Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01130/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th January 2015	**On 20th January 2015**

Before

The Hon. Mr Justice Nicol
Upper Tribunal Judge P R Moulden

Between

(1) SASHA GAYE DONNETTE TANYA RICHARDS
(2) SHANIAH CHAMBERS
(3) RAYDON CHAMBERS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Victoria Hutton, instructed by Blavo and Co solicitors
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal with the permission of First-Tier Tribunal Judge Landes from the decision of First-Tier Judge Clayton dated 31st October 2014. Judge Clayton dismissed the 1st Appellant's appeal against the decision to deport her pursuant to the automatic deportation provisions of the UK Borders Act 2007 s.32(5) and the 2nd and 3rd Appellants' appeals against

the decisions to deport them as their mother's dependents pursuant to s.3(5)(b) of the Immigration Act 1971.

2. The 1st Appellant committed two offences of burglary on 8th August 2011. These offences were part of the riots which were then sweeping through London. She pleaded guilty in the magistrates' court but was committed to the Crown Court for sentence. On 24th February 2012 she was sentenced by HHJ Grobel at Inner London Crown Court to 14 months imprisonment on each count concurrent.

3. On 19th April 2012 the Secretary of State for the Home Department gave notice of the 1st Appellant's liability to automatic deportation. The 1st Appellant resisted deportation on the grounds that it would violate her and her children's rights to private and family life contrary to Article 8 of the European Convention on Human Rights.

4. The 1st Appellant was born in Jamaica on 17th December 1987. She came to the UK on 9th July 2000 and was given leave to enter as a visitor until 7th January 2001. She applied for an extension of her leave on the grounds of her dependency on her father, Patrick Richards. The application was initially refused, but, on reconsideration on 13th February 2003 she was given indefinite leave to remain as his dependent child.

5. On 14th November 2005 when the 1st Appellant was 17 (one month short of her 18th birthday) she possessed crack cocaine with intent to supply. On 17th March 2006 she was convicted of this offence at Kingston-upon-Hull Crown Court and she was sentenced to 3 years detention in a Young Offenders Institution. This was reduced to 21 months by the Court of Appeal Criminal Division.

6. On 2nd August 2006 she was served with notice of intention to deport. She appealed, but this was dismissed on 6th February 2007. The Deportation Order was signed but the 1st Appellant absconded.

7. On 1st August 2007 the 1st Appellant gave birth to the 2nd Appellant, Shaniah, in the UK.

8. The 1st Appellant and her daughter were subsequently found. She applied for the deportation order to be revoked. The Secretary of State refused to do so. The 1st Appellant appealed. On 7th March 2011 Immigration Judge Tiffen (sitting with a non-legal member of the First-Tier Tribunal) dismissed the 1st Appellant's appeal on Article 3 ECHR grounds, but allowed her appeal on Article 8 ECHR grounds. In brief, the tribunal accepted that the Appellant had been shot in Jamaica when she was 12. One of her brothers had also been shot, but there was no evidence as to why this second shooting had taken place. Judge Tiffen disbelieved the evidence of the 1st Appellant that she had lost contact with her mother. There was no real risk that the 1st Appellant would suffer inhuman or degrading treatment if she was returned to Jamaica. On the other hand, the Tribunal found that there was a strong bond between Shaniah and her grandfather (the 1st

Appellant's father, Patrick Richards). Since he had a wife and two further children, it would not be reasonable to expect him to move to Jamaica. In consequence, Shaniah's relationship with her grandfather would be severed if the 1st Appellant was deported to Jamaica. Shaniah's best interests lay in her remaining in the UK and the 1st Appellant's deportation would be a disproportionate interference with her and her daughter's rights under Article 8.

