Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/36145/2014
IA/36155/2014
IA/36157/2014
IA/36156/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 December 2015	**On 23 December 2015**

Before

THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM
LH
CS
C
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant/Secretary of State: Mr S Walker, Home Office Presenting Officer
For the Respondents: Ms N Nnamani, Counsel instructed by Samuel Lewis Solicitors

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

We were not addressed in relation to the issue of anonymity and no order was made by the First-tier Tribunal, but in the light of the child appellants, we considered that such an order was appropriate.

Unless and until a Tribunal or court directs otherwise, the appellants (as they were before the First – tier Tribunal) are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. We shall refer to the respondents as the appellants as they were before the First-tier Tribunal. They are citizens of Jamaica. The appellant, SM, was born on 10 September 1980. She came to the UK on 18 October 2001 as a visitor with a six month visa and has overstayed since the expiry of this. Her partner, LH, was born on 21 August 1977 and he came to the UK in October 2002 as a visitor with a six month visa and has overstayed since the expiry of this. They have two children who were born in the UK. The eldest child, CS, was born on 2 February 2006 and the youngest child, C, was born on 26 April 2009.

2. The appellants made applications for leave to remain which were refused by the Secretary of State in a letter of 1 September 2014. They appealed and their appeal was allowed by Judge of the First-tier Tribunal Atreya following a hearing on 21 April 2015. Permission was granted to the Secretary of State to appeal against this decision by Judge of the First-tier Tribunal Colyer on 13 August 2015. Thus the matter came before us.

The Decision of the First-Tier Tribunal

3. The Judge of the First-tier Tribunal heard evidence from the adult appellants and took into account CS's witness statement. The judge made findings of fact at [44] – [77]. The judge found that the appellants were credible. She found that both the adult appellants have lived in the UK without leave for the majority of time that they have been here and that they have worked here without permission. She found that they have relied on family support and that they have not claimed benefits whilst in the UK. She found that they have used NHS hospitals for the birth of their children and that the children attended state primary schools. The judge found that both the adult appellants were of good character and had no serious criminal convictions.

4. The Judge accepted that SM had experienced a difficult childhood, but that both she and LH recognised the importance of family values and they both were involved in parenting their children. The judge accepted that SM had not worked in Jamaica and that she was not highly educated and had literacy problems, but that LH had had more education and that he had worked in Jamaica as a caterer. The judge went on to find that there would not be significant obstacles for them to return to Jamaica and dismissed the appeal under paragraph 276ADE (vi) of the Immigration Rules.

5. The judge considered the position of CS. She observed that at the date of the hearing she was aged nine. The judge found that she attended school where she was excelling. She was integrated and anglicised and that she defined herself as English. The judge found that she was at a critical stage of her emotional development and that it would not be reasonable for her to return to Jamaica where she has never been and where she has no social ties. The judge accepted SM's evidence that she is not close to her own mother's family (because there was a complicated history of abandonment) and found that CS was close to her father's side of the family (who reside here in the UK). At [58] the judge found that CS would be returning to Jamaica where she does not have a home.

6. The judge found that it was highly probable that the family would, initially at least, only be able to find housing in a poor urban area as they had lost their connections to the places where they grew up. There was no home to return to, no land or other assets. The judge accepted that SM would have considerable difficulties obtaining employment and that LH would have difficulty in obtaining permanent full-time employment. The judge found that these difficulties would impact upon the reasonableness of CS having to relocate to Jamaica. The judge accepted that the adult appellants had no meaningful connections there and that LH's brother and cousins live here in the UK. The family would be returning to Jamaica without resources. The judge attached weight to the views of CS which were reflected in her witness statement. The judge allowed the appeal of CS pursuant to paragraph 276ADE (iv) of the Immigration Rules.

7. The judge allowed the appeal under Article 8, having directed herself in relation to SS (Congo) v SSHD EWCA [2015] 387 and she concluded that there were compelling circumstances which merited consideration outside of the Immigration Rules (see [65]). The judge at [67] stated as follows:

> "I have balanced the state's interests in removal and taken into account the breaches of immigration law of the first and second appellants as against the interests of the family unit in remaining. I find that the balance falls in favour of the appellants because of the 9 year old child whose best interests are met by remaining in the UK."

