



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

Appeal Number: DA/00633/2014

THE IMMIGRATION ACTS

Heard at: Field House

**Decision and Reasons
Promulgated**

On: 8th June 2015

On 7th September 2015

Before

**DEPUTY UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN**

Between

Secretary of State for the Home Department

Appellant

and

MM

(anonymity direction made)

Respondent

Representation:

For the Appellant: Mr I. Khan, counsel, instructed by Atlantic Solicitors

For the Respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Respondent is a national of Jamaica, born on 31 May 1966. On 19 November 2014 First-tier Tribunal Judge Canavan allowed her appeal against a decision of the Secretary of State refusing to revoke an order to deport her from the United Kingdom pursuant to section 5(1) of the Immigration Act 1971. This decision was consequent to her conviction on 1 March 2006 for possession of a false instrument (a counterfeit passport) in respect of which she was sentenced to 12 months imprisonment and a recommendation made that she be deported. The

Secretary of State has sought and obtained permission¹ to appeal against that decision.

Background and basis of claim

2. The Respondent arrived in the United Kingdom on 5 November 1999 and was granted leave to enter as a visitor for 6 months. She may have been granted further leave for another 6 months although the basis of this leave is unclear; what is clear is that she thereafter overstayed. On 13 June 2001, her daughter, GBS (born September 1996) joined her mother in the United Kingdom. It is not known whether she entered lawfully. On 13 January 2003, the Respondent gave birth to her second daughter, CLW, who naturalised as a British citizen on 7.11.13. On 11 March 2009, she gave birth to her third daughter, TM. The Respondent is the sole carer for all three children.
3. On 17 December 2003, she applied for leave to remain as the spouse of a person settled in the United Kingdom *viz* CLW's father. It later transpired that he did not have leave to remain and may have subsequently been removed to Jamaica. On 28 February 2006, the Respondent was found in possession of a stolen British passport and a fraudulently obtained UK driving licence and on 12 April 2006 she was sentenced to 12 months imprisonment. The sentencing Judge took account of the facts that she had no previous convictions, had pleaded guilty at the earliest opportunity and had not relied upon the State to support her whilst in the United Kingdom.
4. On 26 August 2006, the Secretary of State issued a notice of liability to deportation. The Respondent appealed against that decision and following a First-tier Tribunal hearing on 29 September 2006 her appeal was dismissed on all grounds². An application for reconsideration was refused and the deportation order was signed on 8 January 2007.
5. No action was taken to deport the Respondent or her children. On 14 July 2008, the Respondent applied for leave to remain on human rights grounds, which was treated as an application to revoke the deportation order. This application was refused on 10 July 2008. The Secretary of State subsequently agreed that in doing so she had failed to consider policy DP5/96 then in force in respect of children who had lived in the United Kingdom for 7 years and the decision was reconsidered, with a fresh decision to refuse to revoke the Order being served on 17 October 2008.
6. The Respondent appealed against this decision and shortly after the birth of her daughter, TM, her appeal was heard and dismissed in a determination dated 21 April 2009³. Further applications to challenge this decision were made and refused.

¹ Permission was granted on the 7th April 2015 by Upper Tribunal Judge Kekić

² The First-tier Tribunal panel comprising Designated Immigration Judge Wilson & Mrs Harris

