Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04146/2019**

THE IMMIGRATION ACTS

Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 5th October 2021	**On 12th November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

CARMEN NEGREETA HOLDING

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Mavrantonis, Counsel instructed by Legal Affairs Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant's appeal against the respondent's decision of 13th February 2019 to refuse her application for leave to remain in the UK on the basis of her private life and on Article 8 grounds, was dismissed by Judge Kemp for reasons set out in a decision promulgated on 18th September 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge Neville on 9th December 2019. Following a hearing before Upper Tribunal Judge King TDE on 3rd February 2020, the decision of the First-tier Tribunal was set aside for reasons set out in an error of law decision promulgated on 19th February 2019. Upper Tribunal Judge King found the decision of the First-tier Tribunal Judge was infected by a material error of law and directed that the appropriate course is for the decision to be remade in the Upper Tribunal. In doing so he noted at paragraph [5] of his decision, that at the hearing of the appeal before the First-tier Tribunal, the Presenting Officer had conceded that there was no issue with the appellant's residence in the United Kingdom between 1999 to 2007 and between 2010 to 2018. The issue was whether or not the appellant had left the United Kingdom between 2007 and 2010.

3. Upper Tribunal Judge King was referred to the documents contained in the appellant's bundle before the First-tier Tribunal, and in particular, copies of two passports held by the appellant. The first was a passport issued to the appellant on 4th November 1997 that made reference to a previous passport issued to the appellant on 10th September 1987, valid until 3rd November 2007. The second was a more recent passport that had been submitted by the appellant to the respondent when the appellant made her application for leave to remain. It was a passport issued to the appellant by the Jamaican authorities on 26th March 2009 valid until 25th March 2019. Upper Tribunal Judge King was persuaded that it was a material document that ought to have been considered by the First-tier Tribunal Judge in the overall analysis of the evidence when considering whether the appellant had in fact left the United Kingdom between 2007 and 2010. The appellant's case was that her previous passport had expired on 3rd November 2007, and she was not in possession of another passport until March 2009, so that she could not have travelled out of the UK during that time. Upper Tribunal Judge King noted there was little evidence before the Tribunal as to how the passport issued in March 2009, came to be issued and by what process. He also noted that despite the wealth of material in the appellant's bundle, there is no document from 2007 to 2009 to indicate that the appellant was in the United Kingdom during that time.

4. The appeal was listed for a resumed hearing before me on 5th October 2021 to remake the decision.

INTRODUCTION

5. By the decision dated 13th February 2019, the respondent refused a human rights claim made by the appellant. The appellant has appealed that decision under s82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s6 of the Human Rights Act 1998.

6. In her decision of 13th February 2019, the respondent concluded that the appellant had failed to provide sufficient evidence of her continuous residence in the UK. It was not accepted that the appellant has lived continuously in the UK for at least 20 years and the respondent did not accept that there would be very significant obstacles to the appellant's integration into Jamaica. The respondent noted that the appellant had, even on her own account, lived in Jamaica up to the age of 35 and that she had retained knowledge of the life, language and culture in Jamaica.

7. The appellant claims she arrived in the United Kingdom on 15th July 1998 using a passport endorsed at Gatwick Airport, with leave to enter as a visitor valid for 6 months. She claims she has lived continuously in the UK for at least 20 years so that she satisfies the requirements to be met by an applicant for leave to remain on the grounds of private life set out in paragraph 276ADE(1)(iii) of the immigration rules. If that requirement is met, the appellant claims, it follows that her appeal should be allowed on human rights grounds. Alternatively, she claims the decision to refuse her application for leave to remain is disproportionate and in breach of her Article 8 rights.

<u>The issues</u>

8. At the hearing of the appeal before First-tier Tribunal Judge Kemp, the respondent was represented by Mr J Smith, a Home Office Presenting Officer and he conceded that there was no issue with the appellant's residence in the UK between 1999 to 2007 and between 2010 to 2018. On behalf of the respondent, Mr Bates confirmed

that he does not seek to go behind that concession, although in determining the precise dates in issue, Judge Kemp had also recorded in paragraph [10] of the decision, the submission made by Mr Smith "*..that there was a dearth of evidence between 2007 and 2010..*". In any event, the focus of the appeal before me was whether the appellant has established continuous presence in the UK between 2007 and 2010, more particularly, during 2008 and 2009.

9. The burden of proof in respect of all matters, is upon the appellant and the standard of proof is the balance of probabilities.

