Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03928/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34
On 13 July 2020

Decision & Reasons Promulgated
On 22 July 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEHAK MEHAK
(ANONYMITY DIRECTION NOT MADE)

Respondent

DECISION AND REASONS (P)

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 15 October 1990 and is a female citizen of India. Her human rights claim was refused by the respondent by decision dated 19 February 2019; the appellant is subject to an automatic deportation order having been, on 22 November 2013, sentenced at the Crown Court, Canterbury to a period of imprisonment of 12 months. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 15 January 2020, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. This appeal has been subject to the Covid-19 provisions instituted in the Upper Tribunal in March 2020. Directions were issued on 3 April 2020, the Upper Tribunal having taken the provisional view that it would be appropriate to determine matters

error of law/setting aside First-tier Tribunal decision without hearing. Both parties have responded to those directions and the appeal is been put before me for determination or further directions.

3. In my view and having careful regard to the written representations of both parties, I have concluded that it is appropriate to determine the matters referred to above without a hearing. First, in my view, the errors in the First-tier Tribunal decision are so serious and obvious that the setting aside of the decision is the only possible course of action. Secondly, counsel for the appellant in her helpful written submissions, acknowledges [7] that the correct legal tests were not applied by the judge when assessing whether and, if so, how Exception 2 of section 177C(5) of the 2002 Act applied in the case of the appellant. The argument advanced by the appellant that the judge did not fall into error by failing to follow the principles of two Upper Tribunal authorities because these post-dated his decision has no merit. The Upper Tribunal decisions did not seek to alter the existing law but only to clarify its proper meaning. Therefore, the judge did fall into error by failing to follow those principles. Thirdly, at the end of her submissions, counsel for the appellant, possibly anticipating that the decision would be set aside, proposes that, if that course of action is followed, the appeal should be returned to the First-tier Tribunal and the decision made *de novo*. For reasons I shall get below, that is the course of action which I do intend to follow.

4. I find that the judge fell into error for the following reasons. First, I agree with the respondent that is not open to the judge to go behind the reasoning and decision of the sentencing judge in the Crown Court. At [75], the judge appears to take into account mitigation for the criminal offence which the Crown Court judge had failed or chosen not to consider. However, the judge goes further than that and descends into a discussion of the probable motivation for the appellant offending (' unhappy circumstances…', 'Extreme emotional pressure having been the subject matter of an abusive relationship…') and appears to criticise the Crown Court judge for having sentenced the appellant without the benefit of a pre-sentence report. The impression left by the judge's comments is that, had the Crown Court judge had the benefit of a report and had he taken to account the difficulties which the appellant had been experiencing at the time of the offence, he would not have sentenced the appellant to such a lengthy period of imprisonment. The judge has gone beyond his duty to take account of all the circumstances by trespassing upon matters which were the sole concern of the Crown Court.

5. Secondly, whilst the judge's decision is long on lengthy quotations from caselaw, the reasoning which appears under the heading 'Findings and Conclusions' is brief and consists to a large extent of assertions unsupported by any detailed reasoning. Much of the reasoning which has been provided is legally flawed. At [82], the judge finds that it would be 'an unduly harsh result on the children [for the appellant to be deported] given the nature of the offence committed in the appellant's previous good character.' It is not clear why nature of the offence and their mother's character should render the effect of her deportation unduly harsh upon her children. Further, the judge concludes that paragraph with the simple statement, 'I considered the best

interests of the children.' Absolutely no particulars of that consideration have been provided. Further, at [84], I agree with the respondent that the mere fact that the appellant's children are British citizens has been central to her concluding that it would be unduly harsh for them to be expected live in India. The Upper Tribunal found in *Patel (British citizen child - deportation)* [2020] UKUT 45 (IAC) that 'nationality (in the form of British citizenship) is a relevant factor when assessing whether the 'unduly harsh' requirements of section 117C(5) are met. However, it is not necessarily a weighty factor; all depends on the facts…The possession of British citizenship by a child with whom a person (P) has a genuine and subsisting parental relationship does not mean that P is exempted from the 'unduly harsh' requirements. Even though the child may be British, it has to be unduly harsh both for him or her to leave with P or to stay without P; not just harsh. Thus, some substantial interference with the rights and expectations that come with being British is possible, without the position becoming one of undue harshness to the child.'

6. I find that the decision of the judge is seriously flawed for the reasons which I have given above. However, whilst I acknowledge the respondent's comments regarding the largely uncontroversial nature of the appellant's evidence, I do consider it necessary for the appeal to be returned to the First-tier Tribunal. In particular, the judges intrusion upon matters which were solely the concern of the Crown Court and which, in turn, has undermined a proper assessment of the relevant evidence make it appropriate that the fact-finding exercise should be conducted again and that exercise is better conducted in the First-tier Tribunal than in the Upper Tribunal.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The decision will be remade in the First-tier Tribunal following a hearing *de novo*.

Signed Date 13 July 2020

Upper Tribunal Judge Lane