Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/41088/2013
IA/41104/2013
IA/41114/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 30th April 2014	**on 2nd June 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A N C P
S R P
K A P
(Anonymity order in force)

Respondent

Representation:
For the Appellant: Mr Mills – Senior Home Office Presenting Officer.
For the Respondent: In person.

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against a determination of First-tier Tribunal Judge D S Borsada, promulgated on 6 January 2014, in which he allowed the appeals of this family unit against the decision to remove them from the United Kingdom made under section 10 Immigration and Asylum Act 1999 and dated 19 September 2013.

2. ANCP was born in September 1971, SRP in October 1964 and KAP in November 2004. They are a family unit of a mother, father and daughter and are either citizens of Jamaica or entitled to such status. No family member has legal status or a right to remain in the United Kingdom.

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3. ANCP entered the UK in 2002 lawfully as a student. Further periods of leave were granted until February 2007 after which she became an overstayer. In 2009 she made an application to remain in the United Kingdom on the basis of human rights alongside the remaining appellants which was refused in May 2010. A subsequent application was refused in September 2013 resulting in the removal direction.

4. SRP entered the UK in 2002 as a visitor. His visa was valid for six months but he then overstayed and only resurfaced when he claimed to be the dependent partner of ANCP in the 2009 application.

5. Having considered the submissions and available evidence the Judge sets out his findings which can be summarised in the following terms:

i. Neither ANCP nor SNP attempted to hide their poor immigration history and SNP was particularly candid in admitting that he and his family wanted to remain in the UK because they would have a better life here [8].

ii. They have a stable, close, and settled family and private life in the UK. KAP has been brought up in a stable and secure environment by her parents and is making significant progress socially and academically as indicated in the school reports. Miss Norman's submissions concerning the likely profound nature of social integration and difficulty both emotionally and culturally/socially of her living outside this country were accepted. Evidence was provided of KAP suffering eczema which is accepted as being serious and that it will be aggravated in a hot climate. Country information indicates that levels of violence in Jamaica are relatively high and that difficulties that KAP will experience in the education system were noted as were submissions that problems could arise as a result of KAP being an outsider which, it was inferred, could lead to her being bullied or ostracised [8].

iii. The Judge stated he was required to consider the case in relation to the Immigration Rules, section 55, and the case law relating to the cases outside the framework of the Rules. Neither ANCP nor SNP had demonstrated that they should be allowed to remain in the UK. The Judge also agreed that none of the exceptions that did not relate to their child applies to either of them and although they claimed to have very few family ties in Jamaica, they had not done enough to demonstrate that they had severed all social and cultural ties in circumstances in which they spent the majority of their lives in Jamaica. In relation to the article 8 ECHR it was not considered that either ANCP or SNP had demonstrated any disproportionality in the decision [9].

iv KAP has lived in the UK for nine years and has no social and family ties to Jamaica. The Respondent has not sufficiently considered the welfare of the child in relation to either section 55 of the 2009 Act or relevant case law. It is the profound effect that such removal would have on her private life that is the key to the whole case which is not warranted. Removal will result in the child being profoundly damaged both in times of emotional, education and psychological development taking into account all the evidence [10].

v. In relation to article 8 ECHR, interference with KAP's rights will be wholly disproportionate having regard to the impact upon her in relation to private life. The case is not made out in respect of her family life as she will be returning to Jamaica with her parents. Under the Immigration Rules an individual such as KAP can properly apply for leave to remain taking into account all seven years residency, even if they previously lack status. The Judge considered the exceptionality test under Appendix FM and considered it to be entirely unreasonable for her to leave the UK for the reasons given. ANCP and SRP are therefore entitled to leave under the Rules for this reason too [11].

6. The Secretary of State's challenge can be summarised as follows:

i. The Judge erred in finding that KAP had no social, cultural, or family ties to Jamaica when she will be removed with her parents who spent a substantial proportion of their lives in Jamaica. She will therefore have the ties within the loving and supportive family provided by her parents.

ii. The Judge gave undue weight to the child's best interests and failed to consider the parents immigration histories and failure to meet the requirements of the Immigration Rules.

