Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/37408/2013**
IA/37420/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & reasons Promulgated**
On 16 April 2014 and 16 October 2014	**On 12 November 2014**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL CHANA

Between

MS PATRICIA STENNETT
MISS JOY CHIAMAKA OKOYE
(Anonymity directions not made)

Appellant

and

THE SECRETARY Of STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr A Eaton of Counsel
For the respondent: Mr N Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The appellants, who are mother and daughter, are nationals of Jamaica born on 21 July 2079 and 18 September 2006 respectively. They appealed against the decisions of the respondent dated 27 August 2013 to refuse

them leave to remain in United Kingdom outside the Immigration Rules and pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge M.A. Khan dismissed their appeals in a determination dated 24 February 2014.

2. Permission to appeal was granted by First-tier Tribunal Judge Ransley on 17 March 2014 in respect of ground 1. Upper Tribunal Judge Jordan granted the appellant's permission to appeal saying "I am not prepared to refuse the appellant the opportunity to argue Joy's rights on a permission application when the Judge did not deal with them. Hence I shall grant leave on *all* the grounds advanced".

3. Upper Tribunal Judge Jordan stated that it was for the Judge to determine on the evidence whether Joy was a British citizen pursuant to s 1 of the British Nationality Act 1981 to the effect that if a person is born in the United Kingdom they shall be a British citizen if at the time of the birth of their father was *settled* in the United Kingdom. There is no discretion vested in the Secretary of State.

The First-Tier Tribunal Judges Findings

4. The Immigration Judge, in dismissing the appeals under Article 8, found that as Joy was a Jamaican national at the date of the hearing notwithstanding her application for British citizenship. The appellants made an application for settlement outside the Immigration Rules. The Judge found at paragraph 34 "it is said that the second appellant, Joy's case is covered by appendix FM as she was born in this country and has lived here for the past seven years. Joy had not lived in the UK for at least seven years immediately preceding the date of her application. Joy was born on 18 September 2006 and the application was made on August 29 August 2012 which makes her six years old from the date of her application. Both appellants are therefore not covered by Appendix FM of the Immigration Rules.

5. The Judge noted that it is argued that Joy is entitled to British citizenship and an application has been made on her behalf. The Judge stated that whether this application will succeed is another matter but at the present moment, Joy is a Jamaican national along with her mother. The case therefore is not covered by the new Immigration Rules and has to be considered pursuant to Article 8.

6. The first appellant's private life can continue in Jamaica even though she has been in this country since 2001. She has family in Jamaica and has at least on one occasion visited them. As far as Joy is concerned she was born in the United Kingdom. Mr Okoye is named as the father on her birth certificate. There are serious inconsistencies as to how long the first

appellant and Mr Okoye were in a relationship. Mr Okoye said that they were separated soon after Joy's birth and that Joy has lived with her mother ever since birth. There are also contradictions as to how much contact Joy has had with her father. The evidence of both Mr Okoye and the first appellant's evidence has been exaggerated as to the level of contact Joy has with her father. On the evidence Mr Okoye does not "play a great deal of role in Joy's life".

7. In respect of Joy's best interests as a child born and lived in the United Kingdom for seven years these have to be considered under section 55 of the Borders 2009 Act and in the guidance in the case of ZH **Tanzania** and **EB Kosovo**. In making his assessment, he has considered that Joy's best interests must be of primary consideration, although not the only consideration. Her interests do not have the status of paramount consideration.

Appellant's Grounds of Appeal

8. The appellants' grounds of appeal state the following. The First-tier Tribunal Judge failed to consider **SC (Article 8-in accordance with the law) Zimbabwe [2012] UKUT 56 (IAC)**. The appellant's daughter was born 18 September 2006 and has been resident in the UK for in excess of 7 ½ years. Joy has subsequently been granted British citizenship.

Submissions of the Parties at the Hearing

9. Mr Eaton in his submissions stated the following. The judge did not take into account that the appellant has been in this country for 7 ½ years or that she had made an application for British citizenship. Joy's father was naturalised as a British citizen before her birth. Therefore the Judge did not consider **ZH Tanzania** in respect that Joy was a British or was entitled to British citizenship by law. The Judge erred in not considering Joy's rights as a British citizen to live in this country. Her mother has been in this country for 12 years lawfully which was not considered by the First-tier Judge.

