Upper Tribunal
(Immigration And Asylum Chamber) **Appeal Number: IA/33246/2014**

IA/33250/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 20 August 2015

Decision and Reasons
Promulgated
On: 25 September 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MS NADINE NATASHA RHODEN(1)
MASTER JUSTICE ABABIO AFFUL(2)
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr H Kannangara, counsel (instructed by IEC Solicitors)
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are mother and son born on 11 September 1977 and 10 September 2005 respectively. They are nationals of Jamaica. I shall refer to Ms Rhoden as "the appellant." Her son, Justice, was born in the UK on 10 September 2005.

2. They appeal with permission against the decision of First-tier Tribunal Judge Martins, who in a decision promulgated on 14 April 2015 dismissed their appeals against the decision of the respondent dated 5 August 2014 giving directions under s.10 of the Immigration and Asylum Act 1999 for their removal from the UK having refused their application for further leave to remain in the UK.

3. On 19 June 2015, First-tier Tribunal Judge P J M Hollingworth granted the appellants permission to appeal on the basis that there was an arguable

error of law "...in relation to the extent of the Judge's reasoning in the context of s.55 and the period of time spent by mother/child in the UK in reaching her conclusions".

4. By way of background to the appeal, the appellant first entered the UK on 28 December 2002 as a visitor. She was granted further periods of leave to remain as a student initially until 28 June 2004 and was then until 31 May 2006. She was refused leave to remain as a student on 26 June 2006 but has remained in the UK since that date.

5. The appellant applied for leave to remain in October 2013. That was refused on 16 November 2013 on the basis that the appellants are not British citizens or settled in the UK and it was reasonable for them to return to Jamaica as a family unit.

6. The respondent had acknowledged the agreement to reconsider their applications for further leave to remain, and stated that the applications under Article 8 of the Human Rights Convention had been reconsidered, taking into account s.55 of the Borders, Citizenship and Immigration Act 2009 as well as the immigration rules in place on 9 July 2012 (Appendix FM and paragraph 276 ADE of the rules).

7. Judge Martins set out in some detail the route to settlement in the UK. The applications were considered under the parent route in Appendix FM. The appellant had remained in the UK in breach of the immigration laws for more than 28 days and paragraph EX.1 did not apply in her case.

8. The respondent noted that the second appellant was not a British citizen, although he had lived in the UK for more than seven years prior to the date of the application. However, it was considered that it would not be unreasonable to expect them to leave the UK as the second appellant would be returning to Jamaica with his mother as a family unit and it was not accepted that the requirements of paragraph EX.1 were met.

9. Regard was also had to the appellant's private life under the provisions of paragraph 276ADE. She did not satisfy the requirements.

10. The second appellant did not meet the requirements of leave to remain as a child under Appendix FM. Insofar as the child's private life under paragraph 276ADE was concerned, Judge Martins had regard to the respondent's reasons at [11]. The respondent was not satisfied that he met the requirements of paragraph 276ADE. It was reasonable to expect him to leave the UK because he would be returning to Jamaica with his mother as a family unit. His mother would be able to help him adjust to the change and provide him with maintenance and accommodation. The second appellant had lived with his mother in the UK, a multi-cultural society with a resident Jamaican diaspora and therefore the respondent did not accept that the child had lost ties including social, cultural and family, to Jamaica.

11. It was noted by Judge Martins that the respondent also considered leave outside the rules [12]. However, she did not accept that there are any exceptional circumstances rendering their removal inappropriate.

12. The respondent also had regard to her duties under s.55 of the Borders, Citizenship and Immigration Act 2009 [13]. The child would be returning to Jamaica with his mother, who would be able to support him while he adjusts to living there and enjoying his full rights as a citizen of Jamaica. Although he is currently enrolled in education in the UK, Jamaica has a functioning education system which he would be able to enter.

13. There was no evidence indicating that the appellant would be unable to maintain her child in Jamaica or that she would be unable to provide for his safety and welfare. They would be returning to Jamaica as a family unit and would continue to enjoy family life together.

14. Whilst that may involve a degree of disruption to their private life, this was considered to be proportionate to the legitimate aim of maintaining effective immigration control and is in accordance with the respondent's duties under s.55 of the 2009 Act.

15. Finally the Judge noted that the respondent considered the factors under paragraph 353B of the Rules in addition to representations submitted on their behalf [14]. The appellant had remained in the UK without leave since 31 May 2006 when her leave expired. It was not accepted that the length of time she spent in the UK since refusal of her leave to remain application meant that her removal from the UK was not appropriate.

