IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00741/2014

THE IMMIGRATION ACTS

Heard at North Tyneside	**Determination Promulgated**
On 30th October, 2014	**On 24th November, 2014**
Signed 21st November, 2014	

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N A

Respondent

Representation:
For the Appellant: Mr J Kingham, Senior Home Office Presenting Officer
For the Respondent: Ms Rebecca Pickering, Counsel, instructed by David Gray& Co Solicitors

DETERMINATION AND REASONS

The First-tier Tribunal Judge made an anonymity direction pursuant to Rule 44(4)(1) of the Asylum and Immigration (Procedure) Rules 2005. Unless and until a Tribunal or court orders otherwise no report of these proceedings shall directly or indirectly identify the respondent or any member of her family. This direction applies both to the claimant and the respondent as well as to other parties. I have not been asked to alter or amend this anonymity direction and see no good reason to do so.

1. In this appeal the appellant is the Secretary of State for the Home Department and to avoid confusion, I refer to her as "the claimant".

2. The respondent, N A, is a citizen of Portugal who was born on 6th June, 1978.

Respondent's Immigration History

3. The respondent claims to have arrived in the United Kingdom on 9th April, 2004. On 24th August, 2009 she made an application for a Certificate of Approval of Marriage which was issued to her on 13th May, 2010. On 15th July, 2010 the respondent was married at Bury St Edmunds Register Office to M S, a Pakistani national. On 10th August, 2010 she submitted an application for an EEA registration certificate which was issued to her on 14th January, 2011.

Criminal Conviction

4. On 26th March, 2013, at Peterborough Crown Court, the respondent was convicted of two counts of assault/ill-treat/neglect/abandon a child/young person likely to cause unnecessary suffering/injury for which she was sentenced on 29th April, 2013, to a total of two years and four months' imprisonment. She did not appeal against either the conviction or the sentence.

Deportation

5. On 21st May, 2013, the respondent was notified that the Secretary of State was now considering her liability to deportation on the grounds of public policy. A completed questionnaire was received by the claimant on 10th June, 2013.

6. In the light of the respondent's claim to have been living in the United Kingdom since 9th April, 2004, in a letter dated 10th December, 2013 and served on her on 12th December, 2013, the respondent was requested to provide evidence that she had resided continuously and had exercised her treaty rights in the United Kingdom since that date. She responded on 17th December, 2013 requesting more time to provide the evidence and on 19th December, 2013 she was granted a further period of ten working days in which to provide the requested information. On 2nd January, 2014 a response was received.

7. The respondent was served with a notice of decision to make a deportation order on 11th March, 2014.

Appeal to the First-tier Tribunal

8. The respondent appealed against the decision of the claimant to the First-tier Tribunal and her appeal was heard by First-tier Tribunal Judge Cope sitting at North Tyneside Magistrate's Court on 30th July, 2014. He found that the claimant had failed to show that the respondent, by her personal conduct does present a genuine, present and sufficiently serious threat to the prevention of mistreatment of children and allowed the respondent's appeal.

The Hearing Before Me

9. The claimant was granted permission to appeal on 5th September, 2014 and the appeal came for hearing before me at North Tyneside Magistrate's Court on 30th October, 2014.

10. For the respondent, Miss Pickering confirmed that there was no challenge to the finding made by the First-tier Tribunal Judge at paragraph 53 of his determination where he found that the claimant was correct not to treat the respondent as having established that she has a permanent right of residence under Regulation 15 of the EEA Regulations and that as a consequence the claimant only has to show that there are grounds of public policy justifying the respondent's removal.

11. Criticism was made by the claimant in the grounds of appeal of paragraph 92 of the determination. In it, the First-tier Tribunal Judge makes reference to the claimant's decision letter and a reference in it to the respondent being capable of causing psychological and physical harm to children, especially under the influence of alcohol. The judge says at paragraph 93 that he regards this as being completely wrong, because there is nothing in any presentence, OASys or NOMS Reports giving any indication whatsoever that the respondent has had any problems with alcohol.

12. I pointed out to the representatives that for some unknown reason there appeared to be a copy of the claimant's Reasons for Refusal Letter in respect of the respondent's sister which makes reference to the respondent's sister having an alcohol problem. It appeared that the judge had been given this letter for some reason and it simply assumed that it related to this respondent. Mr Kingham suggested that that was an error of law because the judge has examined the wrong letter and therefore failed to take account of the Secretary of State's view of the current risks posed by the respondent.

