IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00954/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 14 December 2015 **On 5 January 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MS EWA NOSAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Thomas, Counsel instructed by Irving & Co Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the dismissal by First-tier Tribunal Judge Cockrill of the appellant's appeal against the respondent's decision to make a deportation order.

2. The deportation order was made pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") following the appellant's conviction for an offence of controlling prostitution for gain for which she received a sentence of 12 months' imprisonment on 9 December 2013.

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3. The circumstances of the offence as set out in the First-tier Tribunal's determination and in the sentencing remarks, are as follows. The appellant's partner was the "prime mover" at the centre of a criminal enterprise over a period of five years whereby women were recruited to work as prostitutes. He controlled a number of small flats in London where the women worked; five flats in total. Although none of the women were forced to work as prostitutes, the system of having "profiles" which were not their own meant that they were often required to offer services to the clients which they did not in fact offer. They were required to pay a penalty to the appellant's partner if as a result of failing to provide those services a client left.

4. The evidence was that the appellant's partner would frequently attempt to persuade the women to take on more risky types of work which were more lucrative. Two of the women contracted sexually transmitted diseases during the course of the work. The judge concluded that there was a degree of mental and economic, if not physical, coercion. £25,000 in cash was found at one of the flats. In addition, 120 mobile phones were seized. The sentencing judge described it as a large-scale planned operation. The judge concluded that the rough sum made over a period of year was in the region of £430,000, of which the appellant's partner would have received roughly half.

5. The appellant's partner received a sentence of 33 months' imprisonment with a consecutive sentence of seven months' imprisonment for doing an act tending to pervert the course of justice.

6. So far as the appellant is concerned, she was assessed as having played a lesser role but was nevertheless a willing participant. She took photographs for the profiles, answered the phones and collected money. On one occasion she threatened one of the women with violence when she attempted to leave. The sentencing judge stated that the appellant had had an active role in the hierarchy of authority, and was next in line to her partner. She also benefited from the proceeds of the crime.

The First-tier judge's determination

7. Judge Cockrill found that the appellant had not acquired permanent residence in the UK and that she was therefore only entitled to the lowest level of protection, namely on the grounds of public policy, public security or public health.

8. He concluded at [126] that the appellant was someone who showed little appreciation and understanding of the plight of the women who were working for them, adopting a "cold and cynical attitude" towards their situation. In the next paragraph he concluded that she had tried to play down her involvement but the reality was that she did benefit from the financial operation. At [131] the judge said that he was not persuaded that the appellant had really "turned over a new leaf". He referred to the OASys Report which stated that there remained an appreciable risk of the appellant reoffending if she sees the prospect of poverty looming. The essential picture of her offending, having been to make money, no matter at what cost, had not altered, he concluded.

9. In relation to the appellant's child E, it was noted that it was envisaged that E would return to Poland with his mother. It was also noted that E has behavioural difficulties and was considered to be on the autistic spectrum, although there was at that time no formal diagnosis of autism. He concluded at [136] that "although there will be some disruption" to E by going to Poland with his mother, he can be perfectly well cared for by the appellant in Poland, where she would be able to gain appropriate help and support through the Polish educational system. At [140] the judge found the welfare of E is best served by remaining with his mother, who would be returned to Poland.

10. It was concluded that there had been a "measure of integration" into the UK simply through the passage of time that the appellant had been in the UK (she arrived in January 2004). It was noted that the appellant did undertake a course in prison but the judge found that that did not show that she had expressed remorse [126]. The appellant had meaningful ties with Poland, her mother being there; although it was accepted that she does not enjoy a particularly close bond with her sibling.

11. Returning to the issue of risk of reoffending, at [149] the judge found that the appellant does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The grounds of appeal and submissions

12. There are three grounds of appeal. The first contends that the judge did not undertake an assessment of the appellant's relative prospects of rehabilitation in the UK and in Poland. The second ground argues that the judge failed to give primacy to the best interests of the appellant's child. The third ground alleges a failure to give reasons for rejecting the expert evidence in relation to the child.

13. In submissions, Ms Thomas took grounds 1 and 3 first. As set out in the grounds, ground 1 relies on the decision in *R (on the application of) Daha Essa v Upper Tribunal (Immigration & Asylum Chamber) and anr* [2012] EWCA Civ 1718. Although the judge had at [54] set out the principle to be derived from *Essa* and had cited that authority, he had failed to go on to apply it to the facts of the appeal before him. The judge was required to assess whether removing her from her employment was conducive to her rehabilitation. In addition, there was evidence that the appellant had approached the Koestler Trust with a view to benefiting from mentoring, and that she was aware of sources of professional support (according to her grounds of appeal, drafted by her).

14. In relation to ground 3, there was evidence from an independent social worker and from a consultant psychologist in terms of the significant adverse effect on E were he to be removed from the UK. The judge's conclusion that there would be "some disruption" to E by going to Poland with the appellant was not an adequate characterisation of the evidence before him.

