Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00642/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 November 2015	**On 26 November 2015**

Before

THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKOSUA SAKYIWAA

Respondent

Representation:
For the Appellant: Ms A. Fijiwala, Presenting Officer
For the Respondent: Migrant Law Partnership

DECISION AND REASONS

1. This is the Secretary of State's appeal from a decision of FtT Judge Dineen promulgated on 23 January 2015 allowing the respondent's appeal against a decision that she should be deported from the United Kingdom on public policy grounds.

2. The respondent is a national of Ghana born in November 1974. She is 40 years old.

3. She states that she entered the United Kingdom in June 2005. In January 2009 she contracted a marriage by proxy to Dutch national of Ghanaian

origins. Her husband was an EEA national exercising Treaty rights in the United Kingdom.

4. On 24 August 2009 she was issued with a residence card as evidence of her status as a spouse of an EEA national exercising such rights. On 25 January 2013 she applied for permanent residence as a spouse under regulation 15 of the EEA Regulations 2006 as amended (the Regulations).

5. On 20 June 2013, at the Crown Court at Snaresbrook, she was convicted of four counts of ill-treatment of a person who lacked capacity. The conduct occurred between 27 February and 23 April 2012 when the respondent was employed as a Health Care Support Worker at Whipps Cross Hospital. She had worked at the hospital for two years. She worked with elderly bed-ridden patients, some of whom suffered from dementia or other mental impairment; she supported them in washing, dressing and sanitary functions. Her verbal and physical interactions with these patients had been observed by student nurses who considered her behaviour inappropriate. Her offender manager indicated that although her conduct did not involve her inflicting serious physical harm, it was nevertheless spiteful and callous but any further details of precisely how she ill treated four patients are not available on the papers before us.

6. On 23 August 2013 she was sentenced by HHJ Lamb to four months imprisonment on each count; one count was to be served concurrently, the others consecutively, making a total of twelve months imprisonment. She was of previous good character and the judge noted that she had expressed remorse. The judge also sentenced two co-defendants and indicated in the sentencing remarks that between them their conduct involved a grave breach of trust, had damaged the trust that had previously existed between patients their families and the hospital and undermined the reputation of her colleagues and the hospital.

7. On 2 April 2014, the Secretary of State made a decision to deport the respondent with removal directions to Ghana by reason of the threat she posed to public policy. A report from NOMS was obtained. At the same time two further decisions were taken: to refuse the respondent's application for a permanent residence card and to cancel her present residence card. We understood from Ms Fijiwala that both these supplementary decisions were based entirely on the assessment of the present threat that the respondent posed to public policy.

8. The respondent would have completed her criminal sentence some around February 2014 but was held thereafter in immigration detention until released on bail in August 2014 with conditions of residence and reporting. Her bail address was not the matrimonial home as she stated that she wanted to avoid acrimony resulting from the publicity given to her offending behaviour and conviction.

9. The hearing before Judge Dineen took place on 26 August 2014. The respondent gave evidence but her husband did not attend as he could not

secure his employer's consent to his taking leave that day from his job as a bus driver. Up to date pay slips confirming his employment were placed before the judge.

10. The rival submissions before the judge focused on the extent to which the respondent continued to represent a threat to the public generally or vulnerable elderly people in particular. This in turn depended on the risk assessment compiled by offender manager in May 2014 in response to Home Office inquiries, as well as his assessment of the respondent's evidence of remorse and insight not her offending behaviour. We note that the presenting officer for the Secretary of State observed that there was no evidence of current matrimonial cohabitation.

11. Judge Dineen expressed himself satisfied 'having heard the evidence of (the respondent) that she now realises the sort of conduct that would be unlawful and inappropriate'. He concluded that notwithstanding the repugnant nature of the offences her personal conduct does not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. He went on to assess the proportionality of the proposed deportation in the light of the fact that she has lived for a substantial period in the UK; is in a valid and subsisting marriage with a man who would not accompany her to Ghana and is integrated fully culturally and socially into the UK.

12. He accordingly concluded she could not be deported and allowed the appeal against deportation. He also allowed the appeal against revocation of the respondent's residence permit and the refusal of her application for permanent residence.

13. The Secretary of State appealed against the deportation decision only. The grounds of appeal took issue with the judge's assessment of future risk.

14. At the start of the hearing we raised with Ms Fujiwala, some concerns about the judge's decision in respect of the permanent residence application. There was no appeal against that decision, and in the event that we dismissed the appeal against deportation, the Secretary of State would be bound by the judge's decision. It seemed to us that this would mean she would be required to issue the respondent a permanent residence card, rather than merely continue consideration of it. There is a material link between the decision on deportation and permanent residence; if in truth (absent the deportation issue) the respondent was entitled to permanent residence on the basis of more than five year's residence in the UK as the wife of an EEA national who was exercising Treaty rights, then the public policy grounds for deportation should have been the higher level of 'serious grounds' rather than the basic level in fact considered by the Secretary of State and applied by the judge.

15. In response, Ms. Fujiwala made two applications in the alternative:

(i) for the proceedings to be adjourned generally for the Home Office to consider the matter and respond;

(ii) in the event that this was refused, to apply for leave to amend the appeal notice and appeal out of time against the decision in respect of the respondent's permanent residence.

16. The respondent opposed the first of these applications: she continued to be on bail restricting her liberty, she was privately paying for legal representation and would be prejudiced by this late application for an adjournment. The second application was formally opposed but acknowledged that there would be no real prejudice if we granted it and adjourned that part of the appeal for further consideration.