³ Determination by First-tier Tribunal Judge Coleman

7. The Secretary of State subsequently decided to revoke the deportation order, because the reasons for deportation letter had not been properly served on the Respondent. On 22 July 2010, a fresh decision to make a deportation order was served on the Respondent and her three children and she appealed against this decision.
8. Her appeal was then heard by a differently constituted panel of Judges⁴ and the appeal was dismissed in a determination dated 16 November 2010. Further applications to challenge this decision was not successful and the Respondent became appeal rights exhausted on 7 November 2011. On 14 December 2011, she applied for leave to remain on *Zambrano* grounds but this application was refused on 2 February 2012 as the Respondent was not the primary carer of an EU national child at that time.
9. A deportation order was signed against the Respondent on 29 February 2012. On 19 April 2013, she made a further application for leave to remain on human rights grounds, with her children as her dependants. Her daughter, CLW, was naturalised as a British citizen on 7 November 2013. On 25 March 2014, the Secretary of State refused this application but treated it as an application to revoke the deportation order⁵. The Respondent appealed against this decision and her appeal came before Judge Canavan for hearing on 29 September 2014. The Respondent gave evidence and was cross-examined.
10. In a determination promulgated on 19 November 2014, Judge Canavan allowed the appeal under the Immigration Rules and on Article 8 grounds. On 27 November 2014, the Secretary of State sought permission to appeal to the Upper Tribunal. Permission to appeal was refused by First-tier Tribunal Judge Ford on 10 December 2014. A renewed application for permission to appeal was successfully made to the Upper Tribunal on 30 December 2014. The grounds of appeal assert that the First-tier Tribunal Judge:
 - (i) Failed to properly appreciate the context and effect of sections 117A, B & C of the NIAA 2002;
 - (ii) Failed to provide adequate reasons for finding that it would be unduly harsh for CLW to return to Jamaica with her mother or remain in the United Kingdom without her mother;
 - (iii) Failed to properly apply paragraph 399a of the Rules;
 - (iv) Erred in her consideration of “very compelling circumstances” for the purposes of paragraph 398 of the Rules.

Matters in Issue at the hearing

11. At the hearing before the Upper Tribunal, Mr Clarke made submissions in respect of grounds (i) and (iv) together. He submitted that in her

⁴ A First-tier Tribunal panel comprising Judge Hanes and Mrs J Holt

⁵ The Order was signed on 29 February 2012

observation that paragraph 399A of the Rules imparts an additional step to the 'unduly harsh' test Judge Canavan had erroneously drawn a distinction between the Immigration Act 2014 and the Rules. He submitted that section 117 was not inconsistent with the Rules and that at paragraph 26 the determination contained the wrong test.

12. Mr Clarke submitted that section 117C(v) was not 'new' law and that paragraphs 29-41 of Nagre [2013] EWHC 720 (Admin) sets out European jurisprudence regarding precariousness, which is reflected in this provision. He submitted that this was relevant to the family life in this case, since the Respondent had contracted her family life with her children in the full knowledge that her status was precarious; the Immigration Act 2014 does not preclude this principle applying in respect of children. In respect of Ground 4, Mr Clarke submitted that there had been no need to go on to consider exceptional circumstances and that the Judge erred in applying a 'compelling circumstances' test and should have looked at whether the undue hardship test had been met. It was not appropriate to look outside the Rules: MF (Nigeria) (2013) EWCA Civ 1192. He further submitted that there was no consideration of the impact on CLW at paragraph 45 and whether or not it would be unduly harsh for her to return to Jamaica or remain in the United Kingdom without her mother. CLW's ties with the United Kingdom had not been identified. He referred to the Immigration Directorate Instructions at 2.5.
13. In response, Mr Khan on behalf of the Respondent submitted that the First-tier Tribunal Judge made no mistake or misdirection in respect of her assessment of the Immigration Act 2014 and the Immigration Rules. He accepted that there may have been an assessment of paragraphs 398 and 399 the wrong way round but this was not material. The issue of the public interest considerations contained in section 117C were additional considerations to those in the Rules. He further submitted that the correct rules had been applied *cf.* MK (section 55 - Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC) and that the Judge's findings at paragraph 42 were consistent with the decision in Zoumbas (2013) UKSC 74 per Lord Hodge at 24. Mr Khan noted that the Home Office policy does not at 2.5 address the effect on children; at 2.5.4 that one issue that could be considered is that it is perhaps more difficult for a foreign criminal to show that deportation would be unduly harsh. The Respondent's conviction was 8 years ago, since then she has been rehabilitated and there has been no further criminal activity. The Judge applied the correct law, applying Zoumbas in considering the impact on CLW.
14. Judge Bruce then clarified the Home Office's position with Mr Clarke, as to whether or not it was the Secretary of State's case that it would not be unduly harsh for CLW to remain in the UK without her mother. He confirmed that the position was that CLW could remain with the aunt who had cared for her when her mother was in prison; this aunt had not turned up at the hearing before the First-tier Tribunal and the Judge had

