



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00123/2014

THE IMMIGRATION ACTS

Heard at Belfast – Bedford House
On 12th January 2015

Determination Promulgated
On 17th February 2015

Before

UPPER TRIBUNAL JUDGE KING TD

Between

MISS S D

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr McTaggart, Counsel instructed by McLernon Moynagh
For the Respondent: Mr Shilliday, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Portugal born on 1st January 1981. The appellant arrived in the United Kingdom on 29th September 2011. She was arrested on arrival having been found to be in possession of a quantity of concealed drugs. She was convicted

of drugs offences on 23rd November 2012 and sentenced to a term of imprisonment in excess of three years. Part of that sentence, one year and seven months, was imprisonment with a further one year eight months on licence. The drugs were cocaine and diamorphine. The appellant became involved in drug smuggling due to her limited financial situation and took a calculated and deliberate risk.

2. By reason of the conduct of the appellant the respondent was satisfied that the appellant would pose a genuine, present and sufficiently serious threat to the interests of public policy/public security if she were allowed to remain in the United Kingdom. Accordingly a decision was made to make a deportation order under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006, the order made in accordance with Regulation 24(3) of the EEA Regulations.
3. The appellant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Fox and Mr Charles O'Brian (non-legal member) on 23rd April 2014.
4. The Tribunal upheld the concerns of the respondent and dismissed the appeal under the EEA Regulations and also under Article 8 of the ECHR.
5. The appellant seeks to appeal against that decision, contending in particular that the Tribunal did not consider fully the aspect of risk to the community and also failed to properly consider the interests of K, her child.
6. Permission to appeal was granted in respect of the assessment of the child's best interests. Thus the matter comes before me in pursuance of the grant of leave.
7. Mr McTaggart, on behalf of the appellant, relies upon the detailed grounds of appeal.
8. At the outset of the appeal I sought to clarify with the parties the essential issues at large.
9. It seems to me that those issues are firstly whether or not at the time of the decision the Tribunal were properly entitled to come to the conclusion that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy/public security if she were allowed to remain in the United Kingdom and that her deportation is justified under Regulation 21. The second issue related to her child K and whether it was reasonable in the circumstances to expect K to accompany her mother in a return to Portugal. The third issue was whether if that were not the case adequate consideration had been given to the welfare of K.
10. It was also said in the submissions of Mr McTaggart, in the grounds of appeal, that the Tribunal had been unduly critical of the appellant such as to donate a degree of bias towards her. In that latter capacity it was said that it was unfair of the Tribunal to comment in paragraph 6 of the determination that the appellant claimed that her

crimes were not “that serious”. It was contended that at no stage did the appellant or her Counsel assert that fact.

11. Mr Shilliday, on behalf of the respondent, invited me to find, having regard to paragraph 3 of the appellant’s skeleton argument, that there was certainly an attempt in that paragraph to indicate that the appellant was operating at the lowest level of the drugs trade, acting at best out of desperation and at worst exploitation. He invited me to find that there was an attempt to downplay the serious nature of the offence and that the comments by the Tribunal were open to be made.
12. He seeks to contrast that comment with the sentencing remarks of the Judge as set out in Annex B to the respondent’s documents that she was carrying a substantial amount of heroin in her body to a value of some £25,600 to £45,000. The Judge indicated that had it not been for the fact that she fell to be sentenced with a Mr D she would have received a higher sentence as the sentence of three years and three months was imposed.
13. As to the risk presented by the appellant it is to be noted that this offence was the appellant’s first introduction to Northern Ireland. It was noted from the probation report that the appellant was struggling to maintain employment and meet her basic needs and that of her daughter whilst living in Portugal. Despite reported efforts to attain regular work she suggests her financial situation was very limited. Thus it was that she accepted the suggestion of being a mule for cash. It was suggested that the financial reward would have assisted her to “get established” in Northern Ireland and to provide a good quality of life for herself and her daughter.
14. At paragraph 9 of the determination the Tribunal indicate that they have paid particular attention to the Judge’s sentencing remarks. The Tribunal noted that upon release from custody the appellant may qualify for housing assistance and qualify for benefits which may make her life easier. It was noted that she had secured a number of certificates whilst in prison in the hope of improving her employability in the United Kingdom. The Tribunal went on, however, at paragraph 19 to say as follows:

“She will have to contend with everyone else in the labour market, particularly those who have a more proficient command of the English language and have no convictions against them. She confirmed to the probation worker and confirmed to us today, that it was the temptation of easy money that prompted her taking these substantial and dangerous risks, by smuggling class A drugs into United Kingdom.”

