Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/25995/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th March 2016	**On 31st May 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

PC
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Sesay, Counsel, instructed by Duncan Lewis and Co.
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court.

2. The appellant appeals against the decision of the First-tier Tribunal dismissing the appellant's appeal on immigration and human rights grounds against a decision taken on 4 June 2014 to refuse to grant further leave to remain.

Introduction

3. The appellant is a citizen of Jamaica born in 1962. She entered the UK on 24 June 2002 as a visitor and overstayed when her leave expired on 24 July 2002. She formed a relationship with AS who had resided in the UK for many years but never held a British passport. He died of a heart attack in July 2005 and their daughter, SC, was born in the UK in February 2006. The family of AS refused to help SC after he died. The appellant first applied to regularise her stay in November 2008 but that was refused in January 2009. A further application was made in July 2010 which was initially refused in September 2010. The respondent decided to reconsider the decision on 27 January 2012 and IS151 forms were then served on 11 April 2015. Further representations made on 2 May 2014 were treated as a fresh application and the decision under appeal was made on 4 June 2014.

4. The respondent considered that the appellant did not meet the requirements of paragraph 276ADE of the Immigration Rules ("the Rules") and had spent the majority of her life in Jamaica before coming to the UK. SC was 8 and of an age where she could return to Jamaica with the appellant, having not yet started secondary school. She would benefit from growing up in a country where she held nationality and could become immersed in their culture and customs at a very young age. The appellant had been receiving £150 per month support from EW (SC's godfather) and that support could continue.

The Appeal

5. The appellant appealed to the First-tier Tribunal and attended an oral hearing at Hatton Cross on 14 July 2015. She was represented by Ms Osazuwa, a Solicitor. The judge found that SC was attending SS Peter and Paul Primary School, having started there in September 2010. She was a child under 18 who had lived continuously in the UK for at least 7 years.

6. The question under Appendix FM was whether it was reasonable to expect SC to leave the UK. There was nothing in the school reports that suggested that SC had any special educational needs or required the assistance of a counsellor or educational psychologist. The appellant had taken no steps to obtain assistance for her after the death of her father. No information had been provided about the cost of schooling in Jamaica.

7. The appellant had worked for many years in Jamaica and had qualifications as a secretary. She could work in Jamaica. She had family in the USA (her mother and two adult children) but had not asked them for help, preferring to rely upon support from the UK state. EW could continue his support if the appellant and SC went to Jamaica. The judge accepted that long residence had led to SC developing ties in the UK. SC could apply for UK citizenship when she was 10 but was still only 9. It was not unreasonable to expect her to leave the UK.

8. The judge found that the appellant could not meet the requirements of paragraph 276ADE of the Rules because she had not lived in the UK for 20 years and had not

lost ties with Jamaica. She had lived there until she was 40. There was no documentary evidence that her sons now lived in New York.

9. The judge then went on to consider Article 8 and the best interests of the child. The appellant had a poor immigration history and had used the services of the UK without making any financial contribution. She received £130.40 every fortnight in subsistence and rent since 2012. Jamaica would be a strange country to SC and she had friends in the UK. However, she was just **8** and could readjust to life in Jamaica. It was not in her best interests to remain in the UK. It was in her best interests to remain with her mother in Jamaica where she could continue her family life. Any interference in her private and family life was not disproportionate.

The Appeal to the Upper Tribunal

10. The appellant sought permission to appeal on the basis that the judge failed to give adequate weight to the age of the child and the fact that she could apply for UK citizenship at her next birthday, made speculative findings about the ability of the appellant to maintain herself and SC, erred in drawing an adverse inference from receipt of public funds, erred in finding that the appellant's sons in the USA could support her, erred in that the appellant's immigration history should not count against SC and erred in finding at paragraph 93 of the decision that SC was just 8 (actually 9 years 4 months as at the date of hearing).

11. Permission to appeal was granted by Deputy Upper Tribunal Judge Mahmood on 27 January 2016 on the basis that it was arguable that the judge made a mistake about SC's age and the fact that SC was so close to becoming British was a highly relevant and weighty matter when considering her best interests. All grounds were arguable.

12. In a rule 24 response dated 9 February 2016, the respondent sought to uphold the judge's decision on the basis that the judge directed himself appropriately. The judge had given due and proper consideration to the best interests of the child and considered the relevant case law. The error of one year of the child's age did not detract from the reasoned and sustainable findings of the judge. The grounds merely disagreed with the adverse outcome of the appeal.

13. Thus, the appeal came before me.

Discussion

14. Mr Sesay submitted that the judge did not engage with the evidence. The reality was that the appellant would be destitute upon return to Jamaica. The judge has not explained the findings to the contrary. There was no separate consideration of the best interests of the daughter.

