Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/07531/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28th January 2016	**4th February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS ANDREAN BAILEY
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer
For the Respondent: Mr T Bobb, Counsel

DECISION AND REASONS

1. The appellant in this case is the Secretary of State for the Home Department. However, for the sake of clarity, I shall use the titles by which the parties were known before the First-tier Tribunal, with the Secretary of State referred to as "the respondent" and Mrs Bailey as "the appellant".

2. The appellant first arrived in the United Kingdom in May 2000 on a visit visa. She subsequently applied for leave to remain as a student. This was refused and she appealed. That appeal was dismissed on 17 August 2007 at which point she became appeal rights exhausted. On 15 March 2010 she made a further application for leave to remain outside the Immigration Rules HC 395 (as amended) (the "Rules"). That

application was refused and she was served with a Form IS.151A in February 2011. She then made an application for discretionary leave based upon her Article 8 rights which was refused in June 2011. A further application was made and refused on 8 August 2014. On 3 September 2014 she was detained pending her removal. She then made further submissions and lodged a judicial review. On 24 September 2014 she was released from detention and granted temporary admission. In October 2014 she then made a claim for asylum. That application was refused.

3. The appellant appealed. Not only did she rely on a need for international protection under both the Refugee Convention and the European Convention on Human Rights but also on Article 8 grounds in relation to her private and family life.

4. Her appeal came before Judge of the First-tier Tribunal N M Paul on 2 November 2015. On 18 November 2015 he promulgated his decision dismissing the appellant's appeal on asylum grounds but allowing it on human rights grounds. That being with reference to Article 8.

5. The respondent sought permission to appeal and in a decision dated 8 December 2015 permission was granted by Judge of the First-tier Tribunal Parkes. His reasons for so doing were:-

> "1. The Respondent seeks permission to appeal against a decision of the First-tier Tribunal Judge Paul promulgated on 18 November 2015 whereby the Appellant's appeal against the Secretary of State's decision was allowed. The application is in time and is admitted.
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> 2. The Judge found that the Appellant's evidence relating to the circumstances of her son's death vague and incredible, the circumstances of his death were speculative and there was no substance to the claim of risk on return. The Appellant did not succeed under the Immigration Rules but did under article 8 and section 55 of the 2009 Act.
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> 3. The grounds argue that the Judge erred in the assessment made outside the rules. The Appellant's daughter and granddaughter are both Jamaican nationals with LLTR who could follow her to Jamaica if they wished. The evidence was that the mother played a significantly more active role than the Appellant in the child's life. It is also argued that given the number of adverse findings the Judge had not engaged with section 117B meaningfully.
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> 4. Given that the Judge found that the Appellant's evidence was not reliable and there were a number of factors against her including accessing NHS resources to which she had no entitlement and her lengthy time in the UK in precarious circumstances and limited role in her grandchild's life it is arguable that it was not open to the Judge to find that the best interests of the child required the presence of the Appellant to the extent that the public interest in the enforcement of immigration control was overridden.
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> 5. The grounds are arguable and permission to appeal is granted."

6. Thus the appeal came before me.

7. Mr Clarke relied upon the grounds seeking permission to appeal in particular the failure of the judge to engage with the fact that were the appellant to be removed from the United Kingdom it was for her daughter and granddaughter to decide if they wished to follow her to Jamaica in order to continue their family life. There would be no interference with the family's Article 8 rights without, as here, the judge making a finding that the daughter and granddaughter of the appellant could not return to Jamaica. Finding that returning the appellant to Jamaica is a disproportionate interference with the family's Article 8 rights is not one that can be sustained. The judge has attached inappropriate weight to various aspects of the evidence including when coming to findings in relation to the role played in the everyday life of the appellant's granddaughter by her mother. Likewise he has erred in the weight attached to the findings of an independent social worker's report. The judge has failed to deal with this expert evidence in the round when looking at the totality of the appellant's claim. Moreover, given the adverse credibility findings of the judge combined with the oral evidence that was recorded, the judge was under a duty to treat the independent social worker's report with some caution. That he failed to do. Beyond that there is a failure to engage with Section 117 of the Nationality, Immigration and Asylum Act 2002. The judge had failed to explain why the appellant's family life should outweigh the public interest in protecting the public purse.

8. Mr Bobb argued that this was a well reasoned decision where the judge had taken into account all aspects of the appellant's claim and carried out the required balancing exercise. The grounds of appeal failed to take account of several issues including that of the appellant's funding as described by the judge in his decision at paragraph 39. It is clear and implicit that he has had in mind Section 55 of the Borders, Citizenship and Immigration Act 2009. The judge concluded that the appellant's granddaughter had no real connection with Jamaica. Any inconsistencies in relation to the oral evidence and the independent social worker's report do not go to the "heart of the judge's decision". This is a family that has lived together for fifteen years and just because the appellant's mother was registered at the General Practitioner and school as the prime carer of her daughter is not inconsistent with the role that the appellant has played in her granddaughter's life. It is clear from the decision that the judge had adopted the findings of the independent social worker's report which he was entitled so to do.

9. During the course of his submissions Mr Clarke handed up the authorities of **SS (Congo) [2015] EWCA Civ 387 (IAC)** and **JL (Medical reports - credibility) China [2013] UKUT 00145 (IAC)** which I have taken into account.

10. I am satisfied that the judge has materially erred. It was incumbent upon him to carry out a two stage approach when looking at Article 8 by firstly considering the Immigration Rules and in the event of the appeal failing thereunder to conduct a balancing exercise outside those Rules guided by Section 117A to D (where applicable) of the Nationality, Immigration and Asylum Act 2002 and Article 8 jurisprudence. Following **SS (Congo)** there must be something "compelling" about a

claim for it to succeed on Article 8 grounds outside the Immigration Rules. The judge here has materially erred in failing to engage with the totality of the issues that fell to be decided. No finding has been made in relation to the appellant's daughter and granddaughter being able to return to Jamaica, the consideration of the independent social worker's report is in isolation to the balance of the evidence and has not been considered in the round. Accordingly inappropriate weight has been attached to it. There is a lack of reasoning as to why such weight was placed upon the independent social worker's report and the evidence has not been set into the context of the adverse credibility findings that the judge made. Beyond that there is a failure to engage with Section 117 and the public interests requirements therein contained.

11. In light of my finding that a material error of law exists within this decision for the above-mentioned reasons both representatives asked that the appeal be remitted to the First-tier Tribunal for the Article 8 issue alone to be considered de novo. Mr Clarke argued that there had been a failure to make findings in relation to various aspects of the Article 8 claim and hence this was the appropriate approach. Mr Bobb was in agreement.

12. On my own analysis that is how the appeal should proceed. I find that the decision of the First-tier Tribunal contains errors of law in relation to its Article 8 analysis and that that aspect alone of the First-tier Tribunal's decision has to be set aside for consideration afresh. The balance of the judge's findings in relation to all other issues in this appeal is not disturbed.

Notice of Decision

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal for Article 8 alone to be dealt with afresh, pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7(2)(b) before any judge aside from Judge N M Paul.

No anonymity order is made.

Signed Dated: 1 February 2016

Deputy Upper Tribunal Judge Appleyard