15. The Tribunal went on at paragraph 25 in these terms:

“There can be no suggestion that she has integrated into society in Northern Ireland. We are aware of a brief period when she was released on bail, between her initial arrest and her subsequent trial where she lived with her aunt. She confirms our suspicions that her crime was one of opportunism, fuelled by a

desire for financial gain. We have concerns that because of her criminal record, the lack of English language skills, qualifications, support network and social contacts that there will be a strong temptation to become involved in criminal activity once again. This appellant has been engaged in criminal activity at the upper end of the scale i.e. drug smuggling. There is every probability, in our view, on the evidence before us today, that given any temptation she would re-engage in illegal activity. That temptation would be even greater as a result of her lack of finances.”

16. Thus it was that in paragraph 28 the Tribunal expressed that it was satisfied on the evidence that the personal conduct of the appellant supports the decision that she represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society.
17. Challenge is made to that finding first of all on the basis that there was little consideration of the probation report which showed a “low likelihood of reoffending” and “no evidence of other lifestyle factors relating to offending behaviour”.
18. Mr Shilliday, on behalf of the respondent, invited me to find that the approach taken by the Tribunal to the probation report set out in paragraph 20 of the determination was a proper one in all the circumstances. It is to be noted that in his sentencing remarks the Judge specifically gives little weight to the pre-sentence report precisely because the appellant had been less than honest with the author of that report, in particular that she had sought to disguise the fact that accompanying her was indeed K’s father. The judgment was as follows:

“These came to light on 29th September 2011 when you arrived at Belfast/International Airport in the company of another person who was the subject of some interest by the UK Border Agency.

You initially denied that you had any knowledge of this person and the most that you eventually admitted was that you had met him at the airport. It now emerges that not only did you know him but he is in fact the father of your 3 year old child. And that means that the court has to have a certain scepticism about what you told Probation, because you certainly didn’t tell Probation that this gentleman was the father of your child, and also about your whole background and the reason why you were tempted to engage in this pernicious enterprise.”

The Judge went on to indicate that he was not attaching significant weight to what was said to the probation officer, given that she did not tell him the whole truth about her situation.

19. Mr McTaggart invites my attention to the skeleton argument that had been submitted before the Tribunal and highlighted in that document was a number of

features affecting risk which he submits were not properly considered by the Tribunal. He submits that the risk of reoffending would be lower because of the impact of the period of custody and the fact of the separation from K. The rehabilitative impact of custody is also stressed together with the fact that the appellant has completed a number of courses and qualifications whilst in prison. It was said that her conduct in prison was exemplary. Further that upon her release she would be subject to licence conditions for a period of twenty months.

20. He said that K is well-settled into a life in Belfast and that the appellant has the support of K's father with whom she shares a final shared residence order. He said that the index offences were out of character.
21. It was also argued that the prospects of successful rehabilitation are significantly greater in the UK than if she were forced to return to Portugal.
22. Mr Shilliday submits that those factors are largely a matter of speculation. At the time of the decision the Tribunal was considering somebody who was in custody and somebody who had misled the probation officer charged with her case in important aspects.
23. More particularly he argued that the issue of rehabilitation in the United Kingdom as opposed to Portugal was misconceived, particularly in the light of the decision of **Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC)**.
24. In that connection he invited my attention to head note 3 of that decision which reads as follows:

“For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.”

25. He submits that in this case there has been no integration. The appellant arrived in Northern Ireland and committed an offence in the process. There has been a period in which she was living on bail but that was a limited period and under the threat of imprisonment. Her association he submits with Northern Ireland outside the prison environment is limited.
26. It seems to me and I so find that that argument has a degree of merit.
27. It is clear that the offence was committed because the appellant wanted to come to Northern Ireland and establish a life for herself but had neither the means to do so

and that led to offending and it is the conclusion of the Tribunal that that risk remains.

