attitude and relationship with her daughters, Ms Cunha disputed that there had been such a significant change.

Ms Cunha further asserted that the Judge had failed to explain the mitigating factors, in the event of the Claimant's deportation, based on support from Child and Adolescent Mental Health Services, or "CAMHS", for the Claimant's daughters. The Judge's reference at paragraph [30(2)] to the "*devastating and serious effect*" of a lack of engagement by KS with CAMHS, if the Claimant were removed, reflected the negative effect of the Claimant on her daughters. Ms Cunha asserted that Mr Horrocks had not referred to, or considered, the full history of the Claimant's interactions with her daughters, so that the conclusions in his report were flawed, although when we explored with Ms Cunha whether the claimed gaps in Mr Horrocks' analysis had been raised with the Judge, Ms Cunha accepted that the issue had not been raised.

The Claimant's submissions

In the skeleton argument on behalf of the Claimant, Ms Loughran asserted that the Judge had clearly summarised her reasons for finding that the effect of the separation of the Claimant from her daughters would be unduly harsh (paragraph [21]). Whilst the Judge granting permission, Judge O'Garro had cited Imran, this was clearly distinguishable from the Claimant's case, as the guidance in Imran related to the unduly harsh effects of deportation where there was a parental relationship with two parents.

The Secretary of State's criticism of Mr Horrocks report did not identify why his report was said to be generalised or speculative. At paragraph [44], the Judge had referred to Mr Horrocks' analysis, which reflected concerns raised by the childrens' foster carer about the effect of the Claimant's removal. Mr Horrocks had previously been involved in a parenting assessment, in the context of previous Family Court care proceedings, and

so had a good knowledge of the family. His qualifications and expertise had been unchallenged. Judge Welsh had clearly explained at paragraph [22] that she had regarded Mr Horrocks' expertise as proven, as well as placing weight on the detail in his report. The challenge that the Judge had failed to provide any reasons for her conclusion, other than the report of Mr Horrocks, was not accurate, as recorded by the Judge at paragraph [48] of her decision.

The gist of Ms Loughran's oral submissions was that the Secretary of State's challenge was effectively a disagreement with the Judge's findings. The Judge's consideration of evidence was not limited to reports of the independent social workers, Ms Pearce and Mr Horrocks, but also included the report of the Clinical Psychologist, Dr Boucher. The Judge had explained and explored the evidence in detail from paragraphs [39] and [43]. The Judge had been entitled to find that the Claimant's attitude and relationship with her daughters had significantly improved. In a balanced decision, the Judge had also considered that the Claimant appeared not to accept the effects of her 2015 offending, but nevertheless concluded that there was a genuineness and constancy of her change in behaviour (paragraph [42]). The Judge had also gone on to consider the 'Nexus report' offences (for which there were no convictions but belief in the Claimant's involvement) and was entitled to conclude that this did not affect the quality of the Claimant's relationship with her daughters.

In essence, the Judge had considered all of the relevant evidence. The criticism of Mr Horrocks, and in particular the suggestion that he had omitted consideration of gaps in the Claimant's history had never been put in the original grounds and was effectively a new ground of appeal. Even if that new ground were entertained by this Tribunal, it was without merit. There was no misdirection in law and the Judge had clearly referred herself correctly to the law at paragraphs [14] to [20], including specifically that the effect of deportation needed to be more than "severe" or "bleak", (paragraph [19] and the reference to KO (Nigeria) v SSHD [2018] UKSC 53).

Discussion and conclusions

We concluded, without hesitation, that the Judge did not err in law in reaching her decision. This was a case where, in an extensive and detailed decision, the Judge clearly explained at paragraph [21] why the effect of deportation would be unduly harsh (which we do not repeat); and she further explained at paragraph [22], why she relied upon the two independent social workers' reports, and at later on at [37], the report of a Clinical Psychologist.

The suggestion that there was an inconsistency in the analysis, because of the earlier adverse effects of the Claimant's behaviour, in contrast to the importance that Mr Horrocks had placed on the security and stability of arrangements for the Claimant's children, was answered by the Judge's consideration of the improvement in the Claimant's attitude and relationship with her daughters, including the Judge's findings about the

"*marked change*" in the Claimant's behaviour since 2015 (paragraph [39]). The Judge was unarguably entitled to make such findings, based on the expert medical evidence and her analysis of the Claimant's offending history (paragraphs [39] to [45]). Therefore any asserted inconsistency said to be because of earlier difficulties or inappropriate contact between the Claimant and her children is explained by the chronology and by the passage of time in the relationship as it improved and developed. This ground has no merit.

