Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10523/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 September 2018	**On 15 October 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

C P
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Rai, of Counsel, instructed by Iqbal Law Chambers
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State against the determination of First-tier Tribunal Judge Flynn allowing the deportation appeal of CP by way of a determination promulgated on 16 July 2018. For convenience, I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a national of St Lucia born in October 1986. She entered the UK in October 2011 and was given leave to enter as a student until 1 January

2014. An out of time application for further leave was refused but the appellant remained unlawfully and her daughter was born in 2014. Shortly thereafter, the appellant was convicted of conspiring to import Class A drugs and was sentenced to five years in prison. Her partner, and father of her child, received a nine year sentence. On 31 March 2016, she claimed asylum. This was refused along with her human rights claim.

3. The appellant maintained that she had provided information about individuals who had been involved in the smuggling process and this had come to their attention. Threats had been made to her family in St Lucia and she was afraid for her safety and the safety of her young daughter if she were returned there.

4. Permission to appeal against the determination of the First-tier Tribunal was granted by Judge Landes on 14 August 2018 on the basis that the judge arguably gave inadequate reasons for the finding that there would not be a sufficiency of protection, that she applied the wrong threshold with respect to s.117 and confused the s.72 certificate with s.94. The matter then came before me on 24 September 2018.

5. **The Hearing**

6. I heard submissions from the parties. The appellant was present with her daughter. A full note of the submissions is set out in my Record of Proceedings.

7. Mr Lindsay submitted that the judge had a statutory duty to consider s.72. The respondent had not waived reliance on that. The judge had also erred with respect to her finding that there was an insufficiency of protection. He maintained the findings were brief, unreasoned and inadequate. There was no reliance on evidence to support the conclusions reached. The evidence showed that legislation was in place to deal with crime and that there was therefore provision and assistance for victims of crime. Following Horvath, it was enough to show that there was a functioning police force. There was no unwillingness on the part of the authorities to provide protection and it was an error for the judge to find that the St Lucian authorities would not do so. The judge had further erred in her consideration of the "unduly harsh" test. The appellant had received a five year sentence and so a different, higher test applied and this had not been considered.

8. Mr Rai responded. He stated that consideration of s.72 was not critical to the determination because the judge had found that the appellant was not a danger to the community. Whilst the judge had directed herself to s.72 at paragraph 9 of the determination, she then went on to consider s.94. although there had been confusion on the part of the judge, this was not material. The

judge had looked at the OASys report, had considered that there was a low risk of re-offending, disagreed with the respondent's submissions and then proceeded to consider article 8. whilst not, therefore, specifically considering the s.72 certificate, she had done what was required.

9. Mr Rai also accepted that the judge had been wrong in applying the unduly harsh test instead of considering whether there were very compelling circumstances. However in assessing all the evidence and the factors put forward at paragraphs 57-79, she had addressed all the s.117C(5) factors. So, although she had erred, this was not a material error. The appellant was the primary carer of her daughter who was a British citizen. The appellant was found not to be a danger to the community. The judge then considered whether there would be a sufficiency of protection available to the appellant in St Lucia. She considered the respondent's evidence as recited in the decision letter, then looked at the appellant's evidence and considered the appellant's fears. Her conclusions adequately dealt with the issue and reasons were given for her conclusions.

10. Mr Lindsay replied. He submitted that it was not at all clear that the judge had s. 117C and the correct test in mind. She may have considered some of the required matters but that did not mean the error was not material. A consideration of the correct test might have led to a different outcome. On the issue of a sufficiency of protection, the judge relied on the US State Department report to support her conclusion but disregarded the fact that the security forces and the police were functioning and able to provide protection even if there was corruption. No good reason was given for rejecting the respondent's submissions.

11. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

12. **Discussion and Conclusions**

13. I have considered all the evidence before me and have had regard to the submissions made.

14. I note, first of all, that there is no challenge to the appellant's claim to be fearful of criminal associates of her former partner in St Lucia who had threatened her family and whom she feared would seek to harm, her and her daughter (at paragraphs 49-50). Indeed, the respondent did not seek to challenge that claim even in the decision letter.

15. It is agreed that the judge made errors, both in her failure to consider s.117C(6) and instead apply 117C(5) and in confusing s.72 with s.94. The issue as far as those two errors is concerned is whether they are material. Additionally, there

is the criticism of the judge's conclusion on the sufficiency of protection in St Lucia.