not given proper consideration to the fact that CLW had lived with her before. The parties confirmed, in response to our query, that the Respondent was released from prison at the end of 2006 and that CLW has been living at home with her mother since then.

15. Mr Clarke responded, suggesting that the word “unduly” imports into the test a proportionality balancing exercise and that in conducting that exercise everything is weighed in including the Respondent’s criminality and the unfortunate history of the delay in this matter. Whilst the Deportation Order had been withdrawn in 2010 as no reasons had been served, there have been a number of hearings. It was a mistake by the Home Office but the Respondent never had leave and knew she should not be here. There is a public policy in favour of deporting foreign criminals and the Judge does not consider the fact that the Respondent was at fault in staying in the United Kingdom when she had no leave to do so.
16. We reserved our decision.

Error of Law: Our Findings

17. We do not find that the Judge made material errors of law in her determination.
18. We agree with the reasons given by First-tier Tribunal Judge Ford in refusing permission to appeal that, although Judge Canavan may, in considering sections 117A-D of the NIAA 2002 have referred to “additional tests” being imported into the Immigration Rules, she was simply highlighting the stages that have to be gone through in the Tribunal’s consideration of Article 8. Her observations about the structure of the present law were no more than that.
19. At the centre of this case is Judge Canavan’s finding that it would be unduly harsh for CLW to either live without her mother in the UK, or to go to Jamaica with her. If that finding was sound, and open to Judge Canavan on the evidence before her, the other matters raised in the grounds fall away.
20. Having given careful consideration to the well-made submissions of Mr Clarke, we are not satisfied that the First-tier Tribunal did err in its approach to this question. We do not consider that Judge Canavan erred in finding that it would be unduly harsh for CLW, a British citizen born in the United Kingdom and aged 11 years at the time of that hearing, to either remain in the United Kingdom without her mother or to relocate to Jamaica. We consider that the Judge did give clear and adequate reasons for her findings in this respect at paragraph 42 of the determination where she referred to CLW’s strong and longstanding connections to the United Kingdom, with friends and family here; she knows of “no other life”. At paragraph 45 of the determination Judge Canavan refers to CLW’s British nationality; her strong ties to the United

Kingdom; the fact that she is still a young child and her mother had always been her main carer except for a temporary period eight years ago when she was in prison. It was for these reasons that the Judge found that the exception at paragraph 399(a) of the Immigration Rules was met on the facts of this case. Mr Clarke provided us with copies of the Home Office guidance at Chapter 13 of the Immigration Directorate Instructions: *Criminality Guidance in Article 8 ECHR Cases* (28.7.14) and the definition of “unduly harsh” therein (at 2.5. and 3.5.). Judge Canavan was clearly aware of the guidance as she cited it at paragraph 32 and specifically in respect of the definition at 44; we are satisfied her decision in this respect was properly open to her.

21. In respect of Ground 4, given that the Judge found that paragraph 399(a) applied, it was not necessary for her to go on to consider, under paragraph 398, whether there were ‘very compelling circumstances’, but the fact that she did so at 52 does not render her findings of fact or her decision as a whole materially flawed.

Decisions

22. The First-tier Tribunal did not materially err in law and the determination is upheld.
23. The Secretary of State’s appeal is dismissed.
24. Having had regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders, and having regard to the minors involved in this case, we maintain the anonymity order made by the First-tier Tribunal in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondent 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”.

Deputy Upper Tribunal Judge Chapman
24 June 2015