9. On 30th June 2011 the 1st Appellant was granted 3 years discretionary leave to remain in the UK.

10. On 9th October 2011, the 1st Appellant gave birth to her son, Raydon, the 3rd Appellant.

11. In the meantime, the 1st Appellant's criminal offending had continued. On 12th January 2007 she was given a conditional discharge for theft. On 21st September 2007 she was given a community order with a supervision requirement because she had breached the conditional discharge. On 2nd April 2008 for theft as an employee and for a further theft, she was given a suspended sentence order of 100 days suspended for 18 months. On 10th December 2009 for a further theft and breach of the suspended sentence order she was sentenced to a total of 140 days imprisonment. I have already mentioned that the two index offences were committed on 8th August 2011, approximately 6 weeks after she had been granted discretionary leave by the Secretary of State.

12. Shortly before the hearing in front of Immigration Judge Clayton, the Secretary of State produced some 17 letters which had been written to the 1st Appellant concerning breaches of the curfew condition of her bail. The Appellant sought an adjournment of the appeal, but this was refused. She did provide a supplementary witness statement. She gave evidence at the hearing. So, too, did her father, Joan Richards (the 1st Appellant's step mother), Adelaide Charles (a friend of the 1st Appellant's) and Lisa Davies, a forensic psychologist who had prepared an expert report (and a subsequent addendum) on instructions from the Appellants' solicitor.

13. Immigration Judge Clayton said that she did not find the 1st Appellant to be credible. In 2011 Judge Tiffen had disbelieved the 1st Appellant when she said that she had lost contact with her mother. In that hearing the 1st Appellant had expressed remorse for her offence (of possessing crack cocaine with intent to supply) but had then gone on to commit the index offences of burglary a short time later. Judge Tiffen had also considered that the 1st Appellant embellished her evidence. Judge Tiffen had allowed the appeal on Article 8 grounds, particularly because of the close relationship which Shaniah had had with her grandfather, but those ties were now considerably looser than they had been in 2011.

14. The 1st Appellant had said that she moved to a different part of London because of her fear of domestic violence from her former partner, Ryan

Chambers (the father of her two children), but as to this, Judge Clayton said,

> "Whilst not in any way condoning domestic violence, I find the Appellant's evidence to have been exaggerated. It was claimed at several points during submissions that she suffered severe domestic violence which the children witnessed. I do not believe her. Again, I do not condone any inappropriate behaviour which may have taken place, but it is not plausible that, if she had suffered domestic violence at the hands of Ryan to the degree claimed, she would willingly have placed Shaniah in his sole care when she was in prison. This is particularly when she claimed a very close relationship between her father, step-mother and half siblings. I accept the relationship may have been unhappy and she may now wish to have no further contact with Ryan, but I find the domestic violence aspect of the claim to have been fabricated or grossly exaggerated to bolster her appeal."

15. Judge Clayton considered it significant that the 1st Appellant had breached her bail condition on a large number of occasions. That was significant in itself, but Judge Clayton also thought it important that the 1st Appellant had not informed the psychologist, Ms Davies of the scale of these breaches. Ms Davies was also unaware that Shaniah had been placed with Ryan Chambers while the 1st Appellant had been in prison. Ms Davies had placed much emphasis on the domestic violence which the 1st Appellant had allegedly suffered, but, as noted above, Judge Clayton took a different view as to whether the 1st Appellant had been a victim of domestic violence. However well-meaning, Ms Davies appeared to be "less than perspicacious in dealing with people such as the [1st] Appellant." For this reason, as well, Judge Clayton discounted Ms Davies' view that the 1st Appellant posed a low risk of re-offending. Judge Clayton preferred the view of the report prepared prior to the 1st Appellant's sentence at Inner London Crown Court that she was a medium risk.

16. Like Judge Tiffen, Judge Clayton disbelieved the 1st Appellant's evidence that she had lost touch with her mother. On the contrary, Judge Clayton found that the 1st Appellant did have her mother and sister in Jamaica plus other members of her extended family. They would be available to provide some support for the Appellants if they were deported.

