



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

Appeal Number: DA/01143/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 11 November 2013

**Determination
Promulgated**

On 6 February 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AS

(ANONYMITY DIRECTION MAINTAINED)

Respondent

Representation:

For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: Ms Soloman, IAS (Sheffield)

DETERMINATION AND REASONS

1. I shall refer to the respondent before the Upper Tribunal as the “appellant” (as she was before the First-tier Tribunal) and to the Secretary of State as the “respondent”. The appellant, AS, was born on 29 May 1993 and is a female citizen of India. The appellant has appealed against a decision of

the respondent dated 22 May 2013 to deport her to India. Her appeal was allowed by the First-tier Tribunal (Judge Kelly and Dr Ravenscroft) in a determination promulgated on 17 September 2013. The particulars of the appellant's immigration history and offending are set out in the First-tier Tribunal's determination at [3]:

The appellant arrived in the United Kingdom on the 11th September 2011, with leave to remain as a student until the 30th October 2014. She was sentenced to 12 weeks imprisonment in respect of two counts of theft on the 21st April 2012. She was released from that sentence on the 1st June 2012. She committed further offences of theft on the 27th June and 6th September 2012, for which she was sentenced to a total period of 12 months imprisonment at Isleworth Crown Court on the 19th October 2012. The appellant gave birth to a son in December 2012. Both the appellant and her son were made the subject of deportation orders, pursuant to Section 32 of the UK Borders Act 2007, on the 22nd January 2013. The appellant claimed asylum on the 22nd February 2013 and the deportation orders of the 22nd January 2013 were revoked. The instant decisions to deport the appellant and her son were made on the 22nd May 2013. For reasons that we do not understand, **the instant decision was not made on the basis that the appellant is liable to automatic deportation, but rather was made solely pursuant to respondent's discretionary power under Section 3 of the Immigration Act 1971.**

2. The Tribunal carried out its assessment of the risk of persecution and/or Article 3 ECHR ill-treatment which the appellant may encounter in India at [24] *et seq*:

We are not satisfied that the appellant would be at risk of harm from Mr Anthony in India. This is for several reasons.

Firstly, we do not accept that the appellant would be prepared (subject to their agreement) to return to her parents' house in India if Mr Anthony genuinely constituted a genuine and present threat to her safety and to that of her child. Her willingness to return to India if permitted to live with her parents in our view provides clear evidence that her continued fear of Mr Anthony, though possibly genuine, is irrational.

Secondly, we are not satisfied that Mr Anthony would have the means to discover her whereabouts in India. This is not a case in which the appellant claims that the person whom she claims to fear is one who has the necessary influence or network of spies that would enable him to track her down in a country the size of India.

Thirdly, and despite the threats that he made against the appellant and her parents on the occasion of the final telephone conversation of the 2nd February 2013, the general tenor of the Mr Anthony's statements was that he intended to move to another country and wished to have nothing more to do with the appellant, having now realised that he was not going to get his hands on a dowry from her father.

We have assumed that women in India are members of a particular social group. However, we find for the above reasons that the appellant would not be at risk on return to India by reason of her membership of this group. It follows from this that her deportation would not contravene the United Kingdom's obligations

under Article 33 of the Refugee Convention. We thus turn to consider whether the appellant would be destitute upon return to India so as to constitute a flagrant breach of her right not to be subjected to inhuman or degrading treatment under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

Assessment of risk of destitution on return to India (Article 3)

The respondent accepted that the appellant would be returning to India as a single mother, but also noted that she had not at that stage asked her mother directly whether she would be permitted to stay with her until she had established herself on an independent basis. However, in view of the recently-expressed uncompromising position of her mother (see paragraph 8, above) we have no doubt that living with her parents would not be a practical option.

Mrs Soloman drew our attention to various passages in the background country information reports that are contained within the appellant's bundle of documents. We agree with her submission that these show a high level of societal discrimination against single mothers in India. We also note that those who were quoted by *The Times of India* as making positive comments regarding single motherhood by way of a lifestyle choice, were generally professional women who were located within a city environment [see the article dated the 15th June 2012, quoted in the respondent's explanatory letter to the appellant, dated the 22nd May 2013].