16. I deal first with the s.72 certificate. Although it was made plain to the judge in the decision letter (see paragraph 9 of the determination) *and* in the Home Office Presenting Officer's submissions (at 37) *and* by Mr Rai (at 15), that the appellant had to rebut the s.72 certificate and would be seeking to do so, the judge appears to disregard this and instead concentrates on the s.94 certificate, noting that the decision to certify the claim had been withdrawn (at 42 and 43). She makes disparaging remarks about the respondent's carelessness in believing there was still in a certificate, failing entirely to appreciate that she was the one who was careless in confusing two entirely different processes of certification.

17. Section 72 (2) provides: "*A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is –*

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years".

Section 72(10) provides: "*The Tribunal or Commission hearing the appeal –*

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)" (i.e. asylum grounds .

18. The duty of the Tribunal is clearly set out. The starting point of the assessment is the consideration of the certificate which involves the presumption that a person with a sentence of over two years (the appellant received a five year sentence) has committed a particularly serious crime and constitutes a danger to the community. It is only if these presumptions can be rebutted by the appellant that an asylum claim can be considered under the Refugee Convention. It is plain however from the judge's findings at 41-55 which culminated in the allowing of the appeal on asylum grounds, that the judge failed entirely to have regard to this statutory duty upon her. Nowhere in the assessment of the asylum claim is there any recognition of the appellant's criminal conviction, its seriousness or the presumption that she is a danger to the community. There is no engagement with the arguments made on the s.72 certificate and no finding that it had been rebutted by the appellant. Having failed to even conduct an assessment of that issue, the judge had no authority to proceed to consider, let alone allow, the appeal on asylum grounds.

19. Mr Rai argued that the error was not material because the judge had found that the appellant did not constitute a danger to the community. That finding comes rather late in the determination at paragraph 74 and as part of the article 8 assessment. It is put in this way: "*I do not agree with Ms Burrell's submission that there is any evidence to indicate that the appellant continues to pose a risk, although I accept that this possibility cannot be ruled out*". I cannot accept that this rather ambiguous finding can be used to argue that the s.72 error is not a material one. It was a finding made in another context, it is equivocal and it does not take account of the correct starting point. It may be that had the judge applied the correct approach and considered the risk in the context of the particularly serious crime committed and the need for the appellant to rebut the two presumptions identified, she may have reached a different conclusion. Whilst Mr Rai's submission is attractive on the face of it, it cannot stand particularly in light of the other errors made, which I now turn to.

20. The next error made by the judge is in relation to the issue of sufficiency of protection. The appeal was allowed on the basis that the appellant would not receive protection from the authorities and would be unable to relocate with a young child. No reasons are given for the latter finding. With respect to the availability of protection, Mr Lindsay is right to point out that the Horvath principles have not been followed. It is accepted that there is a functioning police force and legal system and that mechanisms are in place to assist even if they are not effective. A fuller assessment and better reasoning are required.

21. Finally there is the error with respect to the judge's article 8 assessment. In undertaking a proportionality assessment, the judge applied s.117C(5). That provides for an exception to the deportation of a foreign criminal *not* sentenced to imprisonment for four years or more where there is a genuine and subsisting relationship with a qualifying child and the effect of deportation on the child would be unduly harsh. The judge's assessment was based on this "*unduly harsh*" test and 117C(5) was considered (see 75, 76 and 79) whereas 117C(6) applied. That requires a foreign criminal sentenced to imprisonment of at least four years to show "*very compelling circumstances over and above*" the exceptions set out. The appellant received a five year prison sentence and so the latter provision applies. Mr Rai sought to argue that all the circumstances had been considered and the relevant factors had been taken into account but the fact remains that the judge reached her findings on the wrong legal matrix and applying a lesser test. I cannot say whether she would have reached the same conclusion had the more stringent test been applied. The respondent is right to criticize the judge for failing to correctly apply the law and failing to appreciate that more is needed in this case than the factors identified.

22. For all these reasons, I conclude that the judge materially erred in law. The decision is set aside and shall be re-made by another judge of the First-tier

Tribunal at a date to be arranged. I do not preserve any findings as they were made in the wrong context and are, therefore, unsustainable. The respondent's implicit acceptance of the appellant's claim as set out at paragraph 14 above is not disturbed by the setting aside of this determination.

23. **Decision**

24. The First-tier Tribunal made errors of law which are material to the outcome of the appeal. The decision is set aside and shall be re-made by another judge of the First-tier Tribunal.

25. **Anonymity**

26. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 3 October 2018