Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
HU/10824/2015

HU/12615/2015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 15 January 2018	**On 24 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MRS CHRISTINE AGNES CHARLES-MOHAN
MISS ROSEANNE MOHAN

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss L. Santamera, counsel instructed by Dylan Conrad Kreolle
For the Respondent: Mr. Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The First Appellant is a national of Trinidad & Tobago, born on 26.1.58. The second Appellant is her daughter, born on 27.2.88. The first Appellant arrived in the United Kingdom, accompanied by her

elder sister, Elizabeth, on 25.3.68, in order to join their father, who had British nationality. The first Appellant remained in the UK until 1979 when she returned to Trinidad. She came to the UK for a visit on 26.7.97, returning again to Trinidad. On 24.10.04 both Appellants came to the UK with valid 6 month visit visas. On 3.9.14 they applied for leave to remain on private and family life grounds and this application was refused on 29.10.14 with the right of appeal.

2. The appeal came before First tier Tribunal Judge Caswell for hearing on 2.3.17. In a determination promulgated on 15.3.17, the Judge dismissed the appeal. She found that the first Appellant had suffered abuse at the hands of her father who had manipulated her with the promise of releasing her passport to her [13] but found there was clear evidence that the first Appellant had never had a British passport or ILR [12]. The Judge considered whether there are any insurmountable obstacles to the Appellants' return to Trinidad and concluded at [16] that there are not. At [17] she held that there is no appeal on Article 8 grounds outside the Rules.

3. An application for permission to appeal to the Upper Tribunal was made in time and in a decision dated 31.10.17, First tier Tribunal Judge Simpson granted permission to appeal on the basis that the Judge confined herself to consideration of whether or not the appeal succeeded under the Rules, when that was not and could not be a ground of appeal, given that the appeal had been brought on human rights grounds; there was a lacuna of reasoning concerning the issue of whether there were compelling reasons and an absence of assessment with regard to the necessary *Razgar* structure and mandatory regard to sections 117A-D of the NIAA 2002 and applicable authorities.

Hearing

4. At the hearing before me, Ms Santamera relied on the grounds of appeal and submitted that the issue is whether or not the judgment by the First tier Tribunal Judge sufficiently dealt with all the issues in the case. She submitted that there had been a failure to consider the factors in respect of paragraph 276ADE(vi) individually and cumulatively and properly in the round. The Judge had further failed to apply sections 117A-D of the NIAA 2002. She submitted that on a proper construction, section 117A(2) read with section 117B(v) means that the court has a discretion in an appropriate case to attach more or less weight to precarious or unlawful residence and that insufficient consideration had been given to the positive factors, namely section 117B(2) proficiency in English as both Appellants are native English speakers and financial independence, as the first Appellant has a means of living and income which is not dependent on the State and is a positive factor.

5. Ms Santamera submitted that there has been a distinct lack of consideration of the test set out in *Jeunesse v Netherlands* and the fact that there are exceptional cases where a migrant whose immigration status is precarious can still succeed under Article 8. The Judge further failed to consider whether there were compelling reasons to allow the appeal, in particular, that the first Appellant was in the UK and educated and lived here for 15 years; she honestly and genuinely believed she had the right to remain permanently, which may have come about through deception by her father. She then spent a considerable period of time back in Trinidad as she could not find a route back here and applied to the Embassy and produced ample evidence of her previous life in the UK. In terms of compelling reasons why a forcible return would not be proportionate this must be considered. She has been a productive member of society and none of these very positive factors have been weighed properly in the balance, either by the decision maker or the Judge. The first Appellant is established in the community and has solid friendships. Her past history constitutes compelling circumstances.

6. In response to a question from the Upper Tribunal requesting clarification of why at [17] the Judge found there was no article 8 appeal, Ms Santamera submitted that article 8 was clearly raised in the grounds of appeal and that even if submissions had not been expressly made by the Appellants' representative at the first tier tribunal hearing it was still incumbent on the Judge to consider Article 8.

7. In his reply, Mr Harrison sought to rely upon the rule 24 response dated 27.11.17. He submitted that it was a peculiar case in that the arguments being put forward are that there are compelling reasons as to why the Appellant and her daughter should be allowed to stay but the fact remains that she did not have leave to remain in the UK previously. She returned to the UK after a considerable period of time away and came in on a visit visa for 6 months and then overstayed and eventually made an application to regularize her stay. It was made very plain she did not have either a British passport or ILR. Whether she believed that or not is immaterial. He submitted that the Judge had gone on to dismiss the appeal for sound reasons, has had regard to the law and considered it and concluded on the circumstances of this case that the appeal had to be dismissed. There was no error of law.

8. Ms Santamera in response submitted that the first Appellant had ILR on her Trinidad passport in respect of the entry clearance visa issued on 23.3.68.

Decision

9. I find material errors of law in the decision of First tier Tribunal Judge Caldwell, essentially for the reasons set out in the grant of permission to appeal to the Upper Tribunal and expanded upon by Ms Santamera in her submissions. Whilst the appeal was brought on the basis of human rights and Article 8 was clearly raised in the grounds of appeal, the Judge erroneously concluded at [17] that there was no appeal on Article 8 grounds outside the Rules, when this was the very basis of the appeal. It was thus incumbent upon the Judge to engage with the Article 8 appeal and to apply the relevant jurisprudence and statutory provisions *viz* sections 117A-D of the NIAA 2002.

10. I further find that there is a paucity of reasoning in the Judge's findings and conclusions as to paragraph 276ADE(vi) of the Rules, in light of the first Appellant's particular history and circumstances, which she accepted at [13] and the fact that the second Appellant has resided in the UK since the age of 16 in 2004. Whilst the Judge made reference to the lengths of residence of both Appellants, she failed to conduct a proper evaluative assessment of the evidence and provide reasons for her conclusion at [16] that she could not find that either Appellant would face any particular obstacles to integration into Trinidad.

11. I also explored with the parties the evidence as to the Appellant's immigration status upon arrival in 1968 up to her departure from the UK in 1981. In the evidence there is a letter from the first Appellant's sister, Elizabeth Lucille Marine (Charles) dated 14.11.07 in which she has copied the entry stamp in her passport, made on arrival in the UK with the first Appellant in 1968 [details set out in the directions below]. I expressed my concern to the parties that insufficient attempts had been made to clarify whether or not the Appellant was granted either ILR or British citizenship as the dependant of her father.

12. In light of my findings that the decision of First tier Tribunal Judge Caswell contains material errors of law, I quash that decision and remit the appeal for a hearing *de novo* before the First tier Tribunal. I make the following directions:

DIRECTIONS

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1. The appeal is remitted to the First tier Tribunal, Manchester, to be listed after 3 months, with a 3 hour time estimate.

2. The Appellant and Respondent are to use their best endeavours to ascertain the immigration status of the First Appellant on arrival in the UK on 25.3.68 [entry stamp 568 in London] and thereafter up

to 1981. A search of the files and/or subject access request should be made in respect of the following names:

(i) Christine Agnes Marin (DOB 26.1.58 Port of Spain, Trinidad)
(ii) Christine Agnes Marine (ditto)
(iii) Christine Agnes Charles (ditto)

3. The Respondent is to confirm whether a British passport with number [ ] was issued to the First Appellant either in her own name or as the dependant of her father, Calvin Charles and whether an entry certificate M/92/33 was issued in Port of Spain on 11.1.68.

4. The Appellant's solicitors are required to provide an indexed, paginated bundle of supporting evidence.

Rebecca Chapman
Deputy Upper Tribunal Judge Chapman

23 January 2018