15. In relation to ground 2, the judge said at [140] that the proper decision is for the appellant to be returned to Poland "and consequently" the welfare of E is best served by remaining with his mother. It is argued that this betrays an approach whereby a

decision had first been taken as to the desirability of the appellant's deportation with E's best interests addressed as a secondary matter.

16. In submissions Ms Thomas relied on the grounds of appeal. In relation to ground 1, I was referred to the more recent decision of the Court of Appeal in *Secretary of State for the Home Department v Dumliauskas, Woznik, and ME* [2015] EWCA Civ 145. At [48] of that decision the court concluded that it is not the case that the prospects of rehabilitation are irrelevant unless the offender has a permanent right of residence, although it was also said at [54] that in the case of an offender with no permanent right of residence substantial weight would not be given to rehabilitation.

17. Although it might be submitted on behalf of the respondent that any error of law in this respect by the judge was therefore immaterial, in the light of what was said in *Dumliauskas*, the appeal before the First-tier Tribunal was a finely balanced one. The appellant received a sentence of 12 months' imprisonment which was only just on the cusp of the deportation threshold. Ms Thomas informed me that that submission was made on the basis of the respondent's guidance on deportation in EEA cases, albeit that no copy of any such guidance was put before me.

18. It was submitted that the Probation Service assessment was that the risk of the appellant reoffending was low. Although the judge concluded otherwise, he had failed to consider the issue of rehabilitation. The OASys Report indicated that the appellant was very motivated to change. Similarly, the impact of deportation on E was a further factor which indicated that the case was finely balanced and could go either way. Therefore, it could not be said that the outcome could not have been any different.

19. So far as ground 3 is concerned, I was referred to the reports of Ms Phillipa Williams, a consultant psychologist, and that of Robert Simpson, an independent social worker. It was submitted that the gist of those reports indicated that the appellant's son has particular difficulty adapting to change. At the time of the hearing before the First-tier Tribunal the evidence was that he had an autism spectrum disorder. The impact on E of his having to leave the UK, on the evidence, would therefore be considerably beyond what the judge described as "some disruption". The inference to be drawn from this aspect of the determination is that the judge rejected the evidence of those professional witnesses but did not give reasons for doing so.

20. As regards ground 2, it was submitted with reference to the determination that the best interests consideration was undertaken as an adjunct to the conclusion that the appellant should be deported. The judge referred to E's best interests at the end of the determination at [155]. Prior to that there was no proper assessment of that issue.

21. Ms Brocklesby-Weller relied on the respondent's 'rule 24' response. There was no challenge to the assessment that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I was referred to various paragraphs of the determination in relation to the judge's assessment of the appellant's risk of reoffending.

22. The fact that the appellant had undertaken a course in prison was referred to by the judge at [126]. Although the reference to rehabilitation was brief, unless the appellant had addressed her offending behaviour the issue of rehabilitation would not assist her. This is particularly so bearing in mind that she does not have a permanent right of residence. In that context the decision in *MC (Essa principles recast) Portugal* [2015] UKUT 00520 (IAC) was relied on.

23. It was submitted that the judge did take into account E's best interests and there was a synopsis of the evidence of the psychologist and the independent social worker. The judge was alert to the disruption that there would be to E on leaving the UK and returning to Poland with his mother.

24. In reply, Ms Thomas reiterated that the issue of rehabilitation was important in this case, particularly bearing in mind what the judge said about the appellant's risk of reoffending in circumstances where she might find herself in poverty. There was evidence before the Tribunal of the steps that the appellant had been taking to address her offending. That was not factored into the consideration of rehabilitation.

25. So far as E is concerned, it is not simply the case that he would be removed from the educational system in the UK as had been submitted on behalf of the respondent in submissions, but he would be taken away from the specialised support that he is receiving, as revealed by the evidence before the First-tier Judge.

My assessment

26. As regards ground 1, it is clear from authority that the issue of rehabilitation is a factor to be taken into account in the assessment of proportionality.

27. Ms Thomas relied in part on the OASys assessment which stated that the appellant is very motivated to address offending. I also note that it says on page 32 of the OASys assessment that the appellant is very capable of changing and reducing offending. The grounds refer to evidence that the appellant had approached the Koestler Trust with a view to benefiting from mentoring. The grounds also refer to the appellant's own manuscript grounds of appeal to the First-tier Tribunal which it is said suggest that she is aware of sources of professional support. I note from those grounds that the appellant referred to what is described as the "Sycamore Tree programme", which the appellant stated that she had applied for. She referred to assistance she has sought in obtaining employment and to her being active in the education department (presumably in prison), referring to the courses she has undertaken.

28. In his determination at [53]-[54] the judge referred to the decision in *Essa* and its principle. At [68] he referred, amongst other things, to various certificates that the appellant had obtained, and miscellaneous educational qualifications. At [69] he stated that he had been provided with a copy of the decision in *Essa* "to which I have made earlier reference".

