Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03132/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 11 February 2019	**On 13 February 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

V N W
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Khubber, of Counsel, instructed by Turpin and Miller
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the respondent by First-tier Tribunal Judge Grant-Hutchinson on 24 October 2018. For convenience, the parties are referred to as they were before the First-tier Tribunal.

2. The appellant is a Jamaican national born on 23 September 1978. She entered the UK as a visitor in 2001 and overstayed. She was subsequently arrested for drug related offences in 2010, convicted on seven counts and sentenced to 42 months of imprisonment on each count, to be served concurrently. A deportation order was served upon her in 2011 but different dates for this are given in the evidence. She then claimed asylum and the matter was reconsidered by the respondent. Her appeal against the respondent's refusal to grant her protection or to grant leave on human rights grounds was dismissed by a panel of the First-tier Tribunal by way of a determination promulgated by Judge Astle on 17 April 2012. The appellant claimed to have responsibility for three children (one of whom is her niece). They are now in foster care following the appellant's further convictions in 2015 for common assault (on a female bus passenger for which she received a suspended sentence) and for assaulting an eight year old child in her care. According to Dr B's report, her own children also showed signs of prolonged physical abuse. The appellant is permitted to have monthly supervised contact. It appears from the evidence that the appellant has also made use of false documents and National Insurance numbers in order to take employment and has shoplifted on many occasions.

3. The appeal was allowed by First-tier Tribunal Judge Place on 2 October 2018 following a hearing at Nottingham on 17 September 2018. The judge found that the appellant was at risk of suicide and allowed the appeal on article 8. She also found that it would be in the best interests of the children to continue to have monthly contact with the appellant and on that basis allowed the appeal under article 8 as well.

The Hearing

4. Mr Lindsay represented the respondent at the hearing before me on 11 February 2019. He relied on his grounds which he expanded in his submissions. He pointed out that whilst the judge had considered the appellant's documentary evidence on the availability of effective support mechanisms in Jamaica and found that there was insufficient evidence on which to make a finding that there was no support available, she did not then give reasons for why she found, nevertheless, that there would be a risk of suicide after removal. He submitted further that there had also been no consideration of support mechanisms in the UK and that the judge's finding that the high threshold of suicide risk had been made out was unreasoned.

5. Mr Lindsay also submitted that the judge had misdirected herself with respect to her assessment of the appellant's credibility. He pointed out that she had been found to be lacking in credibility by the panel of the First-tier Tribunal in 2012 and that if she had wanted to depart from that conclusion, she should have provided

good reasons for doing so. It had always been the respondent's case that the appellant was not to be believed and notwithstanding no direct challenge to the oral evidence by the Presenting Officer at her recent hearing, there had been no concession made. The 'findings' at paragraph 12 were insufficient where there had been previous compelling adverse findings and more was required in order for those to be set aside.

6. Mr Lindsay submitted that weight had been placed on the forensic reports but the judge's approach to the reports was also flawed. The doctors had not been aware of the adverse credibility findings. Had they been so aware, they may not have so readily accepted the appellant's claim of more than one suicide attempt. Reliance was placed on JL (medical reports-credibility) China [2013] UKUT 145.

7. With respect to the judge's cursory consideration of article 8, Mr Lindsay submitted that there had been no engagement with 117C. the judge had failed to consider whether it would be unduly harsh to deport the appellant and it was unclear as to why she had allowed the appeal on article 8 grounds. A proper assessment was particularly important where cases of foreign criminals and deportation were concerned.

8. I then heard submissions from Mr Khubber for the appellant. He submitted that the judge had approached the case with care, had understood and appreciated the evidence and had made appropriate findings. Even if she had been generous, that did not amount to an error of law. He submitted that the judge had the guidance on suicide in mind. She also considered the Devaseelan principles but evaluated the case for herself. The appellant's credibility was not challenged by the Presenting Officer.

