IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/02307/2013
DA/02308/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following hearing	
On 14 March 2016	On 21 April 2016

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION MADE)

Appellant

and

MS S C M
MISS D D

Respondents

Representation:

For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondents: The Respondents in person

DETERMINATION AND REASONS

I make an anonymity direction in order to protect the identity of the children who are involved in this appeal.

1. This is the Secretary of State's appeal against a decision made by First-tier Tribunal Judge Ruth, which was promulgated on 6 October 2015 following a hearing at Taylor House on 6 January and 18 September 2015. For ease of convenience I shall throughout this determination refer to the Secretary of State who was the original respondent as "the Secretary of State" and to SCM and DD who were the original appellants as "the claimants".

2. The first claimant is a citizen of Jamaica who was born in 1978. The second claimant is her minor daughter who was born in the United Kingdom on [ ] 2004 and is also a citizen of Jamaica. The first claimant had entered the United Kingdom as a visitor in 2001 and claimed asylum which application was refused but she came to the attention of the authorities following a caution for theft in July 2004. The second claimant having been born in the United Kingdom in August 2004, the first claimant left the United Kingdom in 2005 together with her daughter, using a false passport, but returned in the same year and began using a different name. Subsequently the first claimant entered into a relationship with a British citizen as a result of which she has two other children who were born in the United Kingdom, one born in 2010 and the other in 2014. These children are British citizens.

3. The claimant was convicted of serious benefit fraud at Woolwich Crown Court in 2012. She pleaded guilty to eleven counts of making false declarations and using a false passport and identity in order to obtain housing benefit and council tax benefits for which she was sentenced to nineteen months' imprisonment. The sentencing judge noted her previous conviction in June 2010 for making dishonest representations for which she had received a six month custodial sentence suspended for two years. In consequence of this conviction the Secretary of State made a decision to apply the automatic deportation provisions contained within Section 32(5) of the UK Borders Act 2007 which decision was initially made in March 2013 and then remade in October 2013 after the Secretary of State had withdrawn the initial decision.

4. The claimants appealed against this decision submitting that their deportation would be a disproportionate interference with their Article 8 rights. The immigration history is to say the least unfortunate. The appeal was allowed under the Immigration Rules and on human rights grounds by the First-tier Tribunal in a determination promulgated on 28 May 2014. Thereafter the Secretary of State's application for leave to appeal against this decision was originally refused in the First-tier but then granted in the Upper Tribunal. On 29 October 2014 there was then an error of law hearing in the Upper Tribunal which resulted in a decision made on 28 November 2014 that the First-tier Tribunal had made an error of law and the appeal was remitted back to the First-tier Tribunal for there to be a "redetermination of the balancing exercise".

5. The claimants applied for permission to appeal to the Court of Appeal against the Upper Tribunal's decision remitting their case back to the First-tier Tribunal pending the consideration of which the appeal came before

First-tier Tribunal Judge Ruth in the First-tier Tribunal for hearing on 6 January 2015. On that date as none of the parties were able to inform the Tribunal as to the progress of the application for permission to appeal to the Court of Appeal Judge Ruth decided to proceed with the hearing which he did on the basis that the factual findings which had previously been made by the First-tier Tribunal when that Tribunal had allowed the claimants' appeal had been preserved.

6. Following that hearing, at which submissions had been made, but prior to any decision being made, Judge Ruth was informed that the Vice President of the Upper Tribunal was considering whether or not to set aside the decision of the Upper Tribunal remitting the case to him and for this reason he did not make a decision on the submissions which had been put before him. Subsequently, in February 2015, the Vice President ordered that the decision of the Upper Tribunal which had been made in November 2014 (in which it had been ordered that the appeal be remitted back to the First-tier Tribunal) be set aside and the matter re-heard by the Upper Tribunal.

7. The appeal was then re-heard in the Upper Tribunal in July 2015 but in a decision promulgated on 17 August 2015 the Upper Tribunal once again found that there had been an error of law in the decision of the First-tier Tribunal because insufficient weight had been placed on the public interest in deportation of foreign criminals when that Tribunal had concluded that the removal of the claimants was disproportionate such that the claimants should succeed in their appeal. The decision of the First-tier Tribunal was set aside with regard to the conclusions only but the findings of fact to which I will need to turn below were retained.

8. The appeal then again came before Judge Ruth in September 2015 at which hearing it was agreed again that the factual findings which had previously been made in the First-tier Tribunal decision were to be preserved and that the issue in dispute which had to be addressed was the weight to be given to the public interest when considering proportionality. Accordingly Judge Ruth heard further submissions form both parties but again heard no evidence.

9. Having considered the further submissions Judge Ruth in a very thorough and clearly reasoned determination amounting to some 27 pages and having set out the findings of fact which had been made in considerable detail concluded that the claimants had to succeed both under the Immigration Rules and separately although this was not strictly necessary for his decision on Article 8 grounds outside the Rules as well.