17. Judge Clayton said that she had given the greatest consideration to the position of the two children. Neither of them had committed any offences, but their future was determined by their mother's criminal behaviour. They were not British Citizens and they would be returned with their mother to Jamaica. Although contact had been broken with their father, Ryan Chambers, he, too, was a citizen of Jamaica. He appeared to have no status in the UK and, unless his position changed, he, too, was likely to be removed to Jamaica.

18. Judge Clayton accepted that the relationship between the 1st Appellant, her father and step-mother were close. They supported her emotionally and, at times financially, but she was an adult (now 27 years old). She lived a considerable distance away from them. The family unit was the three Appellants who would be removed together.

19. Judge Clayton recognised that there were two children who were to be deported, but she focussed on the position of Shaniah since she had been in the UK for 7 years by the time of the appeal hearing and was therefore a "qualifying child" for the purposes of ss.117C and 117D of the Nationality Immigration and Asylum Act 2002 and paragraph 399(a) of the Immigration rules. Judge Clayton recognised that deportation would mean that Shaniah would be separated from her grandfather in the UK, but there would be another grandparent in Jamaica (presumably referring to the 1st Appellant's mother). If Ryan was removed to Jamaica, there was no reason why both children would not be able to rekindle their relationship with their father there. In terms of the statute, Judge Clayton did not consider that it would be unduly harsh to deport Shaniah and, in terms of the Immigration Rules and it would not be unreasonable to expect her to leave the UK. Overall, there were no exceptional circumstances which would render deportation disproportionate and there would be no breach, therefore, of Article 8 if it went ahead. Section 55 of the Borders, Citizenship and Immigration Act 2009 did not require a different result. *SW (lesbians- HJ and HT applied) Jamaica CG* [2011] UKUT 00251 (IAC) did not assist the 1st Appellant because she was not a lesbian.

20. In granting permission to appeal, Judge Landes was particularly impressed with the Appellants' first ground of appeal, namely that Judge Clayton had given insufficient reasons for her finding that the 1st Appellant's claim to have suffered domestic violence was fabricated or grossly exaggerated. The Appellants referred to what they said was other evidence of this violence – from a Women's Refuge, a domestic violence worker, a GP, a counsellor with a local children's centre, a member of the local authority's child protection team and statements from Patrick Richards, Joan Richards and Adele Charles. The Appellants also argued that Judge Clayton had relied on the 1st Appellant leaving Ryan Chambers to look after Shaniah when she had been imprisoned for the burglary matters, but not taken into account that he had had parental responsibility as the girl's father and he had never been violent towards the children.

21. However, in the course of the hearing before us, it became apparent that there was a more fundamental problem with the way that Judge Clayton had dealt with this issue. Prior to the hearing in the First-Tier Tribunal the Secretary of State had not challenged the 1st Appellant's claim to have been the victim of domestic violence. During the hearing, she, her father, her step-mother and Ms Charles gave oral evidence. None of them were cross examined to the effect that the incidents of domestic violence had not taken place or were exaggerated. It was not put to the 1st Appellant that she was behaving inconsistently with these claims by leaving Shaniah with Ryan Chambers. Of course an Immigration Judge is not bound to

accept parts of an appellant's case which the Secretary of State has not questioned. But, if the Judge is minded to take that course then fairness will normally require that any relevant witness called to give oral evidence will be given the opportunity to respond to the Judge's concerns. There was no reason in the present case to depart from that usual course. So far as we can see, that would not have been a barren or formalistic exercise. The 1st Appellant could, for instance, have given her explanation for why she left Shaniah with Ryan Chambers notwithstanding his treatment of her. It is not entirely clear to us how much the supporting evidence to which the grounds of appeal referred were in fact dependent on reports from the 1st Appellant herself. But even if they were, she would have been entitled to say that others placed sufficient weight on her account to put a child protection plan in place, to provide her with scarce accommodation in a women's refuge, to give her six sessions of counselling and (it would seem from the 1st Appellant's supplementary statement written on the day of the hearing) to prosecute Ryan Chambers (although she says he was not convicted). The failure of Judge Clayton to treat the 1st Appellant fairly in this regard was, in our view, an error of law.

