



IAC-FH-CK-V1

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

Appeal Number: DA/01327/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 21<sup>st</sup> December 2015**

**Before**

**UPPER TRIBUNAL JUDGE MARTIN**

**Between**

**MS J E J  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr R Sharma, Counsel instructed by Nadia Zeb & Co Solicitors  
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the Appellant's appeal against a Decision of First-tier Tribunal Judge Callow promulgated on 12<sup>th</sup> March 2015. Permission to appeal was granted to the Appellant on the basis of arguable inadequacy of consideration of the best interests of the child in the case.
2. In this appeal the Appellant is a Jamaican national who had appealed against a Decision to deport her following conviction for a serious fraud offence and a sixteen month prison sentence. It is of note that she had a previous eleven month sentence

for related offences. The First-tier Tribunal judge quoted the sentencing remarks at paragraph 6 of the determination indicating that the judge had said:

“You pleaded guilty to a sequence of very serious offences indeed involving a total loss to the taxpayer of in excess of £195,000. In effect, from the facts that we have heard about this afternoon you have essentially lived a lie in this country since the mid-1990s since when you have dishonestly claimed this colossal sum of money, none of which you were entitled to, regardless of what might have been the position had you been legally and appropriately in this country under the proper name, the fact of the matter remains is that you were not entitled to any of this.

It follows that only an immediate prison sentence can possibly be justified for dishonesty on this scale. Because your offending is connected with the false identity it is clear to me that you carefully planned all this and continued to execute your plan over an extended period of time; that, in my judgment, is an aggravating feature underlying already significantly dishonest behaviour.

I also bear in mind that you have served an eleven month prison sentence for using the false passport to gain entry into the country, and I recognise that there is an important link, albeit a dishonest one, between that offence and these offences for which you fall to be sentenced today.”

3. It is clear from the Decision and Reasons that the judge found the Appellant to be a thoroughly unreliable and dishonest witness in that she had lied for years about her identity; she had claimed British nationality to which she was not entitled; she had married a Jamaican national and gave evidence at his appeal, all of which based on untruths. She was not honest about her ties to Jamaica, seeking to hide the fact that she has a married sister and a mother there and that she visited there in July 2008, twice in 2009 and again in 2011. She has an adult daughter in the UK who is 38 and married with children. She also has a son in the UK and the two daughters that she lives with. Those younger children were born in October 1996 and September 1998. Only the youngest is a minor and it is her best interests that are relied upon in the grounds seeking permission to appeal. Those two younger children had British citizenship by virtue of being born to a “British” mother. When mother’s fraud became known their passports were revoked. However, subsequently they have been granted British citizenship and were treated as British citizens by the First-tier Tribunal judge.
4. The judge considered the best interests of the minor child at paragraph 30 although it is fair to say that most of his consideration consisted of setting out case law. Notwithstanding that the conclusion the Judge came to was that it was in the child’s best interests to live with her mother. Whether the Judge’s consideration of the child’s best interest was lacking or not, any error was in her favour. The question then that the judge asked was whether her best interests were outweighed by other matters.
5. It is true that the judge misdirected himself as to the appropriate law and the relevant Immigration Rules because he set out the Rules as they were prior to 28<sup>th</sup> July 2014 and the requirements since then are more stringent. Again, any error was in the appellant’s favour. By referring to the previous version of the Immigration Rules the Judge has not specifically addressed whether it would be unduly harsh for the child

to live in Jamaica with mother or whether it would be unduly harsh for her to remain in the UK without mother. The mother being sentenced to a period in excess of twelve months but less than four years, the exceptions contained in paragraph 399 may apply. She has shown a genuine and subsisting relationship with a child under the age of 18 years who is in the UK and a British citizen (paragraph 399(a)(i)). She must also show that it would be unduly harsh for the child to live in Jamaica and unduly harsh for the child to remain in the UK without her mother (Rule 399(a)(ii)).

6. Those were not addressed by the Judge. Mr Sharma relies on the Court of Appeal's Decision in SSHD v AQ (Nigeria), TH (Bangladesh), CD (Jamaica) [2015] EWCA Civ 250 as indicating the appropriate way to consider such cases and where the law currently stands. He relied on paragraphs 62 and 77. However paragraph 62 contains submissions, not the Court of Appeal's findings. It seems to me that the law is set out in paragraph 77 where Lord Justice Pitchford said:

"I agree with Mr Drabble QC that the question to be examined by the Tribunal was a practical and not a hypothetical one. In my judgment this is the effect of the Decisions of the Court of Justice in Dereci and the Decision of this court in Harrison (Jamaica). I cannot accept the Secretary of State's position that the Tribunal was only required to consider the ability of others to care for the child in the UK and was bound to ignore questions such as whether a family member would be willing to provide care or was under any familial or other responsibility to do so."

7. The question to be considered when considering "unduly harsh" is the practical effect. The Home Office Presenting Officer before me did not argue otherwise. Thus what has to be considered is the practical effect of the removal of the mother and whether that would mean that the child would be obliged to leave the UK.
8. The fact that the child is a British citizen is an important factor but that is recognised in the Rules because it is one of the factors for the exception to apply in paragraph 399. The unduly harsh provisions would not apply at all if the child was neither British nor settled here for a period of seven years or more. MF (Nigeria) [2013] EWCA Civ 1192 tells us that the Rules are a complete code so far as deportations are concerned and it is only if the exceptions do not apply that you then look at paragraph 398 to see whether there are very compelling circumstances over and above those referred to in paragraph 399 which could lead to the appeal being allowed and the public interest in deportation being outweighed.

We are also given guidance in KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC) that the word "unduly" in "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.

9. So the question in this case, the judge having made an error in terms of looking at the wrong version of the Rules, is would it be unduly harsh because, if it would not, then any error is immaterial and if it would, the error is material.
10. It is clear from the judge's sentencing remarks that the offences were serious. Mother has lied about her identity for years to gain support and advantages to which she

was not entitled. Her behaviour drives a coach and horses through immigration control. Bearing that in mind, the facts as found by the First-tier Tribunal Judge were that mother has family and connections in Jamaica and there are both education and medical facilities there. Unduly harsh means more than just harsh, uncomfortable or difficult, and the answer to the question in this case I find is that it would not be unduly harsh for the child to live in Jamaica with her mother.

11. However, as a British citizen she cannot be forced to go and the question alternatively and in that event is whether it would be unduly harsh for her to remain without her mother. Again I take the seriousness of the offences into account and note that mother has twice through her own actions separated herself from her minor child, when she was even younger than she is now, by committing criminal offences and spending time in prison. It is of note that during that period there was no requirement for Social Services to be involved because with the involvement and care of her two older sisters the child was able to remain in her own home. In other words, she has lived without her mother before with her older sister, now 19, and overseen by her sister who is 38. She is not an infant. On that basis I find that, looking at it in practical terms, mother's absence would not require this child to leave the country and she could remain with her family members if she chose to do so.
12. So far as very compelling circumstances are concerned, these were considered by the judge and he found that there were none, and on the facts as found, the public interest in deportation and the fact that it would not be unduly harsh either for the child to go to Jamaica or remain in the UK with her sisters I do not find the errors by the judge to be material. The appeal to the Upper Tribunal is thus dismissed.

### **Notice of Decision**

The appeal is dismissed

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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

Signed

Date 8<sup>th</sup> December 2015

Upper Tribunal Judge Martin

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 8<sup>th</sup> December 2015

Upper Tribunal Judge Martin