10. The Secretary of State yet again appeals against this decision, the basis of her appeal this time essentially being that it is said the judge wrongly considered the appeal under the Rules as they previously had been, considering whether or not the removal of the first claimant would be unreasonable as regards the position of the two youngest British citizen

children rather than whether or not the effect of that decision would be "unduly harsh" on them.

11. In my judgment although Ms Sreeraman advanced this argument as well as it could be advanced this submission is wholly unarguable. I give my reasons below.

12. It is first necessary to set out relevant parts of the previous decision of the First-tier Tribunal containing the factual findings which are to be retained. These are as follows and are at paragraph 34 onwards of that earlier determination.

13. The Tribunal had found that the two youngest children could not reasonably be expected to be brought up by their father. The Tribunal found in terms at paragraph 38 of its determination as follows:

> "We are left in no doubt that it will be totally unreasonable to expect them to leave the United Kingdom with the Appellant. Furthermore, although their father will remain in the United Kingdom, considering that he was also involved in caring for his two daughters from other relationships, and [the oldest child] was only nearly 4 years old and [the youngest child] only 5 months old and being breastfed by his mother, we are satisfied that this is a situation where their father as a single parent could not be expected to provide satisfactory level of care for them without their mother. In the circumstances we are satisfied that it would equally not be reasonable for the two children to be left behind with their father without their mother."

14. Accordingly it is necessary to consider the appeal under the Immigration Rules on the basis that if the first claimant were to be removed the only basis upon which her British citizen children could reasonably remain would be if they were taken into some sort of care either directly in the care of social services or a foster family being provided.

15. I set out the relevant provisions of the Immigration Rules that apply in a deportation case where an applicant has been sentenced to a period of imprisonment of between one year and four years which are as follows:

> "399. This paragraph applies where paragraph 398(b) or (c) applies [398(b) applies in this case because the first claimant received a sentence of imprisonment of between one year and four years] if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; … and …
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported...".

16. Although it is said that the initial consideration by Judge Ruth was on the basis of whether or not it would be reasonable to expect the applicant's children to leave the United Kingdom, at paragraph 77 of his determination, Judge Ruth found as follows:

> "77. I note that in the respondent's Immigration Directorate Instructions at chapter 13, section 3.5.14, the respondent advises her caseworkers that if the only way a child could remain in the UK if a foreign criminal is deported would be in the care of social services or a foster family this would not generally be appropriate. Indeed, the language used in this guidance is that such a situation would generally be 'unduly harsh'. This is the language of the new rule which came into effect on 28 July 2014, but it seems to me more likely than not that if a conclusion is 'unduly harsh' it is likely also to be unreasonable in all the circumstances. Although those instructions do not bind me, they form a useful backdrop to my consideration of the question of reasonableness in relation to this child."

17. It is accordingly clear in my judgment that whether or not there is anything in the submission that Judge Ruth technically applied the wrong Rule insofar as he was looking at the Rules previously drafted this could not have had any material bearing on his decision. Just looking at the provisions of paragraph 399 it is clear and was not disputed that the first claimant has a genuine and subsisting parental relationship with her two youngest children, they are both British citizens and it is not suggested that it would not be unduly harsh to expect these British citizen children to return together with the first claimant to Jamaica thus being deprived of all the benefits to which they are entitled as British citizens. With regard to whether or not it would be unduly harsh for these children to remain in the United Kingdom without their mother in light of the IDIs as set out at paragraph 77 of Judge Ruth's decision, it is clear that he would have found and would have been entitled to find that this also would be unduly harsh. In these circumstances the decision he made was inevitable.

18. I must stress when making this decision that I do not myself and indeed neither did Judge Ruth attempt to minimise the seriousness of the offending of which the first claimant was convicted. Benefit frauds such as she committed are very serious offences and the public attitude of revulsion towards those persons who commit these offences is entirely appropriate. Further, there is a need if this is consistent with the Immigration Rules to deport people who commit crimes such as these to deter other people from committing them. However, the Tribunal has to follow the Rules and in this case Judge Ruth was entirely correct in concluding under the Rules that it would be unduly harsh for the applicant's two youngest children, both British citizens, in respect of whom a finding had already been made that no other person could appropriately

care for them in this country, if their mother to be removed. Of course, should the first claimant commit further offences and in particular if she is sentenced to a period of imprisonment of more than four years (in which case the provisions of paragraph 399 would not apply), she would then be at much greater risk of being deported whatever the effect might be on her youngest children.

19. Regarding the second claimant, clearly the second claimant cannot be returned to Jamaica without her mother. It is not suggested that this would not be wholly disproportionate. I record also that this Tribunal was informed that the second claimant having been here for over ten years and having been born in this country an application has been made on her behalf for British citizenship which is currently under consideration by the Secretary of State.

20. For the reasons I have set out above, the Secretary of State's appeal must be dismissed and I so find.

Decision

21. There being no material error of law in Judge Ruth's decision, his decision allowing the claimants' appeal against the Secretary of State's decision to deport them is affirmed.

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 him or any member of their 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:

Upper Tribunal Judge Craig Date: 15 April 2016