Nevertheless, the threshold for engagement of Article 3 is a high one and the burden of proof is firmly upon the appellant. This was emphasised by the Tribunal in *MA (Prove Destitution) Jamaica* [2005] UKAIT 00013:

Appellants seeking to make points of that kind [that they would face destitution upon return to their country of origin] must prove their case and do it in a way that shows that they have seriously addressed their minds to returning to their country of origin and have made proper enquiries about how they could establish themselves. If they fail to do that it will be most unusual for them to be able to show that they would be destitute in the event of return.

We do not have any evidence that the appellant has made enquiries of the kind envisaged by the Tribunal in *MA*, and we are not persuaded that the background country information that has been drawn to our attention is such as to establish the near-inevitability of the appellant's destitution on return to India. Overall, we share the view of the respondent's official, that whilst return to India will involve a significant degree of hardship for the appellant, it does not meet the high threshold necessary for engagement of her Article 3 rights.

3. Those findings have not been challenged by the appellant in the proceedings before the Upper Tribunal. I therefore have not revisited the findings and conclusions of the First-tier Tribunal as regards the Refugee Convention and Article 3 ECHR.
4. The First-tier Tribunal allowed the appeal on Article 8 ECHR grounds. At [33] *et seq* the Tribunal wrote this:

33. Ms Soloman did not argue that Article 8 was potentially engaged by the facts of this case. However, having regard to the modest threshold for engagement, we are prepared to assume that the appellant's removal does potentially engage the operation of Article 8. We have therefore also considered the other relevant considerations under Article 8.

34. We are satisfied that the decision is in accordance with the law (i.e. Section 3 of the Immigration Act 1971 and paragraph 363 of the Immigration Rules) and that the appellant's removal (though not necessarily by way of deportation) is one that is necessary in a democratic society for the prevention of crime and in order to maintain the economic well being of the country through an effective system of immigration control. We therefore turn to consider whether the appellant's deportation is proportionate to achieving those ends.

35. We approach our task on the basis that the appellant's deportation not only involves the appellant's removal but also, potentially, her exclusion from the United Kingdom for a period to ten years.

36. We have had little if any evidence that the appellant has significant cultural or social ties to the United Kingdom. On the other hand she does have significant cultural ties to India, where she spent the formative years of her life. She also has parents who are permanently resident there and, whilst we are in no doubt that she would be unwelcome were she to return to their home village, we consider it likely that they would provide her with some financial assistance if only to discourage her from causing them embarrassment by returning to their village with an illegitimate son (see paragraph 22, above). Furthermore, the appellant entered the United Kingdom on a temporary basis in the knowledge that she might be required to return to India when her leave to remain had expired.

37. In the above circumstances, we consider that the appellant's removal is a proportionate means of maintaining the economic well-being of the country by the consistent application of immigration controls. However, we consider that removal by the vehicle of deportation - with the consequence that the appellant would be excluded from the United Kingdom for a period of ten years - would be disproportionate in seeking to further the legitimate objectives of preventing crime and protecting the rights and freedoms of others. We have reached this conclusion for the following reasons.

38. Although it is clear from her remarks that the sentencing judge was fully aware of the straightened financial circumstances in which the appellant was living at the time when she committed the index offences, it is equally clear that she was unaware that the appellant had (as we find) committed those offences under duress from her partner. We have already explained (at paragraph 18 above) why the appellant did not put forward this potential defence to the charges that she faced in October 2012, and we have no doubt that the threats that her partner had made to her own safety and that of her baby had been considerably reinforced by his presence in the public gallery throughout the court proceedings. Had she been free to explain fully the circumstances in which she had committed these offences, we have no doubt that either she would have been acquitted of them altogether, or that the additional mitigation they provided would have led to a considerable reduction in the length of the sentence that she in fact received. In either case, her culpability for these offences was either absent or minimal.

5. The Tribunal concluded;

43. Although it is clear from her remarks that the sentencing judge was fully aware of the straightened financial circumstances in which the appellant was living at the time when she committed the index offences, it is equally clear that she was unaware that the appellant had (as we find) committed those offences under duress from her partner. We have already explained (at paragraph 18 above) why the appellant did not put forward this potential defence to the charges that she faced in October 2012, and we have no doubt that the threats that her partner had made to her own safety and that of her baby had been considerably reinforced by his presence in the public gallery throughout the court proceedings. Had she been free to explain fully the circumstances in which she had committed these offences, we have no doubt that either she would have been acquitted of them altogether, or that the additional mitigation they provided would have led to a considerable reduction in the length of the sentence that she in fact received. In either case, her culpability for these offences was either absent or minimal.