9. Mr Khubber submitted that the judge had taken a discerning approach to the evidence and had rejected the country information as to the lack of support in Jamaica. He referred me to Y and Z (Sri Lanka) [2009] EWCA Civ 362 and submitted that there could be cases where even the existence of support was not enough to prevent suicide. Taking me through the six guiding points of J [2005] EWCA Civ 629, he submitted that the judge had considered them all. He submitted that in principle, an article 3 claim could succeed in a suicide case and that was precisely what the judge found having assessed all the evidence. He submitted that irrespective of the availability of support mechanisms, a suicide risk may be so profound as to amount to an article 3 breach.

10. With regard to the previous credibility findings, the judge was well aware that Devaseelan was a starting point. There were five witness statements from the appellant all of which post-dated the previous determination. There had been no medical evidence at the time of

the previous hearing. The judge heard oral evidence and found the appellant to be an honest witness. There was no error in that. The nexus between the previous case and the present one was very far apart. Six years had passed. There had been no direct attack on the appellant's credibility. The hospital discharge letter referred to previous suicide attempts. The doctor's report was detailed. It was difficult to see how the judge could be criticized.

11. On article 8, it was accepted that s.117C had not been referred to and that there had been no assessment of the *"unduly harsh"* test. That could be said to be immaterial, however, if the article 3 decision were to be upheld, or the matter could be remitted to the First-tier Tribunal for article 8 findings to be made.

12. Mr Lindsay responded. He submitted it was enough for the respondent to show that the judge had erred on the sixth J principle for the decision to be set aside. There had been no consideration at all of how the risk to suicide could have been made out when there had been no analysis of effective support mechanisms either in the receiving or the returning state. The respondent did not dispute that the doctor had found there would be a high risk of suicide in the UK if the appellant were notified of a negative decision, but the judge failed entirely to consider whether the UK had effective mechanisms in place to prevent suicide. This amounted to a clear error. On the credibility point, whilst there may have been further evidence, this did not release the judge from the duty of having to give reasons for departing from the previous determination.

13. I then permitted Mr Khubber to make a brief reply and he referred me to Y and Z and the judge's findings at paragraph 24. Mr Lindsay had the last word and emphasised that the presence or absence of effective support mechanisms remained an issue for consideration and the judge had failed in that respect.

14. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

15. I have considered all the evidence before me and have had regard to the submissions made. I reach my decision having taken all that before me into account and having considered the evidence as a whole. I am mindful of the potentially serious consequences of my decision and I have made it with care. I have also endeavoured to make it promptly.

16. There is no dispute over the legal framework, the appellant's criminal and immigration background and the fact that her children (possibly including her niece) are in the care of the local authorities.

The issue is whether her assessment of the claim of suicide and subsequent findings are adequate and sustainable.

17. As I see it, there are three main lines of argument put forward by the respondent. The first is whether the judge properly applied the six J principles, particularly the sixth. The second is whether her approach to the issue of credibility is sustainable and thirdly whether the article 8 assessment and analysis is adequate.

18. Taking the last point first, I am able to quickly find that the judge erred. Indeed, Mr Khubber fairly conceded that there were difficulties with the judge's approach. There was no assessment of s.117C, given that the judge was dealing with the deportation of a foreign criminal, and no analysis or consideration of the unduly harsh test. I note that both written submissions from the appellant's representative and from the Presenting Officer made specific arguments on s.117. In the circumstances, the article 8 findings cannot, therefore, stand. Of course, the judge's failings in this respect may not matter too much if the decision on article 3 were to be upheld, so I now turn to that.

19. I would state at the outset that given the mass of documentary evidence adduced, the complex background of the case including previous litigation, and the issues involved, the judge's determination is surprisingly brief and her findings even more so. That in itself, however, is not necessarily a problem but, in this case, I fear it is.

20. I accept Mr Khubber's helpful submission that the judge did have regard to the principles of J. I note that these are assessed at paragraphs 18-25. The judge considered whether the treatment the appellant would suffer on return to Jamaica (i.e. whether she would commit suicide) would reach a minimum level of severity (at 18 and 20). She considered the causal link between the threat and the expulsion (at 21). She accepted that the risk did not arise from any potential act of the receiving state (at 22) and Mr Khubber submitted that this also covered the fifth principle, which is not mentioned by the judge, whether the appellant's fear of ill treatment in the receiving state was objectively well founded. The judge does not refer to the fourth principle as such but that can be inferred by her general findings. When considering the sixth and final principle, whether the removing and/or the receiving state had effective mechanisms to reduce the risk of suicide, the judge fell into error.

