



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00412/2018

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 21 January 2020

On 20 February 2020

Before

**THE HON. LORD UIST
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**E F
(ANONYMITY DIRECTION MADE)**

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant (referred to as the Claimant in this decision). This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the original Appellant's (the Claimant's) children from serious harm, having regard to the interests of justice and the principle of proportionality.

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer

For the Respondent: Mr B Hawkin, Counsel, instructed by Fadiga and Co

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the Appellant in the proceedings before the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.
2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Kaler (“the judge”), promulgated on 5 August 2019, in which she allowed the Claimant’s appeal against the Secretary of State’s decision, dated 18 June 2018, to make a deportation order under Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (“the Regulations”).
3. The Claimant is a national of Italy born in 1981. She came to the United Kingdom as a baby and has, with the exception of three relatively short periods of absence, resided in this country ever since. The now uncontroversial factual background to the case discloses two features of particular note: firstly, her extremely difficult and chaotic upbringing as a child, and the consequences of this for her adult life; secondly, her offending history, which consisted of 40 convictions for 68 offences between 1998 and 2019. In making the deportation decision, the Secretary of State did not accept that the Claimant had acquired a permanent right of residence, nor that she had resided in this country continuously for 10 years. The Claimant was assessed as constituting a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and it was concluded that the Claimant’s deportation would be proportionate. Article 8 ECHR was considered by the Secretary of State, but it was said that no protected rights would be violated as result of the deportation decision.
4. In response to that decision, the Claimant asserted that her lengthy residence in the United Kingdom afforded her enhanced protection against deportation, that she had no meaningful ties to Italy whatsoever, and that in all the circumstances it would be disproportionate to remove her from this country.

The decision of the First-tier Tribunal

5. At paras 13-25 the judge summarised the Claimant’s offending history and her other personal circumstances, including the fact that she suffers from PTSD, has been dependent on drugs, and that she has two children (the eldest had been adopted and now lives in the United States, whilst the younger child lives with the Claimant’s father under a special guardianship

order made by the Family Court). Her father, who attended the hearing, was found by the judge to be a “highly credible” witness as to the Claimant’s background and current circumstances (see para 26). In light of his evidence and other documents before her, the judge found that the Claimant had acquired a right of permanent residence in the United Kingdom and had also completed 10 years of lawful residence (see paras 30-32).

6. The judge then considered the relevant legal framework with reference to a number of authorities and the 2016 Regulations. At para 43 she found that the Claimant was a “serial and persistent offender” and that whilst the more recent offending had been relatively minor in its nature, it was rendered more serious by its prevalence. Notwithstanding this, at paras 45 and 46, the judge concluded that the Secretary of State had failed to show that there were “imperative grounds” of public security justifying the Claimant’s expulsion from this country. At para 47 the judge reached the first of two alternative conclusions, namely that even on the middle tier level of protection under Regulation 27(3), the “serious grounds” threshold had not been met. At paras 48-51, the judge sets out her second alternative conclusion, to the effect that the Claimant’s deportation would, in any event, be disproportionate.

The grounds of appeal and grant of permission

7. The Secretary of State’s grounds of appeal are essentially twofold. Firstly, and with reference to paras 2-4, it is said that the judge erred in concluding that the Claimant had been entitled to the highest level of protection under Regulation 27(4) of the 2016 Regulations. Secondly, at para 5 it is said that the judge erred in her conclusion on the “serious grounds” test by failing to have regard to para 3 of Schedule 1 to the 2016 Regulations (which states that an individual’s offending history is relevant to the likelihood that their continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society). Para 5 goes on to contend:

“In view of the very many convictions received by the [Claimant], it is submitted that had the [judge] considered this, she would have seen that the ‘serious’ test has been met and that it would be proportionate to deport the [Claimant] despite her long-standing connections with the UK.”

8. Permission to appeal was granted by First-tier Tribunal Judge Holmes on 5 November 2019.
9. In advance of the hearing, both parties filed and served skeleton arguments. On behalf of the Secretary of State, it is conceded that the judge was entitled to conclude that the Claimant had acquired a permanent right of residence in the United Kingdom. The challenge to her conclusions on the “imperative grounds” test is maintained. The skeleton

argument sets out references to Schedule 1 to the 2016 Regulations and puts forward a number of factors of the Claimant's case which it is said were not properly considered by the judge, in particular when considering whether the Secretary of State had been able to show that "serious grounds" existed.

10. The Claimant's skeleton argument asserts that the Secretary of State's challenge amounts to nothing more than a disagreement with the judge's findings and conclusions.