22. Was the error material? In our view it was. In the first place the Judge's view that the 1st Appellant had fabricated or grossly exaggerated her claims to have been the victim of domestic violence contributed to the Judge's wider conclusion that her evidence was not credible. That in turn led the Judge to disbelieve the 1st Appellant when she said that she had lost contact with her mother. On the contrary, found the Judge, the 1st Appellant's mother was alive and available to provide support and help for all the Appellants following their return to Jamaica. It is right, as the Home Office Presenting Officer, Mr Whitwell, commented that there were other matters which also contributed to the adverse credibility findings. Judge Clayton was entitled, for instance, to have regard to the findings of Judge Tiffen that the 1st Appellant had embellished her evidence in the appeal which he had heard. But, as Mr Whitwell also fairly accepted, an assessment of credibility is a holistic exercise. Unless the flawed part related to a matter which was trivial or unless this tribunal could say that the Judge's conclusion would inevitably have been the same notwithstanding that part, then the error cannot be disregarded.

23. The Judge's adverse conclusion regarding the 1st Appellant's claims to have been the victim of domestic violence had another consequence. It contributed to her discounting the evidence of Ms Davies, the psychologist. Since Ms Davies had accepted the 1st Appellant's account, this was one reason why the Judge considered her to have been "less than perspicacious" in dealing with the 1st Appellant. Again there were other contributory factors: the 1st Appellant had not disclosed to Ms Davies the full extent of her curfew breaches and Ms Davies said in evidence that she had felt misled as a result. The 1st Appellant had not told her either about Ryan Chambers looking after Shaniah while she had been imprisoned. But again, we cannot be confident that the Judge's overall assessment of Ms Davies' testimony would have been the same but for Ms Davies' acceptance of the 1st Appellant's account of domestic violence.

24. The discounting of Ms Davies' evidence also played a part in the Judge not accepting the psychologist's assessment that the 1st Appellant had only a low risk of reoffending. She preferred the information in the Pre-Sentence report which was summarised as representing a medium risk of reoffending. More specifically this had been an OGRS score of 53% for offending within 12 months of discharge and 70% within 24 months. The 1st Appellant would have been released at the half way stage of her sentence and so almost exactly 2 years prior to Judge Clayton's decision. The 1st Appellant had not in fact reoffended since August 2011.

25. In short, we agree with the Appellant that the error of law we have identified was material. Accordingly, we set aside the decision of Judge Clayton. In the circumstances, it seems to us that the just disposal of the case requires it to be remitted to the First-Tier Tribunal for a fresh hearing. The issues are too intertwined for us to be able to mark out any findings of fact that can be preserved. The next Immigration Judge will therefore have to make her or his own findings of fact from scratch.

26. In these circumstances, it is not necessary for us to consider in depth the Appellant's other grounds of appeal. We do, though, make the following brief observations.

    a. We would not have accepted that Judge Clayton failed to consider the position of the 3rd Appellant (Raydon). She understandably focussed on the position of Shaniah because she had lived in the UK longer than her brother and, as Ms Hutton on behalf of the Appellants conceded, there were no features particular to Raydon which were not present (and present to a greater degree) in relation to his sister. Judge Clayton did not ignore the fact that there were two children to be considered. On a number of occasions she mentioned that there were two. At the remitted hearing, it will obviously be for the Immigration Judge to consider whether the position is still the same or whether there are aspects of Raydon's case, over and above those of Shaniah's, which require particular mention.

    b. The Immigration Judge at the remitted hearing will need to make her or his own assessment of the likelihood of reoffending. If the 1st Appellant has continued to abstain from any further offences by then, that will plainly be a material factor.

    c. We were not persuaded that *SW (lesbians – HJ and HT applied) Jamaica* had any bearing on this case since the 1st Appellant does not claim to be a lesbian and, with two children, would not obviously be perceived as such.

Signed Date **13th January 2015**

Mr Justice **Nicol**