16. A one-stop notice was issued under s120 of the Nationality, Immigration and Asylum 2002 Act.

The appellant's case before the First-tier Tribunal

17. The grounds of appeal before the First-tier Tribunal contended that EX.1 of Appendix FM applied and that the respondent had not taken account of her own guidance in respect of children who have lived in the UK for more than seven years, over which time they started to put down roots and integrate into the UK. The same criticism was made of the respondent's consideration under s.55 and her treatment of their private life claims. Judge Martins noted that the pertinent case law was also cited in the grounds [15].

18. In her determination Judge Martins summarised evidence that the appellant gave at the hearing. She is Jamaican. She entered the UK in December 2002. She has a brother and a sister who originally lived in Jamaica. Her mother came to the UK some 30 years ago and is a British citizen. Her brother and sister are both British citizens who live in the UK. She has two half sisters who are also settled in the UK as British citizens.

19. Judge Martins referred to her immigration history and the fact that she was granted further leave to remain until 31 May 2006. Thereafter, her application in the same category was refused. She contended that she had

made an application for settlement as all other members of her family are settled in the UK. Her father has died. She has nobody in Jamaica.

20. She made a subsequent fresh application on 19 August 2011 for a grant of leave outside the rules which was also refused. She made further representations for reconsideration. She waited over two years since the application was made in August 2011.

21. Further reconsideration requests were not responded to by the Home Office and with no likely outcome "....she made a fresh paid for application in October 2013 for further leave to remain in the United Kingdom". She included in her application her minor son in the light of the amended immigration rules, incorporating former Home Office policy (DP 5/96). This related to children who had been in the UK for seven years. The applications were refused in letters dated 16 November 2014 [20].

22. The evidence relied on before Judge Martins regarding the second appellant was that he was born in September 2005 in London and at the date of application, was 8 years and 5 months. He had lived in the UK throughout the whole period and had never left the country. He does not have a Jamaican passport.

23. When the appellant made her witness statement on 9 April 2015, her son was 9 years and 3 months old. She claimed in evidence that it was wrong to assert that her son had not formed strong cultural and social ties in the UK as he has lived here his entire life and grown up in the British culture [21]. He has friends and relations here.

24. When her application was made under the amended immigration rules (Appendix FM) she applied for judicial review. Eventually the respondent offered to reconsider the application dated 17 October 2013 and to grant a right of appeal if it was refused. The appellant then withdrew her judicial review application [23].

25. In cross examination, The appellant stated that she is supported in the UK by her mother, brother and sisters. She lives with her mother who looks after her and her son in terms of buying food and clothes. She receives financial support from her siblings. She accepted that were she to return to Jamaica they would no doubt try to help her for a short period but as life is difficult everywhere they would not be able to help her "consistently" [26]. She does not have much education and she did not go to school. It would be difficult to make a living in Jamaica to look after her child.

26. Judge Martins heard evidence from the appellant's sister who confirmed that the appellant is a good mother and has been a good sister. She will try to support the appellant financially if she returns to Jamaica, but it would be far more expensive to support her. She would not be able to afford to visit them in Jamaica. She takes holidays abroad such as in Paris, which is cheaper than Jamaica.

27. A witness who is a member of the appellant's church gave evidence. She testified to the appellant's participation in community projects. She was not cross examined [29-30].

The First-tier Tribunal's findings

28. In her assessment Judge Martins stated that she had had the opportunity of hearing and observing the appellant, her sister and a friend give evidence. This they did in a straightforward and helpful manner. She found them credible.

29. However, the fact remained that the appellant has not had leave to remain in the UK since May 2006. She has made various applications in an attempt to regularise her stay without success [33].

30. Her case was put on the basis that paragraph EX.1 applies as her son has lived in the UK continuously and it would not be reasonable to expect him to leave the UK. However, the requirements to be met for limited leave to remain as a parent under Appendix FM require that the appellant must not be in the UK in breach of immigration laws.

31. The requirements under EX.1 are that the appellant and her son have a genuine and subsisting parental relationship and that it would not be unreasonable to expect the child to leave the UK [35].

32. In that respect, the Judge noted that the second appellant was “some ten years of age” at the date of the hearing. He was born in the UK. He had known no other life other than life in the UK and with his extended family, particularly his grandmother, with whom he and his mother live.

