



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA149812014

THE IMMIGRATION ACTS

Heard at Field House
On 24 May 2016

Decision & Reasons Promulgated
On 26 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

KAYANN ANDREA ALLEN WISDOM
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Adjarho of Counsel

For the Respondent: Mr Whittwell a Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Respondent decided to deport the Appellant on 12 September 2014 by virtue of s32 (5) of the UK Borders Act 2007 due to her conviction and sentence of 5 ½ years in jail for her involvement in the importation of £264,000 worth of Class A drugs. She was born on 3 August 1980 and is now 35 years old.
2. Her appeal against that decision was dismissed by First-tier Tribunal Judge Cohen following a hearing on 2 September 2015. Following a hearing on 7 March

2016 I set aside the decision as I was not satisfied that the Appellant in Jamaica or her family here had been notified of the date time and venue of the hearing and there had been an inadvertent material error law for which no fault attached to Judge Cohen. No findings were preserved. This appeal before me was therefore against the Respondent's original decision.

The law

3. In deportation appeals, the burden of proof is on the Respondent to show that on the balance of probabilities the Appellant is in law a member of the class of people liable for deportation.
4. In human rights appeals, if it is established that there is a real risk that there will be an interference with the Appellant's human rights and the relevant article permits, it is then for the Respondent to establish that the interference is justified.
5. In assessing the evidence a great many cases provide guidance on how the risk is to be assessed. I remind myself of the methodological guidance set out in Karanakaran v SSHD [2000] 3 All ER 449 and bear in mind the words of Scott Baker J that:

“...great care must be taken before making adverse findings of credibility in asylum cases. They should of course only be made when they are justified in the light of the circumstances of the particular case under consideration” (Befekadu CO/4585/97).

6. The deportation case law is perhaps best summarised in KMO (section 117 – unduly harsh) Nigeria UKUT 00543 (IAC), Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC), YM (Uganda) v SSHD [2014] EWCA Civ 1292, MAB (para 399; “unduly harsh”) USA [2015] UKUT 00435 (IAC), McLarty (Deportation – proportionality balance) [2014] UKUT 00315 (IAC), SSHD v AQ (Nigeria), CD (Jamaica), TH (Bangladesh) [2015] EWCA Civ 250, LC (China) v SSHD [2014] EWCA Civ 1310, and Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC) which between them summarise the vast body of jurisprudence. I will apply in the determination of evidence section the principles derived from them.
7. I have applied R (app RK) v SSHD (s117B(6) “parental relationship”) IJR [2016] UKUT 00031 (IAC) and Trebbhawon and others (s 117B(6)) [2015] UKUT 00674 (IAC), and with regards to Article 8 I have particularly applied Razgar [2004] UKHL 27, Beoku-Betts v SSHD [2008] UKHL 39, ZH (Tanzania) [2011] UKSC 4, Patel & Others v SSHD [2013] UKSC 72, and Üner v Netherlands (App no 46410/99) ECHR which between them summarise the vast body of jurisprudence. I will apply in the determination of evidence section the principles derived from them.

8. I have applied paragraph 398, 399, and 399A of the Statement of Changes in Immigration Rules HC395.
9. I am concerned with the Grounds of Appeal specified in Section 84 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 act"). I have applied in particular s55 of the Borders, Citizenship and Immigration Act 2009, and s117A-D of the 2002 act.
10. I heard oral evidence from the Appellant's mother Andrea Gregwah and husband Basil Allen, and submissions from both representatives which are fully set out in the Record of Proceedings. I have also taken into account all the information placed before me. I summarise here what I consider to be the most relevant parts of the law and evidence for the purpose of his appeal. I will not include repetition. The fact that I have not included every word stated does not mean that I have excluded it from my consideration. At the commencement of the hearing I explained the procedure in Court. At the end of the hearing I reserved my determination which I now give with reasons.

Appellant's position

11. The Appellant arrived on 15 December 1993 and was given 6 months leave to enter as a visitor until June 1994. It appears that in September 2002 she was granted indefinite leave to remain under the 7 year child concession policy. She married Basil on 31 August 2002. They had a child called Kari who was born on 24 July 2009 and is now almost 7. She is a British citizen.
12. In the application Andrea made for permission to stay (11 April 2000) it was identified that the Appellant had a sister Claudia who had a twin brother Christopher who are both now aged 31, and another set of twin brothers Simon and Courtney who are both now aged 23. Andrea, Simon, and Courtney are now British citizens. Basil is not. He is a Jamaican citizen.
13. When sentencing the Appellant, the Judge stated that it was a serious offence. Her role was a significant one. She was not acting under duress. She fully knew what she was doing, took a risk, and was caught.
14. In the questionnaire (17 December 2012) the Appellant said that she was born at St Catherine's in Spanish Town in Jamaica. Her father is dead. Everyone helps out with Kari to ensure Andrea gets a break. Andrea took Kari to prison every week. She and her family write letters to each other. She has already lost 2 children and is finding it very hard to live without Kari.
15. In her solicitor's letter (17 January 2013) it is said that she cannot return to Jamaica given her family life here, and her strong local cultural and social ties. She cares for her grandmother who has dementia. Andrea has severe problems with her blood and ongoing stress and depression.

