



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

Appeal Number: DA/00711/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
Judgment given orally at hearing  
On 27 February 2015**

**Decision & Reasons Promulgated  
On 21 April 2015**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YTH**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Mr T Buley, Counsel instructed by Elder Rahimi Solicitors  
(London)

**DETERMINATION AND REASONS**

1. The appellant in these proceedings is the Secretary of State, but for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, the appellant is a citizen of Vietnam born on 22 December 1981.
2. The proceedings before the First-tier Tribunal followed a refusal by the respondent to revoke a deportation order, that decision having been taken on 4 April 2014. The deportation order was originally made as a result of

the appellant's offending, consisting of convictions from about October 2004 until 17 August 2007 for various offences as set out in the respondent's decision letter. Those offences included, materially, an offence of possession of a Class A drug, namely heroin, with intent to supply, for which she received a community rehabilitation order for one year. The appellant was sentenced for that offence on 4 October 2004. Thus it was that there was a decision to make a deportation order, and a deportation order was made in consequence.

3. An application was made in about 2011 for revocation of that order. The appellant's appeal against the respondent's decision to refuse to revoke the deportation order came before First-tier Tribunal Judge Osborne and Mrs N Bray, a non-legal member, on 27 June 2014 with the determination being promulgated on 15 July 2014.
4. The First-tier Tribunal allowed the appellant's appeal with reference to the relevant deportation Immigration Rules, that is to say paragraphs 399(a) and (b). I should state that neither the provisions of the Immigration Act 2014 nor the recent amendments to the Immigration Rules are pertinent to the decision I make today because although they would apply on any re-making of a decision or any subsequent hearing, those statutory provisions and the changes to the Immigration Rules were not in force at the time of the hearing, and more importantly, nor at the date of promulgation of the First-tier Tribunal's decision.
5. It is not necessary for me to set out extensively the appellant's history in terms of the circumstances in which she came to the UK. That is set out in detail in the determination of the First-tier Tribunal. I can summarise it probably rather crudely by saying that the question of whether the appellant had been a victim of trafficking was considered. That relates to her history of having left Vietnam, gone to China apparently having been placed in a brothel, and then having moved to various other countries including countries in Europe. She then came to the UK. Her account is also of having worked in a brothel in London.
6. The First-tier Tribunal concluded that the appellant's overall account of her experiences was consistent, and applying the lower standard of proof (about which no issue has been taken) it was decided that the appellant is likely to have told the truth about her background but also noted that her recollection of events was somewhat hazy due to her addiction to heroin. It is as well at this stage to point out that the decision to make a deportation order was on the basis that she was a persistent offender who in the view of the Secretary of State shows a particular disregard for the law. That is evident from the decision letter at, for example, [43] and [44].
7. The First-tier Tribunal made positive credibility findings, having taken into account a determination from an appeal hearing some years earlier at which her credibility was rejected. There is no challenge on behalf of the respondent to that re-assessment and re-appraisal of the appellant's credibility. It is relevant to point out that at the time of that earlier

hearing, the appellant was still addicted to heroin and there was no reason at that time to believe that she would not continue to commit offences as before.

8. At [31] of its determination the panel of the First-tier Tribunal noted that after spending a lengthy period of time both completing her final sentence for criminal matters and in immigration detention, the appellant appeared to have received appropriate treatment for her drug addiction and there is no sign now that she continues to be drug dependent. The Tribunal noted that she had committed no further criminal offences, indicating that she does not require the money to feed her habit, and is no longer associating with her former partner who was also a heroin addict. The panel noted that the appellant had given birth to two children since the date of the first determination and that she had demonstrated by her actions an ability and willingness to care for them appropriately. Those are matters that they considered should be given considerable weight in their overall assessment of the appellant's situation. I pause there to indicate that the appellant's two children, whom I shall identify by initials, are T who was born on 7 October 2010, a daughter, and a son, W, born on 13 July 2012.
9. Continuing with the First-tier Tribunal's credibility assessment, I note that at [36] of the determination it is stated that the appellant has benefited significantly from her friendship with a witness who gave evidence before the First-tier Tribunal, and who, to summarise, has supported the appellant. It was noted that there had been significant delays in the respondent's decision-making in terms of the refusal to revoke the deportation order and that that decision was taken some three years after the application for revocation was made. Although noting that that was a significant delay the Tribunal did in fact reflect on the possibility, if not probability, that that delay had actually worked to the advantage of the appellant. Nevertheless it concluded at [38] that the appellant's circumstances are now very different from those which pertained at the time she was sent to prison for the last time in 2007. I quote as follows:

"She appears to have turned her life around and it is against that general background that we move on to consider the Appellant's rights under Article 8 both in terms of her right to private and family life."
10. I revert to an earlier part of the determination, that is [24], where paragraph 390 of the Immigration Rules is set out. It is as well to note that in the grant of permission to appeal to the Upper Tribunal it was thought by the judge who granted permission that the First-tier Tribunal had not adverted to the provisions to paragraphs 390 and 391 which deal with revocation of a deportation order. Of course, with reference to [24] of the determination it can be seen that that conclusion was in error.
11. Continuing with the findings of the First-tier Tribunal, it agreed that between 2004 and 2007 the appellant could properly be described as a "persistent offender" and thus paragraph 398(c) applied. The panel went on to look at the provisions of paragraph 399 in terms of her relationship with her children. It was not apparently disputed that the appellant has a

genuine and subsisting parental relationship with those children who are British citizens but the Tribunal went on to identify and recognise that the question of whether it would be reasonable to expect the children to leave the UK had to be decided with reference to paragraph 399(a)(ii)(a), and whether under subparagraph (b) there is another family member who is able to care for the children in the UK.

