Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/20214/2015
IA/20233/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 September 2017	**On 22 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

A B
B K F
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Sesay, Solicitor, Amnesty Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are mother and daughter, both nationals of Jamaica. The first appellant was born on [ ] 1997 and the daughter on [ ] 2007.

2. The appeals under consideration arise from a human rights application made on 9 February 2015 in which the first appellant, using the application form FLR(O), cited the second appellant as her dependant. One application fee was paid to the respondent. The respondent then made one decision citing the second appellant as the first appellant's dependant. Notwithstanding the fact that there was one decision the appellants lodged separate notices of appeal and each paid the appeal hearing fee of £140. As no separate decision was made insofar as the second appellant was concerned, First-tier Tribunal Judge Callow said there was no need for her to lodge an appeal and which should not have been accepted by the Tribunal. In those circumstances, it was agreed by Mr Jaufurally, who was representing the appellants at the hearing on 26 August 2016, that there was only appeal before the Tribunal.

3. Judge Callow dismissed the appeal of the appellants in a decision promulgated on 4 October 2016.

4. On 3 February 2017 First-tier Tribunal Judge Grimmett refused the appellants permission to appeal Judge Callow's decision. The appellants lodged an appeal for permission to appeal to the Upper Tribunal. On 16 February 2017, Upper Tribunal Judge Blum refused their application for permission to appeal to the Upper Tribunal.

5. The appellants lodged an application to the High Court for a judicially review of the Upper Tribunal Judge's decision. On 25 May 2017, The Honourable Mr Justice Mostyn granted permission as follows:

> *"Although this is a stringent test I have concluded that it is arguably satisfied in this case and that there is an important point of principle at large, namely whether proper regard, in accordance with binding authority, was paid to the best interests of the second claimant.*
>
> *The judgment of the First-tier Tribunal has all the hallmarks of a priori reasoning. It seems to go like this: the mother should leave; all children are better off with their mothers; therefore the child should leave. But it is elementary that judging requires the application of a posteriori reasoning, that is to say the analysis of empirical evidence in order to reach a conclusion. The analysis of the evidence concerning the best interests of the child was virtually non-existent. Apart from a passing reference to her grandparents there was virtually no analysis of the undoubtedly deep interpersonal relationships, and the societal and educative networks, that had been formed by this child throughout her life. It seems to me to be distinctly arguable that the importance of the best interests of the child has been in this case relegated to a position of subservience to the perceived public benefit in removing her mother. The child's best interest deserved independent, scrupulous, evidence-based analysis, which seems to me to be singularly lacking in the judgment of the First-tier Tribunal."*

6. On 18 July 2017 Mr C M G Ockelton, Vice President of the Upper Tribunal, granted permission in the light of the decision made by the High Court Judge. He stated that the parties are reminded that the Upper Tribunal's task is that set out in s.12 of the

2007 Act. In other words, the task of the Tribunal is to consider whether the First-tier Tribunal Judge made an error of law in his decision.

7. The facts of this case are that the first appellant arrived in the UK as a visitor on 13 September 2001. On 3 April 2002 she applied for leave to remain as a student which was granted until 30 November 2002. This was twice thereafter extended until 31 August 2004. On 24 July 2004 the appellant married [SI], a British citizen. Thereafter on application she was granted limited leave to remain as a spouse until 23 September 2006. Prior to the expiry of that leave The appellant in oral evidence told the First-tier Judge that prior to the expiry of that leave, her husband instructed solicitors to apply for her indefinite leave to remain. Nonetheless she instructed her current solicitors in 2009 to make enquiry of the result of the said application made for ILR. At that time the first appellant could not locate the solicitors and discovered that their offices from which they had operated were being used as a restaurant. Notwithstanding numerous reminders it was only on 23 May 2011 that the respondent replied, advising that they had no record of any such application. At some point the relationship between the appellant and [SI] broke down. In the interim the second appellant was born in the UK. Her father is [BF], a Jamaican citizen. However, following his conviction and sentence of four years' imprisonment, contact has been lost with him. His whereabouts are unknown to all concerned including the second appellant's paternal grandmother. On 8 June 2011 the appellant made another application for leave to remain, which was refused on 7 July 2011. On 21 July 2011 the appellants were encountered by an Immigration Enforcement Team and served with overstayer notices. On 9 February 2015 the appellants again applied for leave to remain, which was refused without a right of appeal. Subsequent to the receipt of a pre-action Protocol letter, the respondent agreed to reconsider the application, which was finally refused on 19 May 2015 with a right of appeal.

