



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: DA/01375/2013
DA/01378/2013
DA/01377/2013

THE IMMIGRATION ACTS

Heard at Field House
On 15 January 2015

Decision & Reasons Promulgated
On 24 June 2015

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

MRS TAMIKA LATESHA TALABI
MISS TALISA WILLSON
MISS SAPHIRE JADE WILLSON
(ANONYMITY DIRECTIONS NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Layne
For the Respondent: Mr Kandola

DECISION AND REASONS

1. The Appellants are citizens of Jamaica. They are a mother and her two daughters born in 1979, 1994 and 1999 respectively.

2. The history, which is not in dispute, is that the first Appellant arrived in the UK in August 1999 as a visitor, apparently accompanied by the third Appellant who was about 4 months old. In November 1999 the second Appellant joined them, also as a visitor. In February 2000 the first Appellant was granted leave to remain as a student. Her application included the third Appellant as a dependant, but made no reference to the second Appellant.
3. In June 2000 and again in March 2002, the first Appellant (hereafter simply 'the Appellant') was convicted of theft by shoplifting and was given a conditional discharge and a £600 fine respectively.
4. On 21 October 2003, the Appellant married Mr Adeyemi Talabi, a Nigerian national who was naturalised as a British citizen in May 1996. The marriage took place in Jamaica. The following day the first Appellant applied for entry clearance on the basis of her marriage. The application was refused and her subsequent appeal was unsuccessful. Nevertheless, the Appellant returned to the UK anyway (apparently using a false passport) and in November 2004 her son, Akeem Talabi was born in the UK.
5. Since returning to the UK she has accumulated the following further convictions. In July 2006 theft by shoplifting: fined £100; August 2008 handling stolen goods: two year conditional discharge; January 2010 two counts of theft by shoplifting and one of breach of her conditional discharge: fined £50 in respect of each charge.
6. In February 2010 she was convicted of multiple offences concerning deception. The offences involved obtaining two British passports and other identity documents in false names which she used to obtain immigration status and employment. She also committed benefit fraud. She was sentenced to a total period of two years imprisonment.
7. In March 2010 following her last conviction the Appellant was served with a notice of liability to automatic deportation. In June 2010 she submitted an application for further leave to remain. That application was refused, but the refusal was withdrawn after representations were received in relation to Article 8 of the ECHR.
8. In November 2012 the Respondent issued the Appellant with a further notice of liability to automatic deportation and on 14 June 2013 made a deportation order against her under section 32(5) of the UK Borders Act 2007. Deportation orders were also made in respect of the children Talisa and Sapphire as her dependants. Although Talisa was 19 years old, she still lives with her mother and was treated as her dependant for these purposes. No issue was taken with that approach.
9. They appealed successfully against the deportation decisions but on 10 March 2014 that decision was set aside by the Upper Tribunal and the case was remitted to the First-tier Tribunal to be reheard afresh.
10. Following a rehearing at Taylor House on 31 July 2014 Judge of the First-tier Scott allowed the appeal under the Immigration Rules and on human rights grounds.

11. He noted the evidence of the Appellant. In summary, she suffered sexual abuse and physical violence in Jamaica before she came to the UK. Except for the short period in 2003 when she returned to get married she has lived in the UK continuously. The children Talisa and Sapphire have never been back to Jamaica having been here from the ages of 4 years and 4 months respectively.
12. In addition she now has two further children by her husband, born in the UK and British citizens. They are Akeem, now aged 9 and Kayshell now aged 8 months. Her husband has two adult children from his first marriage, a son of about 23 and a daughter of about 21 whom he continues to support financially.
13. She has always accepted her guilt and her punishment, and while in prison reflected on her life especially when she was without her children and resolved never to be involved in crime again. Her husband has had a positive influence on her and she has not offended since coming out of prison.
14. All three of the Appellants have overstayed without leave for most of their time here. They did so when the college which the Appellant was attending closed down and she did not know what to do. Talisa and Sapphire are both in the education system. This country is their home. Jamaica is alien to them.
15. Having been here for over fifteen years she has built up a significant private and family life. They could not have family life elsewhere. They have never been to Nigeria which is her husband's country of origin. He has only been briefly to Jamaica in 2003 for the wedding.
16. She has known her husband since 2001. At that time he was married but his wife died in 2002. She comforted him on his loss and the relationship developed. They wanted to get married and the advice was she should return to Jamaica and then seek entry clearance. The application was refused because the ECO was not satisfied that they had entered into a genuine marriage.
17. Despite this she could not stay on in Jamaica and returned to the UK using someone else's passport. In 2008 seeking to regularise her status she sought ILR but before a decision was made she was sent to prison for having and using false documents. The application was withdrawn.
18. During her imprisonment for around a year, her husband had a very hard time trying to cope with the children.
19. As to the effect of her proposed deportation her evidence was that her husband has been depressed because he would not be able to cope with the children on his own. He runs a minicab business which takes up most of his time. The children are scared of going to Jamaica because it is dangerous. Nigeria is no better.
20. The Appellant's husband also gave evidence. He has been a British citizen since 1996. He confirmed his wife's evidence as to the family situation. If the Appellant and his step daughters were to be deported it would be devastating for the whole family. The step daughters could not cope with being uprooted. They have lived