16. In her solicitor's letter (12 June 2013) it is said that Kari lives with Andrea. Basil spends time with her at the weekends and a couple of nights during the month. They plan to live together as a family unit at the end of the custodial sentence. Basil has health problems.
17. In her letter (8 March 2016) she said she regrets her actions from May 2012. She has no friends or family in Jamaica. She has to keep moving as she has no money. She has no job. Andrea and Basil send £100 when they can. She goes hungry most nights. She misses Kari. Andrea's illness is getting worse. She misses Basil. She has hurt all of them. She wants her family back.
18. In her statement (6 April 2016) Andrea said that she is 54. The Appellant was deported on 6 November 2014 having arrived here when she was 13. She was granted leave to remain in September 2002. Until she was jailed, the Appellant was the carer of her (i.e. Andrea's) mother. It would be unfair for the family to move to Jamaica as all the children had their formative periods here. Basil was granted indefinite leave to remain in April 2014. She struggles to cope with Kari given her (i.e. Andrea's) health. Kari cries nearly all night and wants her mother back. She can no longer cope with caring for Kari. Basil cannot care for her given his job. It is in Kari's best interest for the Appellant to come back. She (i.e. Andrea) had to stop working as a catering manager 8 years ago on medical grounds. The Appellant is destitute and lives from hand to mouth and moves around. She is virtually living on the street.
19. In evidence she added that she speaks to the Appellant once or twice a week. She is a bit worried. She saw a picture of Kari and could not believe how she had grown. She sent money last Friday to enable her to buy food. Claudia lives in Spanish Town with her boyfriend and child in a 2 bedroom house. The Appellant spent 2 or 3 months with her after she arrived in Jamaica. She (i.e. Andrea) was at court when Claudia was sentenced and also gave evidence at the deportation hearing. Simon has just finished university and works at the same photography agency as Courtney who has a diploma and is a photographer. Christopher works at McDonalds. She tries to send between £60 and £90 a month to Jamaica. Basil tries to send roughly £100 per month but sometimes less. The others do not really help. The Appellant is renting a room in Mandeville. She (i.e. Andrea) was in Jamaica last year after her mother died. She did not take Kari as she (i.e. Andrea) was unwell and Kari has just settled and would be upset. Kari does not live with Basil he lives in shared accommodation. Even if the Appellant came back Kari would stay with her (i.e. Andrea) for a while until she adjusted properly to her. The last time they saw each other was when she was 3 just 1 month before the Appellant was deported. She does not use Skype. Claudia is a fitness instructor. It is a 1 ½ drive from Spanish Town to Mandeville and costs \$1,500 Jamaican which is £2 or £3 bus fare.

20. In his letter (12 June 2013) Basil said he is a chef in a care home. He stopped seeing her in prison because of the effects on the family including Kari who misses her mother. He is waiting for an operation on his knee.
21. In his statement (24 May 2016) he said that they had another child who died at birth in 2000. He had no leave from 1997 to November 2007. The Appellant has been punished for her crime. She has promised to receive counselling and is very remorseful. Kari misses her and cries on the phone. He had a knee operation in 2013 and has pains in his hip. He cannot care for Kari alone. He lives in shared accommodation.
22. In evidence he added that he spoke to the Appellant last Saturday. Kari speaks on the phone to her and uses Skype as often as she can which can be 3 or 4 times in a day. He sends her monthly about £70 to £120. He went to Jamaica in 2011 and 2012 and stayed with a friend on his mother's side. He has no family in Jamaica.
23. I have seen his status letter, Jamaican passport, contract of employment, payslips for 2010/11, details regarding physiotherapy outpatient appointments and x-rays in 2013, details of tax credits paid to the Appellant and Basil in 2010, and a list of prison visits from him from October 2012 to June 2014 when he visited 15 times in that 19 month period.
24. I have seen evidence of Andrea's ill-health regarding her blood platelet problem, the medication she receives, and the difficulties she has which include bleeding, headaches, and a chest rash.
25. The determination regarding Claudia (IA/03788/2007), heard on 16 May 2007, notes that she entered the United Kingdom on 1 December 1996 and was given leave to remain on 30 July 2002 under the concession that applied to children under the age of 7. On 20 November 2006 she was convicted of the importation of in excess of 20 kg of herbal cannabis with a street value of £50,000. Each member of Claudia's family gave evidence and gave clear and cogent statements to the effect that that they had a close relationship and would be devastated if she was compelled to return to Jamaica. Andrea's state of health was also noted. The Tribunal dismissed the appeal.