8. Judge Callow stated at paragraph 4 of his decision that the facts in this matter appear from the bundles of documents submitted for the purposes of appeal by the respondent and the appellants and from the oral evidence of the first appellant, [JP] (the second appellant's grandmother), [OD] (the second appellant's uncle) and [WB] (the first appellant's boyfriend) at the hearing of the appeal. The judge did not record the oral evidence that was given by each of the witnesses. I note that the grounds do not raise this as an issue. It was alleged in paragraph 5 of the grounds that the judge failed to take into consideration the second appellant's relationship with her grandmother and uncle as per their oral evidence on 26 August 2016. However, the grounds did not identify the oral evidence of the second appellant's grandmother and uncle and what they said about their relationship with the second appellant.

9. At paragraph 6 of the decision, under "Appellants' Case", the judge stated that "further to the immigration history and background described above, the appellant was in a relationship with [WB], her boyfriend. They did not live together but he regularly visited the appellants at least twice a week. In the future they hoped to live

together as a family unit. As the first appellant was not allowed to work, she was financially dependent on her boyfriend and members of her family who also financially assisted her from time to time. The second appellant has lived continuously in the UK since birth. She attends school and has numerous friends. She has a close relationship with her paternal grandmother and uncle. For her part the first appellant has no friends in Jamaica and has no home to go back to. The first appellant is particularly concerned for the welfare of her daughter should they be removed to Jamaica." I find that this was a summary of the oral evidence given by the second appellant's grandmother and uncle and the evidence of the first appellant's boyfriend.

10. At the hearing before Judge Callow, there was no Home Office Presenting Officer. The appellants were represented by Mr Jaufurally. He relied on his skeleton argument, asserting that the relevant provisions to be addressed in the appeal concerned paragraph 276ADE(1)(iv) of the Rules – the second appellant "*is under the age of 18 years and has lived continuously in the United Kingdom for at least seven years … and it would not be reasonable to expect the appellant to leave the United Kingdom*", Section 55 of BCIA 2009 and Article 8 of the ECHR.

11. The judge accepted that the first appellant has a genuine and subsisting relationship with the second appellant, who is in the UK and has lived in the UK continuously for at least seven years immediately preceding the date of the application.

12. The judge stated at **[14]** that whether it is reasonable to expect the second appellant to leave the UK, he must of necessity be bound by a duty regarding the welfare of children enacted in s.55 of the Borders, Citizenship and Immigration Act 2009, which enjoins the safeguarding and promotion of the welfare of children in the UK. The judge stated that he respectfully acknowledged also and applied the principles enunciated in *EV (Philippines) & Ors v Secretary of State for the Home Department [2014] EWCA*. The judge also noted that in applying *EB (Kosovo) [2008] UKHL 41* and in *ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4*, it was shown that the question of what was encompassed in "*the best interests of the child*" and whether these necessarily entailed protection from removal, "*will involve asking the question whether it is reasonable to expect the child to live in another country.*"

13. The judge also relied on the decision in *MK (India) (best interests of child) [2011] UKUT 00475 (IAC)*, approved in *EV (Philippines)*, which he said shows that the question of the best interests of a child is not the single decisive issue in considering whether the child or a parent should be removed from the UK, but is one of many relevant factors to be considered in an examination of proportionality of removal.

14. With these principles in mind, the judge held that the evidence showed that the second appellant has been in the UK since birth, that is over seven years. She has spent her life to date here. She has no knowledge of life in Jamaica. It is likely that she will be disadvantaged in Jamaica, not least in that she might not enjoy comparable facilities in schooling. Whilst it was not clear what prospects the first

appellant would enjoy in Jamaica, it is likely that there would be some period of hardship and readjustment. The judge thought that these factors might show that it ought to be considered in their interests to remain in the UK.

15. The judge went on to say that he was, however, bound to consider their position on the basis of the facts "as they are in the real world". At the core of the matter, the first appellant does not have a right to remain in this country. She has long been an overstayer. There are friends and the first appellant has relatives in the UK. Family ties in Jamaica are said to be non-existent. The judge found that the education of the second appellant is not at a crucial stage. She is a primary school pupil. The first appellant is not without skills. She has contrived to support herself with the assistance of at least provided accommodation. In the real world, the appellants are liable to removal and could have no expectation, absent any rights of the daughter, to remain. The judge emphasised that in this context the child's best interests would be to remain in the care of the mother, benefiting from her support, guidance and affection.