10. Mr Bramble on behalf of the respondent submitted the following. No attempt was made to address the presumption at paragraph 41 and 43 which clearly deals with the seven year rule within the Immigration Rules. The issue of the appellant's application for British citizenship was dealt by the Judge as far as he was able. Joy's biological father's was naturalised after Joy's birth and therefore there was a grey area. In respect of the private life of the first appellant the Judge dealt with the issue and relied on the evidence before her to come to his sustainable conclusion. The Judge's decision is fully reasoned notwithstanding that Joy is now a British citizen.

Findings on Error of Law

11. The appellants' main argument is that the First-tier Tribunal Judge Khan failed to take into account that Joy had made an application for British citizenship and should have been considered her British citizen and the guidance in **ZH Tanzania** should have been applied in the Judge's evaluation of her rights pursuant to the Immigration Rules and Article 8.

12. Upper Tribunal Judge when giving permission to appeal stated that the Judge should have made a finding on the evidence before him whether Joy is a British citizen pursuant to s 1 of the British Nationality Act 1981. This is because as long as Joy's father was *settled* in the United Kingdom as at the date of Joy's birth, she is entitled to British citizenship and the respondent has no discretion in the matter. Mr Bramble on behalf of the respondent stated that in Joy's case, there was a grey area because her father was not naturalised until after her birth. Subsequent to the Judge's determination, Joy's application for British citizenship has been successful and therefore she is now a British citizen.

13. The Judge acknowledged that Joy had made an application for British citizenship but stated that as at the date of the hearing the application had not been decided by the respondent. Given that the evidence before the Judge was that Joy's father was a British citizen at the date of the hearing, he should have taken into account the possibility that Joy is a British citizen and should have made alternative findings on the bases she is one. By his failure to consider Joy's rights as a possible British citizen has led him into material error. I agree with Upper Tribunal Judge Jordan that Joy should be given an opportunity to argue her case on the bases that she is a British citizen.

14. In the case of **ZH Tanzania [2010] UKSC 4**, the Supreme Court emphasised that, in order to comply with international obligations, including the UN Convention on the rights of the Child 1989 as well as domestic law in the form of section 55 of the Borders Citizenship and Immigration Act 2009, when assessing human rights applications which involve a child. The appellant must treat the best interests of the child as a primary consideration.

15. The Upper Tribunal in **LD Zimbabwe [2010] UKUT (IAC)** stated at paragraph 26 that very weighty reasons are needed to justify separating a child from the community in which he or she had grown up and lived for most of her life. At paragraph 27, the Upper Tribunal stated that although the seven-year policy has been withdrawn but it had been an administrative way of giving effect to the principle of the welfare of the child as a primary consideration and in such cases, when it was considered

that those interests normally required regularisation of the immigration position of the family as a whole.

16. In the Upper Tribunal case of **EM Zimbabwe [2011] UKUT 98 (IAC)** it was stated that in the absence of any other policy guidance by the Secretary of State, it remains legitimate for immigration Judges to give some regard to the previous policy that seven years residence by a child under 18 could afford a basis for regularise the purposes of the child and parent in the absence of reasons to the contrary, in making a judicial assessment of whether removal is proportionate to the legitimate aim having regard to the best interests of the child.

17. In **NF Ghana [2008] EWCA Civ 908,** the Court of Appeal gave guidance in respect of the former seven years policy. They stated that if a child has lived in this country for seven years they should start from the position that it is only in exceptional cases that indefinite leave to remain not be given.

18. In light of the case law referred to above, it is only right and fair that the both appellants appeal be considered on the bases that Joy is a British citizen. Mr Eaton stated at the hearing that if I find an error of law the appeal be adjourned.

The renewed hearing on 16 October 2014

19. At the hearing, I heard submissions from both parties the full notes of which are in my Record of Proceedings.

Findings

20. I shall first consider the appellants appeal under the Immigration Rules. There is no dispute that the first appellant is the mother of the second appellant and the first appellant has been in this country since 2001. There is also no dispute that the majority of that time the first appellant has spent in the United Kingdom with continuous leave to remain. The second appellant was born in the United Kingdom and is over seven years of age.

21. At the time of the application the first appellant was aged 34 and therefore not under the age of 18. Neither was she aged 18 years or above and under 25 years of age. She therefore cannot meet the requirements of paragraph 276 ADE (iv) and 276 ADE (v). Her appeal therefore can only be considered pursuant to Article 8 of the Immigration Rules which are Article 8 compliant. It will therefore only be in exceptional and compelling circumstances that the first appellant would succeed under Article 8 when she cannot succeed under the Immigration Rules.

