Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01652/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 April 2015	**On 29 May 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

COLLEEN ELAINE ROBINSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Furner, Solicitor from Birnberg Peirce & Partners Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Although this appeal touches on the welfare of children the relevant facts are not intimate and we see no need for an order restraining publication of any details about this appeal.

2. This is an appeal against the decision of the First-tier Tribunal's to dismiss the appellant's appeal against the decision of the respondent on 17 July 2014 to refuse to revoke a deportation order made against her on 26 November 1998.

3. The appellant is a citizen of Jamaica. She has shown a disregard for the immigration rules and the criminal law that is discreditable.

4. She is a citizen of Jamaica. She first arrived in the United Kingdom in February 1997 and in April 1997 she claimed asylum. The application was refused but she remained in the United Kingdom and committed serious criminal offences. On 13 February 1998 at the Crown Court sitting at Knightsbridge she was convicted of two offences of being concerned in the supply of class A controlled drugs and one offence of supplying class A controlled drugs. She was sentenced to 30 months' imprisonment as well as other orders. She was recommended for deportation and a deportation order was signed on 26 November 1998. She was deported on 20 March 1999 and on 2 April 1999, barely two weeks later, she returned to the United Kingdom in breach of the terms of the deportation order using a forged passport. She made an application of some kind to remain as a student in February 2001. The application was refused and in May 2001 she was arrested for drugs offences. She was removed as an illegal entrant on 23 August 2001. Slightly less than a year later, on 19 August 2002 she was given six months' leave to enter in the false identity of Tina Tricia Clarence and on 10 February 2003, using that false identity, she was given leave to remain in stages until 17 February 2006.

5. On 27 September 2005 she was encountered and identified as an illegal entrant in the identity of Donna Faith Thelwell.

6. On 10 March 2006 she applied to remain on the basis that removal would be contrary to the United Kingdom's obligations under the European Convention on Human Rights.

7. On 13 July 2006 she was convicted of an offence of deception and sentenced to 60 days' imprisonment.

8. On 4 July 2008 she was served with notice of illegal entry in the identity of Colleen Elaine Robinson which she accepted as her true identity.

9. The human rights application mentioned above was refused on 29 September 2008. She appealed that decision unsuccessfully, judicial review was refused and on 29 March 2010 she was removed.

10. By letter dated 11 April 2013 she applied for the deportation order to be revoked.

11. The application for revocation was made at the same time as an application for leave to enter as a visitor. For reasons that are not clear details of that application were not included in the papers. Mr Jarvis suggested the explanation was that the refusal of entry clearance, unlike the refusal to revoke a deportation order, was not in the circumstances subject to appeal. Our experience of the operation of government departments makes us inclined to accept this explanation which, although Mr Jarvis clearly offered it in good faith, was only a suggestion. However

we do find it regrettable that the system does not have sufficient flexibility for those involved in the appeals process not to realise the potential importance, or at least relevance, of the whole terms of the application being before the Tribunal. The Secretary of State's case could not be in any way disadvantaged unfairly by the disclosure of all that was said and although we do not think there is a sinister reason for the non-disclosure failure to provide the papers relating to the visitor application is the kind of blinkered approach which could lead to an unjustified sense of grievance.

12. The Notice of Immigration Decision is dated 15 May 2013 but there is nothing in our copy to show it was ever sent to the appellant and we wonder if we have been shown a draft decision.

13. Be that as it may, the appellant made the application in the name Colleen Elaine Robinson and drew attention to the fact that she had previously used the name Donna Thelwell.

14. She said that the main purpose of a visit to the United Kingdom was a family visit intending to last for one month starting in July 2013.

15. The appellant indicated that she had several children and three of them would travel with her. It is not apparent from the application form that they are in fact British citizens. They are Jounte Clarence born on 9 September 1997 and so now aged 17 years, Bryana Ashley Smith born on 21 July 2006 and now aged nearly 9 years and Jayden Daykwan Smith born on 24 May 2008 and so now 8 years old. The appellant answered questions about her income and said that "me and kids' father" would pay for the travel to the United Kingdom and the only cost to her personally would be the cost of her ticket. She answered frankly questions about her past immigration history and her convictions although we can only see reference to one sentence of imprisonment and that was for 30 months in 1997. In answer to questions on the forms she showed that she intended to stay with her daughter in the United Kingdom at her address in Luton.

16. The appellant was interviewed on 15 May 2013. She explained that she wanted to visit her daughter, her grandchildren and her son who was in prison. She confirmed that she intended to stay for four weeks or a month.