8. The judge went on to consider Section 117 of the 2002 Act under the heading "Statutory Public Interest Considerations" directing herself in

relation to Chege (section 117D - Article 8 - approach) [2015] UKUT 00165. At [70] the judge took into account that the appellants speak English and had not been a "drain" on public funds. She went on to consider that the adult appellants have been unlawfully here (save for the initial six months' leave they were granted as visitor). The judge considered AM (S.117B) [2015] UKUT 260 and concluded that the adult appellants' immigration status here was precarious. She went on to give little weight to their family and private life, but concluded that she was unable to have no regard to it.

9. The judge allowed the appellants appeal under Article 8 stating as follows:

> "71. However I have also taken into account that the children have no leave and are not tainted by the parents' precarious immigration status. I find that the removal of both the children would constitute a disproportionate interference with their family and private life rights for the following reasons
>
> (i) The third appellant is a child and is integrated and anglicised in the UK. She identifies herself as British not Jamaican. She is westernised
>
> (ii) The third and fourth appellants are at a critical age of emotional development particularly [CS] (9 years 2 months) and 5 years
>
> (iii) The human rights of their parents needs to be taken into account Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39
>
> (iv) The first and second appellants speak English and have not been a drain on public funds but have relied on their own resources and family resources in the UK
>
> (v) No issue about the protection of the public or prevention of crime
>
> (vi) I find that there is a real possibility for an unsafe and uncertain future in Jamaica which will not be in the best interests of the children".

The Grounds of Appeal and Submissions

10. The first ground of appeal challenges the judge's assessment of reasonableness on the basis that it did not factor in the public interest and

a proportionality assessment. The judge failed to take into account the serious countervailing effect of the adult appellants' immigration history, their unlawful working and their reliance on public funds (the NHS). It is asserted that the finding that the family would initially have reside in poor areas of Jamaica is without any reference to the parents' own evidence that friends and family in the UK have financially supported them here and this was a material factor in the reasonableness assessment that the judge failed to take into account.

11. The second ground argues that the finding of the judge at [66] is illogical and unlawful. Mr Walker did not expand on this. We understand the position of the Secretary of State to be that as the judge purported to allow the appeal under the rules, having found that removal of CS to be unreasonable, there was no need for her to consider Article 8 in the wider context because it would fall to be allowed pursuant to Section 117B (6). That she went on to consider the wider Article 8 assessment was illogical. It is further asserted that the judge made no lawful reference to the parents' reliance on NHS funds and that the finding at [71(v)] is erroneous because the fact that the appellants have not committed crimes is never capable of adding to the private rights of an individual.

12. The appellant submitted a Rule 24 response which we took into account. There was an amended version which raised the issue of the Secretary of State's grounds of appeal being unsigned and according to the grounds this invalidated the application and the subsequent grant of permission. Ms Nnamani did not pursue the argument with any force and did not provide any support for it. In any event, we permitted Mr Walker, at the hearing to sign the application. In our view this rectified any procedural error.

13. Mr Walker made oral submissions. He relied on the grounds seeking permission. We asked him to indentify for us the flaws in the proportionality assessment and he confirmed as follows:

    (1) The judge considered the position of the child without taking into account her parents' immigration history.

    (2) The judge failed to consider the public interest with regard to the parents having overstayed, worked illegally and their reliance on public funds.

14. We heard oral submissions from Ms Nnamani, who submitted the relevant Immigration Directorate Instruction (IDI) (Family Migration: Appendix FM Section 1.0b entitled "Family Life (as a Partner or Parent) and Private Life: 10-Year Routes"). The guidance is dated August 2015 and makes specific reference to the assessment of reasonableness and relevant considerations.

15. The thrust of Ms Nnamani's submissions was that a child-centred reasonableness assessment is all that is required under the Rules (in accordance with the IDIs). In any event, the judge considered the public interest at [68] – [70] in the wider Article 8 assessment.

