IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01129/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd March 2016	**On 17th May 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms G Loughran, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr N Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica, born on 12 April 1975. She appealed to the First-tier Tribunal ("FtT") against the respondent's decision to refuse to revoke a deportation order, the decision having been made on 10 June 2014. Her appeal came before First-tier Tribunal Judge Omotosho ("the

FtJ") on 30 and 31 July 2015 whereby the appeal was dismissed on all grounds.

2. The further background to the appeal is best illustrated with reference to the decision of the FtT.

The decision of the First-tier Tribunal

3. The FtJ set out the appellant's immigration history, circumstances and background. The appellant arrived in the UK on 15 December 2001 and was granted leave to enter for six months. She has a number of criminal convictions starting in February 2002, mostly for offences of dishonesty, in particular theft. Sentences have varied from community punishments to fines and imprisonment.

4. Following a conviction on 16 February 2009 for what appears to have been an offence of conspiracy to steal, she was sentenced in the Crown Court sitting at Lewes to two years' imprisonment. She was served with notice of liability to deportation in March 2009 and a decision to make a deportation order was made on 4 June 2009. Her appeal against that decision was dismissed on 24 August 2009. An application for reconsideration was successful but her appeal before the Upper Tribunal was dismissed on 17 April 2012.

5. In between times, the appellant was convicted of further offences of dishonesty, and in 2011 appeared at court for failure to comply with the requirements of a community order. On 18 July 2013 for offences of theft and failing to comply with requirements of a suspended sentence order, she was ordered to pay compensation and costs, with the suspended sentence order to continue. On 22 May 2013 she was again convicted of theft and ultimately sentenced to three months' imprisonment. She was sentenced on 4 December 2013 to 14 days' imprisonment for going equipped for theft.

6. In relation to her two children, on 18 March 2014 in Family Court proceedings it was ordered that she should have contact with her two children face-to-face on at least six occasions per year. The appellant's two daughters, KS and ZS, born on 30 May 2003 and 3 February 2007 respectively, are in the care of Social Services.

7. The FtJ summarised the respondent's decision, and referred to the documentary evidence that she had before her. The FtJ's decision contains a detailed account of the evidence and submissions. Her findings are to be found from [130] onwards.

8. At [130] she referred to the findings made by Upper Tribunal Judge Gill in a decision promulgated in 2012 in relation to a previous appeal by the appellant. She noted that the appellant's age, nationality and criminal record are not in dispute. The appellant is a 40 year old woman originally from Jamaica, who left there aged 14 years, went to live in America and

arrived in the UK at the age of 26 years in December 2001. Accordingly, she had been absent from Jamaica for approximately 26 years at the date of the decision before the FtJ.

9. At [134] it is recorded that the appellant had visited Jamaica twice, the FtJ noting that it had previously been accepted that she does not have any relatives in Jamaica apart from her son. The FtJ concluded that if the appellant is deported to Jamaica she would have to start "from scratch" having to find a job and accommodation and that that is likely to pose difficulties for her which the FtJ stated that she did not underestimate.

10. At [135] she referred to the appellant having used numerous aliases and two dates of birth, and noted that the appellant had admitted having criminal convictions in the USA which resulted in her deportation from there.

11. Referring to PNC records, she said that the appellant has 24 convictions for 32 offences, 22 of them relating to theft and kindred offences. The FtJ said that the appellant could be described as a prolific shoplifter and an experienced and professional thief. She stated that shoplifting on that scale is very serious as it undermines the organisation of commerce, a matter on which the FtJ said she placed great weight. She found that her persistent offending increases the seriousness of the offences that she has been convicted of. With reference to the conviction for conspiracy to steal, she noted that the appellant was one of an organised gang of five and that the appellant and one other person received the heavier sentences because they were "in it from the beginning".