6. The parties agree that the Tribunal misdirected itself as regards to paragraph 364 of HC 395 (as amended) which had been deleted before the immigration decision in the present appeal. At [6], the grounds of appeal assert:

The panel have sought to go behind the sentencing judge's finding by accepting her reasons for failing to plead in defence that she was under duress from her partner, a matter that could have been taken into consideration by the sentencing judge when sentencing her. The appellant has not sought to appeal her convictions. Her index offence leading to twelve months' imprisonment had been preceded by a previous conviction for theft. The appellant has therefore had more than one opportunity before the appropriate jurisdiction to enter a plea in mitigation for her offences. The panel have failed to give adequate consideration to the appellant's risk of reoffending. The panel have erred materially in law by abdicating the appellant from any culpability for her crime whatsoever when assessed alongside her previous conviction for theft, it is submitted that this amounts to a material error of law.

7. With respect to the First-tier Tribunal which has prepared a thoughtful and thorough determination, I consider that assertion to be correct. The Tribunal had before it the sentencing remarks of Her Honour Judge Dean. The judge emphasised the "established pattern of offending behaviour" of the appellant and noted that the appellant's "only real mitigation" was that she was "still young." The judge recorded the very considerable inconvenience and distress which the appellant had caused to passengers at Heathrow Airport by "helping herself" to their personal possessions. There is no mention in the judge's remarks of the mitigating factors which so concerned the First-tier Tribunal at [38] although I appreciate that the judge may not have observed the conduct of the appellant's former partner at the trial. I find that, whilst the Tribunal was right to have regard to all the circumstances of the case, it has strayed into an area which it should have avoided. The appellant was represented by lawyers before the Crown Court and, as the grounds of appeal note, she did not seek to

appeal against either her conviction or sentence. In the vast majority of cases, the sentencing remarks of the Crown Court Judge should constitute the first and last text to which the Tribunal should turn for information about the offending of an appellant. The Tribunal should have declined any invitation to go behind the conviction of the appellant especially when the sentencing remarks of the judge gave a very clear an indication of the seriousness of the offending. By basing its Article 8 ECHR assessment on its finding that the appellant's "culpability for these offences was either absent or minimal" I find that the Tribunal has erred in law such that its determination is vitiated.

8. I am concerned also by the suggestion made at [40] that, whilst it found that deportation would cause a disproportionate breach of the appellant's Article 8 ECHR rights, removal under Section 10 of the Immigration and Asylum Act 1999 might not do so. The Tribunal appears to have moved away from a focus upon the strength of the appellant's ties to the United Kingdom balanced against the public interest concerned with her removal towards an assessment of how easy or difficult it would be for the appellant to get back into the United Kingdom having left it. I do not consider it appropriate that the Tribunal should have given such weight (indeed, possibly decisive weight) to the particular consequences of the method of the appellant's removal. Such an approach has the potential for producing paradoxical results; for example, there might be no breach of Article 8 when an overstayer who has been otherwise law-abiding is administratively removed, whereas another individual with a similar family/private life in the United Kingdom may be entitled to Article 8 leave to remain because, after he has committed serious criminal offences, a decision is made to deport him. I find that the emphasis which the Tribunal has given to the particular method and consequences of enforcement has, as with its observations and findings regarding the appellant's criminal offending, seriously distorted its Article 8 ECHR analysis.
9. I set aside the determination of the First-tier Tribunal. The Tribunal's findings as regard persecution and Article 3 ECHR ill-treatment in India are preserved. The Article 8 ECHR appeal will have to be considered again and I consider that it is appropriate that the decision should be remade by the First-tier Tribunal which will need to look at all the evidence as at the date of the next hearing before it.

DECISION

10. The determination of the First-tier Tribunal which was promulgated on 17 September 2013 is set aside. The findings and conclusions of the Tribunal as regard the Refugee Convention, Humanitarian Protection and Article 3 ECHR are preserved. The appeal is remitted to the First-tier Tribunal (not

Judge Kelly/Dr Ravenscroft) to remake the decision in respect of Article 8 ECHR only.

Signed

Date 20 November 2013

Upper Tribunal Judge Clive Lane