28. Looking at the reasons as a whole I do not find that they have omitted from their consideration any significant factor that would materially alter that assessment of risk. They paid little regard to the probation report for the reasons as given. They noted the lack of integration of the appellant in society and the difficulties which she would face in further integration in terms of language and qualifications, I find little merit in saying that their assessment of risk was not entirely open to them to make.
29. It is also a matter of some concern that the father of K is now established in Northern Ireland. It is not clear whether he is working or not working. He was someone who seemingly accompanied the appellant at the time of the commission of the offence.
30. The next issue is whether it is reasonable for K to return to Portugal with the appellant or whether her best interests are to be protected by her remaining in Northern Ireland with her mother.
31. Mr McTaggart contends that the whole issue of her best interests was not properly attended to. He relies upon the decision of **JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC)**. That case indicates that there is a duty imposed by Section 55 requiring the decision-maker to conduct a careful examination of all relevant information and factors. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the interrelated tasks of identifying the child's best interests and then balancing them with other material considerations. He stressed that whether the duties imposed by Section 55 have been duly performed in any given case will invariably have been intensely fact-sensitive and contractual. Mr McTaggart submits that the decision of the respondent is defective in any event because it was not conformed to those stricter requirements.
32. It is clear in the decision letter of 14th January 2014 that consideration was given to K as set out as follows:

“The Secretary of State is aware that your daughter K, came to the United Kingdom on 15th November 2011. At this time you were on bail for your index offences. Your daughter lived with you and her paternal great aunt, M C. Your daughter is now in the care of her father, B S, having been made subject of an interim residence order by the courts due to your incarceration. It is clear therefore that there is another family member in the United Kingdom who is considered capable of caring for your daughter. Notwithstanding this, you claim your daughter resided with you in Lisbon prior to coming to the United Kingdom. There is nothing in the interim residence order that excludes your daughter returning to Portugal with you should it be decided that it is in her best interest to do so. The Secretary of State is satisfied that your daughter would not be deprived of the perks of EU citizenship should she return to Portugal.

Given that you were arrested on arrival in the United Kingdom and spent a relatively short time on bail prior to being imprisoned, the Secretary of State does not consider that you formed any family or private life here. In addition, Article 8 of the ECHR does not give the right to choose where you live. Indeed you have spent the majority of your life in Portugal. You speak the language and have claimed that you were able to gain employment, albeit limited.”

33. Mr McTaggart contends that the Secretary of State did not, however, embark upon a determination of the best interests of the child as she was required to do so.
34. The Tribunal in JO at paragraph 9 cited Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690 in which Lord Hodge set out some seven principles that should be applied in the approach to Section 55. Of particular relevance was the importance to ask the right questions in an orderly manner to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play. It was important to have a clear idea of a child’s circumstances and of what is in a child’s best interests before asking oneself whether those interests are outweighed by the force of other considerations. There needs to be a careful examination of all relevant factors.
35. There are a number of unusual features in this case. The first is that K resided with her mother and/or aunt in Portugal at all times prior to the appellant coming to the United Kingdom for the purposes of committing a criminal offence. It was only during the period of bail that K came to the United Kingdom in the company of her aunt and it would seem that both she and the appellant and aunt lived together during the year upon which the appellant was on bail. Given the nature of the offence which was committed it was clearly inevitable that at the end of that period of bail there would have been a custodial sentence imposed which indeed there was. During that period, which continues to the First-tier Tribunal hearing, K lived with her father.
36. Her circumstances were considered in the High Court of Justice in Northern Ireland in the Family Division, particularly in the Office of Care and Protection. There are a number of decisions in the papers. By order of 20th March 2013 an interim residence order was granted to the father and an interim contact order was granted to the appellant so that reasonable contact with the child could be as agreed. Restrictions were also placed upon the removal of K from the jurisdiction so that it is clear that where a residence order is in force no person may be removed from the United Kingdom without the written consent of every person with parental responsibility or without leave of the court.
37. At the time of the hearing there was a joint residence order in place in the sense that the residence order was made in the favour of K’s father but it was envisaged that upon release from prison maintenance for K would be a matter as between the parties.