16. In considering whether it is reasonable to expect the child to be removed with her mother to Jamaica, or whether her best interests are in favour of remaining in the UK as to outweigh the due enforcement of immigration control, the judge had in mind the evidence of a potential educational disadvantage in Jamaica and the threat of corporal punishment. Against this, however, the judge considered that the child would be removed with her mother as a family unit. The mother can reasonably be expected to be able to provide a home and support for the child in Jamaica. The judge also considered the fact that defiance by the mother of immigration control gave rise to public demand for enforcement and deterrence. The judge considered the evidence and held that the circumstances of the second appellant were no more compelling than those of the affected minor children in *EV (Philippines)*, who, it was considered, ought to be removed with their parents, notwithstanding that it was considered to be in their best interests to remain in the UK. Therefore, the judge held that it would be reasonable to expect the second appellant to live with her mother in Jamaica.

17. This meant that the appellant did not meet the requirements of Sections 276ADE.

18. The judge went on to consider the case under Article 8 of the ECHR. The judge drew on the guidance in *R (Sunassee) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2015] EWHC 1604 (Admin)*, which considered the issue of the approach to such cases. The judge also relied on *SS (Congo) & Ors* where the Court of Appeal adopted a nuanced approach to the consideration of Article 8 outside the Rules. The approach was that in cases involving entry clearance or a claim for leave to remain, an applicant must show that "compelling circumstances" exist. The judge held in this case that no compelling circumstances had been identified or established for the grant of leave outside the Rules.

19. The judge found that no evidence of any weight beyond disruption to the education of the second appellant has been given that it would be unduly harsh to return to Jamaica or that there were any exceptional circumstances. The judge again noted that the first appellant was born, bred and had lived most of her life in Jamaica. For the majority of her life she has been exposed to the cultural norms of her home country. She is able to work. She is not a stranger to her home country, its people and way of life. It cannot be said that it would be in any way unreasonable or unjustifiably harsh for the first appellant to be returned to her home country. The judge also found that there are no obstacles, let alone any which are impossible to surmount in returning her and the second appellant to Jamaica.

20. With the second appellant, the judge noted that her status is linked to that of her mother, the first appellant. As she was cited as her mother's dependant and no separate immigration decision was made by the respondent, she had no extant appeal before the Tribunal.

21. Mr Sesay submitted that the core facts are not in dispute. The first appellant and her daughter, the second appellant, enjoy a genuine and subsisting parental relationship. At the date of their application, the second appellant had been living in the UK for 7 years.

22. Mr Sesay submitted that the judge erred in his approach to the public interest considerations in this case which involved the assessment of the best interest of the child as deportation was not in issue here. He submitted that the at the date of the hearing the respondent's policy guidance in such a cases is that she would not normally remove where the exceptions to the requirement in the immigration rules in respect of family life are not met and a child has lived in the UK continuously for 7 years. He submitted that the judge ought to have accorded considerable weight to the respondent's policy on the 7 years' residence as observed by the Supreme Court in *Hersham Ali v SSHD [2016] UKSC.*

23. Mr Sesay submitted that the judge failed to have regard to the weight to be accorded to the child's 7 years' residence, the best interests of the child and failed to assess these factors in isolation of the mother's conduct. He said the judge failed to conduct a balancing assessment of the proportionality of removal of the second appellant and disregarded the 7-year rule as a strong factor in her favour.

24. Mr Jarvis relied on *MA (Pakistan) [2016] EWCA Civ 705*. He submitted that Mr Sesay's criticism of the approach of the judge does not bear any reality with the judge's decision. He said there was no Home Office Presenting Officer at the hearing in August 2016. Therefore *MA (Pakistan)* was not drawn to the judge's attention. He submitted that at paragraph 14 the judge relied on the principles enunciated in *EV (Philippines)* on the approach to be adopted where the child has been in the UK for seven years or more. The approach in *EV (Philippines)* was endorsed by the Court of Appeal in *MA (Pakistan)*.

25. Mr Jarvis submitted that at paragraph 15 the judge subscribed to the reasonableness test and what is required in the assessment of the child's best interest. At paragraph 16 the judge applied *MK (India)*, which was endorsed by the Court of Appeal in *MA (Pakistan)* at paragraph 42. The Court of Appeal held that this was the right approach. Mr Jarvis submitted that the judge addressed the issues concerning the second appellant separately.