22. Rule E-LTR PT. 2.2 sets out the requirements for a child who is under the age of 18 at the date of application and is living in the United Kingdom and is a British citizen. Paragraph 276 ADE of the Immigration Rules states that the requirements are that the applicant "is under the age of 18 years and has lived continuously in the UK for at least seven years…. And it would not be reasonable to expect the applicant to leave the UK.

23. I find that the second appellant meets the requirements of the Immigration Rules and the respondent did not seek to argue otherwise.

24. In determining whether the first appellants removal from the United Kingdom would constitute a disproportionate interference with his right to respect for private and family life under Article 8, we have considered each of the following issues, as laid down at paragraph 17 of the speech of Lord Bingham of Cornhill in **R v. Secretary of State for the Home Department, ex parte Razgar [2004] UKHL 27**:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

    (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

25. The question that I have to decide is whether the refusal of leave to the appellant, 'in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8' (**Huang v Secretary of State for the Home Department [2007] UKHL 11 ('Huang'), para. 20**). In considering this question, we have taken into account all factors that weigh in favour of the Appellant's deportation, including the desirability of applying a workable, predictable, consistent and fair system of immigration control (**Huang, para. 16**). Against this, we have taken into

account the effect that refusal of leave would have on the enjoyment of the appellant's private and family life in the appellant's case, bearing in mind the core value that Article 8 of the Human Rights Convention seeks to protect and the fact that '[t]heir family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially' (**Huang, para. 18**).

26. I have further considered the case recent decision of the House of Lords in **Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department [2008] UKHL 39** where the issue for determination was phrased in the following terms:

> 'In determining an appeal under section 65 of the Immigration and Asylum Act 1999 (the 1999 Act) (now sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)) against the Secretary of State's refusal of leave to remain on the ground that to remove the Appellant would interfere disproportionately with his article 8 right to respect for his family life, should the immigration appellate authorities take account of the impact of his proposed removal upon all those sharing family life with him or only its impact upon him personally (taking account of the impact on other family members only indirectly ie. only insofar as this would in turn have an effect upon him)?

27. Baroness Hale observed that 'the right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed'. It was further said that: 'Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims'. In light of this decision we have to consider the family life of all those who share their family life with the Appellant.

28. I have had regard that from 28 July 2014 section 19 of the Immigration Act 2014 is brought into force: article 3 of the Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014 (SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117D and 117D. Part 5A only applies where the Tribunal considers Article 8(2) ECHR directly.

29. I answer the first four questions in **Razgar** in the affirmative. The only issue in the appeal in respect of the first appellant therefore for me to decide is proportionality. I guide myself that I must make a fact sensitive assessment of the appellants' circumstances and make my own assessment of proportionality. When considering whether a decision is in accordance with the law, it has been authoritatively established by the higher courts that the test to be applied is not exceptional circumstances or insurmountable obstacles. It is obvious that respect for a claimant's family and private life under Article 8 (1) is subject to proportionate and justified interferences in pursuit of a legitimate aim under Article 8(2). (**Izuazu)**

30. The appellant is a British citizen and in ***ZH Tanzania*** it was stated "Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they have to leave the country. They will lose the advantage of growing up and being educated in their own country, their own culture and their own language".

31. I take into account the case of ***SC (article 8-in accordance with the law) Zimbabwe UKUT [2012] 56 IAC*** which states that in the absence of contraveling factors, residents of over seven years with children who are integrated into the educational system in the United Kingdom, is a strong indicator that the welfare of the child favours regularisation of the status of the parents and children.

32. I also consider the appeal with reference to s55 of the 2009 Borders Act where the best interests of the child must be considered as a primary consideration.

33. I have taken into account the public interest in maintenance of firm and fair immigration control.

34. The second appellant was born on 18 September 2006 and therefore has been resident in the United Kingdom in excess of 7 ½ years. Her father lives in the United Kingdom as does her half-sister. Her mother, the first appellant has lived in this country since 2001. I find that the first appellant has developed substantial private life in the United Kingdom. I find that in the circumstances, it would not be proportionate to require the first appellant to leave the country and return to Jamaica when she is the main carer of a British citizen child.

35. Considering all the evidence in the round that the first appellant succeeds pursuant to Article 8 as the main carer of the British citizen child.

Decision

Appeal allowed for the first appellant pursuant to Article 8 of the European Convention on Human Rights.

Appeal allowed for the second appellant pursuant to the Immigration Rules.

Signed by, Dated this 9th day of November 2014

A Deputy Judge of the Upper Tribunal

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Mrs S Chana