12. At [137] she referred to the offences in July 2011 which involved the appellant having with her a magnetic security tag remover for use in the course of or in connection with theft, which demonstrated that the appellant was not a novice. Her subsequent convictions in October 2011 for theft were indications of the persistent nature of her offending and the likelihood of her re-offending "as determined by the Upper Tribunal in 2012 in dismissing her appeal".

13. With reference to convictions in July 2013 for theft and failing to comply with the community requirement of the suspended sentence order, the sentences in November 2013 and December 2013 for further offences, justified the findings by UTJ Gill in 2012 that there was a high risk of re-offending. She found that the appellant had continued to re-offend despite the threat of deportation.

14. Noting that the appellant has again expressed remorse for her offending and maintaining that she has changed, the FtJ found that her past actions and conduct instilled very little confidence in her sincerity. She noted that the appellant had previously admitted to lying in support of an application for ILR, concealing her convictions. The appellant had also admitted lying to previous Tribunals about her relationship with her estranged husband. She also found that her numerous convictions for deception-related

offences confirmed that she is a "serial liar" who is unable to tell the truth if required to do so. She concluded that the appellant is a "master of deception" and that she had continued to commit offences even with the clear threat of deportation hanging over her.

15. At [140] she stated that although the appellant had not had any convictions since 2013, it was clear from the evidence presented by DC Kalam that the appellant was arrested twice in 2015 in circumstances very similar to her previous conduct of being found in shops in suspicious circumstances when items had been stolen but the matters were not proceeded with by the prosecution. Whilst noting that DC Kalam confirmed that it was not the appellant seen taking clothes from the store, nor was she found with any stolen items on her, she concluded on a balance of probabilities that the appellant had been involved in further offences despite the lack of a successful prosecution. She rejected the appellant's evidence that she was deliberately targeted by store detectives and the police simply on account of her previous criminal history. The FtJ therefore concluded that the risk of re-offending remained high despite the last conviction being in 2013.

16. At [141] she said that in coming to her conclusions she had borne in mind the psychological report, and that while it was suggested that the risk of re-offending was now medium rather than high, she concluded that she was not persuaded that that was so in the light of all the evidence before her.

17. At [145] she noted that the appellant does not live with either of her children, both of whom are in care. The appellant has a minimum of six hours face-to-face contact with the children per year and is in regular contact by phone, although the children are not dependent on her for the exercise of their Treaty rights. She found that the appellant's deportation would not require the children to follow her to Jamaica. In any event, the appellant's father, a British citizen, is in the UK which means that they are able to exercise their Treaty rights independently of the appellant. Their father had previously given evidence to the effect that he would not allow the appellant to take his children to Jamaica.

18. The FtJ therefore concluded that whilst the appellant has a genuine and subsisting relationship with two British citizen children, both under the age of 18 years, and that it would be unduly harsh for the children to live in Jamaica, she found that there was no credible evidence before her that it would be unduly harsh for the children to remain in the UK without the appellant, the children both being well taken care of by their foster carer. In coming to those conclusions she stated that she had borne in mind the independent social worker's report.

19. She further found that the appellant can be regarded as socially and culturally integrated into life in the UK, although she had not lived in the UK for most of her life. She had spent her youth and formative years in Jamaica and had arrived in the UK in 2001, with her leave to remain being

curtailed in April 2012. She found that there would not be very significant obstacles to her integration into Jamaica if deported. She found that it is likely that the appellant has extended family members and/or friends who reside in Jamaica who can provide her with initial support on return. She found that there was no reason why they would not provide that support to enable her to reintegrate back into Jamaica.

20. She concluded at [149] that the appellant had not established that any of the Exceptions to the automatic deportation provisions of the UK Borders Act 2007 applied, or that the appellant had established that paragraphs 399 or 399A applied.

21. Considering whether there were 'exceptional circumstances' which outweighed the public interest in her deportation, she noted that the appellant is no longer in a subsisting relationship with the father of her British citizen children. She is the mother of five children, three of whom live in Canada and in the USA.