12. The Tribunal expressed itself not satisfied that the appellant had lost all ties with her home country and gave reasons for coming to that view at [40] and [41]. It concluded that the appellant was not able to meet the requirements of the Immigration Rules with regard to her private life. In respect of her family life it concluded that she had no partner at the present time but that it was very much in the best interests of her children that they should continue to live with her, she having cared for them from birth.
13. I deal next with the arguments that have been advanced on behalf of the parties. The challenge to the determination on behalf of the Secretary of State relates principally, it seems to me, to what is said to have been an inadequate consideration of the public interest, reference being made in the grounds to the “severity of the offence (sic)” committed. The issue of serious crime and deterrence is also referred to and various decisions of the Court of Appeal including DS (India) v Secretary of State for the Home Department [2009] EWCA Civ 544 are cited. It is pointed out that the public interest in the deportation of those who commit serious crimes goes well beyond the need to deprive the individual of the opportunity to re-offend. It extends to the need to deter others and to prevent serious crime generally and to uphold the public abhorrence of such offending. Other authorities are cited.
14. In terms of the factual situation, it is said in the grounds and was advanced on behalf of the respondent by Mr Tarlow, that the First-tier Tribunal had erred by failing to have a genuine and proper regard as to whether the appellant’s circumstances have altered either by a change of circumstances since the order was made or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The argument continues that there was only “self-serving evidence” that her ex-partner cannot care for her children in her absence. It is suggested in the grounds that it remains open to the appellant for her children to relocate with her as they are young enough to adapt to life in Vietnam where she has family support. It is also said that the British citizen children can return at any time and can maintain contact with their father via modern methods of communication.
15. So far as the application of the rules is concerned, paragraph 390 provides that
  - “... an application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
    - (i) The grounds on which the order was made;

- (ii) Any representations made in support of the revocation;
- (iii) The interests of the community, including the maintenance of an effective immigration control;
- (iv) The interests of the applicant, including any compassionate circumstances.”

16. Paragraph 390A provides that where paragraph 398 applies, the Secretary of State in assessing the application to revoke a deportation order will consider whether paragraph 399 or 399A applies, and if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

17. Paragraph 398 provides as follows:

“Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and...

- (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.”

18. It is argued on behalf of the appellant that when one considers the terms of paragraph 390A, viz. “where paragraph 398 applies” it can be seen that paragraph 398(c) in particular does not apply to this appellant. The relevant subparagraph is the one quoted i.e. that they are a persistent offender who shows a particular disregard for the law.

19. The argument runs as follows. The First-tier Tribunal concluded that the appellant was not at risk of re-offending and, in summary, had turned her life around. Therefore, she is not (present tense) a persistent offender who shows a particular disregard for the law. She may have been found to have been a persistent offender by the earlier First-tier Tribunal and when the deportation order was made but such is certainly not the case now. Thus, it is said 390A does not apply because 398 does not apply. Both those paragraphs are set in the present tense and the present situation is such that the appellant is not a persistent offender.

20. It is also submitted, in effect, that the arguments advanced in terms of deterrence are misconceived because this is not a ‘serious crime’ type case, that not being the basis on which the deportation order was made. In answer to the question posed by me in relation to at least one of the offences committed by the appellant, namely possession with intent to supply a class A drug, Mr Buley on behalf of the appellant said that one has to take into account the sentence that was imposed and here the sentence was a non-custodial one, being a community rehabilitation order for one year. It was submitted that in the cases of persistent offenders,

under paragraph 398 the public interest in deterrence has much less a part to play, and the Tribunal was entitled to find as it did on the basis of the evidence before it.