26. He submitted that the rest of Mr Sesay's complaints were more form over substance. Because the judge did not refer to the grandmother did not mean that the decision was wrong. There must be strong reasons why a child has to leave. At paragraph 49 of *MA (Pakistan),* the Court of Appeal held that the fact that the child has been in the UK for over seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary. Mr Jarvis submitted that the judge engaged with the fact that the second appellant has been in the UK for seven years or more. The judge considered that the second appellant would be able to adjust to life in Jamaica as would the first appellant, who has a poor immigration history. That should be weighed against her and the child.

27. In reply Mr Sesay submitted that the judge's findings were inconsistent with paragraph 42 of *ZH (Tanzania)*. The judge did not consider separately Section 55 and Section 117B(6). The judge did not take a balanced approach. He submitted that the factual premise does not require revisiting nor is new evidence required. The Upper Tribunal is therefore requested to remake the decision upon finding material errors of law have been established.

Findings

28. I agree with Mr Jarvis that Mr Sesay's complaints were of form over substance. The judge was not provided with a copy of *MA (Pakistan)* and therefore did not refer to it. It is, however, apparent from the determination that the judge relied on other case law such as *EV (Philippines)* and *MK (India)*, the principles of which have been endorsed by the Court of Appeal in *MA (Pakistan)*. Indeed at paragraph 48 the Court of Appeal cited paragraphs 34 to 37 of *EV (Philippines)*. At paragraph 49 of *MA* the Court of Appeal stated as follows:

> *"Although this was not in fact a seven year case, on the wider construction of Section 117B(6), the same principles would apply in such a case. However, the fact that the child has been in the UK for seven years would need to be given significant weight in the proportionality exercise for two related reasons: first, because of its relevance to determining the nature and strength of the child's best interests; and second, because it establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary."*

29. I find that the judge emphasised throughout his decision that the child has been in the UK since birth, that is over seven years. She has spent her life to date here. She has no knowledge of life in Jamaica. The judge considered that she was being educated in the UK. He found that the education of the second appellant was not at a crucial stage. She is a primary school pupil. I find that this evidence was based on the documentary evidence submitted in support of the appeal. The evidence at F1, F2 and F3 of the respondent's bundle showed that the second appellant was at Beechwood Primary School. She had joined the school on 10 September 2012. The evidence at F2 date 13 February 2015 stated that the second appellant had been awarded a certificate for being mentioned in celebration assembly that week. She was awarded similar certificates on 11 October 2013 and 7 April 2014. That was the sum total of the evidence submitted on behalf of the second appellant.

30. At paragraph 6 the judge summarised the evidence he received from the various witnesses. The judge noted that the second appellant has lived continuously in the UK since birth. She attends school and has numerous friends. She has a close relationship with her maternal grandmother and uncle. I note that a lot of letters were submitted by the first appellant's friends and family in support of her appeal. These letters are at H1 to H10 of the respondent's bundle. I accept that the judge did not specifically mention these letters but that of itself does not mean that the judge materially erred in law. The second appellant's grandmother, [JP], gave evidence to the judge which I have said is recorded at paragraph 6. In her letter at H9 she stated that the second appellant has been spending time with her every other week from when she was a baby, and when she was in reception she had her once a month and now she comes to spend time with her during the school holidays. She contributes financially to her clothing and leisure activities. I accept that the judge did not give specific mention to the financial contribution made by the grandmother to the second appellant. Nevertheless, it is my considered opinion that even if the judge had taken this into account he is not likely to have reached a different conclusion. The relationship between grandparents and grandchildren generally call for a lesser degree of protection than that between natural parents and their children (*G.H. B. v. UK Application no. 42455/98*).

31. I find that the judge applied the approach in *MA (Pakistan)*, which had in turn relied on the principles set out in *EV (Philippines)* and *MK (India)*, in his assessment of the best interests of the child and Section 117B(6).

32. I find that the judge considered all the evidence that was before him. I find that the judge considered Section 55 that is the best interests of the child. I find that the assessment is incorporated throughout his determination in different paragraphs. Consequently, I find that the judge did not materially err in law in his decision.

33. The judge's decision dismissing the appellants' appeal shall stand.

Notice of Decision

The appeal is dismissed

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

Unless and until a Tribunal or court directs otherwise, the appellants 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.

Signed Date: 22 September 2017

Deputy Upper Tribunal Judge Eshun