The hearing

11. Mr Whitwell relied on the Secretary of State's skeleton argument and the grounds of appeal. He expanded briefly on the points contained therein. Mr Hawkin relied on his skeleton argument and emphasised the judge's acceptance of the Claimant's past and current circumstances, together with what he described as the "unusually" long residence in the United Kingdom.
12. At the conclusion of the hearing we reserved our decision.

Decision on error of law

13. In our judgment the judge has not materially erred in law.
14. We see some merit in the Secretary of State's challenge to the judge's conclusion on the "imperative grounds" issue. The assessment of whether an individual has accrued the necessary 10 years continuous residence in a Member State involves not simply a pre-existing permanent right of residence (which the Claimant had), but an analysis of the 10 years immediately preceding the deportation decision (that being 18 June 2008 to 18 June 2018) and whether periods of imprisonment (which the Claimant had certainly been subject to) had broken the necessary integrative links. The judge has arguably failed to carry out the necessary step-by-step approach in respect of this particular issue.
15. However, this observation may have no bearing upon the outcome of the appeal before us. The judge reached two alternative conclusions, based firstly upon the "serious grounds" level of protection, and secondly on the proportionality assessment. If these conclusions are sustainable, any error in respect of the "imperative grounds" issue is immaterial, and the first aspect of the Secretary of State's challenge is rendered otiose.
16. The Secretary of State has expressly conceded (in our view correctly) that the judge was entitled to conclude that the Claimant had acquired a permanent right of residence in the United Kingdom and was therefore entitled to rely on the middle tier of protection under Regulation 27(3) of

the 2016 Regulations. The judge was clearly well aware of the Claimant's offending and other relevant history. We agree with Mr Hawkin's description of her assessment of that history as being "realistic", in the sense that there was no attempt to gloss over the nature and extent of the Claimant's criminality, whilst at the same time recognising the very difficult circumstances faced by her over time. The grounds of appeal and the skeleton argument do not in our view acknowledge or engage with the judge's overall assessment made in the context of the "serious grounds" threshold.

17. Contrary to what is said in para 5 of the grounds of appeal and alluded to in the Secretary of State's skeleton argument, in our judgment the judge did have regard to Schedule 1 to the 2016 Regulations. She in fact quoted para 7 of Schedule 1 at para 7 of her decision. Whilst this does not represent the entirety of the Schedule, it is indicative of the relevant provisions as a whole being in the judge's mind when reaching a decision. Schedule 1 is referred to again at paras 33 and 45 of her decision. We would be slow to conclude that having repeatedly referred to Schedule 1, the judge then effectively ignored it. Furthermore, we re-emphasise the point made in the preceding paragraph that the Secretary of State's challenge fails to have proper regard to the judge's holistic approach to the "serious grounds" issue in light of the evidence before her.
18. There is no error of law in respect of the judge's conclusion on the "serious grounds" issue.
19. Even if there had been an error, in our judgment the judge was entitled to conclude that the Claimant's deportation would in any event be disproportionate. This second alternative conclusion reached by the judge is barely alluded to in the grounds of appeal. Para 5 thereof appears to suggest that if the judge had taken para 3 of Schedule 1 to the 2016 Regulations into account, she would have been bound to conclude that deportation was proportionate. This assertion is misconceived for three reasons. Firstly, we have already concluded that the judge did take Schedule 1 into account. Secondly, even if we were wrong about that, para 3 of Schedule 1 relates specifically to the question of whether an individual represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society. This question is not the same as whether it is proportionate to deport. Thirdly, once again, the grounds of appeal failed to recognise what the judge has actually said, with particular reference to paras 43-51 of her decision. In our view, she has conducted a sustainable balancing exercise, having regard to the 'pros' and 'cons' of the Claimant's case.
20. With regard to the Secretary of State's skeleton argument, numerous points are made concerning the Claimant's offending and why this should have led the judge to conclude that deportation was appropriate. However, when considering the decision as a whole, and in light of what we have said previously, in our judgment the judge was entitled to

conclude as she did. Her decision is sustainable and it follows that Secretary of State's appeal to the Upper Tribunal falls to be dismissed.

Anonymity

21. The First-tier Tribunal did not make an anonymity direction. However, the Claimant has two children, one of whom has been adopted and the other is subject to an order of the Family Court. Whilst we have not stated any specific information in our decision which might lead to their identification, their particular circumstances justify the making of a direction at this stage.

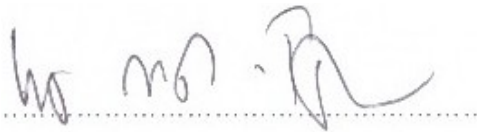
Notice of Decision

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

The Secretary of State's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands.

Signed

A handwritten signature in blue ink, appearing to read 'Ms Norton-Taylor', written over a dotted horizontal line.

Date: 29 January 2020

Upper Tribunal Judge Norton-Taylor