Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/30841/2014
IA/30850/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 February 2015	**On 5 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS SDO (FIRST CLAIMANT)
MISS SAO (SECOND CLAIMANT)
(ANONYMITY DIRECTION MADE)

Claimants

Representation:

For the Appellant: Ms A Holmes, Home Office Presenting Officer
For the Claimants: Ms Jones, Counsel instructed by A & P Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference I shall refer to the parties as "the Secretary of State" and to the appellants in the First-tier Tribunal as the "Claimants".

2. The Claimants are citizens of Ghana whose dates of birth are 6 March 1976 and 16 May 2002. They are mother and daughter. The first claimant came to the UK as a visitor in September 2004 returning in November

2005. She then travelled between the UK and Ghana during 2006 to 2008 and further made several visits to Italy where she held an Italian residence permit. She applied for a registration certificate as an EEA national in 2007 but this was refused. She last entered the UK as a visitor on 15 August 2008 with valid leave until 17 July 2009. The second claimant accompanied her on all visits.

3. In a determination promulgated on 28 November 2014 by the First-tier Tribunal (Judge Sangha) the appeal was allowed on human rights grounds and dismissed under the Immigration Rules. The Tribunal found that Article 8 ECHR was engaged and that the removal of both claimants would be disproportionate as it would have a "devastating" effect on the family life that would be destroyed.

4. An application for permission to appeal was made contending that the Tribunal's decision was wrong in light of findings made that the Claimants could not satisfy the Immigration Rules and could reintegrate into Ghanaian society. The Tribunal further failed to have regard to the fact that the second claimant was not a "qualifying child" and accordingly **ZH (Tanzania)** was not applicable. The Tribunal ought to have concluded that family life could continue in Ghana. It was further contended that the Tribunal failed to consider the issue of legitimate expectations, in circumstances that the Claimants could have had no expectation to live in the UK. There is no obligation on the UK to provide educational support for the second claimant who has special educational needs notwithstanding that there may not be comparable provision in Ghana. The Tribunal failed to have proper regard to relevant jurisprudence including **Zoumbas v SSHD [2013] UKSC 74** [24] and **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874** [59–61]. The Tribunal erred by placing little weight on their fundamentally "precarious" private life which could reasonably be established in Ghana and that they could reasonably be expected to reintegrate into Ghanaian society.

5. Permission to appeal was granted by First-tier Tribunal Judge Kelly on the following grounds;

> "It is arguable that the following matters constitute material errors of law in the Tribunal's determination of these appeals:
>
> (i) in the case of both appellants and contrary to Section 117B(4) of the Nationality, Immigration and Asylum Act 2002, attaching substantial weight to their private lives despite them having been established at a time when their presence in the UK was unlawful or at best precarious,
>
> (ii) in the case of the first appellant, and contrary to Section 117B(6) of the 2002 Act, assessing the public interest question by reference to whether it was reasonable to expect the second appellant to leave the UK when she was not a 'qualifying child' for the purpose of that subSection, and

(iii) in the case of the second appellant failing to consider her best interests against the background that the first appellant did not have leave to remain in the UK and thus failing to ask itself the 'ultimate question': 'is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?' (**EV (Philippines)** per Lewison LJ at paragraph 50). Insofar as the application contains other grounds that are not covered by the above summary, these may also be argued".

Error of Law Hearing

6. The First-tier Tribunal decision specifically referred to the skeleton argument prepared on behalf of the claimants and placed weight on the factors set out therein at [24]. At the hearing before me a copy of the skeleton argument was provided for Ms Holmes which she had the opportunity to consider. Ms Holmes relied on the grounds of the application and submitted that in essence the Tribunal disregarded significant relevant legal precedents and had not approached the issues within the appropriate legal framework, for example failing to follow the principles established in **ZH (Tanzania)** where the claimant was neither a qualifying child nor a British citizen and failing to have regard to principles in **Zoumbas** and **EV (Philippines).**

7. Ms Jones submitted that it had been accepted that the Claimants could not meet the requirements under Appendix FM and that the second claimant was not a qualifying child under paragraph 117B(6). She submitted that the finding under the Rules that the Claimants could reintegrate in Ghanaian society was not inconsistent with her decision under Article 8 ECHR.

8. The Tribunal placed weight on the fact that the second claimant had spent over six years residing in the UK which was a weighty consideration having regard to the guideline figure of seven years used to establish a substantial period of time. Ms Jones placed emphasis on the significant and important evidence of the second claimant's vulnerability, which had weighed heavily in the Tribunal's assessment. There was expert evidence as to the considerable restrictions, both physically and mentally, on the second claimant as a result of profound autism. The Tribunal found the interference disproportionate as regards private life (my emphasis), not family life. The Tribunal did not misapply **ZH (Tanzania)**; the principles were not restricted only to British citizen children [46] and further, citizenship was not the only factor in assessing where a child's best interests lie. The Tribunal placed significant weight on the impact and consequences of removal on the child to Ghana including special education. The Tribunal considered all of the relevant issues, provisions and legal requirements with reference to the relevant case law as evidenced in the skeleton argument relied on. Finally Ms Jones

emphasised the consideration of the welfare of children was not limited nor restricted by the immigration failures of their parents.

9. At the end of the hearing I reserved my decision, which I now give with my reasons.

Discussion and Decision

10. I am satisfied that there was no material error of law in the decision and reasons made by the First-tier Tribunal. I take the view that the issues raised by the Secretary of State amount effectively to a disagreement with the findings and conclusions and indeed the decision made by the Tribunal. The Tribunal found that the requirements of paragraph 276ADE(vi) in respect of the first appellant were not met.

11. In considering Article 8 ECHR the Tribunal emphasised the strength of the child's private life and where her best interests lie in light of her autism, severe learning difficulties, and severe communication difficulties, as a full time student of a special needs school, under the mental health team and in receipt of speech and language therapy [18 &21] . It is certainly arguable that the Tribunal could have set out in more detail the strong evidence relied on, in particular, that from the expert witness Esther Quarcoe and the statement of special educational needs. However, I am satisfied that the Tribunal made clear that it placed weight on the contents of the skeleton argument which set out all of the appropriate and relevant case law on Article 8 ECHR issues [21 & 24]. The Tribunal had regard to the provisions under Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended)[26]. The Tribunal fully considered all of the relevant public interest factors and found none that were capable of outweighing the very strong private life established by the second claimant in the UK together with that of her mother in establishing where her best interests lie. Having regard to the totality of the evidence, I am satisfied that the Tribunal did ask itself the ultimate question as to the reasonableness to expect the child to follow the parent with no right to remain to the country of origin ? The Tribunal found this to be an exceptional case and notwithstanding that the first claimant had a poor immigration history to the extent that she was without lawful leave since 2009 [26], the strong evidence of the second claimant's private life was the significant feature determining that the removal would be disproportionate. I find that this conclusion was open to the Tribunal to make on the evidence before it.

Notice of Decision

12. **There is no material error of law in the Tribunal's decision. The decision and reasons shall stand.**

Anonymity order made.

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

Unless and until a Tribunal or court directs otherwise, the claimants 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 claimants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 4.3.2015

Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

Although the Secretary of State's appeal has been dismissed and the claimants' appeal remains allowed on human rights grounds, I make no award for any fee repayment.

Signed Date 4.3.2015

Deputy Upper Tribunal Judge G A Black