15. Mr Kotas submitted that the point at paragraph 92 of the decision is that the appellant stated in her application that she was never reliant on public funds. The grounds of appeal failed to acknowledge that the burden of proof was upon the

appellant. The findings were rational and properly open to the judge. The error as to age was made at paragraph 88. The age was stated correctly elsewhere and SC will not be 10 until February 2016. As at the date of hearing SC was 7 months away from applying for UK citizenship. The Tribunal cannot keep looking into the future – that issue could be addressed in a future application. The immigration status of parents is the background against which the assessment is made. The judge was well aware of the law and the facts. The grounds are just a disagreement.

16. Mr Sesay submitted in reply that paragraph 58 of EV Phillippines is inconsistent with paragraphs 42-44 of ZH Tanzania. The judge here has conflated the best interests of SC in paragraphs 15, 18, 45, 73, 74 and 84 of the decision. The judge's findings should be evidence based. The appeal should be allowed and the decision remade in the Upper Tribunal. However, Mr Sesay did agree that further findings of fact were required from paragraphs 79-85 of the decision.

17. I find that the issue of proportionality involves striking a fair balance between the rights of the appellants and the public interest. In assessing proportionality, the "best interests" of any children must be a primary consideration (see **ZH (Tanzania) v SSHD (2011) UKSC 4** and section 55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of the child are not necessarily determinative, a child's best interests are a weighty consideration, albeit one that can be outweighed by sufficient weight of public interest concerns (see **ZH (Tanzania)** *per* Lady Hale at [33]).

18. The judge did not consider the 2002 Act in this decision although the same test of reasonableness features in Appendix FM (leave to remain as a parent) of the Rules and that was considered by the judge. A significant issue in this appeal is the fact that SC is a qualifying child, as defined in section 117D and therefore falls within section 117B(6) of the 2002 Act. The judge had to consider whether it was reasonable to expect her to leave the United Kingdom. The recent case law remains relevant, whilst taking into account that the case law effectively pre-dates the commencement of sections 117A - D (28 July 2014).

19. In EV (Philippines) and others v SSHD [2014] EWCA Civ 874, Lord Justice Clarke held that in determining whether the need for immigration control outweighs the best interests of the children, it is necessary to determine the relative strength of the factors which make it in their best interests to remain here and also to take account of any factors that point the other way. A decision will depend on a number of factors such as the children's age, the length of time in the United Kingdom, how long they have been in education, what stage their education has reached, the extent to which they have become distanced from the country to which it is proposed that they return, how renewable their connection may be, to what extent they will have linguistic, medical or other difficulties in adapting to life in that country and the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

20. In Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197(IAC), Mr Justice Blake held that as a starting point, it is in the best interests of children to be with both their parents and if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other than the state of origin can lead to development of social, cultural and educational ties that it would be inappropriate to disrupt in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period. Seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.

21. The difficulty with the decision in this appeal is that the judge found that it was in the best interests of SC to return to Jamaica with the appellant but then appears to have become confused about her age during the decision. At paragraph 4 of the decision, the judge correctly stated SC's date of birth. At paragraph 88, the judge correctly stated that SC was 9 as at the date of hearing. However, at paragraph 93 the judge found that SC was now just 8 and was "*of an age where she can readjust to life in Jamaica*". There was plainly no question of SC readjusting to life in Jamaica (as opposed to simply "adjusting") because she has never lived there. I am not persuaded that the error of fact in paragraph 93 is not material to the decision – reaching the age of 9 brought SC very close to an application for UK citizenship and the authorities make it clear that the period from age 7 onwards is particularly important when assessing the degree of independent private life that has been built up by a child. I therefore find that the judge has made a material error of fact when assessing reasonableness, best interests and the strength of SC's private life in the UK. That is a material error of law.

22. I have not found it necessary to consider the remaining grounds of appeal which all involve matters which can be argued at the rehearing. It is certainly arguable that the finding at paragraph 94 of the decision that it was not in SC's best interests to remain in the UK was not soundly based upon the evidence.

23. Thus, the First-tier Tribunal's decision to dismiss the appellant's appeal involved the making of an error of law and its decision cannot stand.

Decision

24. Both representatives invited me to remake the decision in the Upper Tribunal if I set aside the judge's decision. However, the factual matrix of the appeal has now changed because the SC has now reached the age of 10 and applied for registration as a UK citizen on 15 February 2016. The factual issues to be determined are reasonably extensive. Bearing in mind paragraph 7.2 of the *Senior President's Practice Statements* I do not consider that retention in the Upper Tribunal is an appropriate course of

action. I find that the error of law infects the decision as a whole and therefore the re-hearing will be de novo with all issues to be considered again by the First-tier Tribunal.

25. Consequently, I set aside the decision of the First-tier Tribunal. I order the appeal to be heard again in the First-Tier Tribunal to be determined de novo by a judge other than the previous First-tier judge.

Signed

Judge Archer
Deputy Judge of the Upper Tribunal Date 26 May 2016