Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00569/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 March 2019	**On 18 March 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS
UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R---D--- S---
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: The Respondent did not appear and was not represented

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent (also called the Claimant) or her children. Breach of this order can be punished as a contempt of court. We make this order because we have to consider the interests of children who are entitled to privacy and may well be protected by court orders dealing with their circumstances.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing an appeal by the Respondent, hereinafter the Claimant, against the decision of the Secretary of State to deport her. The decision to make a deportation order was taken on 17 September 2016 explained in a supplementary letter of 2 December 2016. The Claimant is an EEA national

and the Immigration (European Economic Area) Regulations 2006 apply. It is the Secretary of State's case that although the Claimant is an EEA national she is not entitled to more than the minimum level of protection and that the decision to deport her is proportionate.

3. We were surprised that the Claimant did not appear before us and was not represented. She had instructed experienced solicitors and those solicitors had communicated with Mr Wilding in the week before the hearing and referred to the hearing before us. We adjourned for enquiries to be made and Mr Wilding was kind enough (because this is not his job) to contact the solicitors and received a communication from them saying that they were in fact no longer on the record and had contacted the Tribunal to that effect. We have not found anything on our file that confirms that claim but it is very clear to us both that the Claimant had proper notice of today's hearing and that her representatives who have been on the record are no longer acting for her. We therefore decided to continue in her absence.

4. We have no hesitation in saying that the decision of the First-tier Tribunal is quite unsatisfactory. It is not clear from the First-tier Tribunal's decision what level of protection, if any, the judge was satisfied the Claimant had. He refers in the same paragraph to "imperative grounds" for removal and "serious grounds" for removal without indicating which of the tests was relevant and that is sufficient to undermine the decision as a whole.

5. We simply do not know what evidence the judge accepted about the Claimant's reasons for being in the United Kingdom or really what reasons he had for allowing the appeal. There is no proper analysis of the law and no reasoned findings on crucial points. This is a rather serious criticism but it is justified and explains why the decision of the First-tier Tribunal cannot stand.

6. Having decided to set aside the decision we had to decide what to do next. We considered remitting the case but given the lack of evidence before this Tribunal and the Claimant's apparent lack of interest in promoting her case, we saw no point in so doing. There was evidence before us and we have considered it.

7. It is quite plain that the Claimant has lived in the United Kingdom for a long time; it seems likely that she lived there for about 28 years. This causes us to suspect that she may have acquired EEA residence rights but that is something she has to prove and she knows she has to prove it because this has been made clear and we find that she cannot do that. When the Claimant first came to the United Kingdom it seems that she was with her parents who may have been exercising treaty rights but we do not know what they were doing in the United Kingdom or what, if any, arrangements had been made, for example, about healthcare.

8. We are satisfied on the evidence that for some of the time that the Claimant has been in the United Kingdom she was following her education but we do not know the circumstances and so cannot say that she was, or should be treated as, exercising treaty rights in that time. There are "missing links" in the evidence. It is regrettable if the Claimant has acquired rights that we have not recognised but we cannot ignore gaps in the evidence.

9. We are also entirely satisfied that the Claimant has been working and this has caused us particular concern because people who are intent on exercising treaty rights and obtain work very often are indeed exercising treaty rights as they set out to do and have acquired rights as a consequence.

10. That contention that the Claimant has worked is supported by correspondence from HMRC confirming the Claimant's work record. We have gone through that evidence with particular care and with the assistance of detailed submissions from Mr Wilding. Like Mr Wilding, we cannot find five years of continuous work. The particular difficulty for the Claimant is that there is a gap in her employment record which suggests to us that she was unemployed for considerably more than the period of three months which is, in broad terms, an allowable time gap for the purposes of exercising treaty rights. The correspondence from HMRC certainly does not prove that the Claimant was exercising treaty rights for a continuous five year period.

11. We struggled to understand the evidence because it is not explained but we have considered it and that is the view we take. It is our finding that the Claimant is a person who, notwithstanding her long residence in the United Kingdom, has not shown that she has exercised treaty rights for the time need to obtain permanent residence and is therefore not entitled to more than the minimum level of protection.

12. We have also considered what her position would be if we are wrong on this and she has exercised treaty rights for a continuous period of five years. In that event she could not be removed except on "serious grounds". We will consider the offending shortly but it is our view that there are "serious grounds" in this case so even if we are wrong on the first finding our conclusion would still be the same.

13. We have considered too if there are "imperative grounds" but we are quite satisfied that the Claimant is not entitled to the "imperative grounds" protection that is available to a person who has accrued ten years' lawful residence including five years in which she has established a permanent right of residence. We say this because the Claimant has been to prison. Going to prison usually has the effect of breaking the integrated links and so "restarting the clock". Sometimes it does not. We have to look for the effect of imprisonment on integrated links. Without making ourselves a hostage to fortune we are entirely comfortable with the idea that a short period of imprisonment in a long period of industrious living in the United Kingdom would not have that effect but that is not what has happened here. This is a case of a person who for reasons that are not disclosed but we suspect are to do with drug abuse has got into serious trouble on many occasions and the consequent periods of imprisonment and living irregularly and committing offences would have broken any proper integrated links. This is not a case where the Claimant is entitled to the imperative grounds of protection.