13. Mr Kingham addressed me at some length and very helpfully identified four clear challenges to the judge's decision on the part of the Secretary of State. The first refers to what the judge said at paragraphs 74, 75, 76 and 77 of his determination. The judge said:

> "74. It seems to me that this degree and context of contact with the [respondent], as well as the statutory and policy framework within which the probation officer have to work in addition to

> their training and experience, means that I can and should give considerable weight to what they have to say about her.
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> 75. There is one caveat that I would mention here. This is that there is reference for instance in section 2 of the pre-sentence report and section R7.1 of the OASys Report to the effect that the [respondent's] daughters had to give evidence in court and that thus has further damaged them.
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> 76. I have to say that I do not understand these remarks. It is quite apparent not only from the sentencing remarks of the judge but also from the trial record sheet included in the [claimant's] bundle of documents that the [respondent] pleaded guilty to two charges of ill-treatment of the child. The judge sentenced the [respondent] on the basis of having pleaded guilty and explicitly stated that he had given her credit for having avoided the trial and the need for the children to give evidence; and trial record sheet shows that no jury was sworn.
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> 77. I have proceeded therefore on the basis that the comments made in the probation reports about the children having to give evidence in court are incorrect for whatever reason."

14. Mr Kingham said that that was entirely incorrect, because the children *had* given evidence. They were required to give evidence in care proceedings as is apparent from page 42 of the respondent's bundle. At paragraph R7.1 the OASys assessment says this:-

> "[the respondent] clearly presents a risk to her children. However they are currently in long term foster care and had been in the care of the local authorities since the investigation began in August 2012. The social worker involved reports that the children were very frightened and had suffered abuse for a long time. They were all in poor health, requiring significant dental work and that they had been expected to do a lot in the family home that was not appropriate to their age. The children were further damaged by them having to give evidence in court and being told that they liars by their mothers. The ongoing case meant that they could not start therapy and counselling as it was felt that they may have tainted the evidence.
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> In relation to other children [the respondent's] co-defendant is her twin sister, the social worker states that the documentation reports the sisters each holding each others children down for the other one to physically abuse them further – escalating the seriousness and illustrating more planning and calculation than they have acknowledged."

15. Mr Kingham suggested that the second error was to be found in paragraph 120 of the determination. The judge has found that because of the licence conditions which will be attached to the respondent's licence once she is released from prison and the findings of the Family Court, that the respondent is of no risk whatsoever.

16. The judge examined the licence at paragraph 107 of the determination and noted that there were quite specific conditions that the respondent should not approach or communicate with her daughter without the approval of the Probation Service or Cambridgeshire Children's Services; that she was not allowed to stay in the same household with any child under the age of 18 except with the approval of the Probation Service; that she was to notify her probation officer of any developing personal relationships with any children under the age of 18; and she was not permitted to work or organise any activity with someone under the age of 18 either on a paid or unpaid basis without prior approval. The judge believed that those stringent conditions were likely to reduce the degree

of risk that the respondent may pose to children and at paragraph 20 the judge said:

> "So far as the particular risk is concerned I am satisfied for the reasons that I have set out above that the respondent poses no risk whatsoever to her daughters."

17. That, Mr King said, represented a further error on the part of the judge. The judge went on to say at paragraph 121:

> "121. In relation to a more generalised risk to other children, then again I consider that there is no risk to such children in general – that is children that the [respondent] may come into contact with during the normal course of the day in a social situation or through employment that she may obtain following release from custody. There is nothing in any of the probation documents to suggest that she presents any such risk."

18. Next Mr Kingham, asked me to consider paragraph 100 of the determination. The OASys Report makes reference to the respondent and her sister assisting each other in holding the children down whilst the other abuses the child. Mr Kingham suggested this may not have been the basis of her plea of guilty, but the judge was wrong at paragraph in ignoring the OASys Report in assessing the risk. The judge said:-

> "100. There is an indication in the pre-sentence report that the [respondent] may have been involved in some way in abuse of the children of [her twin sister] with them all living together in the same house – I note the comments attributed to apparently Miss Forrester at Section 4 of the OASys Report about the respondent and her sister holding each other's children down for them to be beaten. However the [respondent] was not sentenced on this basis, and apparently the pleas accepted by the Crown were also not on that basis."