here from a very young age. They have no knowledge of the country of their birth. The only place they know is here.

21. As for his own circumstances he confirmed that he runs a minicab business which takes up most of his time. When the Appellant was in prison the business nearly went bankrupt because he depended so much on his wife to look after the children when he was at work. The business has still not recovered. He owes £18,000 to HMRC. Without his wife he would have to give up the business but many people depend on him financially including his elderly parents in Nigeria. If his wife and step daughters were deported it would ruin their lives. The step daughters and his children by his wife are all very close. Akeem, in particular depends on Talisa. He could not afford to employ a helper nor would he wish to do so.
22. He could not relocate to Jamaica. He has lived all his life in the UK and has only visited there once, very briefly, for the wedding. His step daughters have spent all their lives here. If they and his wife went to Jamaica he would not be able to support them. Nor could they go to Nigeria. It is not safe and there is nothing there for them.
23. There was also evidence from Talisa. She has no recollection of life in Jamaica. Her education has been in the UK and she hopes to go to university. All her relatives and close friends are here. She has a good relationship with her stepfather and looks up to him as a role model. She also gets on well with her step brother, Akeem, who saw her as a mother figure when their mother was in prison. She could not imagine living without her half sister, Kayshell. When her mother was in prison it had a huge impact on the family.
24. In his findings the judge found the three witnesses to be credible. He went on to consider the relevant law in particular paragraphs 398, 399 and 399A of the Immigration Rules. He considered that the focus was on 399(a) and that the Appellant has a genuine and subsisting parental relationship with all of her children, three of whom are under the age of 18 and in the UK. Akeem and Kayshell are British citizens and thus satisfied 399(a)(i) while Sapphire, a Jamaican citizen, has lived in the UK continuously for over seven years and thus satisfied 399(a)(ii).
25. The judge went on to consider whether it would be reasonable to expect the children to leave the UK and whether any other family member is able to care for them in the UK. He found (at [37] and [38]) that it would not be reasonable to expect the children to leave. At [39] ff he found that there would be no other family member able to care for them. Concluding that 339(a) was satisfied he allowed the appeals.
26. The judge then went on to consider Article 8 ECHR. Having advanced to proportionality he noted the public interest in the deportation of foreign criminals and went on to consider s117 public interest factors. He considered that s117C Exception 2 applied (genuine and subsisting relationship with a qualifying partner/child and the effect of deportation on the partner/child would be unduly harsh). He also found that it would be in the best interests of the British born

children to live in the UK with both parents as part of a family unit. He allowed the appeals, additionally, under Article 8.