10. In reaching my decision I have considered whether the appellant's account of events is internally consistent and consistent with any other relevant information. I have had regard to the ingredients of her account of events, and her story as a whole, by reference to the evidence available to the Tribunal. I have had the opportunity of hearing the appellant and seeing her evidence tested in cross-examination. I have also had the opportunity of hearing the oral evidence of three witnesses called by the appellant. In considering the oral evidence, I have borne in mind the fact that events that occurred some time ago, can impact on an individual's ability to recall exact circumstances. I also recognise that there may be a tendency by a witness to embellish evidence because although the core of the claim may be true, he/she believes that by embellishing their evidence, the claim becomes stronger. I also remind myself that if a Court or Tribunal concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion, and emotional pressure. I have also been careful not to find any part of the account relied upon, to be inherently incredible, because of my own views on what is or is not plausible.

<u>The evidence</u>

11. In readiness for the hearing before me, the appellant's representatives have provided the Tribunal with a hearing bundle comprising of pages 'A' to 'G' and a

further 248 pages. On the day of the hearing before me, I was also provided with a skeleton argument settled by Mr Mavrantonis, dated 4th October 2021

12. It is entirely impractical for me to refer in this decision to all the evidence that is set out in the extensive bundle prepared by the appellant's representatives. I do however make it clear that in reaching my decision I have had regard to all of the evidence whether that evidence is expressly referred to or not, in this decision.

13. I heard oral evidence from the appellant, and three witnesses, namely Dorcas Henderson *(witness statement at page [3]),* Nadine Jackson *(witness statement at page [248])* and Pastor Wilton Pryce *(letter at page [31]).* The evidence of the witnesses is set out in the record of proceedings and is a matter of record. There is nothing to be gained by a full recital of that evidence in this decision. For the avoidance of any doubt, in reaching my decision I have also had regard to all the other witness statements that are in the appellant's bundle. The authors of those statements did not attend the hearing and their evidence was not tested in cross-examination. That impacts upon the weight I attach to their evidence.

14. The appellant adopted her witness statement dated 12th February 2020 *(witness statement at page [1]).* She confirms that since her arrival in the UK in July 1998 as a visitor, she has not travelled out of the country. She sets out the various addresses at which she has lived since her arrival in July 1998. She claims that between 2007 and 2010 she lived with a friend at an address in Grange Road, West Bromwich. She states that because she has never had a right to work in the UK, she has no utility bills or documentary evidence to show that she has resided in the UK for more than 20 years. She claims she has nothing to return to, in Jamaica. She claims that since her separation from the father of her children, who were aged five and nine when she left Jamaica, she has not seen or spoken to them. She claims the fact that she could not travel, has contributed to the destruction of her relationship with her children.

15. In cross-examination the appellant claimed that between 2007 and 2010, she had initially lived at an address in Dartmouth Street, West Bromwich, before moving to

the address in Grange Road. She claimed that she lived with a friend, whose name was Carlton. She could not remember his surname. She said that Carlton has not provided a statement in support of the appeal because she lost his telephone number when her mobile phone crashed, and she only speaks to him rarely, when they bump into each other whilst out. She said that she had met him "the other day", but he had said that he would be unable to provide a statement or attend the hearing because he was working away. When asked how she had supported herself, the appellant said that she receives support from friends and family, and sometimes people will pay her a small amount to bake cakes. She has been unable to secure employment because she does not have the required papers to establish she has a right to work. The appellant said that between 2007 and 2010 she attended the "7th day Church of God", and she was supported by the church community. The church she attended in Birmingham, was linked to a "7th day Church of God" in Wolverhampton. She accepted that none of the witnesses that are called to give evidence before me, went to the church she attended in Birmingham, but Pastor Wilton Pryce had visited the church at some point between 2007 and 2010. The appellant was asked why she had applied for a Jamaican passport in 2009. She said that her previous passport had been lost in 2006 and it had since expired. She was asked why, if her previous passport was lost in 2006 and had expired in 2007, she had waited until 2009 to replace the passport. She said that she thought she might need a passport to make an application to the respondent. She claimed that she had made an application once she had received her passport. She could not recall when that application was made but said that she had spoken to about three lawyers but did not get very far.

16. The appellant said that during the period between 2007 and 2010 she saw Dorcas Henderson regularly. Ms Henderson owned a salon not far from where the appellant lived, and the appellant would often go there. She could not recall a particular event that occurred during that period, by reference to which she had any particular recollection of seeing Dorcas Henderson, but they would often meet. The appellant was asked about her family ties to Jamaica. She said that she has four brothers and three sisters. They were all living in Jamaica when she left, and she

assumes they are still there. She claimed that she is not in contact with any family in Jamaica and that she does not know where her family now live. She said that her ex-partner and two children, now live in Canada. She believes they moved to Canada in 2008.

