Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: UI-2022-000571
[DA/00229/2021]

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2022

Decision & Reasons Promulgated
On 3 August 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BIANCA MARIA KOSLOWSKI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Susana Cunha, Senior Presenting Officer
For the Respondent: *Hollie Higgins*, instructed by the AIRE Centre

DECISION AND REASONS

1. The Secretary of State appeals, with permission granted by First-tier Tribunal Judge Boyes, against the decision of First-tier Tribunal Judge Bart-Stewart, who allowed Ms Koslowski's appeal against the decision to deport her from the United Kingdom.

2. In order to avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Ms Koslowski as the appellant and the Secretary of State for the Home Department as the respondent.

Background

3. The appellant is a German national who was born on 17 December 1974. She is said to have arrived in the United Kingdom in 2002. She was granted an EEA Residence Permit as an EEA national exercising Treaty Rights on 7 February 2003.

4. On 7 November 2018, following an eight week trial at Wood Green Crown Court, the appellant was convicted of making false representations in order to make gains for herself. She had made false claims for interpretation services, significantly defrauding the taxpayer between the years 2010 to 2016. On 12 November 2018, she was sentenced by HHJ Kaul QC to five years' imprisonment for that offence.

5. On 23 February 2021, following the usual exchange of correspondence, the respondent decided to make a deportation order against the appellant. The respondent did not accept that the appellant had acquired 'imperative grounds' protection against deportation: [11]-[20]. She therefore assessed whether the appellant's deportation was justified on serious grounds of public policy or public security. The respondent concluded that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom: [22]-[37]. Having considered the factors in regulation 27(6) of the Immigration (EEA) Regulations 2016, and to the appellant's prospects of rehabilitating in Germany and the UK, the respondent concluded that it would be proportionate to deport the appellant from the United Kingdom: [39]-[50]. For reasons she gave at [51]-[63], the respondent concluded that the appellant's deportation would be proportionate in terms of Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed. Her appeal came before the Judge Bart-Stewart (the judge), sitting at Taylor House on 19 January 2022. The appellant was represented by Ms Higgins, as she was before me. The respondent was represented by Ms Davis, a Presenting Officer. The judge received evidence from the appellant via a British Sign Language ("BSL") interpreter. She received submissions from Ms Davis and Ms Higgins before reserving her decision.

7. In her reserved decision, the judge concluded that the appellant should benefit from the highest level of protection against deportation. She did not accept that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. She did not consider that it would be proportionate to deport the appellant from the United Kingdom.

The Appeal to the Upper Tribunal

8. The respondent's grounds of appeal are not properly delineated into separate, particularised complaints of legal error, as required by Nixon [2014] UKUT 368 (IAC) and Harverye v SSHD [2018] EWCA Civ 2848. After a short paragraph entitled 'Background', there are eight further paragraphs, all of which appear under a sub-heading which is "Ground

one: Failing to give adequate reasons for findings on a material matter". On analysis, however, there are three grounds of appeal:

(i) The judge failed to give adequate reasons for concluding that the appellant's integrative links to the UK had not been broken by her term of imprisonment;

(ii) The judge failed to give adequate reasons, or failed to take account of material matters, when concluding that the appellant's conduct did not represent a genuine, present and sufficiently serious threat to the fundamental interests of the UK; and

(iii) The judge failed to give adequate reasons or to take account of material matters when concluding that the appellant's deportation would be disproportionate.

9. Permission was granted by Judge Boyes on each of these grounds.

10. In compliance with directions issued by an Upper Tribunal Lawyer, Ms Higgins filed a detailed response to the notice of appeal under rule 24. The respondent filed a rather shorter skeleton argument.

Submissions

11. At the outset of her submissions, Ms Cunha indicated that the first of the grounds I have summarised above was formally abandoned. She proceeded to make focused submissions on the remaining two grounds. The judge had failed, she submitted, to take account of the sums defrauded from the taxpayer; the cost of the eight week trial; the lack of any remorse on the part of the appellant; and the absence of any rehabilitative courses undertaken. All of these matters were relevant to the assessment of risk and had been overlooked by the judge. In relation to the third ground, the appellant's health needs would obviously be met in Germany and the reasons for finding that her removal would be disproportionate were inadequate or altogether absent.

12. In her admirably concise submissions, Ms Higgins adopted her rule 24 response and submitted that the judge's decision was careful and thorough in every respect. She had clearly borne all relevant matters in mind when considering the level of risk posed by the appellant and the proportionality of the decision. She submitted, as she had in her rule 24 response, that the respondent's appeal was hopeless. The judge had been cognisant of the facts and had evaluated them in a nuanced way which the grounds of appeal failed to understand. The burden was on the respondent to show that the appellant represented a threat. She had produced no evidence and the appellant's past conduct could not suffice in itself. The respondent's appeal should be dismissed.