22. So far as proportionality under Article 8 of the ECHR is concerned, she found at [160] that the appellant continues to show disregard for UK law due to the persistence of the offending. At [162] she concluded that the evidence did not necessarily suggest that the appellant is a wholly reformed character as claimed, notwithstanding the assessment of the appellant as a medium risk of re-offending in a psychological report. The FtJ said that the appellant had in her view exhibited little or no insight into her re-offending and had continued to deflect responsibility for her crimes by blaming her upbringing and personal circumstances.

23. At [167] the conclusion was that the appellant's deportation would clearly interfere with her relationship with her children, with her losing the direct, frequent and regular contact that they currently enjoy. She found however, that there was the possibility of visits to Jamaica subject to local authority or court agreement, finances and someone available to accompany the children.

24. The FtJ concluded that it was in the children's best interest to maintain face-to-face contact with the appellant, albeit that that was not sufficient to outweigh the public interest in deportation. She noted at [172] that the reports indicated that one of the appellant's daughters suffered some emotional problems whilst the other appeared to have coped well when they were separated from the appellant during her prison sentences. She noted that the children having re-established contact with the appellant, it may well have a greater impact on their emotional wellbeing were they to be separated again. She referred to the children being "innocents" in the matter and that the appellant's deportation would mean that both children will not have a normal life with either of their biological parents, they having very little contact with their father. At [173] she found that the effect of separation from the children may well be traumatic for the appellant in the light of their renewed relationship. Unlike the children

however, the FtJ expressed the view that it was the appellant's own actions that had brought her to that point.

25. She concluded that it would be unreasonable to expect the children to leave the UK in order to enjoy family life with the appellant. There is reference to the period of separation following deportation being likely to be for a substantial period; a minimum of ten years, by which time the children would be adults or nearly adults. She recognised that that period of separation could never be replaced although stating there was nothing preventing the children, once they achieved the age of maturity, visiting the appellant in Jamaica.

26. At [178] she noted that the appellant had spent the majority of her life outside the UK but that she had visited Jamaica in 2013. She did not accept the appellant's evidence that she has no ties or links to Jamaica. She concluded that it was unlikely that the appellant was telling the truth so far as her family circumstances in Jamaica or elsewhere are concerned. She found that it would not be unreasonable to expect her to be able to readjust to life in Jamaica despite the initial difficulties that would be expected. The appellant had shown herself to be resilient and very resourceful and she had found a way of maintaining long distance contact with her three children outside the UK, on a regular basis.

27. She concluded therefore, that there were not the very compelling or exceptional circumstances necessary to outweigh the public interest in deportation.

The grounds of appeal and submissions before the Upper Tribunal

28. On behalf of the appellant four grounds are advanced. The first is that the FtJ failed to have regard to the Joint Presidential Guidance Note and the Practice Direction in relation to vulnerable witnesses, a matter raised in the appellant's skeleton argument. The FtJ did not make any finding on that issue which was relevant in the assessment of the evidence.

29. The second ground argues that the FtJ failed to have regard to expert evidence from two clinical psychologists, Dr Katherine Boucher and Dr Ann Lewis, dealing with the risk of re-offending. Within this ground it is also argued that it was irrational for the FtJ to conclude that the appellant's current risk of re-offending was high, based on her previous convictions.

30. Ground 3 concerns the conclusion that the appellant had been involved in further offending since 2013, notwithstanding that she had not been convicted of any offence. Reference is made to the decision in *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC). It is argued that the FtJ was not entitled to conclude that the appellant had re-offended, based solely on her previous convictions and DC Kalam's evidence.

31. The fourth ground contends that the FtJ failed to have regard to relevant evidence in an independent social worker's report from Ms Dymphna Pearce in relation to the effect of the appellant's deportation on one of the appellant's children in particular.

32. In submissions Ms Loughran relied on the grounds. So far as ground 1 is concerned (vulnerable witness) it was accepted that it had not been suggested to the FtJ that any special arrangements were necessary in relation to the hearing itself. As to whether, aside from in the skeleton argument, the issue was raised at the hearing, Ms Loughran was unable to assist with reference to any notes of the hearing.

