Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00087/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 January 2018	**On 9 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS JANELLE TAJUANNA ELLIS

Respondent

Representation:

For the Appellant: Mr Duffy, Home Office Presenting Officer
For the Respondent: Ms Rahman, Counsel for Redfern Legal, London

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State, however for convenience I shall now refer to the parties as they were before the First-Tier Tribunal.

2. The appellant is a citizen of Jamaica born on 1 October 1997. She appealed against the decision of the respondent dated 4 December 2015, refusing to grant her leave to enter the United Kingdom with a view to settlement here as the minor dependent daughter of Jannet Gilling, a person present in the United Kingdom with limited leave to remain with a view to settlement, who the appellant states is her mother. The appeal was heard by Judge of the First-Tier Tribunal Malone on 27 September 2017 and was allowed on human rights grounds in a decision promulgated on 11 October 2017.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Boyes on 7 November 2017. The permission states that the grounds assert that the Judge erred in not following the principles and dictat of ***Devaseelan*** and that these grounds are arguable. Permission was granted on all grounds raised.

4. There is a Rule 24 response. This makes reference to a previous appeal relating to this appellant which was heard in the First-Tier Tribunal on 10 February 2015 by Immigration Judge Abebrese and was dismissed on 5 March 2015. It was dismissed as it was found that the requirements of the Immigration Rules had not been met and that the refusal did not amount to a breach of Article 8 of ECHR. The response states that there is no material error of law as the Judge's findings were made in accordance with the ***Devaseelan*** principles and were open to the First-Tier Judge, based on the evidence that was before him. The grounds state that it was open to the Judge to depart from IJ Abebrese's findings relating to Ms Gilling's evidence about the abuse suffered by the appellant at the hands of Mr Ellis, the lack of interest shown by Mr Ellis to the appellant, the condition of the accommodation at 68 Hanover Street, Kingston and Ms Gilling's sole responsibility for the appellant. The response states that clear reasons are given for the Judge's findings. The response states that the guidance in ***Devaseelan*** is that the first Judge's decision should always be the starting point but is not binding on the second Judge. The issues will differ because of the passage of time and the presentation of arguments and evidence that were not before the first Judge. The Upper Tribunal has stated that compelling new evidence may provide a good reason for the second Judge departing from an earlier finding and that the obligation of every Judge is to independently assess each new application on its own individual merits and that the first decision should not impose any unacceptable restrictions on the second Judge's ability to make the findings which he consciously believes to be right.

5. The response states that the material facts are the same in both appeals. The response states that the second Judge had a significant amount of evidence before him that was not before the first Judge and which was material to his findings, including the appellant's statement of 24 May 2017, the witness statement of Stacey Wedderburn dated 26 May 2017, objective country information, email correspondence between the appellant and her mother and copies of information relating to US Immigration applications, photographs of the accommodation at 68 Hanover Street, Kingston and letters from the appellant's school. The response states that it was not incumbent on the second Judge to seek an explanation as to why this evidence was not before the first Judge. In any case some of it would not have been available as the first decision was dated 6 March 2015. The response states that the second Judge made findings of fact that were supported by the evidence and provided sufficient reasons for showing why he accepted this evidence. It states that the first Judge drew adverse inferences due to the lack of evidence. The second Judge found that he was able to depart from the first Judge's

finding relating to the abuse of the appellant by her father as he had vastly more material before him, allowing him to better assess the claim that the appellant was abused by her father. The second Judge accepts the lack of interest in the appellant by her father because of the updated statement of Stacey Wedderburn and the evidence about the domestic abuse. There are also photographs of the property the appellant is staying in, in Kingston. Additional evidence was also supplied relating to sole responsibility and the response states that if the second Judge's decision is read as a whole there are a number of good reasons for departing from the first Judge's findings and accepting the sponsor's evidence.

6. I was asked to find that there is no material error of law in the Judge's decision.

The Hearing

7. The Presenting Officer submitted that he is relying on the grounds of appeal and the grant of permission. I was referred to paragraph 61 of the decision in which the Judge states that much of the evidence before him had not been before the first Judge. In this paragraph the Judge also states that the appellant's circumstances in Jamaica have not changed since the date of the first decision. He states that because much of the evidence was not before the first Judge this has led him to conclude that he can depart from the first Judge's findings and that there are serious and compelling family or other considerations which make the appellant's exclusion from the United Kingdom undesirable. The Presenting Officer submitted that the Judge does not ask why this evidence was not before the first Judge, as much of the additional evidence before him was available at the date of the first hearing. He submitted that as this evidence was available but not before the first Judge, this diminishes the weight that should be given to it. He submitted that the Judge has not given sufficient reasons as to why he is departing from the first Judge's decision.

8. Counsel for the appellant submitted that the second Judge has analysed all the evidence before him and has made an assessment based on this evidence. She submitted that at the first hearing before Judge Abebrese, the appellant had not had proper legal advice.

9. She submitted that the sponsor, after seeing the refusal of the first application, addressed the shortcomings in it when the second application was made. She submitted that the first Judge did not find in the appellant's favour because of a lack of evidence. Because of this the appellant had not proven her case to the standard required, being the balance of probabilities, but with the additional evidence the appellant has proven her case on the balance of probabilities.

10. I was asked to find that there is no material error of law in the second Judge's decision and that adequate reasons have been given by him for going against the first Judge's decision.