17. When prompted she also admitted that she had been sent to prison for 60 days for theft from a shop.

18. Perhaps not entirely unsurprisingly, given her history, the Entry Clearance Officer did not believe her assertions about accommodation or length of visit but also refused the application with reference to paragraph 320(11) saying that there was nothing to justify issuing entry clearance given that the Rules require an application should normally be refused because of her past misconduct, in particular her overstaying and being removed to the public expense, and additionally refused with reference to paragraph 320(19) because her exclusion is conducive to the public good.

19. Given her history an interested observer unfamiliar with ways of immigration control and the need to consider often conflicting rights might wonder how she might ever have thought the application could possibly have succeeded.

20. The answer lies in the letter from Birnberg Pierce dated 11 April 2013 to the Entry Clearance Officer at Kingston. It emphasises that the appellant intended only a short visit to the United Kingdom but asserted that she was entitled to enter the United Kingdom under European Community law. The crucial paragraph is the third paragraph and I set it out below:

> "Because these children are British citizens they are also European nationals and citizens, and are therefore entitled to enjoy the rights and benefits of European citizens to live within the EEA – in this case to live in the United Kingdom. They are, however, entirely dependent on our client and cannot visit or stay in the United Kingdom without her. Our client wishes to come to the United Kingdom for a temporary visit with the children, so that they can see other relatives and friends in the United Kingdom. These relatives and friends would not be able to look after the children, even for a short period of time, and therefore it is necessary for our client to come with them. To prevent the British children exercising their rights as British/European citizens in the UK would be contrary to European Community law, as explained in the case of Ruiz Zambrano [2011] EUECJ C-34/09."

21. The Secretary of State did not agree and gave reasons in a letter dated 11 July 2014.

22. The letter sets out the appellant's immigration history including her criminal activities. It acknowledges that it is an application to facilitate the rights of EEA (in this case British) nationals and noted that there was no evidence that the children were other than well-established in Jamaica and concluded there were no grounds that could make it "unduly harsh" for the children to remain there.

23. At paragraph 24 of the letter the respondent described the children's status as British citizens as being a "significant weighty factor in the consideration of whether to revoke" the deportation order.

24. The letter then pointed out that the children could resume their British citizenship when they were old enough to do so (this must mean when it is practical; it is not suggested that they are not entitled to settle in the United Kingdom until they reach their majority) and their family links can be preserved by other means.

25. The letter then addressed in more detail the appellant's criminality and referred to the determination of her appeal on human rights grounds promulgated in February 2009. The letter said that the appellant's conduct in the United Kingdom had been "appalling" and her convictions "tip heavily in the balance against her and in favour of the public need to be protected from her and her activities".

26. The letter concluded that the deportation order should not be revoked and there were no exceptional facts raised to warrant a departure from the ordinary position.

27. The grounds of appeal to the First-tier Tribunal are in the following terms:

> "The decision is wrong in law, in particular the decision fails to give sufficient weight and/or apply the law appropriately to the status of the appellant's three children as European citizens. Further it failed to pay sufficient regard to the fact that the appellant's conviction is now spent."

28. The appeal came before First-tier Tribunal Judge Youngerwood who dismissed the appeal. It is clear that the First-tier Tribunal would have had no hesitation in dismissing the appeal apart from "the Zambrano issue".

29. It is also clear that the First-tier Tribunal understood the argument that the appellant should be allowed to enter the United Kingdom so that her EU national could exercise their rights.

30. Whether or not the First-tier Tribunal Judge was right in law his reasons for his decision were extremely clear. Having said in paragraph J(q) that the appellant had recognised there was a sister in the United Kingdom and referred to there being relatives in the United Kingdom said:

> "I am not prepared to speculate that there are no other relatives in the UK, given the total absence of any evidence from the appellant as to her relatives in the UK and her intentions in relation to the proposed short visit. That conclusion is reinforced by the findings in the earlier determination as to the circumstances of the children being looked after when the appellant was in prison. The appellant, on my findings, is not to be considered as a family member within the EEA Regulations, for the simple fact that she is not established to be dependent on her children and is, therefore, not an ascendant relative but that begs the question of whether it is established by the appellant, the burden of proof being on her, that there are no other relatives in the UK who are able and willing to look after her children, should they wish to exercise their rights of residence as EU citizens."

31. In short, although the arguments of the law were all very interesting the case turned on its facts and the crucial facts were the First-tier Tribunal Judge was not satisfied that the appellants needed their mother's support to exercise their treaty rights.

32. The appellant appealed. The grounds extended to some eleven paragraphs. Permission was granted by the First-tier Tribunal. Mr Jarvis was concerned that Mr Furner's skeleton argument, which was not provided until the morning of the hearing, went beyond the scope of the grant of permission to appeal. The courts should generally be slow to decide cases on pleading points and human rights cases involved the welfare of children really should be determined on their merits rather than procedural steps unless fairness to all parties really requires strict interpretation of the Rules and arguments submitted. It was Mr Jarvis's contention not so much that the argument should not be entertained but rather if it went beyond the scope of what had been considered he should

be given opportunity to consider the matter further. If there were points that were entirely fresh then permission needed to be sought.