17. In re-examination, the appellant confirmed that she had last seen Carlton, about a month ago, and before that, she had seen him in 2019. She had asked him to support her application and appeal, but he said that he would be working far away. She confirmed that she has not left the United Kingdom since her arrival here in 1998.

18. Dorcas Henderson adopted her witness statement dated 12th February 2020. She confirms that she has known the appellant since 2005 when the appellant started attending her salon, and they have since become friends. In her oral evidence before me she confirmed that since 2005 the appellant has become a good friend of hers and she has been supporting her. She said that she regularly sees the appellant face-to-face. She said that there was a period in 2013/14, when Ms Henderson was back-and-forth in London and so she did not see the appellant as frequently, but even then, they remained in contact. She recalls giving a lawyer about £300 to see what they could do for the appellant. In cross-examination she confirmed that between 2007 and 2010 the appellant was living in the Grange Road area, in West Bromwich. She had never been into the appellant's house but had sometimes dropped her off outside. She said that she would see the appellant between two and four times a week, and they would often help each other. She was asked whether she knew who the appellant lived with. Ms Henderson said the appellant lived with a friend, who she named as 'Calberth Allen". She said that they had asked Mr Allen to confirm that he had been renting the property at the time, and the appellant had been living there between 2007 and 2010. Mr Allen said that he had moved on, was with someone else, and he did not want to know. Ms Henderson said the appellant attended the '7th Day Church of God' in the Soho Road area of Birmingham during that time, until that Church moved to Wolverhampton.

19. Nadine Jackson adopted her witness statement dated 22nd May 2020. She claims that she has known the appellant since 2002. When asked by Mr Mavrantonis how often she sees or communicates with the appellant, she said that they mostly communicate by telephone "Weekly or daily". She said that the appellant was in the UK between 2007 and 2010. When asked how she knew that she said that she had been to Jamaica in 2007 and the appellant regularly communicated with her during that time. Ms Jackson said that her mother had passed away in 2010, and the appellant had telephoned her, to express her condolences. She said that they kept in touch by telephone between 2008/2009. In cross-examination, Ms Jackson said that she had been in Jamaica for three weeks in 2007. She said that she had never visited the appellant at her home between 2007 and 2010 and she did not know where the appellant lived. She was asked who the appellant was living with, and how she supported herself. Ms Jackson could not remember.

20. Finally, Pastor Wilton Pryce was called to give evidence and he adopted the content of his letter dated 2nd March 2019. He confirms that the appellant became a dedicated member of the Mount Zion 7th Day Church of God, 9 years ago *(i.e. circa 2010)*. When asked by Mr Mavrantonis when he had first met the appellant, Mr Pastor Pryce said it was in 2010. He said that he did not know the appellant, or of the appellant, before then. There was no cross-examination.

21. After hearing the oral evidence of the appellant and the three witnesses, I heard submissions from Mr Bates and from Mr Mavrantonis. The submissions are recorded in my record of proceedings, and it serves no purpose to burden this decision by repeating the submissions here. Briefly stated, Mr Bates submits I should reject the appellant's claim that she was continuously resident in the UK between 2007 and 2010, and more particularly during 2008 and 2009. He submits there remains a paucity of evidence to establish the appellant's continuous residence in the UK during that time. He submits that during 2008/9, there was a global financial crisis, and it is quite possible that the appellant left the UK during that time in circumstances where she was already relying upon support from others. He submits that having a passport is not determinative because it is possible

that the appellant illegally exited and re-entered the UK, possibly using the land border with Ireland. He submits the appellant's credibility is damaged as someone who remained in the UK unlawfully, and has survived several years without, on her account, working. He submits the appellant only took steps to regularise her immigration status many years after securing a passport, despite the purpose of obtaining a passport, being to make an application to the respondent.

22. On behalf of the appellant, Mr Mavrantonis adopted his skeleton argument and submits there is evidence of the appellant's presence in the United Kingdom during the material time. He drew my attention a letter sent by Cleveland & Co Solicitors to the respondent, dated 16th October 2007, in which reference is made to representations set out in a letter dated 19th April 2005, and seeking an update from the respondent. That letter, Mr Mavrantonis submits, is evidence of the appellant's presence in the UK in October 2007, and he submits, there is no evidence of the appellant ever having received a response from the respondent. He submits there is also evidence before the Tribunal in the form of a letter from the Jamaican High Commission, dated 7th July 2020 which confirms the appellant was issued with a Jamaican passport on 26th March 2009. The High Commission confirms the application for a replacement passport was submitted through the Jamaican Consulate in Birmingham, and the new passport from Jamaica, was sent to the High Commission, and then dispatched to the appellant. Mr Mavrantonis submits that the documents now before the Tribunal taken together with the oral evidence of the appellant and Ms Henderson in particular, establishes that the appellant continuously resided in the UK between 2007 and 2010.