17. We considered there was substance to the objection to the first application. We refused it for these reasons. We granted the second application and adjourned the appeal against the permanent residence entitlement for further consideration. Our reasons for the latter decision are as follows:

(i) An entitlement to permanent residence would require satisfaction by the relevant decision maker that the respondent was party to a genuine marital relationship with an EEA husband who had exercised Treaty rights continuously for the five years before the decision in issue.

(ii) It was common ground that the respondent was not living with her husband at the time of the hearing; he did not attend the hearing; there was no evidence as to the nature of their relationship in 2014/15 or indeed throughout the period of the proceeding five years.

(iii) There was evidence that the husband was working in 2014 but no evidence that that had been the case for the previous five years.

(iv) There was, therefore, no evidential basis for the judge's decision allowing the appeal against the permanent residence decision outright, as opposed to declaring it to be outstanding and requiring reconsideration by the Secretary of State in the light of the outcome on the deportation appeal.

(v) There was no prejudice to the respondent in the course proposed. If the Secretary of State's appeal succeeded and the deportation had to be remade, there would need to be clarity as to the basis on which it would be remade. If the deportation appeal were to be dismissed then the respondent could supply any further information relevant to permanent residence; if agreed the appeal would be withdrawn and if disputed she would have a chance to address the Secretary of State's reasons in a further hearing before this Tribunal.

18. We then resumed the hearing of the Secretary of State's appeal against the judge's assessment of risk and present threat. There were essentially three points:-

(i) The respondent had indicated that she did not realise at the time that what she had done was wrong; she showed no insight and must therefore be a risk to the elderly and vulnerable.

(ii) She had undertaken no offending course or other rehabilitation whilst in detention or subsequently.

(iii) The NOMS assessment was that the respondent was at low risk of offending generally, but a medium risk of causing physical/psychological harm towards vulnerable people. The judge had concluded that the fact that she would be unable to take employment or voluntary sector work with the elderly in the future because enhanced disclosure would be required. This did not sufficiently reduce the risk to the elderly and vulnerable of the respondent came across them in other circumstances.

19. We are satisfied that the judge was alive to the material issues in the appeal on the question of risk. He properly directed himself as to the relevant test and in our view reached a conclusion he was entitled to reach on the evidence. There was no material error of law or any other basis for us to reopen his conclusions of fact. He had had the advantage of hearing from the respondent and seeing her cross examined and his conclusions depended in significant part on his assessment of the reliability of her evidence to him. We, nevertheless, address the specific submissions advanced to us below.

20. As far as insight is concerned, we note that the papers before Judge Dineen recorded the respondent telling her offender manager (we believe in a pre- sentence report) that she did realise what she was doing was wrong was at the time of the time of the behaviour in question. This had to be balanced against the subsequent recognition at the sentence hearing and in the instant appeal that her conduct was inappropriate and unlawful, and she had acquired insight having gone through the trial process. The sentencing judge acknowledged that she had expressed remorse before him and there was a written statement to that effect from the respondent. The respondent had had an opportunity to reflect on her conduct whilst serving her sentence and subsequently and acknowledged her criminal behaviour before the judge and the judge had accepted that evidence.

21. The absence of any offending programme in custody was not surprising given the short sentence actually to be served. Six months is too short a period for NOMS to make a formal OASys assessment find an appropriate course and allocate the offender to it. An OASys assessment was made in May 2015 and showed the low risk of re-offending. The serious concern raised by the respondent’s conduct was reinforced by these proceedings and the restrictive bail conditions. The absence of positive evidence of rehabilitation was at best a neutral factor given the other conclusions.

22. There was nothing to contradict the OASys assessment that the respondent presented a low risk of harm to the public generally. There were no previous convictions or subsequent suspect conduct. With respect

to any risks to the elderly and vulnerable, despite the insight now shown, the judge was entitled to conclude that the respondent would never be in a position to work with them in respect of their personal care and hygiene. The NOMS report specifically stated that medium risk of harm was 'where she is in a position of such responsibility'. This refers to her inappropriate behaviour in the specific context of her former employment when she had control over the incapacitated patients. Such an opportunity and the repetition of the occasion for offending, would be unlikely to occur as the protective vetting regime would prevent the respondent from being employed in such work in the future. Whatever it was that caused her to behave in the way she did previously, there was no nothing in the evidence to suggest would be replicated with ordinary contact with elderly people in public life or that she would seek elderly people out in order to harm them.

23. In our judgment none of the grounds advanced amounted to a material misdirection on the question of risk. The overall conclusion on the absence of a sufficiently serious present threat was one that the judge was entitled to reach on the basis of his factual findings.

24. The Secretary of State's appeal against the deportation decision is accordingly dismissed.

Notice of Decision

The Secretary of State's appeal from the judge's decision on deportation is dismissed. The judge's decision allowing the respondent's appeal accordingly stands.

Leave to appeal to the Secretary of State out of time against the judge's decision on permanent residence is granted

The appeal on permanent residence is adjourned without a date with the following directions:

i) the Secretary of State file a notice and grounds of appeal against this decision within 14 days of the promulgation of this decision;

ii) the respondent shall have 28 days from the filing of that notice to supply any information material to the decision on which she would wish to rely ;

iii) the Secretary of State file a response to any such material within 14 days of its service by the respondent;

iv) the file be passed to a judge for directions for hearing as soon as practicable after nine weeks from the promulgation of this decision.

The respondent's bail is to continue on the same terms as before until such time as this decision becomes final.

No anonymity directions are made.

No fee was payable and no fee award is made.

Signed Date 23 November 2015

The Hon Mr Justice Blake