Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/34054/2015**

IA/34053/2015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 18 October 2017 **On 24 October 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

LC (FIRST APPELLANT)
LDB (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Aslam, Counsel instructed by Solomon Shepherd Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Brazil. LC is the mother of LDB. LC's date of birth is 27 April 1982 and LDB's 27 February 2007. Their application to remain on human rights grounds was refused by the Secretary of State on 23 October 2015. The Appellants appealed and their appeal was dismissed on Article 8 grounds by Judge of the First-tier Tribunal Gaskell in

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a decision promulgated on 8 February 2017, following a hearing on 22 December 2016. Permission was granted to the Appellants by Judge of the First-tier Tribunal Grant-Hutchison on 24 August 2017.

2. The grounds are lengthy. They argue that the findings of the judge are contradictory insofar that the judge directed herself that the child Appellant should not be disadvantaged because of the behaviour of her mother, but then the judge went on to conclude that as a result of her mother's immigration history there could be no expectation of the child being able to access the education system here. It is argued that the judge engaged in speculation and conjecture and specific reference is made to paragraphs 31 and 38. It is argued that the judge failed to provide adequate reasons and that there were no proper credibility findings made in respect of the adult Appellant's evidence and the impact of removal on the child Appellant. It is argued that the judge erred in respect of Section 117B (6) of the 2002 Act. It is argued that seven years is significant and the judge failed to identify powerful reasons why it was reasonable for the child to leave the UK. It is argued that the judge erred in failing to have regard to the fact that the second Appellant was, at the date of the hearing, two weeks short of completing ten years residence which would entitle her to British citizenship. I have been informed by Mr Aslam that the child is now a British citizen.

3. I will set out the salient parts of the decision of the judge and those are paragraphs 29 through to the end of paragraph 39:-

> "29. I first consider the position of the 2nd appellant in isolation. My first consideration is the 2nd appellant's 'best interests' as required by Section 55 (Paragraph 21 above). The 2nd appellant is clearly thriving in the UK educational system; I have been provided with no information or evidence as to the standard of education in Brazil. For the purpose of this consideration I will assume that educational standards in Brazil are inferior to those in the UK; but Brazil has a functioning and sophisticated education system; providing, probably, a better education than is available to the vast majority of children in the world. On the narrow test of her education alone, it would be easy to conclude that the 2nd appellant's best interests require her to remain in the UK. But, the same conclusion may not be reached on a wider analysis; she is living in the UK with a single mother without the support of wider family; she has many friends among her peer group; but she is deprived of contact with her grandparents and her extended family; no consideration appears to have been given for examples as to what the position might be finding the 1st appellant were taken ill and needed hospital care. In my judgement, on the evidence available to me, I cannot conclude that the 2nd appellant's best interests are necessarily served by her remaining in the UK. In my judgement her best interests are more likely to be served by her living in Brazil with her mother and her extended family.

30. In any event, whilst the 2nd appellant's best interests must be and have been considered, they are not determinative of her appeal. Under the Immigration Rules – Paragraph 276ADE (iv), having lived in the UK for a continuous period exceeding 7 years (in the 2nd appellant's case for the whole of her life), she would be entitled to leave to remain on the grounds of her private life if the tribunal were to find that it would not be reasonable to expect her to leave the UK.

31. I have now considered the position of the 1st appellant in isolation (without reference to the fact that she has a child). In my judgement, on this basis, for the following reasons, whether considered inside or out with the Immigration Rules, her appeal is totally without merit:-

    (a) Self-evidently she does not meet the requirements of Paragraph 276ADE(1)(iii)-(v) of the Immigration Rules.
    (b) In my judgement, she does not meet the requirement of Paragraph 276ADE(1)(vi); there are no significant obstacles to her return and re-integration into Brazil. The 1st appellant is clearly a highly resourceful woman; she has gained entry to the UK on 2 occasions; and she has supported herself illegally for more than 10 years. There is therefore no reason to suppose that she could not support herself illegally in Brazil. Further, in Brazil, she has support available from her parents and brothers.
    (c) Although she may have friends in the UK; and she may lose contact. She must also have friends in Brazil and will make new ones. In Brazil she has family members from whom support could be derived. She is of an age (34 years) where it is not unusual for there to have to be relocation; be it for employment purposes; marital breakdown; or family need.
    (d) The provisions of Section 117B(4) (Paragraph 20 above) clearly operate against her in terms of the balance to be struck between the interests of her private life and the respondents (sic) legitimate interest in pursuing proper immigration control.

32. I have next considered the position of the 1st appellant having regard to the fact that she is the mother of the 2nd appellant. The 2nd appellant, having lived in the UK for more than 7 years, is clearly a 'qualifying child'.

33. When considering the 1st appellant's appeal under Appendix FM of the Immigration Rules on the basis that she is a parent, she immediately falls foul of the immigration status requirement – Paragraph E-LTRPT.3.2; the 1st appellant has been living in the UK illegally at all material times. The appellant can only therefore qualify under the Immigration Rules if Paragraph EX1 applies.