Decision and Reasons

11. I have carefully considered Judge Abebrese's decision. Counsel has stated that the reason the application was refused the first time was that there was a lack of evidence before the Judge. The first Judge points out that financial support alone does not constitute sole responsibility. He makes reference to the sponsor believing that it is in the appellant's best interests to live in the UK but he finds that personal choice does not constitute a serious and compelling consideration. He makes reference to witness statements and a letter of support from Stacey Wedderburn, letters from the school the appellant attends and evidence relating to accommodation. The first Judge also notes that paragraph 301 of the Rules cannot be satisfied as the sponsor only has discretionary leave. He refers to the fact that the appellant is now living with a relative who is going to America and that she has been subjected to abuse by her father. He also makes reference to the current conditions the appellant is living in and notes that she will have no one to look after her except her father who, it is stated, has abused her. He also refers to emails between the appellant and her mother and telephone calls. He refers to there being no evidence of any kind of abuse by her father and no evidence of the appellant's relatives making an application to reside in America. Judge Abebrese has given full reasons for why he does not find there would be grave consequences if this application is refused. Judge Abebrese finds that he has not been provided with evidence that the most important decisions in this appellant's life have been taken by the sponsor. In reaching his decision he has noted that there is no evidence about this from the school and that financial assistance on its own is not sufficient.

12. Judge Abebrese finds that the sponsor's immigration history is relevant when considering public interest. The sponsor has a precarious immigration history. He also finds that the fact that the terms of the Immigration Rules cannot be satisfied is an important consideration.

13. Judge Abebrese also took into consideration Section 55 and the best interests of children. He finds that the appellant is settled in Jamaica and there are people there she can rely on. He makes reference to her adult sister who can support her. He therefore finds that there is no credible evidence that there are compelling circumstances which would render the appellant to be vulnerable as a child. He also notes that the sponsor is in a position to visit the appellant and does not have the status to support her as a settled person in the United Kingdom.

14. Judge Abebrese has given proper reasons for his decision.

15. I have then carefully considered Judge of the First-Tier Tribunal Malone's decision and the evidence before him.

16. At paragraph 9 of his decision he states "I found Ms Gilling to be an honest and reliable witness. I accept her oral and written evidence as I do the

written evidence of the appellant and Ms Wedderburn". First-Tier Judge Malone refers to Judge Abebrese's decision and states that he is taking this as his starting point and to depart from his decision he will require good reasons. He does not seem to have taken into account Ms Gilling's precarious immigration history.

17. It is clear that the sponsor has made much more of the appellant's father's character than she did at the hearing before Judge Abebrese. Counsel submitted to me that when the sponsor saw the first decision she put together additional evidence but it seems that she may have exaggerated the situation because of what is stated in the first decision. If her father's character and behaviour were so abusive why was this not made more of at the first hearing? It should not have taken the decision in the appellant's appeal before this was properly explained.

18. The sponsor came to the United Kingdom in November 2001. At paragraph 19 of Judge Malone's decision he states that she left Jamaica on 23 November 2011. This is not the case. At paragraph 20 of Judge Malone's decision he states that Ms Gilling's mother became unable to look after the children and travelled to the USA so in October 2004 Ms Gilling let the children go to stay with their father, Mr Kenneth Ellis. This begs the question of why Ms Gilling allowed the appellant to move in with her father given her evidence about his abusive behaviour. The additional evidence before Judge Malone appears to consist of some photographs, a further statement from the appellant, a further statement from Stacey Wedderburn, some emails and some objective evidence. What Judge Malone has done is accept this additional evidence on its face. I have to decide if the evidence was of such a compelling nature that Judge Malone had to depart from Judge Abebrese's decision.

19. The sponsor states that she sends money to Jamaica for the appellant and that is accepted by both Judges although Judge Abebrese finds it not to be credible that Mr Ellis could not be bothered picking up the money.

20. Photographs have been supplied supposedly of 68 Hanover Street which Judge Malone has accepted. At paragraph 46 of Judge Malone's decision he states that the accommodation at 68 Hanover Street is shocking and it is unsuitable for human occupation. He has however stated at paragraph 61 that the appellant's circumstances have not changed since the date of the first decision. It is true that Judge Abebrese had not seen the photographs but he clearly did not find that where the appellant was living was unsuitable for human habitation. Judge Malone has at paragraph 61 stated that the appellant's circumstances have not changed since the date of the first decision. It is true that Judge Abebrese had not seen the photographs but he clearly did not find that where the appellant was living was unsuitable for human habitation.

21. Based on what is before me I do not find that there was compelling new evidence before Judge Malone. I find that he has not given proper weight to Judge Abebrese's decision. He refers to the wealth of other evidence

before him compared to the evidence before Judge Abebrese. Much of the new evidence could have been produced at the first hearing and no reasons have been given for why it was not produced. This diminishes the weight it can be given. The evidence of the abuse is not based on medical reports but is based on statements of friends and family of the appellant and could be said to be self serving and may be exaggerated. There was nothing before Judge Malone to indicate that there are compelling circumstances which make it difficult for the appellant to remain in Jamaica where she has spent her whole life and has family and friends. The only significant evidence is the photograph of the house and the appellant has an older sister in Jamaica she can stay with.

22. I find that there are material errors of law in Judge Malone's decision. Because of this his decision should be set aside. None of his findings are to stand other than as a record of what was said on that occasion. The nature of the case is such that it is appropriate in terms of Section 12(2)(b)(i) of the 2007 Act and of Practice Statement 7.2 to remit the case to the First-Tier Tribunal for an entirely fresh hearing.

23. The members of the First-Tier Tribunal chosen to consider the case are not to include Judge Malone or judge Abebrese.

24. No anonymity direction has been made.

Signed Date 08 February 2018

Deputy Upper Tribunal Judge Murray