38. Thus it seems to me that the important consideration in this case was that the interests of K had been considered by the appropriate authority and relevant orders made.
39. That situation was acknowledged by the Tribunal as can be seen from paragraph 29 of the determination. It is relevant to note that from 29th November 2012 to 23rd April 2014, nearly eighteen months, K had been with her father and the appellant had been in prison. That was the situation that had been considered by the appropriate High Court Family Division and approved.
40. The First-tier Tribunal embarked upon enquiry at paragraphs 29 and 30 in relation to Section 55 and it is clear from the context of paragraph 30 that they proceeded on the basis of K living with her father and he allowing her to have contact with the appellant in Portugal.
41. The precise basis upon which Mr S is able to remain in Northern Ireland is far from clear given that, according to the finding of the Tribunal he has little motivation to find employment and rather lives on benefits. It is difficult to imagine therefore that he is exercising EEA treaty rights. However, the position as at the time of the hearing was that he had been granted a residence order in relation to K. It seems in those circumstances entirely understandable why the Tribunal view the best interests of K in that light. Clearly her interests have been considered elsewhere.
42. Criticism is made of the Tribunal that they underestimated the amount of time K had spent with the appellant during the course of her life. As is set out in paragraph 33 of the determination, in which the Tribunal expressed themselves satisfied that it was in the best interests of the child to remain with the father or whoever the High Court may consider appropriate given her tender age. It was noted that K had established no family or private life except with her limited time with her mother in the United Kingdom. It was said that she had spent more time with her grandaunt and father than her mother. That is a matter of some contention.
43. I note, however, that there is a document, a statement from the appellant to the High Court of Justice in Northern Ireland Family Division dated 24th May 2013.
44. It would seem that K, who was born on 12th January 2009, lived with the appellant at her address in Lisbon until 29th September 2011, that is nearly three years and two months, and thereafter she lived with the appellant's sister in Portugal and then lived with the sister and appellant for a year in the United Kingdom before the sentence of 20th November 2012.
45. Although that may be mathematically an error it does not, as it seems to me, materially affect the considerations that applied. As can be seen from paragraphs 29 and 30 the Tribunal approached the matter on the basis that the court had awarded a

residence order to Mr S, however, it recognised in paragraph 33 an alternative to that situation, commenting as follows:

“If the father of the child were to return to Portugal with them this would be an enhancement for their productive family and private life in Portugal. It is acknowledged that he has no reason why he could not return to Portugal. The appellant also confirms she has contacts and family in Portugal. The child will accrue a benefit from enjoying Portuguese and UK culture from both parents if she is to travel between the two countries.”

46. Thus it was envisaged either that the child should stay in the United Kingdom with her father or to return with him to Portugal.
47. In any event the Tribunal had borne very much in mind the reality that what should happen to K upon release of her mother would be very much a matter for the High Court to determine. K could not return to Portugal without permission to do so from the court.
48. The submissions of Mr McTaggart are largely premised on the basis that it is in the interests of K to remain in the United Kingdom and that the appellant should also remain with her. The situation has somewhat moved on from the Tribunal decision in that the appellant was released from custody in June 2014 and has subsequently been the primary carer of K, the father not now living with the child. She has the benefit of the joint residence order.
49. That, however, was not the position that was before the Tribunal and it is important to make that distinction clear. At the time of the Tribunal’s consideration of the best interests of K the appellant was in custody. The basis of K coming to the United Kingdom perhaps was not fully clarified but it clearly was to be with the appellant whilst on bail. She had lived with the appellant before. The Tribunal envisaged that one alternative would be for K to return to Portugal to be with her parents or parent as before.
50. As Mr Shilliday indicated, given that the appellant came to the United Kingdom solely for the purpose of committing criminal offences it would be extraordinary that that enabled her to claim a right to remain thereafter. K was, as I have indicated, in the United Kingdom during the period of her mother’s bail but the appellant played little part in her care thereafter for obvious reasons.
51. Although the matter is somewhat more complicated than otherwise might be case I do not find there to be any obvious error of approach taken by the Tribunal in relation to the best interests of the child. She can either stay in the United Kingdom under directions of the High Court or return. There would seem to be little reason why, if the appellant were not in UK, K could not return live with her father or indeed to return to Portugal to live with her mother and/or father.

52. Looking at the matter overall I do not find any material error of law in the approach taken by the First-tier Tribunal. In those circumstances the appeal before the Upper Tribunal is dismissed.
53. The findings of the First tier Tribunal shall therefore stand. The appeal under the Immigration Regulations is dismissed as is that under Article 8 of the ECHR Convention.

An anonymity direction is made to protect the child

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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.

Signed

Date

Upper Tribunal Judge King TD