14. In any case involving the removal of an EEA national under the 2006 regulation the personal conduct of the person must represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". This is set out in Regulation 21(5)(c). It is an important requirement and one that must not be overlooked. We are satisfied that that requirement is

met here. A brief look at the Claimant's criminal record makes the point. In 2012 she was in trouble for making an article for use in fraud. This is an offence which shows some sophistication and planning. Then she was in trouble for failing to surrender at the appointed time. That shows irresponsibility or inability to co-operate with the authorities. In 2013 she was fined for shoplifting and also for possessing a controlled drug of class A. In May 2013 at the Crown Court sitting at Harrow for an offence of robbery that she denied she was given a suspended sentence of imprisonment. Robbery is always a serious matter and is concerning because it impedes on the rights of to go about their lawful business without fear. Clearly drugs were involved because as well as a suspended sentence there was a twelve months' drug rehabilitation order. In November 2013, barely six months later, the Claimant was before the Crown Court again when she was sent to prison for fifteen months. The earlier suspended term was activated. In 2014 there was a short period of imprisonment for burglary of a non-dwelling place. She was in trouble again in April 2015 and made subject to a drug rehabilitation requirement and a community order. In April 2015 at the North London Magistrates' Court for theft from shops she was subject to a drug rehabilitation requirement and a community order. In September 2015 a similar, further, penalty was imposed. She was also conditionally discharged because she had failed to attend or remain for assessment following a drug test. In August 2016 she was imprisoned for three months for theft from shops and for breaching her conditional discharge and then in August 2016 for theft from shops and failing to surrender to custody she was subject to a short period of imprisonment.

15. We have seen the judge's sentencing remarks. Clearly, he was concerned about the Claimant and wanted her to do well. He imposed a sentence that he knew would allow her immediate or almost immediate release and finished his sentencing remarks wishing her "good luck". We have no difficulty in concluding that there were undercurrents here that made the judge understandably sorry for the Claimant but she has not taken advantage of the opportunities that had been extended to her. There is nothing before us to suggest that she has in fact given up the drugs that have got her into trouble. There is nothing before us to suggest that there has been any prolonged or serious rehabilitation. Rather her absence and failure to explain herself adds to the picture of her irresponsibility or her inability to give effect to good intentions that no doubt have been expressed. We have no difficulty in saying that her conduct does represent a present threat because in the past she has behaved in a way that has caused distress and inconvenience and fear of crime to a number of people for a variety of reasons and there is nothing before us to suggest she has changed. That aspect remains real. It follows therefore that we are satisfied that the personal conduct does represent a threat and that requirement of the Rules is met.

16. We are also satisfied that if she had established a right of permanent residence and therefore benefitted from the "serious grounds" protection there are serious grounds in this case to remove her. The serious grounds are her persistent criminal behaviour of quite a serious kind.

17. Nevertheless, we also have to ask ourselves if this is proportionate and we do bear two things very much in mind. First is the long length of residence in the

United Kingdom. It does represent a big chunk of this woman's life. Second is that she is the mother of three children and they have to be considered. We have to do our best to make findings about their best interests. The difficulty we have about that is we know very little. We know there are three children who are still minors. We understand that one of them has remained in the care of his father and does not feature in the Claimant's life. We understand that another is in the care of a close relative of the Claimant. There arrangement seems to be approved by appropriate court orders or local authority involvement and another is in local authority care. This is not a case where the children are living with the Claimant, as far as we know, or where the Claimant's removal is going to disrupt close family links as might be the case if the Claimant has frequent contact with her children. Our reading of the evidence suggests, but does not establish clearly, that there is little or no contact and that if there is any contact at all it is not a regular event.

18. There is evidence that the child in the care of the local authority was being considered for adoption. We do not know how far those plans advanced but it certainly adds to our view that the Claimant is not in constant contact with the child and that the best interests of the child do not require the mother to remain in the United Kingdom.

19. We can only make the decision on what we have before us and there is nothing before us to suggest that her removal would have a big impact on the children. No doubt they would want to know about their mother and no doubt if there is any sort of contact they would miss her but this is not a case where removal would break up a nuclear family or interfere with a close or re-emerging parental bond. We do not know nearly enough about the circumstances of the children to make an informed decision on their best interests but we are confident that the occasional contact that they might enjoy is not a weighty element in a proportionality exercise.

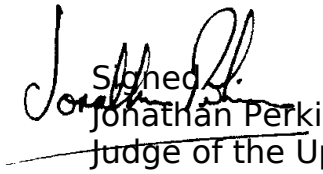
20. We have considered the Claimant's length of residence in the United Kingdom. The fact is she entered the United Kingdom as a child. For quite a lot of her stay she appears to have lived respectably and has been employed. Since about 2012 she has been involved in criminal activity of a kind that is serious in itself and made much more serious by its cumulative effect. We do not regard her long residence in the United Kingdom in these circumstances as a weighty point in any proportionality exercise.

21. It follows that we find the evidence here points entirely one way and it is that the decision of the Secretary of State shows a proper analysis of the relevant points and was proportionate and, more importantly, we take the view that it is proportionate and that under the Rules she has no right to remain.

22. In the circumstances we set aside the decision of the First-tier Tribunal and substitute a decision dismissing the Claimant's appeal against the decision of the Secretary of State.

Notice of Decision

The First-tier Tribunal erred in law. We allow the Secretary of State's appeal. We set aside the decision of the First-tier Tribunal and we substitute a decision dismissing the Claimant's appeal against the decision of the Secretary of State.



Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 14 March 2019