29. Those parts of the determination are not within the "findings and reasons" section but are indicative of the judge's awareness of the issue of rehabilitation. At [126] he

stated that he was aware that the appellant had undertaken the course in prison but concluded that that did not necessarily mean that she had expressed remorse. In the same paragraph he went on to express his view that the appellant was someone who showed little appreciation and understanding of the plight of the prostitutes who were working for them, and that she adopted what could only be described as a cold and cynical attitude towards their situation. He went on to refer to the appellant as having tried to play down her involvement.

30. It seems to me that it can legitimately be said that in those paragraphs the judge was commenting on the appellant's attitude to her offending which in fact militated against any conclusion that the appellant would be, or has been, engaging in any rehabilitative work. In subsequent paragraphs, after further comment on the appellant's attitude to her offence, the judge stated at [133] that the whole pattern of offending was to make money, no matter at what cost and he concluded that as far as he could see "that essential picture has not altered." In those circumstances, it is difficult to see what realistic part any question of rehabilitation could have to play in the proportionality assessment, on the facts this appeal.

31. I do consider that the determination would have benefited from some express identification of the evidence relied on by the appellant going to the issue of rehabilitation. However, I am not satisfied that the judge erred in law in not having done so. The judge did refer at [144] to the appellant having had some measure of integration simply through the passage of time that she has been here but he then went on to refer to the ties that she has with Poland.

32. Even if it could be said that the judge erred in law in failing to undertake a clearer articulation of the issue of rehabilitation, I am not satisfied that this amounts to an error of law requiring the decision to be set aside. I bear in mind what was said at [54] in *Dumliauskas* as follows:

> "Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation."

33. It is to be remembered in this case that there is an unchallenged finding that the appellant had not acquired permanent residence. The point made at [54] of *Dumliauskas* was reiterated in the decision in *MC*.

34. Grounds 2 and 3 can be taken together. I do not accept that the First-tier Judge failed to give appropriate consideration to E's best interests or that he failed to have regard to, or minimised, the expert evidence.

35. So far as the expert evidence is concerned, at [70] the judge referred to the appellant's skeleton argument and the report of the consultant psychologist Ms Williams, as being part of the evidence that he had before him. He also referred to a series of letters provided by Body and Soul concerning E and the impact removal might have upon him. He set out in detail the oral evidence concerning the impact on E of his parents' imprisonment. Other oral evidence in relation to E was also summarised.

36. At [134] the judge stated as follows:

> "A good deal of focus was put on E's reaction to the time when his parents were in prison. It is perfectly understandable that he was traumatised by their absence. His behaviour was disturbed and that has been perfectly well described not only by his grandparent but also by the social worker and psychologist."

37. There is express recognition there of the evidence in the reports in relation to E.

38. In the next paragraph there is reference to the expectation that E would accompany the appellant back to Poland and that it was no part of the respondent's case that there should be separation. At [136] one finds the following:

> "I can readily understand that E has got these behavioural difficulties and has been placed on the autism spectrum rather than with a formal diagnosis of autism. It seems to me, looking at the totality of the material, that although there will be some disruption to E by going to Poland with his mother, that really he can be perfectly well cared for by his mother in her home country and he will be able to gain some appropriate help and support through the Polish educational system."

39. Again, at [140] the judge emphasised that he had "assessed as carefully as I can" the material presented about E. He then stated however, that the right and proper decision for the appellant was that she be returned to Poland and "consequently" it seemed to him that the welfare of E was best served by remaining with his mother.

40. At [155], being the last paragraph in the reasons part of the determination, the judge stated that he had the best interests of E in mind, and referred to section 55 of the Borders, Citizenship and Immigration Act 2009 in considering those best interests.

41. In my judgement, when one surveys the determination as a whole it is apparent that the judge did have proper regard to the evidence before him from the independent social worker and the consultant psychologist in relation to E. It was not necessary for him to quote verbatim from the reports which he plainly considered. I do not accept the proposition that the judge minimised or sidelined the evidence in the reports in stating there would be "some disruption" to E in his going to Poland with the appellant. That conclusion was a recognition by the judge of the content of the reports. He was entitled to find however, that E would be cared for by his mother during that process of transition. He was similarly entitled to conclude that E would be able to obtain appropriate help and support through the Polish educational system.

42. The contention that at [140] the judge had decided that the appellant should be removed and that E's best interests were considered as an adjunct to her removal, is not made out. Prior to that conclusion in that paragraph there was consideration of E's circumstances and the expert evidence. Similarly, although the judge used the expression "best interests" for the first time in the last paragraph of the determination, and also in that last paragraph referred to s.55, that belies the fact that the best interests assessment had been conducted during the course of the judge's reasons.

43. Again, it may be that the determination would have benefited from specific reference to the particular support that E is receiving in the UK, with reference to the evidence before the judge. However, it was not encumbent on him to make specific reference to every piece of evidence, particularly in circumstances where it is apparent that the judge was aware that E leaving the UK would involve disruption for him over and above what would ordinarily be expected in a child without his difficulties.

44. In conclusion therefore, I am not satisfied that there is any error of law in the decision of the First-tier Tribunal. Accordingly, its decision to dismiss the appeal is to stand.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the Fist-tier Tribunal to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek 29/12/15