21. It was further submitted that paragraphs 390 and 390A are umbrella provisions that say nothing, or virtually nothing, about where the public interest lies. The public interest considerations come into play when one looks at paragraph 398 which deals with the circumstances of those who have been convicted of offences which result in imprisonment for either periods of at least four years or periods of less than four years but at least twelve months.
22. So far as concerns this distinct argument in relation to Paragraph 390A, I reject the argument. Paragraph 390 in its own terms requires by implication, if not expressly, a recognition of the public interest. One only has to look at the first sentence of paragraph 390 to be satisfied about that. Thus, “an application for revocation of a deportation order will be considered in the light of all the circumstances” then stating matters which are to be included in the consideration.
23. The circumstances in which the deportation order was made plainly would have included the public interest not only in preventing a particular individual from offending, and assessing their risk of re-offending, but also the public interest in deterring others. One sees further at paragraph 390(iii) that the interests of the community are to be taken into account. Many authorities over several years have emphasised the importance of the public interest being taken into account, that public interest including the need to deter others and that foreign offenders must understand that the consequence of offending may be deportation.
24. Thus, I do not accept that in the case of persistent offenders under paragraph 398(c) little or no regard needs to be had to the public interest in deterrence. The public interest did need to be taken into account and I am not satisfied that the panel of the First-tier Tribunal here did reflect that aspect of the public interest.
25. It is true to say that at [39] for example, the Tribunal did refer to paragraph 398(c) including in terms of an individual’s deportation being conducive to the public good because their offending has caused serious harm or they are a persistent offender. I also note that at [45] it was stated that “it can no longer be said that her deportation would be conducive to the public good”. However, those references to the public interest, general as they are and not specific to any particular aspects of the public interest, in my judgment are insufficient to reflect what should have been reflected in the decision, for example the public interest in deterrence.
26. I do not consider that I need to go further and express a detailed view about the other aspect of deterrence, or the same aspect but in different colour, namely public revulsion at the seriousness of the offending. There

is something to be said for the argument on behalf of the appellant that seriousness of offending was not what was contemplated by the Secretary of State, although one does have to have regard to the offence of possession with intent to supply. As I say however, it is sufficient for present purposes to conclude that the First-tier Tribunal did err in law in terms of its failure to recognise the public interest in the respects to which I have referred. However, that issue does not seem to me to provide a complete answer to the questions I need to decide today.

27. The questions are whether there is an error of law in the decision of the First-tier Tribunal and whether any such error of law requires the decision to be set aside. Having regard to the findings of fact made by the First-tier Tribunal in terms of paragraph 399, I do not consider that the error of law made by the First-tier Tribunal does require the decision to be set aside.
28. Paragraph 399(a) refers to circumstances where a person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and (i) the child is a British citizen and (for present purposes) it would not be reasonable to expect the child to leave the UK. The First-tier Tribunal did come to the view that it would not be reasonable to expect the children to leave the UK albeit that that conclusion could have been more explicitly articulated. There was evidence before the First-tier Tribunal of the relationship that those children have with their father. He provided two written statements in which he indicated the extent to which he has contact with the children and his views about separation from them. The evidence was that he had close and regular contact with them. He has four children from another relationship and it was not suggested, and it has not been suggested before me, that he would be able to leave the UK in order to continue contact with his and the appellant's children. Indeed, it does not appear that he is in a relationship with the appellant any longer.
29. At [42] of the determination the Tribunal stated that that the children's father, who I will identify as H, did not attend the hearing but that he had provided two witness statements confirming his position. The reason I say that the Tribunal's conclusions in relation to the issue of reasonableness of the children leaving the UK could have been better articulated is because it is only implicit that the Tribunal accepted the evidence of H in his witness statements. Nevertheless, I consider that it is sufficiently clear from the determination and strongly implicit, that his evidence was accepted, albeit noting that the Tribunal had no opportunity to hear oral evidence from him, particularly with regard to the level of responsibility he has assumed for his partner's children.
30. Being satisfied as I am that the Tribunal concluded that there was a genuine and subsisting parental relationship between the appellant and her two children who are British citizens, a matter uncontested, and that it would not be reasonable to expect the children to leave the UK, the Tribunal then had to decide whether there was another family member

who was able to care for them in the UK. The conclusions in that respect were more explicit and in my judgement sustainable.

31. At [42] it was concluded that:

“... in general terms we are satisfied that it appears unlikely that he would be in a position to care for [T] and [W] if the need arose and in any event, that would not substitute for the care of their mother thus the alternative would be for them to be removed together with their mother to Vietnam. We are satisfied that the children are young enough to adapt to the changes which would thereby be engendered and also find that it is highly likely that the children are exposed to the Vietnamese language at home...”

32. The Tribunal went on to state however, at [43], that although the children would be free in theory to return to the UK at any time:

“... the practical possibility of this happening must be taken into account in order to reach a sensible decision and we are satisfied, that if the children returned to Vietnam with their mother that is where they would have to be brought up and where they would not enjoy the same high level of facilities as would be available to them in the UK.”

33. So at [42] one finds the conclusion that it is unlikely that their father would be in a position to care for them. I am satisfied that the Tribunal found that there is no other family member who is able to care for the children in the UK, no other family member having been suggested other than their father.

34. In those circumstances, where the Tribunal was entitled to find that the terms of paragraph 399 applied to the circumstances of this appeal. Notwithstanding the error of law that I have identified, it is not an error of law that requires the decision to be set aside, it not being material to the outcome of the appeal. The decision of the First-tier Tribunal allowing the appeal under the Immigration Rules therefore stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the children T and W. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek

14/04/15