Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/41977/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th July 2016	**On 27th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

ANNIE STACIA ALICIA SMITH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jaufurally, Counsel
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica born 12th January 1988. She appealed against the decision of the Respondent dated 10th October 2014, refusing to vary her leave to remain in the United Kingdom on account of her Article 8 ECHR family/private life and giving directions for her removal.

2. The Appellant arrived in the UK in 2002 as a minor. She travelled on a visitor visa and came to stay with her older sister Cleopatra who was resident here. The Appellant's parents were both deceased and she had been looked after in Jamaica by another sister, Paula. After the Appellant arrived in the UK, Paula who had been

looking after her in Jamaica claimed she could no longer accommodate her. She has remained in the UK since that time.

3. The Appellant made application for indefinite leave to remain on 9th January 2003 on the basis that her sister in the UK has assumed responsibility for her. This application was refused without a right of appeal. The Respondent was asked to reconsider her decision and although she agreed to do so, the process took two years to complete. The refusal was maintained.

4. However a fresh decision was made on 28th July 2005 and that decision contained removal directions together with a right of appeal against the decision.

5. Regrettably that decision never reached the Appellant. It appears it was sent in error to the Appellant's former representatives despite the fact that the Appellant's current representatives had informed the Respondent that they were now on record as acting for her.

6. The Appellant's representatives had in fact made enquiries about the progress of the Appellant's case, but it was not until May 2010, after they made a formal complaint to the Respondent about the delay in the matter, that they were served with a copy of the 2005 refusal decision.

7. Following this ,the Appellant was then issued with a One-Stop Notice which was completed and returned by her in October 2010. The case still did not progress and the Appellant was informed by the Respondent in August 2013, that there would be further delays until her application could be dealt with.

8. She was asked to complete another One-Stop Notice and finally on 10th October 2014 the Respondent made the decision which is the subject of this appeal. By this time the Appellant had been in the United Kingdom twelve years, had attended secondary school here where she had taken her GCSEs and had obtained an A level in psychology.

9. In 2010 the Appellant's sister Cleopatra gave birth to the Appellant's nephew C. The Appellant and C are close, especially since C's father sadly died in 2012.

10. The Appellant's appeal against the Respondent's refusal of 10th October 2014, came before the First-tier Tribunal on 1st October 2015, which in a decision promulgated on 18th November 2015 dismissed her appeal.

11. The Appellant sought permission to appeal the FtT's decision. Permission was refused initially by the FtT but granted on a renewed application before the Upper Tribunal.

12. The grant of permission succinctly sets out the issue before me which is that it is arguable that the FtT erred when it came to consideration of the best interests of the Appellant's 5 year old nephew C. The relevant parts of the grant are set out here below.

> "Although the judge considered the best interests of the appellant's nephew, it is arguable that the findings lack clarity and it is not clear how the findings feed into the Article 8 assessment. I grant permission on all grounds, but note that the ground concerning delay is weaker.
>
> On the one hand, the judge accepted that it is in the child's best interests to benefit from the love and support he received from the appellant and the judge concludes that the appellant's removal would be very disruptive and an emotional shock for him. It is not challenged that the appellant is the child's aunt and they live together in the same household and that the appellant has caring responsibilities for him. The judge then went on to conclude that regardless of the decision the status quo is unlikely to be maintained because the appellant will ultimately move on and the relationship will undergo 'radical change' at some time in the future. It is arguable that any decision that the appellant may take in relation to employment and relationships that may take her out of the family home, would not have the same consequences of a removal to Jamaica"

13. Thus the matter comes before me to decide initially whether the decision of the FtT contains such error that it must be set aside and remade.

Error of Law Hearing

14. Mr Jaufurally on behalf of the Appellant, adopted the renewed grounds seeking permission and relied upon the grant of permission itself. He submitted that the FtT clearly erred in that [36] is contradictory and therefore unclear. He said that the judge had found, that he "did not doubt that the Appellant's removal would be very disruptive and an emotional shock to C" but then started speculating on what might happen should the Appellant be allowed to remain. It was no part of the judge's task to start pondering on what might or might not happen.

15. Further since the Appellant's relationship with C is one of the central planks of her case, there needs to be clarity in the judge's findings. The judge's findings at [36] appear equivocal. As the grant of permission points out any decision that the Appellant may take in relation to employment and relationships that may take her out of the family home would not have the same consequences as removal to Jamaica.

16. Mr Jaufurally pointed out further, that the judge had failed to factor into the balancing exercise, the fact that the Appellant had now been here in the UK for twelve years, since the age of 14 years. The delay on the part of the Respondent (including the error of wrongly informing her past representatives of the 2005 decision) should also be factored into the balancing exercise. although this had been characterised as a weaker argument in the grounds, nevertheless it was a matter raised and a finding needed to be made. Cumulatively, those errors meant that the decision could not stand and it should be set aside to be remade.

17. Mr Walker did defend the decision, but accepted that if I were to find an error of law because of lack of clarity in the FtT's findings then the appropriate course would be

to remit the appeal to the First-tier Tribunal for that tribunal to remake the decision at a fresh hearing.

Consideration

18. I find I am in agreement with Mr Jaufurally's submissions. I find the decision of the FtT is flawed for material error because there is a lack of transparency in its reasoning. When [35] is read it appears the judge is drawing a conclusion that the ties that exist between the Appellant and her sister Cleopatra extend beyond the emotional ties which normally exist between adult siblings. The judge then says at [36] that he did not doubt that the Appellant's removal would be very disruptive and an emotional shock from C's point of view. It is not clear how those findings feed into the Article 8 assessment, or indeed of the judge has kept them in mind when conducting the proportionality exercise. The reason for this is that the judge then starts speculating on the Appellant's future rather than keeping to the evidence before him. This affects the whole of the judge's decision making.

19. Whilst C's best interests are not a trump card, there does need to be a clear finding to show that those interests have been looked at as a first consideration and have been placed into the balance.

20. Likewise the fact that the Appellant has been here since the age of 14 years, with some of the delay in her case being attributable to the Respondent, also needs to be considered.

21. I find therefore that there is no alternative to setting the decision aside in its entirety. The decision will have to be remade. No findings can be preserved.

22. Both representatives were of the view that should I find an error in the FtT decision on account of a lack of clear reasoning, then the fairest course for disposal of this matter would be to remit it to the First-tier Tribunal (not Judge Higgins) for that tribunal to remake the decision. I agree that this is the appropriate course and direct that there should be a full rehearing in the FtT with nothing being preserved from the original decision.

Notice of Decision

23. The decision of the First-tier Tribunal is hereby set aside for material error. The matter will be remitted to the First-tier Tribunal (not Judge Higgins) for a fresh rehearing.

24. Anonymity direction is not made.

Signed C E Roberts Date 23 July 2016

Deputy Upper Tribunal Judge Roberts