



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/14183/2015

**THE IMMIGRATION ACTS**

**Heard at Cardiff Civil Justice Centre  
On 8 February 2018**

**Decision & Reasons  
Promulgated  
On 5 April 2018**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NOMSA [N]  
(aka: NATHALIE [D])**

Respondent

**Representation:**

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer  
For the Respondent: Ms S Alban instructed by Fountain Solicitors

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State appeals, with the permission of the First-tier Tribunal granted on 20 July 2017, against the decision of the First-tier Tribunal (Judge B Lloyd) allowing the respondent's appeal under Art 8 of the ECHR.

2. The basis of the Secretary of State's appeal is that Judge Lloyd erred in law in applying Devaseelan v SSHD [2002] UKIAT 702 and in relying upon the findings of Judge Osborne, when the appeal was previously before the First-tier Tribunal, and whose decision had been set aside by the Upper Tribunal and remitted to the First-tier Tribunal for a rehearing.
3. Before us, the Secretary of State was represented by Mr Richards, and the respondent by Ms Alban.
4. At the heart of the appellant's Art 8 claim before Judge Lloyd was her reliance upon her relationships with her children in the UK, including "C", aged 11. Judge Lloyd accepted that the respondent was the mother of the children and that there was a subsisting parental relationship with them. Having done so, Judge Lloyd found that, despite the respondent's conviction for assault and neglect of a child in November 2002 for which she was sentenced to two years' imprisonment, the best interests of her children were that they should remain with the respondent and that her deportation would have an "unduly harsh" impact upon the children and that the public interest was outweighed by compelling circumstances.
5. Before us, Mr Richards indicated that he no longer relied upon the final paragraph in the Secretary of State's grounds that challenged the judge's finding that the respondent's deportation would have an "unduly harsh" impact upon the family unit.
6. However, Mr Richards submitted that Judge Lloyd had been wrong to rely upon the findings of Judge Osborne as the Upper Tribunal (Lord Boyd of Duncansby) had, in remitting the appeal to the First-tier Tribunal, set aside Judge Osborne's findings including that the respondent was the parent of the three children and that she had a genuine and subsisting parental relationship with them.
7. Nevertheless, during the course of his submissions Mr Richards acknowledged that although the grounds had put in issue the biological relationship between the respondent and the children, that was not in fact in issue before Judge Lloyd. He ultimately, therefore, restricted the Secretary of State's challenge to Judge Lloyd's finding that the relationship (admittedly parental) between the respondent and her three children was genuine and subsisting.

## **Discussion**

8. We have no doubt that the effect of the decision of Lord Boyd in the Upper Tribunal was to set aside Judge Osborne's previous decision including any findings of fact made by him. It is clear from para 7 of his decision that Lord Boyd did not expressly preserve any of Judge Osborne's findings, including his finding that the respondent had a genuine and subsisting relationship with her three children.

9. It would, therefore, have been wrong in law for Judge Lloyd to apply Devaseelan and take, at least as a “starting point”, Judge Osborne’s finding on that issue. It is certainly possible to read passages in Judge Lloyd’s determination as falling foul of that approach. At para 13, having referred to Devaseelan, he continued:

“I rely on the findings of Immigration Judge Osborne and those of Immigration Judge Hart in his determination of the Appellant’s asylum claim of 17<sup>th</sup> November 2006”.

10. The reference to Judge Hart’s decision is to an earlier asylum appeal and it was not suggested before us that that had any impact on the issue that we had to decide.

11. Then, at para 14 Judge Lloyd stated as follows:

“14. When the Appellant gave evidence before Judge Hart, [C] was already 13 months old. However, the Appellant had made no mention whatsoever of [C] in those proceedings. She intentionally had hidden the fact that she had given birth to a child some thirteen months earlier and Judge Hart made his findings in complete ignorance of the fact that [C] had been born. Such circumstances led Judge Osborne at the last First-tier Tribunal appeal to find ‘resoundingly’ that the Appellant is a woman who cannot be believed. Nevertheless, even with an acknowledgment of the Appellant’s dishonesty Judge Osborne was able to find that not only is the Appellant the natural mother of [C], [A] and [Z] but the evidence suggested that she was caring for two other elder daughters (the qualifying children) to a standard that at least met the threshold of good enough parenting. All three children appear to be fit and healthy and engaged with their mother. It was, in Judge Osborne’s conclusion, in the children’s best interests to continue living with their mother”.

12. However, we do not consider that Judge Lloyd did, in fact, rely upon Judge Osborne’s earlier findings in reaching his own findings favourable to the respondent.

13. Before Judge Lloyd, C gave oral evidence. It was, in fact, Judge Osborne’s decision not to hear evidence from C that led to the setting aside of his decision by the Upper Tribunal.