Respondent's position

26. The offence for which she was jailed was serious as reflected in the Judge's sentencing remarks. The Respondent gives significant weight to protecting society against crime and disorder and protecting health and morals. Her deportation is conducive to the public good. She has not demonstrated that she is not a danger to the community.
27. There are no very compelling circumstances over and above those described in the exceptions to deportation as set out in the rules at paragraphs 399 and 399A.

28. It is not accepted that she has a genuine and subsisting parental relationship with Kari. They were separated when she was just 3 years old. There are no concerns about the ability of her carers. There is no evidence to demonstrate it will be unduly harsh for Kari to remain here without her. The Appellant's presence is not required to prevent Kari from being ill treated, or to ensure her health or development are not impaired, or to provide her with safe and effective care. The negative emotional impact will be set against the fact that she will continue to live with her family and be supported through her schooling. Contact could continue with visits to Jamaica.
29. It will not be unduly harsh for Kari to live with her in Jamaica. She has Jamaican heritage and is young enough to adapt to life there where the Appellant herself lived until she was 13. There would not be social or cultural barriers and she speaks English which is the official language used.
30. She has a subsisting relationship with Basil. It was formed when his immigration status was precarious as he arrived in United Kingdom in 1996 and had no leave to remain from July 1997 to November 2007. It would not be unduly harsh for Basil to live in Jamaica as he lived there until he was 21 and is a Jamaican national. It would not be unduly harsh for Basil to remain here without her given the nature of her crime which outweighs the rights they are entitled to with respect their family life.
31. She has not been lawfully here for most of her life. She had no leave to remain from June 1994 to November 2002 and only arrived when she was 13. She was in jail for a serious offence. There are no very significant obstacles to her integrating to Jamaica as she lived there until she was 13, speaks the official language of English, can seek support from relatives, and can use skills acquired here to work.

Determination

32. I accept that the Appellant has the recorded conviction and received a sentence in excess of 4 years. She falls within the automatic deportation provisions given the length of the sentence and outside the scope of paragraphs 399 and 399A of the immigration rules.
33. The Judge made clear in his sentencing comments that the Appellant had a significant role in the offence and knew exactly what she was doing.
34. The Appellant knew the consequences of her actions before she committed the offence because her sister Claudia was deported for the same type of offence. The only difference between them was that the Appellant was importing class A drugs of a higher street value than Claudia who was importing cannabis. The Appellant knew the destruction of her family life that would follow should she be caught given the evidence in Claudia's case and the deportation that followed,

and the destruction of other families and communities that would follow through the distribution of the Class A drugs if she was not caught. Within the context of that, her remorse sounds extremely hollow.

35. There is a strong public interest in the Appellant being deported given the serious nature of the offence, the significant impact it could have caused on others and society, the importance of deterring others from committing such a crime, and as an expression of society's condemnation of this serious criminal activity. The offence was not committed whilst the Appellant was a juvenile but a mature adult of then 31 years old who did so in the knowledge of exactly what would happen to her should she be caught because of her own personal family circumstances namely Claudia's deportation. She did of course also have a poor immigration history.
36. There are various strands to her family life claim which I must consider in deciding whether removal would be contrary to her, and the various people she identifies as family members, Article 8 rights. I bear in mind the importance of family life, the fact it takes many forms, the fact that people do not have to live together to have a family life, and the positive duty to promote it. I bear in mind that I must consider family members to be victims.
37. The Appellant has been deported to Jamaica. She has been living there now for 18 months. There is no cogent independent or documentary evidence of any health problems. She was able to stay with Claudia for 2 or 3 months on arrival in Jamaica and is regularly receiving money from family in the United Kingdom. She has accommodation and is not homeless. There is access to technology because she is able to speak to her family here once or twice a week and sometimes a number of times a day. She can buy paper and use the postal service because she was able to send a letter.
38. The fact that Basil has chosen not to return to Jamaica to be with her is a matter for him. He is a Jamaican citizen who lived there until he was 21 and lived here without any leave for about 10 years. He speaks the language and understands the culture in Jamaica and could work there as he has skills. He would have family support and has friends he can stay with. He has been there recently twice but has chosen not to go there since the Appellant was deported. He can visit whenever he wants. If the relationship was currently of such significance to him he would go to Jamaica to be with her. I bear in mind that their relationship was formed (around 2000) when neither of them had leave to remain and their status was both unlawful and precarious.
39. The fact that he and Andrea have chosen not to allow Kari to go to Jamaica to be with or see the Appellant is a matter for them. They are acting in what they consider is in Kari's best interest.

