Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number AA/05070/2014

THE IMMIGRATION ACTS

Heard at Field House **Decision and Reasons Promulgated**
On 18 December 2014 **On 13 January 2015**

Before

The Honourable Mrs Justice Carr DBE
Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Secretary of State for the Home Department
Appellant

and

GD
(Anonymity order made)
Respondent

Representation
For the Appellant: Mr. L. Tarlow, Home Office Presenting Officer.
For the Respondent: Mr. R. Reynolds of Counsel instructed by Sutovic & Hartigan.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Siefert promulgated on 3 November 2014, allowing the appeal of GD against the Respondent’s decision dated 3 July 2014 to remove her from the UK.

2. We continue the anonymity order that has already been made in these proceedings pursuant to Rule 14 of the Tribunal Procedure (Upper

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Tribunal) Rules 2008 (SI 2008/269). **Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

3. Although in the proceedings before us the Secretary of State is the appellant, and GD is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to GD as the Appellant and the Secretary of State as the Respondent.

Background

4. The Appellant's personal details are a matter of record and are not reproduced here in full in line with the anonymity order. By the date of the hearing before us the Appellant was just short of her 25th birthday. She was born in the Democratic Republic of Congo (DRC). However, her nationality has been a matter of controversy: the Respondent considered her to be a national of Angola, and indeed in due course the First-tier Tribunal Judge concluded "*that it has not been shown on the available evidence that she is a DRC citizen and that it is most likely that she is an Angolan citizen*" (paragraph 45).

5. The Appellant's immigration history may be taken from the summary at paragraphs 2-7 of the First-tier Tribunal's decision:

"*GD left the DRC in July 2004 when she was 14 years of age. On 5 July 2004 GD arrived in the UK using a DRC passport.*

On 27 August 2004 GD made an application as an Angolan National for indefinite leave to remain as the child of a person present and settled in the UK, her father. That application was refused on 15 January 2008. Her appeal was dismissed in March 2008.

On 28 March 2013, GD made an application for leave to remain relying on Article 8 of the ECHR. That application was refused on 21 May 2013. GD did not appeal against that decision.

On 19 June 2013, GD claimed asylum.

On 3 July 2014 a decision was made to refuse to grant asylum under paragraph 336 of HC 395 (as amended) of the Immigration Rules, to refuse to grant Humanitarian Protection and under human rights. On 3 July 2014 a decision was made to remove GD from the United Kingdom by way of directions under section 10 of the Immigration and Asylum Act 1999.

GD appealed against the decision."

6. Further details of the Appellant's personal history are set out at paragraph 19:

   "- She was born in Kinshasa, DRC [in] December 1989. Her father left the DRC when she was two years of age. Her mother left her when she was a baby. She used to live with her grandmother in Kinshasa and attended school there for 8 or 9 years.
   - On 5 July 2004, when she was 14 years of age, she came to the UK because her grandmother was too old to look after her. She travelled to the UK with her father's friends.
   - She was taken to her father's friend's house in Lewisham. Her father's friend, his wife and child lived there. Her father did not stay there. She stayed there for 4 or 5 months. She helped the family with cleaning, shopping and helped pick up their child from school. She was not forced to do these things, but felt she had to otherwise she would be shouted at. She did not attend school. She was not locked in the house, but felt she could not leave the house as she was too young. Her father visited at the weekends. The woman in the house was not physically violent to her, but she felt scared. She shared a bedroom with her father's friend's daughter and sister. She was not paid for helping in the house.
   - In December 2004 she moved to her father's house in Tottenham. She had her own bedroom. She attended school from 2004 to 2007. At the weekends she stayed at her father's friend's house. This stopped when she told her father that she had to study more. Her father used to shout at her and on one occasion he threatened her with a knife. She lived with her father for one year or one and a half years.
   - In 2005/2006, when she was about 15 years of age, she was taken into care by social services because her father hit her with a chair. She is now estranged from her father. She has not spoken to her grandmother in the DRC since she left her father's house in 2005/2006.
   - She attended college from 2007 to 2009 where she studied Child Care. She has been volunteering as an usher at Zion Church in North London."

7. Paragraphs 40-42 of the First-tier Tribunal decision relate further information concerning the involvement and support of social services in the Appellant's life.

8. For completeness we note that, notwithstanding the circumstances of the Appellant's arrival in the UK and the domestic duties undertaken at the address of her father's friend, there was a separate, unchallenged, decision taken on 18 June 2014 that the Appellant was not a victim of trafficking for the purpose of domestic servitude: see determination at paragraph 21.

9. The First-tier Tribunal Judge found the Appellant to be a credible witness in respect of her life in the DRC, and also found her account of events since she came to the UK to be credible (paragraphs 45 and 46).

