IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00476/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 January 2015
Extempore judgment

Determination Promulgated
On 14 January 2014

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LAURENCIA BERNICE YANKSON
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss J Isherwood, Home Office Presenting Officer
For the Respondent: Mr A Ollennu, Counsel, instructed by BWF Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Lester who allowed the appeal of Miss Yankson against a decision to refuse to revoke a deportation order. The determination was promulgated on 7 October 2014.

2. The Secretary of State sought and was granted permission on the issue of whether the judge had correctly applied the test of unduly harsh in the Immigration Rules

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and Section 117 of the 2002 Act. Section 117C of the 2002 Act states where relevant that the deportation of foreign criminals is in the public interest, the more serious the offence committed by a foreign criminal the greater is the public interest in deportation of the criminal, and there are then two exceptions that if an appellant falls within one of those exceptions then the public interest does not require deportation.

3. Miss Yankson's submissions before Judge Lester were that she has a genuine and subsisting relationship with a qualifying child and that the effect of her deportation on the child would be unduly harsh. It was accepted by the Secretary of State that she did have a genuine and subsisting parental relationship with a qualifying child.

4. The issue was whether or not the judge had correctly applied the test of unduly harsh.

5. In paragraph 45 of the determination Judge Lester made a number of findings of fact which included, and these findings are not disputed by the Secretary of State, that she is in a relationship with a British citizen and they have lived together since August 2013 and it is a genuine and mutually supportive relationship; that she has no immediate family in Ghana and has no relationship with her extended family there; that the child who is a British citizen attends infant school and attends her local medical centre for treatment for asthma and eczema and that the conclusions of the independent social worker state that the child's best interests and welfare would be better safeguarded and promoted in the UK rather than in Ghana.

6. The judge then refers in paragraph 48 of the determination to **ZH (Tanzania)** and says, as is well known, that although nationality is not a trump card, it is of particular importance in assessing the best interests of any child.

7. The judge then goes on in paragraph 49 to say

> "Bearing in mind also the provisions of section 117C(5) which again uses the words 'unduly harsh' in the context, I note that [the child] has spent all her life with her mother, that she has already suffered the emotional distress of a father who abused her mother and then abandoned them. To lose another father figure, to whom she has become genuinely attached cannot be anything but harmful. The report of the independent social worker also dealt with whether her welfare would be best served were she to travel to Ghana and concluded that that would have a 'negative impact' on her wellbeing. She would have no family members, no accommodation, no income, no access to medical care and would have her education disrupted."

8. In paragraph 50 the judge also makes reference to the Secretary of State's policy document of November 2009 "Every Child Matters" and the judge finds that the child's "best interests, her life chances would be jeopardised were she to go with her mother to Ghana and goes on to say "In my view, the test of unjustifiable harshness is satisfied taking into account all the circumstances of this appeal".

9. As Mr Ollennu said, the question was whether the deportation of the mother which would be followed by the departure of the child, is unduly harsh for the child. Clearly it is in the best interests of that child to be with her mother and it appears the judge has made a finding that it would be in the best interests of the child to remain with her mother in the UK as opposed to with her mother in Ghana.

10. That however is not the test. The test is not simply what are the best interests of the child. It is whether taking into account what those best interests are, it would be unduly harsh for her to leave the UK if her mother is deported.

11. The Secretary of State was unable to find the judicial definition of unduly harsh and relies upon a dictionary definition for "unduly" meaning "to an unwarranted degree" "inordinately" and "harsh" to mean "cruel or severe". It may well be that those are dictionary definitions but as Mr Ollennu says, the issue of whether something is unduly harsh or not is something that is apparent from just the mere use of those words.

12. That, however, means that it is not simply a question of whether it is going to be harsh for the child to depart with her mother but also whether in the context of all the factors it would be unduly harsh. As Mr Ollennu says, it is necessary to look at all the matters. It is important to look whether or not the harshness and the best interests of the child are outweighed by other matters.

13. One of the significant issues that the judge has not considered is that Miss Yankson in her witness statement says in paragraph 22:

> "Somehow my employers told the police that I had lost the company about £70,000 which was untrue to the best of my knowledge. I strongly believe that my employers came up with that allegation as they faced being fined for employing an illegal immigrant."

14. At paragraph 23 of her witness statement she goes on to say:

> "On 15 May 2009 I attended Southwark Crown Court and pleaded guilty. I did not imply that I was guilty of the crime but I was compelled to enter a guilty plea as the police and prison had regular meetings with me regarding separation from my child should the investigation go on and kept threatening me that if I am found guilty I could be separated from my child for a long time, something I did not want to happen. I therefore had no other choice than to plead guilty in order to get a lenient sentence."

15. Mr Ollennu says that by pleading guilty she accepts that she has committed the crime. From her witness statement she clearly does not accept that she committed the crime. The judge at Southwark Crown Court was not informed that this was the basis upon which she was pleading guilty. Had he been so informed he would not have accepted a plea of guilty. In his sentencing remarks he says "You have pleaded guilty fairly late to the most serious count of fraud." The judge took into account

that it must have been ghastly for her to give birth in prison but against that he refers to her having applied for a job which was a position of high trust.

16. He says:

> "It was a reasonably complex fraud and you did it carefully. You were continuing to do it and you were only caught because you phoned in pretending you were a claimant when you were supposedly off sick."

He then sentences her on that basis.

17. The First-tier Tribunal Judge has not taken this into account. The judge has taken into account that she was convicted and sentenced to eighteen months' imprisonment but does not take into account the fact that she denies having committed that offence. Nor does the judge in paragraphs 49 and 50 take into account the whole of the evidence in assessing whether, given that it is in the child's best interests to remain in the UK with her mother and to avoid any disruption, the offences committed by the mother and the context of those offences. Those are issues which have to be taken into account in assessing whether the subsequent departure of the child along with her mother is unduly harsh in that context.

18. That failure by the judge to look at all of those matters renders the determination of the judge unsafe. She has erred in law in failing to properly assess the evidence before her in assessing whether or not it would be unduly harsh for the child to remain in the UK and I therefore set aside the decision.

19. So far as future conduct of the matter is concerned, it seems to me that this should go back to the First-tier for a proper assessment of whether it is unduly harsh for this child to depart with her mother. The findings of fact set out in paragraph 45 remain but evidence as to unduly harsh should be heard.

CONCLUSION

The appeal of the Secretary of State is allowed.

The appeal is remitted to the First-tier Tribunal to be heard with the findings of fact set out in paragraph 45 retained.

Signed Date 13th January 2015

Upper Tribunal Judge Coker