33. So far as vulnerability is concerned, it was submitted with reference to the report of Dr Ann Lewis dated 14 July 2015 (page 44 of the appellant's bundle) that the appellant is a person receiving a form of healthcare and is therefore a vulnerable witness, as set out at [3] of the skeleton argument that was before the FtT. I was also referred to [6.1] of Dr Boucher's report which states that the appellant presents with symptoms of depression and anxiety. It was submitted that the question of whether the appellant is a vulnerable witness was relevant to her credibility as a witness, and bearing in mind that the FtJ concluded that she was a serial liar. Had her vulnerability been considered it could have affected the FtJ's assessment of what Dr Boucher considered to be a moderate risk of re-offending. Furthermore, there was evidence from Dr Lewis to the effect that the appellant had been receiving therapy, a matter also relevant to the risk of re-offending.

34. Although at [141] there is reference to the psychological report (of Dr Boucher), there is no detailed assessment of that report or reasons for it having been rejected. There is no consideration of Dr Lewis's report in terms of the appellant's engagement with therapy, which therapy Dr Boucher said was essential. It was insufficient for the judge to say she had considered the evidence. It was submitted that it was clear from the structure of the determination that the FtJ's conclusions were arrived at without reference to Dr Boucher's and Dr Lewis's evidence.

35. It appears that her conclusions as to the risk of re-offending are based on the appellant's previous convictions and the evidence of DC Kalam, bearing in mind the reference at [160] to her previous offences.

36. With reference to the decision in *Farquharson*, it was submitted that there was insufficient evidence for the judge to have concluded on the balance of probabilities that the appellant had committed further offences. There was nothing in the crime reports to suggest that the stores had been asked to provide CCTV evidence or witness statements. The appellant was bailed but no CCTV was viewed.

37. It appears from [147] that the conclusion that it would not be unduly harsh for the appellant's children to remain in the UK without the appellant was arrived at before consideration of Ms Pearce's social work report (page

272). It is not clear, it was submitted, whether the FtJ accepted Ms Pearce's written evidence about the impact on KS of the appellant's removal.

38. Again, on the question of the risk of re-offending, it was accepted by Ms Loughran that the best that could be argued for on behalf of the appellant was that there was a moderate risk of re-offending. In any event, even if there is a high risk of re-offending, the offending is likely to be shoplifting, which is not at the higher end of the offending scale, leading to a risk to individuals. Furthermore, DC Kalam's evidence was that the shops did not seem to take the matters very seriously.

39. Mr Kotas submitted that, aside from the question of whether the issue of the appellant as a vulnerable witness was pursued with any vigour at the hearing, the materiality of the point also arises. It is to be remembered that this was not an appeal where there was any great factual dispute, in terms of the appellant's relationship with her children, her ties to Jamaica and her convictions. All that is relevant to the materiality of any failure to consider the appellant as a potentially vulnerable witness.

40. In addition, the appellant represents either a high or a moderate risk of re-offending, which again relates to the materiality aspect. She has been sentenced to 24 months' imprisonment and accordingly there is a strong public interest involved in her deportation. She has a number of previous convictions. The judge had referred to the findings made in her previous appeal before UTJ Gill.

41. The FtJ's decision is a lengthy one in which she gave several reasons for concluding that the appellant represented a high risk of re-offending. She referred at [135] to the numerous uses of aliases and two dates of birth. She had offended even whilst facing deportation. She had lied to the Tribunal in the past as indicated at [139].

42. At [140] the FtJ had given reasons for concluding that the appellant had been involved in offending in 2015 despite the fact that there was no prosecution. Furthermore, it was submitted that focusing on the last two matters in 2015 is to take a "myopic view" of the appellant's offending.