Conclusions

16. We dismissed the Secretary of State's appeal and communicated this to the parties at the hearing and gave brief reasons. We will now expand on these. Our focus was on the findings of the judge in relation to CS because whether or not her removal to Jamaica was reasonable was determinative of the appeal. The judge considered reasonableness having focused on CS and did not factor into this assessment the pubic interest. The Upper Tribunal in KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 and MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 considered unduly harsh in the context of the Immigration Rules and whether this required the Tribunal to consider public interest factors. The conclusions of the Upper Tribunal on the point are inconsistent. It is clear that the Secretary of State's position is that of the Upper Tribunal in KMO and the appellants' position is that of the Upper Tribunal in MAB. We are not bound by either case, but we prefer the decision in KMO; however acknowledge that the immigration rules in relation to deportation are a complete code whilst this is not necessarily the position under paragraph 276ADE.

17. Ms Nnamani referred us the IDI in existence from August 2015. We are prepared to accept her word that there is no significant difference between these and the IDI in existence at the date of the decision of the Secretary of State and that the guidance suggests that a child centred approach to reasonableness is appropriate. However, this guidance is not conclusive. Guidance is not binding. When considering Article 8 generally and paragraph 276ADE of the Immigration Rules, in our view, a judge must take into account relevant primary legislation, namely Section 117B of the 2002 Act. In any event, nothing turns on this issue because ultimately the judge considered the appeal under Article 8 and made a proportionality assessment having regard to public interest factors. We refer specifically to [68], [69] and [70] of the decision.

18. We conclude that the proportionality assessment is not flawed. It is clear to us that the judge attached significance to the immigration status of the adult appellants in accordance with Section 117B (4) (see [70]). The judge decided that the family had not been a "drain" on public funds. It is clear that the judge was mindful of the fact that the appellants had relied on NHS funds and that the children attended primary school here (see [47]), but in concluding that they had not been a drain on public funds the judge considered that the family were not in receipt of state benefit payments (this is not challenged by the Secretary of State) and the judge was

entitled to conclude that, to this extent, the family was financially independent. The judge was mindful of the evidence of LH that if his immigration status was resolved he would be able to find full-time work here. We conclude that the judge properly considered proportionality through the lens of Section 117B (3).

19. In our view, the judge was entitled to conclude, on the evidence before her that it was probable that the family would, initially at least, only be able to find housing in poor urban areas. The finding is made at [58] and the reasons are explained in that same paragraph. Whilst it is the case that the appellants' evidence was that they had received some financial support from friends and family in the UK (supplemented by LH's income), this does not support an argument that by implication those same friends and family would be willing and able to offer the family comprehensive support on return to Jamaica. We have considered [71(vi)] of the decision and it is our view that if the judge attached weight to this factor, it was in no way determinative of the appeal. On reading the decision as a whole it is clear that the factors which the judge considered for and against the appellants were not confined to the matters that she summarised at [71].

20. We do not find that there is any "illogicality" in the decision of the judge. The judge's view was clearly that a reasonableness assessment should be made independently from public interest considerations (an approach which the Upper Tribunal endorsed in MAB) and on this basis her finding at [66] is logical.

21. If the judge made an error in the reasonable assessment, this is not material to the outcome of this appeal. We accept that reasonableness in 276ADE is the same as that at Section 117B (6), but it was incumbent on the judge to consider the appeal under the Rules before considering Article 8. Whilst another judge may have dismissed the appeal, Judge Atreya was entitled, on the evidence before her, to allow it. The decision in relation to the eldest child and is lawful and sustainable.

22. The Secretary of State's appeal is dismissed. The judge made an assessment of reasonableness and she considered proportionality taking into account the public interest in removal and on the evidence before her she reached a conclusion that was open to her and therefore lawful and sustainable. The judge properly directed herself and the grounds do not disclose that she made a material misdirection.

Notice of Decision

The appeal of the Secretary of State is dismissed.

An anonymity direction is made.

Signed

Joanna McWilliam Date 11 December 2015
Upper Tribunal Judge McWilliam