33. The Judge had regard to the submission that there are no family members in Jamaica who could assist the appellant on her return. However, the appellants have not had permission to be in the UK. They are both in good health and although there is no doubt that it would be an adjustment for the second appellant on his return to Jamaica, a country which he does not know, he would be returning with his mother, who has spent 25 years of her life there and would therefore be able to assist him in adapting. Although difficult, the family in the UK could assist the appellants from here to settle in Jamaica as they have been supporting the appellant in the UK [36].

34. The Judge had regard to the s.117B considerations regarding the public interest in such cases. It was in the public interest that those who seek to enter or remain in the UK are financially independent, such that they are not a burden on taxpayers and better able to integrate into society. She had regard to s.117B(4) noting that the weight to be given to a private life established by a person who is in the UK unlawfully. Little weight should be given to a private life established by a person when their immigration status is precarious [37].

35. She concluded that for the reasons given, it would not be unreasonable to expect the second appellant to return to Jamaica with his mother [38]. The

appellants had failed on the totality of the evidence to discharge the burden on them. The decision was in accordance with the law and the Rules [39].

The Upper Tribunal hearing

36. Mr Kannangara submitted that the Judge had accepted that the second appellant is a minor who is now nearly ten years old. The appellant is a single mother. The only issue was whether it is reasonable to expect the child to live in Jamaica where he has never been in his life.

37. He submitted that the Judge's findings are only to be be found in paragraphs 33 to 37 of her decision. It is evident that the only reasons she has considered and given were that the child would be returned with his mother and therefore it was reasonable to expect the child to leave the UK.

38. He submitted that the Judge has not given consideration to relevant legal principles in this particular area. If the only reason that the Judge could find was that the child would be leaving with the mother that would defeat the purpose of the rule. The child is likely to live with his parents. He thus submitted that the reasonableness test goes beyond the fact that the child would be returned with the parent.

39. Mr Kannangara also submitted that the Judge failed to consider the Home Office guidance relating to the seven year rule set out in the IDIs under the title “Guidance on paragraph EX.1 – consideration of the child's best interests.” He referred in particular to that part of the guidance which deals with a non-British citizen child who has been in the UK for more than seven years.

40. The guidance recognises in respect of the seven year threshold that over time children start to put down roots and integrate into life in the UK to the extent that being required to leave the UK may be unreasonable. The guidance instructs that “.....you need to consider whether in the specific circumstances of the case, it would be reasonable to expect the child to live in another country. You will need to consider the facts for each child within that family, and for the family in the round.”

41. He submitted that the Judge failed to consider the child's best interests, in particular under s.55 of the 2009 Act. He relied on authorities such as ZH (Tanzania) v SSHD [2011] UKSC 4, which requires a proportionality assessment applying the child's best interest principle as a starting point. The next step is to consider whether the best interests are outweighed by the strength of any other countervailing consideration. Nor should a parent's “mistake” be visited on a child.

42. Mr Kannangara, who had also represented the appellant at the hearing, stated that no consideration was given by Judge Martins to the decision in Azimi-Moayed and others (Decisions affecting children; onward appeals) [2013] UKUT 197 (IAC). The Judge had also failed to consider the decision in JO and Others (s.55 duty) Nigeria [2014] UKUT 00517 (IAC) where it was

held that the duty imposed by s.55 of the 2009 Act requires the decision maker to be properly informed of the position of a child affected by the discharge of an immigration function. The decision maker must conduct a careful examination of all relevant information and factors.

43. Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter related tasks of identifying a child's best interests and then balancing them with other material considerations.

44. The question whether the duties imposed by s.55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or Tribunal considering the question will frequently be confined to the application or submission made to the secretary of state and the ultimate letter of decision.

45. Mr Kannangara also submitted that the Judge did not consider various letters from the appellant's mother, brother, sister and various friends produced from pages 66-88 of the bundle.

46. On behalf of the respondent Ms Isherwood adopted the Rule 24 response in which the respondent contended that whether viewed through the prism of Rule 276ADE(1)(iv) (private life of the child) or that of EX.1 of Appendix FM, or indeed under s.117B(6) of the 2002 Act, the material test was one of reasonableness for the qualifying child.

47. The IDI guidance relied on is entirely consistent with the long established understanding of “reasonableness” referred to in EB (Kosovo), the rule itself and EV (Philippines), supra.

48. The Judge's analysis of the position of the child was consistent with EV (Philippines) and Others v SSHD [2014] EWCA Cic 874 (CA).

49. Moreover, a Judge is entitled to consider s.55 issues themselves through the prism of proportionality, which this Judge did – MK (s.55 – Tribunal Options) [2015] UKUT 223 (IAC).