Findings and conclusions

23. Even on the concession previously made by the Presenting Officer at the hearing of the appeal before First-tier Tribunal Judge Kemp, there can be no doubt that the appellant has spent a considerable amount of time in the UK and has established a private life in the UK. Article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain may have consequences of such gravity as potentially to engage the operation of Article 8. I accept that the interference is in accordance

with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.

24. I have had regard to the respondent's policy as set out in the immigration rules. Although the appellant' ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. Conversely, if the rules are not met, although not determinative, that is a factor which strengthens the weight to be attached to the public interest in maintaining immigration control.

25. The appellant does not claim to have established a family life in the UK. The requirements to be met by an applicant for leave to remain on the grounds of private life are set out in paragraph 276ADE of the immigration rules. Insofar as relevant here, paragraph 276ADE states:

> "276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. to S-LTR.4.5 in Appendix FM; and
>
> …
>
> (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or
>
> …
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."
>
> …"

26. In her decision of 13th February 2019, the respondent confirmed the application does not fall for refusal on grounds of suitability in Section S-LTR of Appendix FM and paragraph 276ADE(1)(i) of the Immigration Rules.

27. The issue before me is whether the appellant has established that she lived continuously in the UK between November 2007 and 2010. In my search to establish the dates between which I find the appellant has continuously lived in the UK, I have had regard to the documents that are set out the appellant's bundle, the evidence of the appellant, the letters and statements relied upon by the appellant and the oral evidence of the witnesses called to give evidence before me.

28. The starting point is the concession previously made that the appellant lived continuously in the UK between 1997 and 2007. It is not entirely clear whether it was conceded by the respondent that the applicant had lived in the UK continuously during 2007 because as Mr Bates rightly submits, the Presenting Officer had also submitted before the First-tier Tribunal that there was a dearth of evidence regarding the period between 2007 and 2010. However, I find that the appellant was in the UK in 2007. Mr Mavrantonis drew my attention to a letter sent by Cleveland & Co Solicitors, who were instructed by the appellant, to the respondent in October 2007. It is in my judgement, more likely than not that the appellant was in the UK when that letter was sent on her behalf. At page 130 of the appellant's bundle there appears to be a manuscript note that has been disclosed by the respondent concerning the letter received from the appellant's representatives. The manuscript note refers to a previous application for leave to remain that had been refused in July 2003. The note records the appellant is an over-stayer, and it appears the file was forwarded to the 'West Midlands RCT' for further action. There is no evidence of any further action having been taken by the respondent, or of any response sent to the appellant's representatives at the time.

29. I also have in the papers before me a letter from the Jamaican High Commission which confirms that the appellant made an application for a replacement passport that was submitted through the Consulate in Birmingham and forward to the relevant department in Jamaica. A new passport was issued on 26th March 2009 in

Jamaica and was sent to the Jamaican High Commission in the UK for dispatch to the appellant. It is likely therefore that the replacement passport was received by the appellant in or about April/May 2009 and she is in my judgement more likely than not to have been in the UK at that time. Mr Mavrantonis quite properly accepts that the letter from the Jamaican High Commission does not set out the date upon which the application for a replacement passport was made.

30. In summary, there is at least some documentary evidence before me therefore that establishes that the appellant was more likely than not to have been in the UK in October 2007 and April/May 2009. I must therefore consider the possibility that the appellant may have left the UK at some point between October 2007 and April 2009 or between April 2009 and 2010, such that she is unable to establish that she had lived continuously in the UK for at least 20 years when she made her application in July 2018.