27. The Secretary of State sought permission to appeal which was granted by a judge on 22 October 2014.
28. At the error of law hearing on 10 December 2014 the Panel (Carr J and Upper Tribunal Judge Conway) concluded that while much of the grounds amounted to no more than disagreement with the findings, the first ground had merit. That ground was that the Tribunal had referred to the incorrect rule. The test applied, namely, whether it was reasonable for the children to leave the UK and whether another family member can care for them had been changed from 28 July 2014 to the test of whether it would be unduly harsh on her children or husband to relocate or remain without her. Whilst the Tribunal later found (at [51(5)]) in its consideration under Article 8 ECHR that it would be unduly harsh on her husband and children, it was clear from [36-41] that this was not the consideration the Tribunal were assessing when making those findings under the rules.
29. Mr Oke, who appeared on that date for the Appellants agreed that the Tribunal had considered the wrong rules and that such was a material error. By consent the determination was set aside to be remade.
30. At the resumed hearing date before me there was no oral evidence only submissions.
31. Mr Kandola did not seek to make any challenge to the credibility of the witnesses.
32. His first submission was that the Appellant's criminal history was an escalating one. The public interest in her removal was a pressing one.
33. Turning to paragraph 399, Mr Kandola submitted that (b) did not apply as the Appellant's relationship with her partner had been precarious when their relationship was formed.
34. He accepted 399(a) was potentially applicable. There was a genuine and subsisting parental relationship. However, Mr Kandola questioned whether it was necessarily in the children's best interests to stay with their mother. In that regard the offending by Talisa who was reprimanded by police in 2012 for shoplifting was noted. Such did not suggest the good influence of her mother.
35. Mr Kandola next questioned whether it would be unduly harsh for the children to go to Jamaica. Many people take their children abroad legitimately. The Appellant is to blame for not thinking that such might be a consequence of her criminality. If it is in the best interests of the younger children to be with their mother they could adapt to life in Jamaica. Whilst Sapphire has been in the UK for most of her life she is approaching adulthood and would have the maturity to adapt with her mother and her stepfather if he chose to go.
36. Mr Kandola submitted that an option was for the UK born children to remain in the UK with their father. He is well able to look after them as he was when their mother

was in prison. It was not determinative that he might have to give up work to care for them. They are young. Any effects are not likely to be so adverse. There was no evidence that they would lose contact with their mother.

37. Mr Kandola ended by submitting that the rules are a complete code. There was no need for separate enquiry outside the rules. He invited me to dismiss the appeals.
38. In reply Mr Layne submitted that the crux is paragraph 399(a). Whilst Talisa is over 18, the other three children are under 18 and the two youngest are British. Sapphire has been in the UK for most of her life and indeed has, effectively, never been to Jamaica. The children are innocent parties. Through no fault of their own the British children could find themselves split up from their mother. If she was deported and they remained in the UK they would be likely to lose their bond with her. The consequences would be unduly harsh.
39. Mr Layne submitted that the husband/father also had an interest. He was previously married but lost his first wife to sickle cell anaemia. To lose his second wife to deportation would be a severe blow to him particularly as she would face ten years exclusion. He has his business. It would be difficult to run that and care for their two younger children. His business almost failed when his wife was in prison. He would have no help from UK relatives.
40. Mr Layne submitted that the best interests of the children must be that all remain in the UK with both parents, the family intact.
41. Mr Layne considered the public interest. The Appellant had not offended since her release. She is a reformed character who had learned a painful lesson.
42. Mr Layne submitted that the public interest in deportation was outweighed in the particular circumstances of this case. He asked me to allow the appeal.
43. In considering this matter I note first the relevant law:

'A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention ...

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

...

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. *This paragraph applies where paragraph 398(b) or (c) applies if –*
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK, and*
 - (i) the child is a British Citizen;*
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case*
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and*
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or*
 - (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and*
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and*
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and*
 - (iii) it would be unduly harsh for that partner to remain in the UK without that person who is to be deported.*
- 399A. *This paragraph applies where paragraph 398(b) or (c) applies if –*
- (a) the person has been lawfully resident in the UK for most of his life; and*
 - (b) he is socially and culturally integrated in the UK; and*
 - (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.'*

44. In considering this matter it is noted that deportation is conducive to the public good because she has been sentenced to a period of imprisonment of two years. I begin by seeking to identify issues in the public interest. In deportation appeals the public interest is often much stronger than in other types of immigration appeals relying on private and family rights. The public interest not only refers to any risks the

individual might pose but also to the fact that it is necessary to have a consistent policy of expelling foreign national criminals in order to deter others. The more serious the offence the greater weight to be attached to the Respondent's decision.