This depends on whether or not it is reasonable to expect the 2nd appellant to leave the UK – Paragraph EX1(a)(ii).

34. Considering the 1st appellant's appeal on the basis of her parenthood, but outside the Immigration Rules, I must consider the provisions of Section 117B(6) (Paragraph 20 above) in considering whether it would be proportionate to remove the 1st appellant from the UK – I must again consider whether it would be reasonable to expect the 2nd appellant to leave.

35. By whatever route, the test which determines these appeals under the Rules is whether or not it is reasonable to expect the 2nd appellant to leave the UK. This is the test applicable directly to her appeal pursuant to Paragraph 276ADE(1)(iv) of the Immigration Rules; and it is also the test to be applied to the 1st appellant when considering her appeal by reference to Appendix FM and Section 117B(6).

36. So, the question to be answered is '*whether or not it is reasonable to expect the 2nd appellant to leave the UK?*' In my judgement, it is not remotely unreasonable to expect her to leave. Of course, she must not be disadvantaged because of her mother's unlawful behaviour; but, on the other hand, in my judgement, where a child has substantially benefited directly from her mother's unlawful behaviour (by accessing the UK education system), she has no reasonable expectation of continuing to receive that benefit indefinitely; and after her mother's unlawful conduct has been detected.

37. The 2nd appellant is clearly a highly intelligent child; she would return to Brazil with the benefit of her early years' education in the UK. I fully anticipate that any sophisticated education system will have the means in place to receive children who, for whatever reason, moved to a new country part-way through their education.

38. The 2nd appellant is of an age where inevitably her private life mainly centres on her mother. Of course she has friends in the UK who she will miss when she leaves; but it is not at all unusual for children of her age to have to re-locate with their parents often because of the demands of parental careers; or, as stated earlier, marital breakdown; or family need. She is of an age where she will learn new skills including the mastery of Portuguese very quickly; she will make new friends very quickly; and, of course, it is not inevitable that she will lose contact with her existing friends.

39. I have considered the question of the 2nd appellant's relationship with her father; but so little information has been provided with regard to this; and he appears to take so little part in her

upbringing; (and in any event he himself may not be lawfully resident in the UK); that my conclusion is that this does not disrupt the reasonableness of requiring the 2nd appellant to leave."

Error of Law

4. The grounds conflate the tests in relation to the best interests of the child and the assessment of reasonableness under Section 117B (6). However, they are in reality a challenge to the findings of the judge in respect of the child Appellant. In my view, the judge erred in respect of the assessment of the child's best interests at paragraph 29 of the decision. The remaining paragraphs relate to the reasonableness/proportionality assessment. They are different tests. The best interest's assessment is child centred and the reasonableness test requires a holistic assessment, taking into account all matters including a parents immigration history.

5. In this case the judge was not assisted by the Appellants. It may be that they were poorly served by their representatives, but the evidence was lacking. However, there were material matters, not in dispute, which the judge did not properly factor into the assessment of the child's best interests. The judge should have had regard to the child's age, the length of time that she has been here (attaching significance to the material fact that she has been here in excess of 7 years, 9 at the date of the hearing), the stage reached in her education and ties with Brazil. (I appreciate that the evidence was lacking, but there was no suggestion that the child had ever been to Brazil). The judge should have considered any difficulties in adapting to life in Brazil, simply as a result of the length of time she has been here. The longer the child has been here, the more advanced the stage of education, the looser his ties with the country in question, and the more deleterious the consequences of his return (see EV (Philippines) v The Secretary of State for the Home Department [2014] EWCA Civ 874 at paragraph 35). The judge attached significance to a hypothetical situation; namely, the impact on the child Appellant should her single parent mother fall ill and need hospital treatment. I am satisfied that there was a degree of speculation involved. In any event, whilst this may be a consideration that the judge was entitled to consider, he attached significance to this without proper consideration of the material matters identified above.

6. The judge considered some of the above mentioned factors in context of reasonableness at [37] and [38], but they were not all adequately engaged with in respect of the child's best interests which were considered as a discrete issue at [29]. The judge erred because the assessment of the child's best interests was inadequate and the decision inadequately reasoned. The error is material. The assessment of child's best interests is not determinative of the appeal. However, the judge's assessment is flawed. It is far from certain that had he properly considered the child's best interests, he would have reached the same conclusion in

respect of proportionality. His conclusion, that it is in the child's best interest to return to Brazil with her mother, unarguably informed the reasonableness/proportionality assessment and for this reason the error is material. The decision is set aside.

Notice of Decision

7. I set aside the decision because the judge materially erred. The matter is remitted to the First-tier Tribunal for the matter to be determined de novo. It will be a matter for the Appellants to submit whatever evidence they wish.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 20 October 2017

Upper Tribunal Judge McWilliam