31. Although I found some of the answers given by the appellant in cross examination to be vague, I accept she was doing her best to assist the Tribunal, trying to recall events that occurred some time ago. I gained no assistance at all from the evidence of Nadine Jackson, who I find was not a credible witness. I formed the clear impression having had the opportunity of hearing her evidence, that what she said to the Tribunal was being said out of loyalty to the appellant. She was unable to give any clear evidence as to how often she spoke to or communicated with the appellant, and in the end, she was unable to give the Tribunal any evidence as to where the appellant was living between 2007 and 2010, who she lived with, or how she was supported. I found Pastor Wilton Pryce to be an entirely credible witness who gave clear and unambiguous answers to the questions put to him. Although the appellant claimed in her evidence that she had come across Pastor Wilton Pryce between 2007 and 2010 when she attended the 7th Day Church of God in Birmingham, Pastor Wilton Pryce candidly said that he first met the appellant in 2010 and he did not know of her before that. The evidence of the appellant and Pastor Wilton Pryce is not necessarily inconsistent. I accept the appellant may have previously come across Pastor Wilton Pryce when she attended the 7th Day Church

of God in Birmingham, but that Pastor Wilton Pryce may have no recollection of any such meeting, because of the passage of time since. He is however clear in his evidence, and I accept his evidence that the appellant became a dedicated member of the Mount Zion 7th Day Church of God in Wolverhampton, in 2010. In my judgement, the appellant gave a credible account of the 7th Day Church of God that she attended in Birmingham, merging with the Mount Zion 7th Day Church of God in Wolverhampton, and that merger being the catalyst to the appellant attending the church in Wolverhampton.

32. I gain the greatest assistance from the evidence of Dorcas Henderson, who I found to be a credible witness, doing her best to assist the Tribunal without any embellishment. I accept her evidence that she has known the appellant since 2005 and that she has remained in regular contact with the appellant. The oral evidence that she gave before me as to where the appellant was living between 2007 and 2010, was consistent with the evidence of the appellant. Ms Henderson named the gentleman the appellant lived with as 'Galberth Allen', whereas the appellant said his name was Carlton. Both witnesses had difficulty with the pronunciation of the name and its spelling. Having heard the evidence of both witnesses, I am quite satisfied that they were both referring to the same gentleman. Both the appellant and Ms Henderson, independently of each other, gave evidence of the approach made to the gentleman to try and secure his support.

33. I have also considered whether the appellant might have had any reason to leave the UK between 2007 and 2010. I have carefully considered the submissions made by Mr Bates that there was a financial crisis in 2008 and the appellant, as someone who had been in the UK relying upon the support of others, might well have decided to leave the UK during the height of the crisis, and to return later. That is pure speculation. It is in my judgement unlikely that an individual who had no independent financial resources of her own, but who had at least some support from friends and the church, would have left the UK in the midst of what was a global financial crisis. I find it is unlikely the appellant would have risked unlawful exit from the UK, in circumstances where there was a risk that she would not be

able to return to the UK, other than via unlawful entry. It is equally unlikely in my judgement that the appellant, who had instructed solicitors to contact the respondent in October 2007 regarding her immigration status, would have left the UK until at least some response had been received. There is no evidence before me of the respondent having ever responded to that correspondence. Finally, although the date of the application for a replacement passport is not known, there is evidence before the Tribunal that the appellant made an application for a replacement passport, from the UK, via the Jamaican High Commission. She must have been in the UK to do so, and it was not until April/May 2009 that she will have received the replacement passport. The respondent accepts the appellant lived in the UK continuously between 2010 and 2018. In my judgement, having secured a replacement passport in April/May 2009, it is unlikely that the appellant would have taken the risk of unlawful exit and return to the UK in 2009/2010.

34. Taking all the evidence before me in the round, and in particular the oral evidence of Ms Henderson, I find that the appellant has established that she lived continuously in the UK between 2007 and 2010. That finding taken together with the concession already made by the respondent is sufficient for me to find, on balance, that at the date of application, the appellant had lived continuously in the UK for at least 20 years and satisfies the requirement set out in paragraph 276ADE(1)(iii) of the immigration rules.

35. In reaching my decision, I have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. I note the appellant is able to speak the English language and that although she has not worked in the UK, she has throughout been supported by friends and has not been a burden on the taxpayer. They are however nothing more than neutral factors in my assessment of proportionality. I remind myself that s117B(4) of the 2002 Act provides that little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully. The appellant's private life has been established at a time when she has been in the United Kingdom unlawfully.

36. However here, I remind myself that the requirements to be met by a person for leave to remain on the grounds of private life in the UK are *inter alia* that at the date of application, the person has lived continuously in the UK for at least 20 years. I have found the appellant meets that requirement. As I have already said, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal of the claim could be justified. The ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules.

37. In my final analysis, I am satisfied that on the facts here, the decision to refuse leave to remain is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the appeal on Article 8 grounds.

Notice of Decision

38. I allow the appeal on Article 8 grounds.

39. I decline to make a fee award. I have reached my decision based upon evidence before me that was not before the respondent when she reached her decision to refuse the application

Signed *V. Mandalia* Date 6th October 2021

Upper Tribunal Judge Mandalia