



IAC-FH-CK-V1

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

Appeal Number: AA/03083/2015

THE IMMIGRATION ACTS

**Heard at Bradford
On 27th January 2016**

**Decision & Reasons Promulgated
On 10 February 2016**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A T

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs R Petterson, Home Office Presenting Officer

For the Respondent: Miss S Khan, Counsel instructed by Parker Rhodes
Hickmotts Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of Judge Turnock made following a hearing at Bradford on 10th July 2015.

Background

2. The claimant is a citizen of Jamaica born on 27th January 1970. She arrived in the UK on 18th October 2000 as a visitor. She subsequently made an application to remain as the spouse of a British citizen which was ultimately refused and she became appeal rights exhausted in 2005.

3. On 11th March 2005 she was convicted of conspiracy to supply class A controlled drugs (heroin and crack cocaine) and sentenced to four years' imprisonment. She applied for asylum on the basis that she would be at risk on return to Jamaica from fellow gang members against whom she had given evidence.
4. On 11th December 2012 she was convicted on two counts of conspiracy to supply class A controlled drugs and sentenced to three years and six months' imprisonment. A notice of liability to automatic deportation was served and a further asylum interview conducted. She appealed against the making of the deportation order on the basis that she was entitled to be granted refugee status and her rights under Articles 3 and 8 of the ECHR would be breached by her removal.
5. The judge discharged the certificate issued by the Secretary of State under the provisions of Section 72 of the Nationality, Immigration and Asylum Act 2002 and concluded that the claimant was not excluded from consideration as to whether she was entitled to protection of the Refugee Convention, but he dismissed the asylum appeal because he was not satisfied that the evidence presented established that informers against gangs could be considered as a particular social group.
6. He went on to consider whether the appellant had shown that she would be at risk from non-state agents from which the state would not be able to provide reasonable protection and accordingly whether the appeal should be allowed under Article 3 of the ECHR.
7. The Secretary of State accepted that she was a witness for the Crown Prosecution Service and that she was threatened by her co-defendants in 2005. The judge recorded that it was the view of the police that the claimant was at risk of reprisals in 2005. She did not go into a witness protection programme in the UK although it was offered because she thought that she was unlikely to be attacked here and her co-accused did not know where she was when she came out of prison.
8. The claimant did not argue that there had been direct threats made against her since 2005. The judge concluded that the evidence of allegations to threats to members of her family in Jamaica was not coherent or consistent and was unsupported by other evidence. He observed that if a ruthless gang member were seeking retribution against family members of the claimant it was surprising that they were not more effective in doing so. He then wrote as follows:

“What I find makes the assessment of risk more difficult is the absence of information which I consider would have a considerable bearing on that issue. Her co-accused were sentenced to lengthy periods of imprisonment. [P] was sentenced to eleven years' imprisonment and [D] to ten years' imprisonment. In each case a recommendation for deportation was made. In the case of [M] he was sentenced to six years' imprisonment but there was no recommendation for deportation made in his case. It is reasonable to assume that both [P] and [D] were deported but what is not known is

what happened to him on his release. Was he deported to Jamaica or did he remain in the UK? More important is the question of whether it is the case, as the appellant claims, that he is the cousin of Dudus and Livery Coke and does he have any connection to the Shower Posse? I appreciate that the burden is on the appellant but having raised these issues in her claim I consider that the respondent should have responded appropriately.

I have little doubt that those against whom the appellant gave evidence would wish to seek to take action against the appellant should the opportunity arise. In 2006 at the time of the trial there is little doubt that was the case when the evidence of the police officers is considered. I accept that they would be considerably more likely to achieve that goal in Jamaica rather than in the UK. If her co-accused were linked to the Shower Posse then they are more likely to have the resources to be able to find where she is living than if they have no such connection. If she were to come into contact with any of her co-accused in Jamaica I am satisfied that she would be at considerable risk."