50. Ms Isherwood submitted that that there had been no material error of law. There was a reasoned decision which was nine pages long. The respondent's letter itself referred to the s.55 considerations.

51. She submitted that the Judge was entitled to find that the appellant has had no basis to be in the UK for a very significant period. The reasons for refusal letter had also referred at page 6 to the guidance relied on.

52. She submitted that no alternative decision could have been reached. The findings were open to the Judge. The Judge acknowledged the evidence and letters of support but found that s.117B (4) required that little weight should be given to a private life established by a person when that person is in the UK unlawfully.

53. At [38] of the First-tier Tribunal's decision, the Judge has considered the second appellant's position. She has also acknowledged the impact of a return to Jamaica on the child. In the event she submitted that there had been no material error of law.

54. In reply, Mr Kannangara again submitted that the child was not to be visited with the “mistakes” of his mother. The child was almost ten years old at the date of hearing.

Assessment

55. The Judge has set out and considered in some detail the evidence presented by the appellants, including the appellant's immigration history. She referred to the bundle of documents that was submitted, including the witness statements and letters of support from members of the family and friends, as well as considering letters from the appellants' GPs and evidence regarding the second appellant's education in the UK [17]. She has set out the evidence of the appellant, her sister and Ms Adzam.

56. The Judge has had regard to the immigration history of the second appellant. In arriving at her finding that it was reasonable for the family to relocate to Jamaica, she has taken into account the facts as set out in the earlier paragraphs in support of her conclusions.

57. I have had regard to the decision in EV (Philippines, supra, and in particular to [35], [37] as well as the comments of Lord Justice Lewison at [49], where he stated that in the real world, the appellant is almost always the parent who has no right to remain in the UK. The parent thus relies on the best interests of his or her children in order to “piggyback” on their rights.

58. Lord Justice Lewison noted that in the case before the court of appeal, as no doubt in many others, the Judge made two findings about their best interests:

(a) The best interests of the children are obviously to remain with their parents; and

(b) It is in their best interests that education in the UK is not to be disrupted.

59. At [58], Lord Justice Lewison stated that the assessment of the best interests of the children must be made on the basis that if one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, it is the background against which the assessment is conducted. Thus the ultimate question will be, is it reasonable to expect the child to follow the parents with no right to remain in the country of origin?

60. I have also had regard to the decision in Azimi-Moayed and others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC).

61. It is correct as asserted by Mr Kannangara, that the Judge has not in her decision expressly referred to the need to consider the child's interests as a primary consideration.

62. However, it is necessary to consider whether as a matter of substance, she has properly approached the assessment of the child's interests as a primary consideration. She has set out in some detail and has had regard to the evidence relating to the second appellant, including the fact that he was “some ten years of age” at the date of the hearing. She acknowledged that he was born here and that he has known no other life other than being here with his extended family.

63. She had regard to the difficulties of adjustment that he would have on his return to Jamaica, a country which he does not know. Against that he would be returning with his mother who had spent 25 years of her life there and who would be able to assist him. The UK family would assist the appellants from the UK to settle in Jamaica as they had done in the UK.

64. However, against that she noted that neither appellant has had permission to remain in the UK. They are both in good health.

65. The Judge also properly considered as required to, the provisions of s.117B of the 2002 Act as amended.

66. The Tribunal needs to assess the best interests of children on the basis of facts as they are in the real world. In this case, the appellant had no right to remain. Accordingly, that is the background against which the assessment is to be conducted. The ultimate question is whether it would be reasonable to expect the child to follow a parent with no right to remain to Jamaica. The Judge bore in mind the overall factors making removal of the child reasonable in the circumstances.

67. It is not contended that there was any significant factor, apart from the fact that he had been here for almost ten years throughout his life, that had been left out of the account relating to the second appellant which affected her assessment of his interests in returning to Jamaica.

68. Although the First-tier Tribunal might have given a more structured determination in respect of the second appellant's best interests, I am satisfied that she has in fact properly appreciated and considered the significance of all the evidence relating to their circumstances in the UK.

69. Having assessed the determination as a whole, I find that the Judge has in substance considered the best interest of the child as required and has concluded that in the circumstances it would be reasonable for him to return to Jamaica with the appellant. Those findings were neither irrational nor perverse in any way. The Judge has given proper reasons for the conclusions reached.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any material error of law. The decision shall accordingly stand.

No anonymity direction is made.

Signed Date: 14 September 2015

Deputy Upper Tribunal Judge Mailer