13. In reply, Ms Cunha submitted that the appellant's crime was so serious that it outweighed all else.

14. I reserved my decision at the end of the submissions.

Analysis

15. Given Ms Cunha's concession in relation to the first ground of appeal, I propose to say nothing more about it other than to observe that the finding that the appellant retains the highest level of protection against deportation is relevant to my evaluation of the two grounds which were ultimately pursued by the Secretary of State. It is necessarily more difficult for the respondent to show that any threat posed by such a person is *sufficiently* serious so as to justify deportation or that it is proportionate to deport a person with such a level of integration in the host state.

16. I agree with Ms Higgins submission that the respondent's second ground is hopeless. The judge's decision runs to eighteen pages of single-spaced type, comprising 61 paragraphs of closely reasoned analysis. It is a careful and thorough decision and it is clear that the judge took all relevant matters into account in her assessment of the level of threat posed by the appellant.

17. As Ms Higgins observed, all of the matters which are said by the respondent to have been left out of account are expressly recorded in the judge's decision. Paragraph [6] of her decision shows that she was aware of the sums of money which the appellant had defrauded from the taxpayer. In the same paragraph, the judge recorded that the fraud had taken place over the course of a six year period; that the appellant had made some 300 claims during that period; and that she had had many opportunities to stop what she was doing. The judge also recorded in that paragraph that the sentencing judge (HHJ Kaul QC) had observed that the eight week trial had probably cost the same as the offence and that the appellant must have known all along that she had no defence.

18. The judge set out a detailed summary of the respondent's position at [7]-[21] of her decision. Under the sub-heading 'Assessment of threat', the judge summarised the matters which were said by the respondent to bear on that assessment, including the appellant having 'relentlessly defrauded the tax payer'; the fact that the appellant could have 'stopped and walked away'; and the length and cost of the trial: [12]. There was also reference, in [13] and [14], to the sophisticated nature of the fraud; the high level of culpability; and the absence of any rehabilitative programmes undertaken by the appellant. The judge specifically noted the respondent's stance that the appellant displayed a lack of remorse and a 'lack of understanding of the negative impact of her offending'.

19. The judge set out a summary of the appellant's oral evidence at [22]-[36] and a summary of the submissions at [37]-[43]. At [37], the judge noted the Presenting Officer's reliance on the cost to the public purse and the appellant's lack of acceptance of her offence, all of which was said to justify a conclusion that the appellant presented a genuine, present and sufficiently serious threat. Ms Higgins' response to those particular submissions is detailed at [42], in which she was noted to have relied (amongst other matters) on a letter from the Probation service in which the appellant was said to present a low risk of reoffending.

20. At [44]-[61] of her decision, the judge undertook a careful analysis of the competing submissions and concluded that the appellant was entitled to enhanced protection against deportation and that she did not present a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. Those conclusions are to be found at [58] and [61] but the analysis which supported the conclusions is necessarily to be read as a whole.

21. In reaching those conclusions, the judge directed herself to relevant domestic and CJEU authority and she took careful account of the submissions I have mentioned above. Ms Higgins submitted that the judge's assessment of risk was nuanced and I am satisfied that that description is apt. At [51], the judge concluded that the appellant 'would have learned a lesson' from her time in prison. At [52], she took specific account of the respondent's submission that the appellant had not taken part in rehabilitative courses but she accepted that the appellant had tried to do so, to no avail (as a result of disability), and that she had a 'proactive approach to rehabilitation' and had taken part in numerous activities and attained further qualifications since her conviction. The judge noted supportive evidence from a number of sources at [53]-[56]. Then, at [57], the judge said this:

> It is accepted that a conviction and sentence of imprisonment shows non-compliance with the values of society however it is not the case that the mere fact of a prison sentence automatically causes the loss of a high level of protection that has been earned by an EU national lawfully residing in the UK. The circumstances must demonstrate that her personal conduct constitutes a real and present threat. The judge referred to relentless dishonesty and while there was a certain amount of care exercised in all the claims it was not sophisticated. I found the appellant rather equivocal with regards to remorse. However, she accepted that by 2013/2014 she knew that what she was doing was illegal but had continued. She continued to try to make excuses for the offending and I take this into account. However, the sentencing judge said that some claims involved genuine interpreter's but the names or hours exaggerated. The appellant used a system designed to help her and others like her to take part in employment and manipulated it to her benefit but not solely.

22. At [61], the judge noted that the appellant's Probation Officer had adjudged her to present a low risk and that she had 'much to offer' in light of her 'very significant skills and experience'.