9. The judge then went on to consider whether the claimant would be able to call upon the authorities for protection. At paragraph 137 he said:

"137. It would have been helpful to have had a definitive answer, or as near to that as could be achieved from the Jamaican authorities as to whether, given her particular circumstances, the appellant would be admitted into the witness protection programme and if so what form of protection would be offered to her.

138. The information as to whether McFarlane and the other co-accused were deported and what connections he has, if any, would also have assisted in the analysis as to whether there would be sufficiency of protection for the appellant in Jamaica.

139. I find that the country information produced raised considerable doubt as to whether the appellant would be admitted to the witness protection programme and if she were whether it would provide adequate protection to her. In the absence of admittance to the programme I conclude that relocation would not provide adequate protection for her."

10. On that basis he allowed the appeal with respect to Article 3.

11. With respect to Article 8 and the Zambrano principle, he said that he was not satisfied that the two children currently residing with the claimant would be compelled to leave the UK if she were to be deported. However, if they went with her it would have an adverse impact on them and would not be in their best interests as British citizens. He wrote:

"On the respondent's own case they would have severe limitations placed upon them as a result of being in the witness protection programme and/or being severely limited as to where they could live. Their contact with their extended family in the UK would be curtailed. If they were to remain in the UK there is a great deal of uncertainty as to what their living arrangements would be. Taking account of all of the factors set out above I have concluded that there are very compelling reasons why the removal of the appellant would breach her rights under Article 8 of the ECHR."

The Grounds of Application

12. The Secretary of State sought permission to appeal on three grounds.
13. First, the judge had reversed the burden of proof in concluding that the claimant's appeal should be allowed under Article 3. He had required the Secretary of State to produce information as to the current whereabouts of the co-accused, to say whether they had been deported to Jamaica, to show whether they were related to Dudus and Liverty Coke and whether they had any connection to the Shower Posse. These were matters that the claimant had to prove as part of her asylum claim. If she had received any threats from the co-accused emanating from Jamaica she could have asserted that in her evidence and its credibility assessed. It is not for the Secretary of State to substantiate facts as asserted by her. The judge had misdirected himself in law.
14. His consequent finding that the co-accused were looking for the claimant in Jamaica was unduly speculative, having made no finding that they were there or related to Dudus and Liverty Coke or that they had any connection to the Shower Posse.
15. Second, the judge's approach was inconsistent with the country guidance case of AB (Protection - criminal gangs - internal relocation) Jamaica CG [2007] UKAIT 00018, which requires an assessment of risk in the home area. The judge had not properly addressed his mind as to whether there was a viable internal relocation option without being admitted into the witness protection programme. There were no findings as to the reach of the co-accused and whether she would be tracked or traced. AB Jamaica does not support the view that internal relocation is an unsafe or unreasonable option in Jamaica in general. The judge had wrongly jumped to the conclusion that the claimant needed to be admitted to the witness protection programme in order to be safe without first finding a real risk of persecution in her home area based on proper findings of fact. In the alternative he had applied too high a standard of proof in respect of whether she would be admitted into the programme in requiring a definitive answer from the Jamaican authorities as to whether she would be or not. If the claimant cannot prove whether there was a real risk of persecution from non-state actors in Jamaica because she had no information about them, it could not amount to a breach of Article 3.
16. Finally the judge had erred in finding that there were very compelling circumstances in respect of Article 8. The findings were premised on the flawed Article 3 decision that the claimant would have to be live under the witness protection programme when there was no evidence of persecution in her home area. Absent such evidence she would be returning to Jamaica with her two children and there is no evidence that it would be unduly harsh for them to accompany their mother.
17. Permission to appeal was granted by Judge P J G White for the reasons outlined in the grounds on 25th August 2015.