19. Mr Kingham said that since reference to the respondent and her twin sister assisting each other in the abuse of each other's children was contained within the OASys Report. It was wrong and therefore an error for the judge to say what he did at paragraph 100.

20. Lastly Mr Kingham refereed me to the judge's finding of the judge at paragraphs 112 and 113 of the determination. Here, the judge said:-

> "112. So far as the [respondent] herself is concerned she has said at paragraphs 12-13 that she knows what she did was wrong and that she apologised for her actions; she was ashamed and upset about what she did; and that she deeply regretted what she did to her children.
>
> 113. I consider that this is an indicator, albeit far from being determinative, of recognition by the [respondent] of the unacceptability of her behaviour and her being aware that such offending should not occur in the future. As such it does need to be given some weight in the overall assessment of risk."

21. It was for the judge to assess the respondent's remorse, but the facts which led to the respondent's behaviour, namely learnt behaviour and poor thinking skills, without evidence that the respondent had been addressing the facts which had led to the behaviour, the judge was wrong in focusing solely on remorse as an indication of the likelihood of the respondent's future offending.

22. Having heard Mr Kingham's submissions I adjourned briefly for Miss Pickering to take instructions from her client. The respondent had arrived late and following an altercation in the cells involving another detainee it had not been possible for Miss Pickering to have a conference with the respondent. On resuming the hearing Counsel confirmed that she had been given sufficient time to consult with the respondent.

23. Miss Pickering invited me to uphold the determination. She pointed out that it was a detailed and thorough determination.

24. Counsel then addressed me on each of the four challenges identified by Mr Kingham, starting first with the last one.

25. At paragraph 113 the judge believed that the respondent's remorse was an indicator of recognition by the respondent of the unacceptability of her behaviour and was right to identify that it did need to be given some weight in the overall assessment of risk. The weight to be given was a matter entirely for him. Linked in with the respondent's remorse is the fact that the respondent has learned to address her behaviour. Counsel drew my attention to the letter of 17th April, 2014 from Christopher Langthorne, offender supervisor at HM Prison Long Newton. This was at pages 53 and 54 of the respondent's bundle. The letter points out that the respondent is on G wing which provides a relaxed environment with low security,

> "To allow the trusted prisoners to take more responsibility for themselves. [The respondent] has not presented with any management problems during the course of her sentence since her arrival at HMP Long Newton. [The respondent] is an enhanced IEP status and her wing records are wholly positive. [The respondent] works in the education department where she attends the English for foreign nationals class."

26. In the last paragraph on the first page of that letter Mr Langthorne writes:-

> "[The respondent] is demonstrating through her prison behaviour and the way that she is dealing with her immigration position that she can deal with challenging situations. She is working with the education department to both improve her English and then step on to improve her vocational skills and her employability. It is likely that if/when she is released to her home area the Probation Service will work with her individually to address her offending behaviour and increase her victim empathy. Her scheduled release date is 28th June, 2014. She will not be eligible for HDC as her offences are against children."

27. Counsel pointed out that the respondent is clearly dealing with her behaviour issues. Miss Pickering drew my attention to paragraph 2.11 of the OASys Report which states:

> "Although [the respondent] has admitted her behaviour and she acknowledges that it took some time for her to accept that the way in which she had behaved was inappropriate [the respondent] did state that she felt very sad about the situation and the way she acted. She said that she behaved in the wrong way in an attempt to gain control of the situation. She acknowledged that she had hurt her children and that she should have asked for help. It did appear during the interview that

> [the respondent's] remorse was focused on her own losses, rather than the impact of her actions on her children.
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> [The respondent] stated that she did not feel she was doing anything wrong at the time as it was the only way she knew to discipline her children yet she said that on occasion she regretted her actions immediately afterwards, felt ashamed, was upset and apologised to them for causing them pain. When asked how she thought others disciplined their children, she said that on occasions she had observed others smacking their children, but had never seen anyone use a weapon on a child."

28. Miss Pickering also drew my attention to what appeared to be a contradiction at paragraph 2.7 of the OASys Report, where it suggests that there was no evidence to suggest that the respondent and her twin sister had acted together in abusing their children, "but their behaviour stems from the same belief and experiences that they have had. It appears to be based on their own upbringing, they have the same ideas about disciplining children but there is nothing to suggest that they were influencing each other."