45. In that regard I note the decision in **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT** to which reference was made in the grounds seeking permission. The Tribunal stated: *'In a case of automatic deportation full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place ... Deportation of foreign criminals exposes society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.'*
46. In the Appellant's case I note first her criminal history. There are, as indicated, convictions in 2000, 2006, 2008 and 2010 relating to theft by shoplifting/handling stolen goods for which the sentences were fines/conditional discharge. The major offence resulted in the conviction on 17 February 2010 for deception involving the obtaining of two British passports and other identity documents in false names which she used to obtain immigration status. She also committed benefit fraud. The sentence was a total of two years' imprisonment.
47. The sentencing judge's remarks note that while she arrived in the UK lawfully she had *'absolutely no right to remain in this country after the expiry of (her) student visa on 31 March 2001'*. The judge noted that *'The claiming in particular of passports and two provisional driving licences to which (she was) not entitled'* was something regarded *'very seriously by the courts'*.
48. The judge took into account in her favour that she had three children, had been *'very frank in pleading guilty at the first opportunity and that (she) honestly accepted (her) guilt in interview'*.
49. I note that since her release she has not reoffended. Further, there is no suggestion that she is at risk of reoffending or at risk of harm to the public.
50. I next turn to consider the facts in the context of the law which is set out above, namely paragraphs 398 – 399 of the Rules.
51. The claim is that deportation would be contrary to the UK's obligations under Article 8.
52. There is no dispute that there is family life between the Appellant, her husband and the three children. Although Talisa is now a young adult it is accepted she remains part of the family unit.
53. I require to consider whether paragraph 399 or 399A applies. Paragraph 399(b) does not apply not least because although the Appellant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen the relationship was not formed at a time when she was in the UK lawfully. Paragraph 399A also does not apply as she has not been lawfully resident for most of her life here.

54. Turning to consider 399(a) there is no dispute that she has a genuine and subsisting parental relationship with her children who are under the age of 18 and are in the UK. They are Sapphire, Kayshell and Akeem. Sapphire is a citizen of Jamaica but has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision (399(a)(ii)). Kayshell and Akeem are British citizens.
55. The issues are whether it would be unduly harsh for them to live in the country to which the Appellant is to be deported or whether it would be unduly harsh for them to remain in the UK without her. I give these words their ordinary meaning, thus, '*unduly*' defined as '*excessively*' and '*harsh*' as '*severe, cruel*' (such also being the position in the Respondent's IDI at 2.5.2).
56. I need to consider the best interests of the minor children. The situation is complicated because two are British citizens, Akeem and Kayshell, whilst the third, Sapphire is a Jamaican citizen. Talisa, although now nineteen is still part of the family unit.
57. The presence of children, even when they are British has been held not to preclude deportation action automatically. The interests of the children particularly with regard to nationality, whilst very important are not a trump card over all other policy considerations which include the need to maintain firm and fair immigration control.
58. I note from the refusal letter that it was conceded that it would not be reasonable to expect Akeem to leave with his mother but that he could continue to live with his father who was his primary carer while his mother was in prison. Since then his younger sister Kayshell has been born.
59. Mr Kandola's submission on paragraph 399 (a) (ii) (a) in the situation where the Appellant returned to Jamaica without her husband but with the children appeared essentially to be limited to the suggestion that the British children could adapt to life in Jamaica. I disagree. Neither child has ever been to Jamaica. Whilst Kayshell is a baby, Akeem is nine years old and knows of no other life. It is not disputed that the Appellant, who has herself been absent from Jamaica for some 15 years has no family there. She left at least in part because of gang problems, violence and abuse she suffered in inner city Kingston. As well as no local support, she has limited financial resources, limited skills, education or training that she could utilise, so it is difficult to see how she would be able to support them. On the facts of this case I conclude that it would be unduly harsh for the British children to live in Jamaica with their mother alone.
60. The situation for Talisa and Sapphire is different to the extent that they are Jamaican citizens. They are also older. However, they too have spent, effectively, their entire lives in the UK having arrived here in 1999 when Talisa was 4 or 5 and Sapphire only a few months old. They had no choice. Talisa only became aware of the illegal status recently as she said in her January 2014 statement. They are innocent players in this matter. They have never been back to Jamaica. They have developed considerable ties beyond those of their family and know of no other life other than in this country.

Talisa is completing her school education and hopes to go on to university. The same issues of lack of support and resources on return apply. I again do not see there to be merit in the suggestion that they could adapt to life there. Further, I do not see that it is in the best interests of the children that the siblings be split up. It is not disputed that they are all close and that particularly when their mother was in prison Talisa effectively took over the mother role for Akeem. As indeed, Mr Talabi has been a father figure to Talisa and Sapphire.