In relation to the challenges to the Judge's reliance on the report of Mr Horrocks, first, we accept Ms Loughran's submission that any challenge to a gap in Mr Horrocks analysis is not included in the grounds of this appeal, for which permission was granted. We reflected on the authority of Latayan v SSHD [2020] EWCA Civ 191 and the importance of focussing on grounds in respect of which permission was granted. The assertion that Mr Horrocks had not considered the full history of (the Claimant's children (specifically the period of the Claimant' unauthorised contact with her daughters) was not a ground in the application for permission, and we do not grant permission now. Second, and for completeness, we considered the ground and concluded that it does not have any arguable merit. As was clear to the Judge, Mr Horrocks' knowledge of the Claimant's children extended from 2013, when he carried out the parenting assessment which had resulted in the children being place in long-term care (paragraph [29]), to 2019, when he produced his report dated 7th October 2019 (paragraph [22]). The Judge noted that Mr Horrocks had "*long-term involvement with this family*" and had an "*in-depth knowledge of their circumstances*." There was, as Ms Cunha candidly accepted, no challenge by the Secretary of State before the Judge, criticising Mr Horrocks' report, in terms of its contents, to which we were directed; nor any challenge to Mr Horrocks's expertise. In these circumstances, such a criticism of Mr Horrocks' report now, even if it were justified (which we do not accept that it was) cannot amount to an arguable error of law by the Judge. The Judge had also plainly considered the involvement of Waltham Forest Childrens' Services and their foster carers when evaluating the effects of deportation on the Claimant's children, in particular in the context of the Claimant's increasing involvement in her daughters' lives, with tangible benefits (paragraphs [45] to [46]). The Judge set out at paragraph [47] the conclusion of Mr Horrocks, which referred to the loss of the Claimant for her daughters as having:

"*lifelong consequences in terms of their emotional wellbeing/health, their educational and professional development and their overall quality-of-life and functioning in society"*

In the circumstances, we concluded that the challenge that the Judge had failed to consider the positive impact of Childrens Services and foster parents was without merit. We also conclude that it was not necessary for the Judge to refer specifically to modern means of communication (e.g. phone or video communications) as a mitigating factor against the effects of separation, when the Judge had considered expressly the importance

and positive benefits of the Claimant's increasing involvement (including face-to-face) with her daughters.

We considered lastly the challenge that the Judge had misdirecting herself on what was meant by "unduly harsh". We are reminded by the recent authority of HA (Iraq) v SSHD [2020] EWCA Civ 1176, that what is "unduly harsh" must be considered in the context of the strong public interest in the deportation of foreign criminals and the underlying question is whether the harshness which the deportation will cause for the children is of a sufficiently elevated degree to outweigh that public interest. That public interest was clearly in the Judge's mind, as she considered not only the Claimant's previous convictions, at paragraph [2], but also her likely involvement in further offending (paragraphs [33] to [35]). The Judge reminded herself correctly of the authority of KO (Nigeria) v SSHD [2018] UKSC 53, as well as the public interest in deportation (paragraph [18]). The Judge's conclusions about the unduly harsh effect of deportation, at paragraph [48], must be fairly read in the context of her earlier references.

The Judge had concluded that the effect of deportation would be unduly harsh, because, to repeat, at paragraph [22], she had found that:

"*the emotional effect on them will be of such significance that it would have a devastating and permanent effect on [the] [sic] lives.*"

The Judge was unarguably entitled to conclude that the Claimant's circumstances fell within "Exception 2" of Section 117C of the 2002 Act, in a decision that was clear and detailed in its reasons. The Secretary of State's challenge discloses no error of law and in the circumstances, her appeal fails and is dismissed.

Notice of Decision

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

The decision of the First-tier Tribunal stands.

The anonymity directions continue to apply.

Signed J Keith Date: 14th December 2020

Upper Tribunal Judge Keith