29. In making his findings, Miss Pickering suggested that the judge had been able to assess the respondent's oral evidence at the hearing before him and she had earlier expressed remorse. Her behaviour also supports the assertion that she is remorseful and an understanding that it was wrong. She stated that there was nothing unreasonable or perverse about the judge having attached some weight to the remorse expressed.

30. As to the third challenge, it is clear that the judge did consider carefully the OASys Report, but that in itself is contradictory. There was a basis of plea and her pleas were on the basis of her having assaulted her two children. Her plea was found to be acceptable to the Crown. The judge attached weight to a number of documents as is evident from paragraph 70 where he refers not only to the pre-sentence report but also the OASys assessment and NOMS report, the letter from Christopher Langthorne and an email from Mr Langthorne to the respondent's solicitors. The judge attached particular weight to the probation officer's reports as is apparent from paragraph 73 of the determination.

> "73. I have placed particular weight on the five documents from the probation officers. If nothing else they have been working with the respondent as well as making criminal justice assessments on the degree of risk that she poses both prior to her conviction and subsequently while she has been serving her sentence of imprisonment."

31. And at 74 he said:-

> "74. It seems to me that this degree and context of contact with [the respondent], as well as the statutory and policy framework within which the probation officers have to work in addition to their training and experience, means that I can and should give considerable weight to what they have to say about her."

32. The judge did not make an assessment in a vacuum. He has clearly considered all the relevant evidence and weighed upon what he should do. He reached conclusions based on this evidence which were open to him.

33. Turning now to the first challenge made by Mr Kingham, namely the issue of the children having to give evidence in care proceedings, this is not something that was material to his decision. He considered the reports and thought that they were mistaken but he did consider them. He considered the overall assessment which of course was made on the basis that the children had been required to give evidence in court. This may have been an error on his part but it is certainly not one which is capable of having any effect on the eventual outcome of the appeal.

34. So far as the second challenge is concerned, paragraph 120 of the determination must be read in the context of the determination as a whole. There is a risk but there are conditions in place which address them which means that for all practical purposes the children are not at risk from their mother. Paragraph R10.3 of the OASys assessment says:-

> "The risk is not currently imminent due to [the respondent's] children being in long term foster care. This is the long term plan and there is currently nothing in place to consider any reconciliation. The risk will remain at this level as [the respondent] will not have unsupervised contact with her children and will not be responsible for their care. She will need to have completed significant work to address her offending behaviour, before CSC will even consider working with her on parenting courses. If she was to be involved in the care of other children, then the risk she poses would of course be escalated."

35. The judge's comments need therefore to be considered in the context of the whole determination and in the context of the licence conditions which were imposed until August of next year.

36. It is unfortunate that the judge had, for some unknown reason, been given a copy of the respondent's sister's refusal letter and confused the two of them. However the only confusion is in respect of his reference at paragraphs 92, 93, and 94. Elsewhere it is clear that he has referred to the respondent's refusal letter and thus this is not a material factor in how he reached his decision. It is clear from paragraph 11 that the judge did examine the correct letter.

37. Mr Kingham had no further comments to make. He did, however, confirm that what the judge said at paragraphs 30, 31 and 32 in relation to the Immigration Act 2014 was correct. It does not apply.

38. I reserved my decision.

39. I am grateful to Mr Kingham for the very careful and concise way in which he identified the challenges to the determination. Unfortunately the grounds of appeal were not as helpful, suggesting as it does that the judge appears to disparage the contents of the reasons for deportation letter, without given sufficient reasons and without adequate analysis. It suggests that the judge appears to have been looking for reasons to allow the appeal, but gives no examples.

40. The judge was clearly wrong in what he said at paragraphs 75 and 76. He has very clearly overlooked the fact that the respondent's children were required to give evidence in care proceedings. However, I agree with Miss Pickering; the judge has simply said that he has proceeded on the basis that the comments made in the probation reports about the children having to give evidence in court are incorrect, but he does nonetheless fully consider the reports and takes into account their contents. He assumes that the comments about the children having to give evidence against their mother are incorrect and put their comments to one side. Nonetheless he did consider the remainder of the reports and I agree that this error on his part is simply not capable of having affected the outcome of the appeal.