7. Leave to appeal was granted by First-tier Tribunal Judge Davey on the basis it was arguable that the Judge focused upon the period of time in the United Kingdom rather than the proper range of factors and that in relation to consideration of the best interests of the child, the Judge makes no reference to the public interest considerations especially when it was shown that KAP's parents removal is proportionate.

Error of law

8. I find that the Judge has erred in finding that KAP has no social or cultural ties to Jamaica. There is merit in the argument that such ties as she will have, even though she has not travelled to that country previously, will be with her parents. The proposal is to remove the

family group as one and so in Jamaica she will not be alone or abandoned but within the care of what was found to be a loving parental unit. This does not, however, detract from the strength of ties she currently has in the United Kingdom which is part of the assessment required by 276 ADE (vi) of the Rules.

9. The fact KAP may have been in the United Kingdom for nine years is not determinative, in isolation. The SSHD’s position is that the Immigration Rules incorporate section 55 and the starting point, as the Judge identified, was to consider whether the members of this family can satisfy the requirements of the Rules. The family and private life elements of the claim had to be considered in accordance with the guidance to be found in the cases of MF (Nigeria) [2013] EWCA Civ 1192, the High Court in Nagre [2013] EWHC 720 (Admin) and by the Upper Tribunal in Gulshan [2013] UKUT 640, as confirmed by Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. This approach has been further confirmed by the Court of Appeal in the more recent case of Haleemundeen v SSHD [2014] EWCA Civ 558. The Judge's statement that he had to consider the rules, followed by section 55, followed by article 8 ECHR is therefore a misdirection in law as it is only if there are compelling or exceptional circumstances requiring an assessment under article 8 to be undertaken outside the Rules that this exercise need be undertaken.

10. It is not suggested KAP is able to succeed on the basis of her family life as that is with her parents and will continue whatever the outcome. Hers is a claim based on her private life in relation to which it is necessary to consider the provisions of 276ADE which state:

> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
>
> (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

276ADE (2). Sub-paragraph (1)(vi) does not apply, and may not be relied upon, in circumstances in which it is proposed to return a person to a third country pursuant to Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004."

11. It is accepted by Mr Mills this is a ‘best interest’ case and that this is the determinative factor. The Judge in allowing the appeal under EX 1 in isolation is contrary to the finding of the Upper Tribunal in Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC) as this is an element that must be considered as part of the Rules generally.

12. In relation to the findings regarding the impact upon KAP on return Mr Mills submitted that the Judge had not adequately reasoned his findings and had just accepted counsel’s submissions.

13. Paragraph 276 ADE (iv) is met in terms of KAP having been in the United Kingdom for a period in excess of seven years and so the question is whether it can be implied from a reading of the determination that the Judge found it not reasonable in all the circumstances to expect her to leave the UK.

14. The Judge sets out the reasons why he considers KAP should not be expected to leave the UK in paragraph 8 which is based upon the adverse impact upon her of having to go to a country of which she has no experience of living in, in which at least at the outset she will be an outsider, that her medical condition could be aggravated in a hot climate, and that she would have great difficulty both emotionally and culturally living outside the United Kingdom.

15. Submissions made by an advocate are not evidence and a Judge is required to do more that just state that such submissions are

accepted. Findings must be made on the evidence to enable a reader of the determination to understand what aspects of the case are accepted and which are rejected and proper reasons given for the conclusions reached. The issue in this appeal is whether there was adequate material in the bundle to support the findings made. It is accepted Jamaica is a country affected by gang violence but that does not necessarily mean that all children are likely to face such difficulties on return. In the bundle at pages 234 is a reference to the UNICEF November 2009 report regarding children indicating a number of issues facing children in Jamaica including:

i. Violence and abuse.

ii. More than 2000 children living in institutions deprived of parental care.

iii. Inadequate services and opportunities the children with disabilities.

iv. About 7% of 15 to 17-year-old children working.

v. One in five children being born to a teenage mother.

vi. Poor educational outcomes, especially among boys, which increase the risk of intergenerational exclusion.

vii. Adolescence having insufficient access to information skills and services for HIV/AIDS knowledge and prevention, increasing the risk of infection.

viii. Many children lacking opportunities for learning and life skills at home.