43. At [172] the judge had said that she had been assisted by the evidence of the social worker Ms Pearce. At [168]-[176] the FtJ had been at pains to recognise the 'dilemma' of separation. She had referred to relevant authority. It was relevant to note that at [121] she referred to the decision in *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 which refers to the consequences of deportation for a family.

44. In reply, Ms Loughran submitted that the appellant had been addressing her offending behaviour, which was a matter that the FtJ was obliged to consider. Although the FtJ's decision was a lengthy one, there was no indication of whether she accepted the evidence of the independent social worker and one cannot tell what weight was given to it. Stating that

"appropriate weight" was afforded to the evidence does not suffice. It was similarly unclear what the judge made of the evidence from Dr Lewis in terms of the appellant's engagement with treatment.

My assessment

45. The Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance ("the Guidance Note"), states at [2] that although some individuals are by definition vulnerable, others are less easily identifiable. A number of factors to be taken into account are set out; the list is not exhaustive. Those that by definition are "vulnerable", as described in s.59 Safeguarding Vulnerable Groups Act include a person who "receives any form of health care". It is on that basis that it is submitted that the appellant is/was a vulnerable adult.

46. The evidence of health care being received by the appellant comes from the letter or report of Dr Lewis dated 14 July 2015 at page 44 of the appellant's bundle. This refers to her receiving psychological therapy from November 2014. It describes her as presenting with depressed mood and low self-confidence/self-esteem. The appellant related to Dr Lewis that this was as a result of a number of difficult events she had experienced over the course of her life, including bereavements and losses in her childhood and teenage years. The report describes the appellant's views or attitudes towards herself and others and the consequences in terms of her offending and other coping strategies. It describes the appellant as being a motivated and interested participant in therapy so far. Her mood at that time is described as having been quite stable. She was referred to a 12 week Compassion Focused Therapy group ("CFT") which is described as a "third-wave" cognitive behaviour therapy treatment, starting in September 2015. It states that "by the time she finishes the 12-session CFT she will have undergone over 12 months of therapy".

47. On the basis of that report, it could be said that as at the date of the hearing before the FtT the appellant was undergoing treatment. On the other hand, it is recorded at [95] of the FtJ's decision that the appellant said that the therapy sessions which were once a week started in the first week of December 2014 "but have now finished". The appellant stated that she hoped to start new therapy sessions in September. That is consistent with the evidence of Dr Lewis. On that basis, it could be said that the appellant was not, at the date of the hearing before the FtT, receiving any sort of health care and she was not therefore by definition a vulnerable adult. Her treatment had ceased at that stage and although the appellant said that she hoped to start new sessions in September, they had not started.

48. In any event, it is not apparent that the appellant's representatives took any steps in accordance with the Guidance Note in terms of identifying potential issues that could arise in relation to the appellant's vulnerability at the hearing. Detailed guidance is set out in the Guidance Note. It is similarly not apparent that any submissions were made to the judge in

terms of the conduct of the proceedings to accommodate any vulnerability that the appellant could be said to have. Again, the Guidance Note has considerable guidance on that issue. Furthermore, although in submissions on behalf of the appellant before the FtT reliance was placed on the skeleton argument, there is no indication that any submissions were made in terms of the appellant's vulnerability, in any respect, in particular in terms of the assessment of her evidence.

49. In addition, the detailed narrative of the appellant's evidence given to the FtJ does not reveal that the appellant had any difficulty in giving her evidence.

50. Whilst I do consider that the FtJ should have addressed the issue raised as to the appellant being a vulnerable adult, I cannot see in the circumstance of this appeal that it was an error of law for her not to have done so. Even if it does amount to an error of law, I am not satisfied that it is an error of law that is material to the outcome in the light of the observations I have made about the lack of reliance on the Guidance Note in all its other manifestations, except on the basis that the appellant is receiving some form of health care, and given that it is not apparent that the appellant's evidence was affected in any way by reason of any asserted vulnerability.