Submissions

18. Mrs Petterson unfortunately did not have her file but was in a position to make submissions on the error of law grounds on the basis of a copy of the determination and the grounds, which she relied on; she submitted that the judge had materially erred. She also observed that he had made contradictory findings since he had disbelieved the evidence in relation to threats since 2005 but had then speculated that she would be at risk on return.
19. Miss Khan strenuously defended the decision. She submitted that there was no misapplication of the burden of proof. It was not unreasonable for the judge to say that the Secretary of State could easily check whether the gang members had in fact been deported. The fact that there had been no reprisals in the interim was because the main perpetrators had been given very lengthy jail sentences.
20. The evidence from the claimant had been set out in a clear and cogent manner. The judge had set out in great detail the police evidence from 2006 and 2009. The claimant had given evidence against the network as a whole. It was clear that this operation involved Jamaican nationals using other Jamaican nationals and there was a serious history of violence and fear of future violence surrounding members of the conspiracy. She rejected the argument that the judge had not assessed the risk in the home area - the decision was not founded upon a decision as to whether or not she would be admitted to the witness protection programme.
21. The judge had considered the case on the basis that the claimant would be at risk as a consequence of having been an informer in 2006 and on the basis that that risk would be elevated if her co-accused were linked to the Shower Posse and in Jamaica. The foundation of risk was established even if neither were true.

Consideration of whether there is a material Error of Law

22. In very many ways this is an absolutely outstanding determination. This judge has done an exceptional amount of work on this case. He clearly took a great deal of care in analysing the evidence, and was clearly frustrated that key facts could not be established.
23. I have carefully considered Miss Khan's submission that the judge allowed the appeal both on the basis that the claimant's co-accused were linked to the Shower Posse and in Jamaica, and on the basis that that had not been established. However, that is simply not clear from the text of paragraph 125.
24. Moreover in saying that the Secretary of State should have responded appropriately, by which I presume he meant by providing evidence in relation to the deportation of the co-accused, the judge clearly reversed

the burden which always remains with the claimant to prove her case, which is that she would be at risk from them in Jamaica.

25. Furthermore the judge has not based his assessment of real risk upon findings of fact but upon a number of surmises. It would have been open to him to reasonably conclude that [P] and [D] were deported to Jamaica since they were recommended for deportation and had served ten year sentences. Equally it would be open to him to conclude that [M], having been sentenced to six years, was in all likelihood deported. However, that is not how he phrased his decision.
26. So far as Ground 3 is concerned, if the judge erred in his assessment of risk, his view of whether there were very compelling reasons why the claimant's removal would breach her Article 8 rights and those of her children is flawed.
27. There is less merit in Ground 2. The judge assessed the evidence in relation to the witness protection programme and was entitled to conclude at paragraph 139 that on the basis of the country information provided there were considerable doubts as to whether she would be admitted and if she were, whether it would provide adequate protection for her. He was entitled to conclude that in the absence of admittance to the programme relocation would not provide adequate protection.
28. Mrs Petterson was not in a position to assist with the remaking of this decision without her file. I canvassed with the parties whether the appropriate course, unusually, would be to remit this matter back to the same judge and neither had any objection.
29. In view of the amount of work that the judge has already put into this case, and his familiarity with it, the most economical course would be for this case to be remitted back to him to make an assessment of risk on return on the basis of the facts that he has already made. He needs to clarify whether it is his view that the co-accused have been deported to Jamaica. If the Secretary of State chooses not to provide any evidence about deportation at the next hearing that could be a reasonable inference. He also need to say whether it makes any difference to his decision that they have any connection to the Shower Posse. If it does, then it is for the claimant to prove that connection.
30. This matter is remitted back to Judge Turnock. There is no challenge to his conclusions on the asylum claim, nor to his findings of fact which are preserved, namely that the claimant was at risk of reprisals in 2006 but there is no evidence of threats to members of her family in Jamaica since then and none to her.

Notice of Decision

The judge erred in law for the reasons set out in ground 1. The appeal is remitted to Judge Turnock so that he can reassess the risk on return to the applicant..

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Taylor