16. It is not established that KAP is likely to find herself in such a situation as a result of the strong parental support she has. In relation to educational facilities it is not established on the evidence that KAP cannot be educated in Jamaica although the education system and resultant opportunities may be less than those available to her in the United Kingdom.

17. The letter from the GP dated 9th December 2013 refers to eczema and dermatitis for which KAP uses creams to enable her to undertake day-to-day activities. The GP states he or she has been told, presumably by one of KAP’s parents, that heat may cause aggravation by way of itching and irritation as will exposure to sunlight, but it is not established that appropriate medical treatment will not be available in Jamaica.

18. The reports from the school in the UK suggest a high percentage of attendance and a child who appears to be performing reasonably well educationally although in some subjects such as English often requires additional assistance. It appears from the evidence that KAP has a network of friends within the school and with other family members living in the United Kingdom. Paragraph 23 of her mother's witness statement refers to KAP struggling at school and sometimes requiring additional help from the teachers and a claim that if returned to Jamaica she will not have such assistance and may be subject to physical punishment which still exists in Jamaica. The absence of additional support for children who need it has not been established on the evidence although if corporal punishment is still used and there is a real risk of the child being subjected to that as a result of educational difficulties, this mitigates against it being found to be reasonable for her to be returned to face such consequences which result not from deliberate bad behaviour but difficulty in coping in an educational environment.

19. Whilst this question has to be determined by reference to the Immigration Rules, guidance on the correct outcome can properly still be obtained from the ECHR case law such as SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC) in which the Tribunal held that the absence of strong countervailing factors, residence of 8 years in the United Kingdom with a child is likely to make removal at the end of that period not proportionate to the legitimate aims in this case.

20. In **E-A(Article 8 - best interests of child) Nigeria[2011]UKUT 00315(IAC)** (Blake J) the Tribunal held that (i) The correct starting point in considering the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.(ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case. (iii)During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well being. (iv)Those who have their families with them during a period of study in the UK must do so in the light of the expectation of return. (v)The Supreme Court in **ZH(Tanzania)[2011] UKSC 4** was not ruling that

the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

21. In EM and Others (Returnees) Zimbabwe CG [2011] UKUT 98 (IAC) the Tribunal held that in the absence of countervailing factors, residence of over 7 years with children well-integrated into the educational system in the United Kingdom, is an indicator that the welfare of the child favours regularisation of the status of mother and children.

22. In this case KAP has lived in this country for nine years such that her focus is both within the family and outside on her friends and her education. There is no evidence to suggest that KAP cannot adapt to life in a new country as many children and parents move or are posted overseas. I find that although there are issues of concern which are understandable in relation to any family being moved there is no one factor that indicates KAP cannot be returned. It is the accumulation of factors that were considered by the Judge that appear to have been determinative of his decision that it was not reasonable in all the circumstances to expect KAP to have to relocate to Jamaica. Although some, including the Secretary of State, may consider this an overly generous decision it cannot be said to be a finding outside the range of those findings that it was permitted for the Judge to make on the evidence.

23. The weight to be given to the evidence was a matter for the Judge and his finding is that KAP is entitled to succeed under the Immigration Rules, which are the Secretary of State's own assessment of what needs to be shown. The implication in the grounds that the conduct of the parents should be considered as part of the assessment of the child fails to acknowledge the principle established in ZH (Tanzania) that children should not be punished for the failings of their parents and the fact it was not established before the First-tier Tribunal that any such conduct is a sufficient countervailing factor such as to override the best inertest finding.

24. As KAP succeeds in her own right her parents immigration history is not relevant for they, as her primary carers, have been found to be entitled to remain in line.

Decision

25. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

26. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson
Dated the 30th May 2014