21. The judge refers to one news article some three years out of date about the availability of mental health care in Jamaica. Not surprisingly, given the size of the bundles before her, this single page of information did not impress her and she did not find it persuasive (at 23). She then stated: *"There is insufficient evidence*

for me to make a finding that there are not effective support mechanisms available in Jamaica". As Mr Lindsay argued, that must mean that the judge found that there were sufficient mechanisms in place but the judge does not dwell on the matter any more, proclaiming that she does not find the point of relevance because the appellant would be at a high risk of suicide even before she were to reach Jamaica. This finding is made entirely upon Dr B's opinion as contained in part 7 of her report. That opinion is reached without any consideration whatsoever of the mechanisms that may be available to assist in reducing the risk. No evidence of the systems in place in the UK to address suicidal individuals was referred to either in the report or by Counsel at the hearing. In spite of the total absence of such evidence, the judge made a finding that the appellant would be at high risk of committing suicide in the UK. Such a finding, without any assessment other than the opinion of the forensic psychologist and one hospital discharge letter from October 2017, is unsustainable. The discharge letter, whilst referring to previous attempts gives no information on how that information was obtained. Moreover, Dr B reported that the appellant was mentally stable and had not felt suicidal since November 2017. Whilst I fully accept that in rare and extreme cases, the risk can be so high and profound that mechanisms even if in place may not reduce the risk but the judge has not given any sustainable reasons for why that might be so in this case. In any event, she would still be required to consider what is available and then to give reasons why she finds the available support would not help someone such as the appellant. That has not been done.

22. A further problem which links in with the second ground argued, is that Dr B accepted the appellant's evidence of gang warfare and violence in Jamaica when these were matters found by the previous First-tier Tribunal to have been fabricated. It is unclear how much of her conclusion was based on that acceptance. Of course, as Mr Lindsay argues, this also impacts upon the judge's assessment as if the doctor might have taken a different view had she known all the relevant facts, then it is also possible that the judge would have made a different decision.

23. I have considered Dr B's report carefully to see whether she was aware of the previous adverse credibility findings that were made in respect of the appellant's evidence. Dr B purports to list all the evidence she was given at Appendix II but unhelpfully that consists of just the number of pages read and no details as to what the documents were.

24. Coming on to the Devaseelan issue, I accept that the previous determination was some years ago and that the appellant had prepared several witness statements since then but, as Mr Lindsay submitted, the judge is still required to give reasons for why she

departed from the adverse findings made. She is entitled to do so, of course, but more is needed than what is contained in paragraph 12. No reference is made to what persuaded her to believe the appellant. there is no mention of any of the evidence and the absence of any direct challenge to the oral evidence by the Presenting Officer does not relieve the judge of a duty to explain why she made positive findings of credibility.

25. It is not the case, as Mr Khubber argued, that the issues were completely different from those previously considered because the judge referred to the appellant's consistent reference to gangs and violence putting her at risk in Jamaica (at 15) without giving any reasons why this was accepted as credible in circumstances where the previous fact finding Tribunal found the claim had been fabricated.

26. Having, therefore, carefully considered the determination, I conclude that the judge erred in law to the extent that her conclusions cannot stand.

27. I have considered very carefully whether there are findings that can be preserved, knowing that my decision will not be welcomed by the appellant, but no submissions were made to me on this and as the findings are largely interlinked and largely unreasoned and/or dependent on Dr B's opinion which raises separate difficulties (as set out above), I conclude that it would be unsafe to preserve any findings. I, therefore, set aside the decision in its entirety other than as a record of proceedings.

28. As the appeal shall have to be re-heard and findings of fact will need to be made on all issues, the matter is remitted back to the First-tier Tribunal.

Decision

29. The decision of the First-tier Tribunal is set aside and the appeal is remitted to another judge of that Tribunal for the decision to be re-made.

Anonymity

30. I continue the anonymity order made by the First-tier Tribunal.

Signed

Upper Tribunal Judge

Date: 12 February 2019