61. The crux of Mr Kandola's submission was that it was feasible for the whole family including the Appellant's husband to go and live in Jamaica, which failing, the British children could remain in the UK with him but without their mother. Mr Kandola did not press that they could all go to Nigeria.
62. I find this to be a finely balanced issue. Mr Talabi took up his relationship with the Appellant and had children by her despite his knowing her status. However, he is a British citizen who apart from the brief marriage visit has never been to Jamaica. A more significant issue is how he would be able to support his family in Jamaica particular the three minor children. As indicated the Appellant has limited skills that she would be able to provide. The sole, legitimate, earner during her married life has been Mr Talabi. He too has limited skills and resources. His taxi business is struggling and he owes a substantial payment to HMRC. He has financial responsibilities for adult children by his first, deceased, wife and his elderly parents. The Appellant cannot succeed on the basis of her relationship with her husband Mr Talabi under paragraph 399(b). However, on the facts looked at cumulatively for the reasons given above I find that it would not be in the best interests of the children to relocate as a complete family unit to Jamaica.
63. It was submitted that it would not be unduly harsh for the British children to remain without their mother in the UK. I note in that regard **AD Lee v SSHD [2011] EWCA Civ 348** when Sedley LJ said *'the tragic consequences is that this family ... would be broken up forever because of the Appellant's bad behaviour. That is what deportation does'*.
64. As indicated the British children are both young. Akeem, age 9 is in his formative years. Kayshell is a baby. It is, in my judgement, indisputable that they, particularly the baby Kayshell, are of an age when they need their mother, their primary carer. I do not find merit in the submission that it might be in the children's best interests to be separated from the Appellant because her criminal history might be a bad influence on them. There is no evidence that Akeem has been adversely affected by his mother's criminality. Whilst it is recorded that Talisa was reprimanded by police for shoplifting in 2012 it seems to me to be speculative to blame that on their mother's influence. I see no indication that the Appellant when she was on her own, and later with Mr Talabi, has been anything other than a caring mother.
65. I find it also to be of relevance that Mr Talabi struggled to care for the three children during the period of his wife's imprisonment. It helped that he knew the separation was temporary. Nonetheless, the effect was such that his business nearly folded. I accept the claim that were he to be again in that position such difficulties would be likely to recur with the consequent effects on the children. As this time separation

would almost certainly be for much longer, it seems reasonable to conclude that Mr Talabi would face real difficulties, not just financial, in providing the children (which include a baby) with the level of care that they would require.

66. The Appellant is likely to face exclusion for up to ten years. I see no reason why the British children were they to remain without her, would not be able to keep in touch with their mother by telephone and the internet. However in view of the family's limited financial circumstances it seems unlikely that there would be the possibility of visits to her. I conclude that such cannot be to the benefit of, in particular, young children. There must be a significant risk that their bond with her and their half sisters would be broken which cannot be in their best interests.
67. In submissions I was urged to consider Mr Talabi's situation as well as that of the children. I find some merit in the submission that the effects on Mr Talabi of his wife's deportation would be severe not least because he would effectively be facing a loss for the second time, having been previously widowed.
68. It is difficult to have much, if any sympathy for the Appellant. Her criminality in using false documents was deplorable as was her complete disregard for the laws of this country by remaining here for so long unlawfully. Also, that she entered the relationship with Mr Talabi and started a family by him despite her status. Whilst it is difficult not to have some sympathy for Mr Talabi in seeking a new relationship following the death of his first wife, he too entered the relationship with the Appellant knowing her status.
69. I note the Appellant's rehabilitation. However, I bear in mind in that regard that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors, as indicated, include the need to mark the public's revulsion at the offender's conduct and the need to deter others from acting in a similar way. However, the crux in this case, as the rules indicate, is the children, in particular the three minors. In the particular circumstances of this case for the reasons given I conclude that it would be unduly harsh for the children to remain in the UK without their mother and to live in the country to which she is to be deported.
70. The deportation would be contrary to the UK's obligations under Article 8. The appeals succeed under the Immigration Rules.

Notice of Decision

The appeals are allowed under the Immigration Rules.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Conway