14. Judge Lloyd was clearly impressed by the evidence given by C. At paras 19–23, Judge Lloyd set out C’s evidence as follows:

“19. With great care, I took evidence from [C] who is now aged 11. Mr Arkless, for the respondent followed with his questions. I invited the Appellant’s representative, Mr Da Silva, to open the questioning and I then proceeded to engage with the young child in a gentle and sympathetic manner. [C] presented to this Tribunal as a very polite, well spoken and evidently intelligent child, who was well dressed and looked as if she was cared for to a very high standard. She told me, using this precise word, that

she would be 'devastated' if she had to leave this country with her mother and siblings and go to live in Zimbabwe. It was all very frightening and scary for her. She loved school in this country and she had a very wide circle of friends. She did not know what it was like in Zimbabwe and as far as she was aware it was only her grandmother who was her family there. She had never met her grandmother. She was very good at her schoolwork and was ambitious to become a writer or a singer.

20. She attended church regularly with her mother and her sister and brother. She attended Bible classes and she sang in the church choir.
21. She remembered that about three years ago her aunty took her to see her father in Aberystwyth. He has another family now and does not have anything to do with her. She never sees him, and never hears from him even by way of a birthday card.
22. There are lots of things that she wants to do, lots of ambitions she wants to achieve. She cannot imagine how it would be if she had to leave this country with her mum and family and have to live in a country that she knows nothing about.
23. I was very impressed with the evidence of [C] and I well understand the reasoning of the Upper Tribunal when it concluded that her evidence was important to the consideration of the issues now to be determined”.

15. Then at paras 48–51 Judge Lloyd reached his conclusions on the basis of the evidence, including in particular that of C as follows:

“48. When I took evidence from [C] at this appeal it was very clear emotion and uncertainty that she felt; in circumstances where she thought she might be sent away from the only life she knows. She is evidently an intelligent, polite and well brought up young lady who places great importance upon her family and her circle of friends here in the UK. She is articulate and intelligent and has very clear views as to what she wants to do with her life and what she would like to achieve in her future life. It would in my view be truly devastating for her and indeed her younger sister if the family were to be torn away from the only life that they know because of the wrongs that her mother has committed in the past. I do not take issue with the Home Office Presenting Officer when he says that the Appellant's history in terms of both her engagement with the immigration authorities and the criminal justice system is quite appalling and is characterised by dishonesty and deceit on the Appellant's part. The Appellant expresses contrition to this Tribunal and says that she has put her life together and is now committed to the future lives and welfare of her three children. I can draw no clear conclusion as to the Appellant's state of mind in those respects. What is clear, however, is that she has been and continues to be a good and caring mother to her three children who are under consideration in this appeal. They should not be condemned by reason of their mother's past and to have their lives ruined as a consequence. That is what I consider would be the consequence of tearing them away from their lives here and returning them to Zimbabwe.

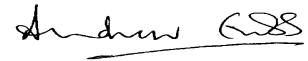
49. Of course, as Mr Arkless for the Secretary of State concedes there is no power under which the Secretary of State can expel the Appellant's daughters [C] and [A]. However, it is inevitable that if the Appellant is deported to Zimbabwe the only possible conclusion that can be drawn in respect of the best interests of the children in those circumstances is that they remain with their mother. But to remain with their mother there are devastating consequences for them. They should not be allowed to occur; and it would be wholly disproportionate to allow such consequences.
  50. I acknowledge the submission of the Appellant's representative that the Appellant's deportation will indeed constitute the most drastic interference conceivable with [C's] and [A's] rights to enjoy family life with their mother and the deportation would be seriously adverse to those two young girls' interests.
  51. The Appellant's deportation with the inevitable and direct consequence of the removal of the children cannot be proportionate in all the circumstances. There are compelling circumstances which outweigh the public interest in deporting the Appellant".
16. We were referred to para 43 of Judge Lloyd's determination where he stated that:
- "There is no dispute before me that the Appellant is a parent who is in a subsisting relationship with a child under eighteen".
17. Whilst the maternal relationships were accepted, as Mr Richards acknowledged before us, the substance of the relationships was not. We are not, however, persuaded that Judge Lloyd failed to make his own findings, based upon the evidence, as to the nature of the relationships, in particular with C. As we pointed out at the hearing, Judge Lloyd would have had to reject all of C's evidence in substance to have reached a conclusion that there was not a genuine relationship between her (and her siblings) and her mother. As the passages from his determination we have set out above make clear, Judge Lloyd did not reject any of C's evidence. He plainly accepted it. Consequently, despite his reference to Devaseelan and to the absence of any "dispute" as to the nature of the relationships, Judge Lloyd went on to reach his own factual findings based upon the evidence before him, in particular his acceptance of the evidence of C. It is not suggested that those findings were irrational in themselves or otherwise not properly open to him.
18. In our judgment, Judge Lloyd did not err in law in reaching those findings based upon the evidence before him. For those reasons, we reject the Secretary of State's grounds as relied upon by Mr Richards.

## **Decision**

19. Accordingly, the decision of the First-tier Tribunal to allow the respondent's appeal under Art 8 did not involve the making of an error of law. That decision stands.

20. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", with a horizontal line underneath.

A Grubb  
Judge of the Upper Tribunal

4, April 2018