40. It is not unduly harsh for Kari to stay here with Andrea and Basil without the Appellant for the following reasons. Kari was separated from the Appellant due to the Appellant's choice when she was 3 years old. The Appellant knew that that would be the consequence of her action and made that choice. She has failed to establish that she has a genuine and subsisting parental relationship with Kari as she has not seen her since she was 3, Kari has not been taken to see her, and there is no evidence she has any role in decisions affecting Kari's life either on a daily or general basis. Kari is being cared for by Andrea. There is no independence cogent evidence to suggest that she has suffered in any way. She has appropriate housing and schooling. She sees her father and extended family members. She is no doubt showered with love and attention. There is no report from social services, the school, or GP to indicate any problem whatsoever. I do not accept that the Appellant is a significant feature in her life because of the inevitably limited relationship they have through modern means of communication and lack of direct contact since Kari was 3. That was the choice the Appellant made when she committed the offence the result of which she knew would happen.
41. It is in Kari's best interest to remain in the United Kingdom given she is British and settled here at that school and has family around her. As will be seen shortly that does not however mean it would be unduly harsh for her to leave the United Kingdom to be with her mother in Jamaica if that was what the family thought was best.
42. Whilst I note the Respondent's position that it is in Kari's best interests for the Appellant to return to the United Kingdom, it is Andrea's position that the current living arrangements would remain. In the absence of independent evidence of the damage caused to Kari by living with a convicted drug smuggler, it is by no means clear that it is in Kari's best interests to live with the Appellant given the destruction to families (whether her own or others) the Appellant chose to embark on by her involvement in the drugs trade in the knowledge of what would happen should she be caught. That cavalier attitude to relationships will inevitably weigh heavily on the minds of social workers conducting the assessment of who it is best for Kari to live with and what contact she should have with the Appellant.
43. Basil complains that his knee problem affects his ability to care for Kari. The medical evidence falls woefully short of suggesting that. He also identifies his living arrangements and work commitments as a reason Kari cannot live with him. I do not accept that either of those would prevent living with him as there are many single parents who work and provide accommodation for themselves and their child. I am satisfied as it is a matter of choice that he chooses to play a secondary role in her life.
44. Andrea complains that her health problem affects her ability to care for Kari. The medical evidence falls woefully short of suggesting that as there is no independent report from the doctor suggesting that her health could affect her

childcare to any significant extent and no independent evidence from a social worker suggesting that Kari has been affected by Andrea's health or indeed for any other reason. There is no evidence from the school to indicate any problems Kari is having. I only have the word of the family and given the absence of cogent independent evidence reject their concerns as being unfounded embellishment.

45. It would not be unduly harsh for any of them to return to Jamaica because Claudia has proved that work is available, a life can be made there, and a family brought up there. It would not be unduly harsh for Kari to go there because she plainly has family there, speaks the language, could go to school, and is of Jamaican heritage as both of her parents are Jamaican.
46. The Appellant had not been here lawfully for most of her life. She is 35 years and 9 months old. She spent 13 years and 4 months in Jamaica and the last 2 years and 6 months there. That is a total of 15 years and 10 months. She had no leave to be here from June 1994 to September 2002. That is 8 years and 3 months. She only had leave to be here for 6 months at the beginning of 1994 and for 12 years and 2 months from September 2002. That is a total of 12 years and 8 months which is significantly less than 17 years and 10 months (that being half of her life). Given her failure to comply with the drug or immigration laws in the United Kingdom she has failed to establish she is socially or culturally integrated here.
47. For all the reasons I have given I am not satisfied that there are any compelling circumstances let alone very compelling circumstances that go above and beyond those falling within paragraph 399 and 399A of the immigration rules when taking into account the factors set out in section 117B. Indeed, all of the factors weigh very heavily against the Appellant being allowed to return.

Decision:

I set aside the decision of the 1st tier tribunal.

I dismiss the appeal against the deportation order on all grounds.

Signed:
Deputy Upper Tribunal Judge Saffer
25 May 2016