51. I do not accept that the FtJ erred in law in failing to have regard to relevant expert evidence in terms of the risk of re-offending. At [47(vi)] the FtJ identifies the expert evidence before her. At [107] the submissions made on behalf of the appellant in terms of the risk of re-offending with reference to the expert evidence are recorded. Importantly, the FtJ recorded the submission that evidence of therapy and its significance are relevant factors in terms of the risk of re-offending, which on behalf of the appellant was said to be 'medium'. At [141] the FtJ said that in coming to the conclusion that the appellant is a high risk of offending, she had taken into account the psychological report. Although not identified, this appears to be a reference to the report of Dr Boucher at page 310 of the appellant's bundle.

52. At [131] it is stated that in coming to her conclusions the FtJ had had regard to the detailed submissions made by both parties, as well as the written and oral evidence.

53. At [139], the FtJ referred to the appellant having "again" expressed remorse for her offending and that she maintained that she had changed, but the FtJ concluded that her past actions and conduct instilled very little confidence in her sincerity. Reference is made to the appellant's deception in an application for ILR, and to her having admitted lying to previous Tribunals. Her numerous convictions for deception-related offences are also referred to.

54. In the light of that evidence, I cannot see that a lack of express reference in her reasons to the fact of the appellant having received psychological

therapy, is an error of law, or if it is, that it is an error of law that is material.

55. In any event, it is to be borne in mind that the best that could be, or could have been, contended for on behalf of the appellant is that her risk of re-offending is medium rather than high. As is well-known from authority, the risk of re-offending is only one factor to be taken into account in the assessment of proportionality and the suggestion that the appellant's likely future offending would relate to shoplifting, belies the fact that she has a conviction for conspiracy to steal which resulted in a sentence of two years' imprisonment.

56. I am not satisfied that there is any merit in the contention that the FtJ's assessment of the appellant's involvement in offences in 2015 was irrational, with reference to the evidence of DC Kalam. The FtJ set out the evidence on that issue in detail, both from the appellant's and from the respondent's perspective. The appellant's evidence on this issue is recorded at [96]. There is a clear analysis of the issue at [140] whereby the appellant's arrest on two occasions in 2015 in circumstances very similar to her previous conduct is referred to. The FtJ was entitled to reject the appellant's evidence that she was deliberately targeted by store detectives and police simply on account of her previous criminal history.

57. The FtJ was aware of the relevance of the decision in *Farquharson*, having referred to it at [48] and stating at [140] that she was satisfied on the balance of probabilities that the appellant had been involved in those offences in 2015 despite there having been no prosecution. Notwithstanding what is in the grounds before me, it is readily apparent that the FtJ was aware of and took into account that the appellant was not seen taking clothes from the store and was not in possession of any stolen items, having referred to that evidence and assessed it.

58. Likewise, I do not consider that there is any merit in the contention that the FtJ failed to take into account the evidence of the social worker, Ms Pearce. As already indicated, she identified this as amongst the reports that she had before her. She referred to the submissions on that evidence at [105] and [107]. At [147] she stated that in coming to her conclusions in relation to the question of undue harshness, she had had regard to the report of Ms Pearce. She again made reference to it at [172] stating that she had been assisted by the family court order and the report by the independent social worker (Ms Pearce).

59. It is clear from [172] that the judge was aware of what was said about the emotional problems suffered by KS in separation from the appellant and the potential emotional impact on them if there is another separation. She referred to the children being "innocents". She made a clear assessment of where the best interests of the children lie.

60. It was not encumbent on the FtJ to refer to every facet of the evidence, or to extract passages from reports and comment on them. A holistic

assessment of the FtJ's decision reveals a comprehensive consideration of the evidence within a structured and balanced decision. I am not satisfied that there is any error of law in her decision in any respect. Even if it could be said that there is an error of law in terms of the 'vulnerability guidance' issue, for the reasons I have given any error of law in that respect is not material.

Decision

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

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.

Upper Tribunal Judge Kopieczek 25 April 2016