33. We agree with that analysis. We do not agree that there is anything in the skeleton argument that should not have been reasonably anticipated.

34. Mr Furner submitted that the proper legal test was to be drawn from the analogous cases of removing a parent from the United Kingdom. He said that removal was not permissible when it would "compel" or "oblige" or "require" the EU national child to leave. He further submitted that the word "compel" which came from case law should not be interpreted with strict literary statutory force. Very few cases would truly compel something if that meaning was given. There must be an element of practicality and reasonableness involved in deciding if the appellant's removal prevented the children from exercising their rights.

35. We do not agree with Mr Jarvis that the skeleton argument goes beyond the scope of grant.

36. Where we do disagree very strongly with Mr Furner is his contention that it is immaterial whether a short stay or settlement is contemplated. The Entry Clearance Officer then Secretary of State dealing with the application were dealing with an application not brought by children who need no permission to be in the United Kingdom but by a parent who expressed a desire to be in the United Kingdom for the purpose of the visit lasting about a month. We do not have to consider the refusal of that application on its merits except to the extent the children are involved but it is clear that she has an appalling immigration history and although the index offence is now spent, there is significant more recent misbehaviour.

37. Neither do we see any basis for criticising the earlier decision to dismiss the appeal on human rights grounds. Human rights add nothing to the core point here which is the exercise of EU rights by the children. We do not agree that the respondent should have approached the case expressed to be permission to enter for a short time as if it were a settlement case. The respondent should have addressed its mind to what the appellant wanted and the appellant wanted permission to stay for a short time. If that permission had been granted British citizen children could be expected to travel with her to the United Kingdom to visit their family. We incline to the view, without actually deciding it, that an EU right might have the effect of "trumping" exclusion in a case such as this. However that is only relevant if it is necessary for the EU right to be exercised.

38. We repeat what was contemplated here was a short holiday for visitors. The appellant has not, as far as we can see addressed her mind at any point at all to explaining in detail why the children have to travel with her or why she has to remain with them while they exercise a short stay in the United Kingdom. Although the children are young they are not so small that they cannot fly without their mother being with them and they could be expected to travel in the care of the older sibling who is now close on

17 years old. It was not really touched on in interview or in the application. The evidence before the First-tier Tribunal that the father could not assist was not really material. The appellant must prove her case.

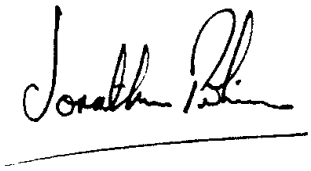
39. Mr Furner contended that the appellant was preparing her case in response to the refusal letter and the reasons for refusal did not say that the children could manage without her for the purpose of a short stay. That is undeniably right and is something that has taxed us. To an extent appellants do prepare their cases to deal with the reasons for refusal advanced by the respondent. That does not alter the fact that it is fundamental to this case to explain why the children need to be cared for by their mother for the short period contemplated. This has not been done by anyone and the First-tier Tribunal in the circumstances was entitled to find, as it did, that the appellant had not proved her case.

40. We understand Mr Furner's contention that there is a certain irony in it being harder for the appellant to prove that she is entitled to visit the United Kingdom for a short stay than it might be to prove she is entitled to settle in the United Kingdom. We do not know that to be right. If she had wanted to settle the case should have been looked at from a different perspective but even if it is right that is not relevant. The respondent was responding to the application that the appellant had made which was for permission to be in the United Kingdom for a short time. The only way she could hope to succeed in that is if she could be admitted as the carer of children exercising their EEA rights and she wholly failed to do that. The First-tier Tribunal Judge has not indulged in speculation as alleged. As is so often the case with the benefit of hindsight the determination could have been expressed a little differently on the point but a fair reading of it is quite clear. The appellant has not shown why her presence is necessary for what was proposed. All the judge was doing in referring to the role of other relatives is making the point that there were reasons in the background to think it was not fanciful or unjustifiably speculative to suggest that the children could be looked after in a way that did not involve their mother being with them. It was never contemplated in the application that the children would be permanently deprived of their mother's support and the case should not have been assessed as if that was in issue. It was not.

41. Although Mr Furner and Mr Jarvis have made thoughtful submissions on the law and we appreciate the care taken by both of them to explain the legal basis behind this c ase, this is on its proper understanding a case decided on its facts. The decision based on the facts was the only reasonable conclusion that could be made because of the absence of evidence and the evidence was not there because the point had not been addressed by the appellant and it should have been.

Notice of Decision

There is no material error on the part of the First-tier Tribunal and we dismiss this appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal  Dated 27 May 2015