10. The Judge determined that the Appellant was "*most likely*" an Angolan citizen (paragraph 45). It is clear that the Judge did not consider the Appellant's claim to be a citizen of DRC, or the timing of her application for asylum, to be damaging to her credibility. Implicit is that he accepted the submission made on the Appellant's behalf that she genuinely considered herself to be a citizen of the DRC by reason of having been born there and having lived there until she came to the UK. The finding that the Appellant was most likely an Angolan citizen was based on her father's nationality. It is to be noted, however, that an enquiry made of the Angolan Embassy in the UK on behalf of the Appellant by Haringey social services as to how she might establish her nationality did not apparently result in any response. Moreover, the Appellant has never visited Angola.

11. The Judge dismissed the Appellant's asylum appeal and claim for humanitarian protection for reasons set out at paragraphs 49-69.

12. Consideration was then given to the Appellant's private life pursuant to paragraph 276ADE of the Immigration Rules. The Judge quite properly rejected the Respondent's case on suitability under 276ADE(i) and Section S-LTR of Appendix FM: see Respondent's 'reasons for refusal' letter of 3 July 2014 at paragraph 44, and determination at paragraph 75. However, in respect of 276ADE(vi) the Judge found "*it has not been shown to the required standard that GD has no ties with Angola or with the DRC. GD has two uncles in Angola with whom she has some contact as referred to in the evidence. In respect of the DRC, GD has her grandmother there, although they are not currently in contact. She speaks Lingala and French*".

13. There is no cross-appeal before us in respect of this finding.

14. The Judge then considered the Appellant's case pursuant to Article 8 of the ECHR, and concluded that "*it has been shown that the Respondent's decision constituted a breach of GD's right to private life under Article 8 of the ECHR*": see paragraphs 80–88.

15. Accordingly GD's appeal was allowed on human rights grounds.

16. The Respondent sought permission to appeal to the Upper Tribunal which was granted on 19 November 2014 by First-tier Tribunal Judge Frankish.

Consideration

17. Mr Tarlow on behalf of the Respondent essentially relies upon the grounds drafted in support of the application for permission to appeal.

18. The Respondent contends that the First-tier Tribunal Judge failed to have proper regard to the public interest considerations outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. In particular, it was submitted that the Judge

erred in his approach to the issue of financial independence (section 117B(3)); further, it was submitted that the Judge erred in having regard to the circumstances in which the Appellant had come to be in the UK unlawfully and/or ‘precariously’, rather than simply attaching little weight to her private life (sections 117B(4) and (5)).

19. The relevant provisions of Part 5A of the 2002 Act are as follows:

“*117A Application of this Part*
(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
(a) breaches a person’s right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases
(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.

(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom."

20. Mr Reynolds in his submissions emphasised the words "*the court or tribunal must (in particular) have regard… to the considerations listed in section 117B*" in section 117A(2)(a). He submitted that such language indicated that the 'considerations' were matters to be taken into account "*in considering the public interest question*", but were not thereby determinative of it, or determinative of where the overall proportionality balance lay on the facts of any particular case. We accept that submission as being consistent with the plain and ordinary meaning of the statutory words.

21. Moreover, in our judgement the words "*in particular*" are clearly indicative of the 'considerations' in section 117B not being intended as an exhaustive list of relevant considerations.

22. In the premises, the 'considerations' are not determinative requirements, and do not constitute an exhaustive list of relevant factors to which regard is to be had in evaluating the public interest or proportionality under Article 8.

23. The First-tier Tribunal Judge plainly had section 117B in mind when determining the appeal. At paragraph 80 he made reference to the representatives' submissions and paraphrased sections 117B(4) and (5). Submissions relevant to the substance of section 117B(3) are also recorded at paragraph 81 of the determination. The Judge then expressly addresses section 117B at paragraph 87 in these terms:

"*I have taken into account section 117B of the Nationality, Immigration and Asylum Act 2002. Although the Appellant entered the UK unlawfully, it was noted that she was only 14 years of age at that time. Her initial application as the child of a person present and settled in the UK was made in 2004, and not determined until 2008. During that period, as a result of the incidents referred to in the evidence, she was taken into the care of Haringey social services, and from that time, her private life began to be established. She has no relatives in the UK, and from her evidence, it appears that she relies on the continued support of Haringey social services, and in particular her caseworker, for emotional support and direction. The requirement that little weight be attributed to private life established when her immigration status was unlawful areas should be regarded in that context. Although she is currently provided with*

accommodation and maintenance, she has expressed the wish, if permitted to remain, to become a social worker here and will therefore contribute to society."