41. So far as the last challenge is concerned, Mr Kingham suggested that in focussing solely on remorse as an indication of the likelihood of the respondent's future offending, the judge had erred because the facts which led to the respondent's behaviour, namely her learnt behaviour and her lack of thinking skills, have still not been addressed by the respondent.

42. I do not believe that the judge did err. He said at paragraph 113 that he thought that her expression of remorse was an indicator of the recognition by the respondent of the unacceptability of her behaviour but he did make it clear that it was far from being determinative and he was right to suggest that it did need to be given some weight in the overall assessment of risk. I believe that the finding he made was one which was open to him.

43. Turning now to the third challenge and paragraph 100 of the determination, there is, as I have indicated above, a clear contradiction in the OASys Report. There is a reference to comments attributed to Miss Foster at Section 4 of the OASys Report about the respondent and her sister holding each other's children down for them to be beaten, but this is contradicted elsewhere in the report. As Counsel pointed out, there was a basis of plea and the plea made by the respondent was found to be acceptable by the Crown. The judge very clearly did consider and attach particular weight to the probation officer's report. I believe therefore that the judge was entitled to deal with the respondent on the basis that her own offending was confined to physical and psychological abuse of her own children.

44. I then turn to the second challenge. It is clear from the safeguards put in place that the respondent's children are not at any risk from her, because they are in foster care and the respondent will not be permitted access to them at the moment, and if and when she ever is, it will be in a controlled environment.

45. The judge starts his assessment of whether or not the respondent represents a genuine and present and sufficiently serious threat at

paragraph 97 of his determination and at paragraph 98 he makes it clear that from his examination of the probation reports and the sentencing remarks of the judge that there is no generalised risk from the respondent to the children as a group as a whole. The respondent's offending related to the physical and psychological abuse of her own children. As he points out, the pre-sentence report, OASys report and NOMS report assess the risk as being confined to the respondent's own children and any other children who may be placed in her care. He was entitled to find as he did at paragraph 104. Here he said:-

> "104. A further significant factor to take into account in assessment of risk of reoffending against the two children concerned is that it seems highly unlikely to say the least that the respondent will be allowed any further contact with them, or indeed that this would happen – there are the orders of the Family Court proceedings which as I understand it have placed the children in long-term foster care and with no provision for at least personal or telephone contact with the [respondent]; and there is the information from Miss Forrester in her letter and email that [the respondent's' children] have said that they do not currently wish to have any contact with the [respondent]."

46. He pointed out that the actual lack of contact that the respondent would have, the children's express wishes and the orders of the Family Court, not only reduces any risk offered to them by her, but in practice eliminates it entirely. The judge then considered the licence conditions and at paragraph 108 regarded those conditions as likely to greatly reduce the degree of risk the respondent may pose to children given that the conditions effectively minimise the possibility of her having care of children.

47. The First Tier Tribunal Judge went on to say that he believed, therefore. that the respondent poses no risk whatsoever to her own daughters. I believe that by doing so, the judge has materially erred in law.

48. I believe that the lack of contact which the respondent will have with her children, the children's express wishes at not having contact with the respondent, the orders of the Family Court and the conditions of her licence mean that there will be no practical risk to the children of harm from the respondent, because she will not be allowed to see them or have any contact with them. However, that is not the same as suggesting, as the judge did, that the respondent poses no risk whatsoever to her own daughters.

49. It is precisely because she *does* pose a risk to her own daughters that these stringent safeguards have been put in place: to protect the children.

50. I believe that the judge has confused the risk which the respondent poses, with the risk to the children. I believe that on the evidence before the judge he has erred in law and that the respondent, by her personal conduct does present a genuine, present and sufficiently serious threat to the prevention of mistreatment of children.

51. The fundamental interest of society that is threatened by the personal conduct of the respondent is the prevention of mistreatment to children. Having carefully examined the evidence in this appeal and carefully considered the oral evidence of the respondent together with her unsigned, amended statement in her bundle, the probation report, the letter from Ms Forrester, the OASys report the NOMS report and the letter from Mr Langthorne, I have concluded that the respondent's removal would be an entirely proportionate response on the part of the Claimant.

52. The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. My decision is that the respondent's appeal on European Union law grounds is dismissed.

Richard Chalkley

Upper Tribunal Judge Chalkley
21st November, 2014