23. It is quite plain, therefore, that the judge took careful account of all that is said by the respondent to have been overlooked. She was aware that the appellant perpetrated a significant fraud over a number of years and that she cost the taxpayer in the region of £1 million due to that fraud and the lengthy trial which followed. She was demonstrably aware of the appellant's equivocation about her offending and the lack of rehabilitative courses she had taken. What

emerged from the sea of evidence before the judge, however, was her conclusion that the respondent had not established that the appellant presented a future risk which was genuine, present and sufficiently serious. That was a finding of fact which was open to the judge on the evidence before her and it is not established that the judge omitted material matters in reaching that conclusion. The respondent's ground of appeal amount to nothing more than disagreement with the judge's analysis and 'island hopping' of the kind deprecated in authorities including Fage v Chobani [2014] EWCA Civ 5 and Lowe v SSHD [2021] EWCA Civ 62; [2021] Imm AR 792.

24. The respondent's third ground is actually expressed in terms suggestive of mere disagreement, rather than an attempt to particularise a legal error on the part of the judge. The appellant's length of residence in Germany and other matters are highlighted at [6] of the grounds before the respondent submits that 'the appellant's deportation to Germany is proportionate'. Ms Cunha very properly said little about this ground, and made it clear that the crux of the case was to be found in ground two. She was correct to adopt this stance in relation to ground three. The finding made by the judge that the appellant did not present a genuine, present and sufficiently serious threat was determinative of the appeal in the appellant's favour: MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC); [2016] Imm AR 114, and anything she said about proportionality was immaterial to the outcome of the appeal.

25. In any event, the basis upon which the judge concluded that the appellant's deportation would be a disproportionate step is clear when the decision is read as a whole. The judge did not reach this conclusion because the appellant would not be able to access treatment for her various medical conditions in Germany. That would obviously have been a surprising conclusion and I consider there to be merit in Ms Higgins submission, at [34] of her response, that the respondent's ground of appeal 'grossly mischaracterises' the FtT's decision in this respect.

26. The judge's conclusion was, instead, that the appellant might have difficulty in Germany in accessing support in the short term: [60]. That was evidently a minor point in the judge's analysis, however, and the critical points which concerned her were the appellant's deep level of integration to the UK over the course of 20 years; her faded connection to Germany; and her use of *British* sign language as a means of communication. These were all relevant points. Nothing was demonstrably left out of account by the judge and the conclusion which she reached was one that was certainly open to her.

27. The pleaded grounds of appeal fail, therefore, to establish any legal error on the part of the judge. In her reply to Ms Higgins' submissions, Ms Cunha submitted very briefly that the appellant's offence was so serious that it illustrated, in and of itself, that her conduct represented a genuine, present and sufficiently serious threat to the fundamental interests of society. That submission was not made in the grounds. There was no application to vary the grounds and I decline to admit the argument, raised as it was at the last stage of a contested appeal.

28. If I understood the point correctly, what Ms Cunha intended to convey with this submission was a complaint that the judge had failed to consider whether the appellant fell within what has become known as the Bouchereau exception, so called because of the case in which it was first considered: R v Bouchereau (30/77) [1978] 1 QB 732. What was decided in that case was that it was 'possible that past conduct alone may constitute such a threat to the requirements of public policy.' The principle was applied in R v Marchon [1993] CMLR 132 but some doubt was expressed about its ongoing application in Straszewski v SSHD [2016] 1 WLR 1173. It is clear from the decision of the Court of Appeal in Robinson v SSHD [2018] 4 WLR 81, however, that the principle might continue to apply in a case with 'very extreme' facts: per Singh LJ at [85]. In the same paragraph, Singh LJ declined to provide an exhaustive definition of that category of case but suggested that a person who had committed 'grave offences of sexual abuse or violence against young children' might fall within it. (This aspect of the Court of Appeal's decision did not go on appeal to the Supreme Court: [2021] 2 WLR 65.)

29. It was not suggested in the respondent's decision that the appellant fell within this exceptional category. There was no reference in that decision to Bouchereau, to the exception which it recognised, or to any of the other authorities in which the exception has been considered. The Presenting Officer before the FtT did not rely upon such a submission, and was content to submit (conventionally) that the appellant presented a future risk to the fundamental interests of the UK. Even if the point had featured in the respondent's grounds, therefore, it would have come to nought for two reasons. Firstly, because the judge was not asked to consider the case on that basis. Secondly, because the facts of this case came nowhere near those envisaged in the authorities.

30. I feel bound to observe that permission to appeal should not have been granted in this case. The point which particularly persuaded the judge to grant permission, regarding the level of protection available to the appellant, was rightly abandoned by Ms Cunha at the hearing as there was nothing in it. On a cursory analysis of the grounds, it is quite plain that they represent nothing more than a disagreement with a careful and thorough analysis by an experienced First-tier Tribunal Judge. It should have been clear to the respondent, and to the First-tier Tribunal, that Judge Scott-Baker's decision represented a lawful determination of the appeal.

Notice of Decision

The respondent's appeal is dismissed. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 June 2022