24. Given the premises we have identified above at paragraph 22, we find nothing objectionable in the phrase "*The requirement that little weight be attributed to a private life established when her immigration status was unlawful or precarious should be regarded in that context*". It indicates both that the Judge had express regard to the requirements of section 117B(4) and (5), but also that he – entirely consistently with the scheme of Part 5A of the 2002 Act (as now amended) - set that 'consideration' in the overall context of the Appellant's case. The scheme of Part 5A appropriately is broad and flexible enough to permit a full and proper consideration of all relevant matters, including considerations beyond (and not inconsistent with) the express statutory 'instructions', and thereby to permit a decision-maker to accord such weight to other factors and circumstances as is appropriate.

25. This is in keeping with the fundamental underlying principle that an Article 8 evaluation by definition involves a personal assessment of an individual and is highly fact sensitive. Whilst the nature of 'public interest' may be relatively fixed, there is nothing in the statutory scheme that undermines the established imperative to conduct a fact-sensitive case-by-case analysis of the issue of proportionality. 'Public interest' informs only one side of the proportionality balance.

26. We find that that is what the Judge did.

27. We note that in granting permission to appeal First-tier Tribunal Judge Frankish suggested the need for judicial guidance as to whether the protection from penalty of a child for a parent's appalling immigration record referenced in **ZH (Tanzania) v Secretary of state for the Home Department** **[2011] UKSC 4** had any application in the context of section 117B. We do not consider that this is a matter that requires lengthy exposition on the facts of this particular case; we consider that First-tier Tribunal Judge Seifert adequately and sustainably had regard to all relevant considerations, according them such weight as he was required to do, either pursuant to Part 5A of the 2002 Act or otherwise as he saw fit when not statutorily confined, and reached a decision on proportionality that was open to him on the evidence.

28. Nonetheless we note the observations in **ZH (Tanzania)** in respect of recent European jurisprudence showing "*a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making*" - per Baroness Hale of Richmond at paragraph 20. See similarly per Lord Hope of Craighead at paragraph 44: "*But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle*

to devalue what was in their best interests by something for which they could in no way be held to be responsible".

29. Further, the best interests of a child remain a primary consideration: nothing in sections 117A-117D alters that principle. Parliament has not otherwise availed itself of the opportunity in passing the Immigration Act 2014 to amend section 55 of the Borders, Citizenship and Immigration Act 2007. Accordingly, 'best interests' must inform a consideration of proportionality under Article 8 as a primary consideration, notwithstanding the identification of specific considerations pursuant to Part 5A of the 2002 Act.

30. The jurisprudence in this area has developed through cases which in the main concerned a parent or parents – often undeserving in immigration terms – potentially securing an advantage in immigration terms, notwithstanding poor immigration histories, through the presence in the UK of a blameless child. We do not see – without having heard full argument on the point – that there is anything in the scheme of Part 5A that now denies a place for having regard to the lack of culpability of a child. This does not mean that the wider public interest could not justify a non-culpable individual being the subject of an adverse decision, or being indirectly affected by such a decision in respect of a relative: it will entirely depend on the particular circumstances of the case.

31. Be that as it may, in commenting upon the particular position of children we have not lost sight of the fact that the current appeal is concerned with an adult. In our judgement her lack of culpability for her unfortunate immigration history when a child was a relevant consideration in the overall proportionality balance, and one to which the Judge was entitled to have due regard. Moreover, that was only part of the case. What the Judge has clearly given particular weight to is the quality of the Appellant's private life established in the UK and the achievement of stability from very difficult origins and the abuse of her father, (see especially paragraph 86), and necessarily therefore the extent of interference with the Appellant's private life inherent in a removal to a country which the Appellant has never visited.

32. In reaching his conclusion we consider the First-tier Tribunal Judge gave very careful consideration to all relevant circumstances, including in particular the public interest, and we do not accept the basis of the Respondent's challenge that the Judge failed to have proper and due regard to section 117B of the 2002 Act.

33. We acknowledge there is substance to the criticism of the Judge's comment to the effect that the Appellant's ambition to become a social worker was such that she "*will*" therefore contribute to society. We do not consider that the Judge is to be criticised for having consideration to possible future circumstances: because the 'proportionality' assessment is concerned with the impact of the public interest if an applicant or

appellant is permitted to remain it necessarily has a prospective element. However, because the Appellant's identified future contribution to society was contingent on the Appellant achieving her ambition, the Judge should more properly have stated that the Appellant "*may*" contribute to society. Nonetheless, in the overall context of the particular proportionality exercise conducted by the Judge in this case, we are not persuaded that what has every appearance of being a grammatical slip amounts to a material error of law such as to impugn the Judge's conclusion.

34. In all of the circumstances we reject the Respondent's challenge to the decision of the First-tier Tribunal. The decision of Judge Siefert contained no errors of law and therefore stands.

Notice of Decision

35. The decision of the First-tier Tribunal contained no material errors of law and stands. The Secretary of State's challenge is dismissed.

36. GD's appeal remains allowed on human rights grounds.

Deputy Judge of the Upper Tribunal I. A. Lewis **11 January 2015**