Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA111672015
IA133942015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2016	**On 9 June 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

S S (FIRST APPELLANT)
M S (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr H Kannagara of Counsel instructed by Paul John & Company Solicitors
For the Respondent: Mr L Tarlow

DECISION AND REASONS

1. The appellants are citizens of Mauritius. The first named appellant was born on [ ] 1976 and she is the mother of the second appellant who was born on [ ] 1988. A reference hereinafter to the appellant is a reference to the first named appellant.

2. The appellant was granted leave to enter the UK as a student on 26 June 2006 and has remained as a student with leave until 15 October 2014. Her daughter arrived in April 2008 as the appellant's dependant and her leave has been extended in line. On 7 October 2014 the appellants applied for further leave to remain. These applications were refused on 10 March 2015. The appellant had not submitted a valid Confirmation of Acceptance for Studies. The appellant's daughter's application was refused.

3. The appellants appealed and their appeals came before First-tier Tribunal Judge Hembrough on 29 September 2015. At that hearing it was accepted that the appellants could not succeed under the points-based system there being no Confirmation of Acceptance for Studies.

4. Having heard the oral evidence from both appellants the judge recorded that the appellants' representative submitted:

> "that whether considered under paragraph 276ADE (1) (iv) or paragraph EX.1 (cc) of Appendix FM or Section 117B (6) of the 2002 Act the outcome of the appeal was likely to turn on my finding as to whether it was reasonable to expect the second appellant, who has been here lawfully for 7 years and is thus a qualifying child, to leave the UK, having regard to the obligation imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote her welfare."

5. The judge records his agreement with that submission but noted he must first make some preliminary findings in relation to the second appellant's mother. The determination continues:

> "32. It was not argued on her behalf that there would be very significant obstacles to her re-integration into life in Mauritius where she has spent most of her life and where she has family residing, and I so find. She was formerly employed as a teacher. She has worked as a teacher in the UK where she has also been studying. Her knowledge and skills are therefore current and it is reasonable to infer that she will have references available to her. In the absence of expert evidence to the contrary I reject her evidence that she would have difficulty in finding employment because of her age (39) and lack of connection.
>
> 33. I also reject her evidence that she would have nowhere to live and would be without support on return. Her parents and her brother live in Mauritius and it is reasonable to expect that they might provide support at least in the short term. I assume that there is also a family home there but I accept that given her estrangement for her husband this may not be available to her.

34. Of perhaps more importance however is the fact that when making her application she submitted a Lloyds Bank statement for an account in her name with a credit balance of over £17,000 at 4 September 2014. Information in the public domain indicates this to be many times the average annual wage in Mauritius. The bank statement also shows a transfer of £2000 from another account in her name which would indicate that other funds are also available to her. I find that upon return she has the skills and experience to be able to obtain employment and sufficient funds available to accommodate and maintain herself (and her daughter) to an acceptable standard while she looks for work.

35. For the avoidance of doubt therefore I dismiss any appeal by the first Appellant based on paragraph 276ADE (1) (vi) of the Immigration Rules.

36. As she and her daughter fail to be removed together there will be no interference in their family life inter se. Having been here since 2006 and having regard to the low threshold of engagement I accept that she has established a private life that potentially engages the protection of Article 8 ECHR. However in light of my above findings I am satisfied that her removal is in accordance with the law and, absent other factors, necessary for the economic welfare of the country."

6. The judge considered the provisions of Section 117B of the 2002 Act which he sets out in paragraph 37 of the decision and noted that Parliament had stated that the maintenance of effective immigration control was in the public interest. The appellant had accepted in her evidence that she had come as a student for temporary purposes and could have had no legitimate expectation that she or her daughter would be allowed to remain unless they could satisfy some requirement of the Immigration Rules. Little weight should be given to any private life established by her while her immigration status was precarious. The judge observed that considering the first appellant's appeal in isolation "I would have no hesitation in holding that her removal is necessary and proportionate to the legitimate aim already identified."

7. Having rejected an application by the appellants' representative that the matter be remitted to the Secretary of State the judge concluded that he was sufficiently informed to make an assessment in relation to the second appellant's best interest. He referred to Section 55 and **ZH (Tanzania) v Secretary of State [2011] UKSC**. He then directed himself by reference to subsequent authorities and the determination continues as follows:

"48. Put shortly it was submitted that the removal of the first appellant to Mauritius with her mother would be contrary to her best interests because the level of integration that she has achieved in the UK and her lack of familiarity with Mauritian culture and the potential adverse effect on her mental health.

49. The cases do not decide that a child's period of residence for more than 7 years should result in the grant of leave to remain. Length of residence is simply a factor to be considered as part of a holistic assessment of best interests. I note the finding in MK (best interests of child) Nigeria [2011] UKUT 00475 (IAC) that factors relating to the public interest in the maintenance of effective immigration control should not form part of the best interests of the child consideration.

50. The starting point for consideration is that it is in the best interests of a child to live with and be brought up by his or her parents in the cultural environment to which he or she belongs. I am satisfied that this is so in this appeal.

51. The second Appellant is not a British citizen. She is a Mauritian citizen with an entitlement to all of the rights appurtenant to such citizenship. Mauritius is not a 'struggling, impoverished and plague stricken West African state' as was the case in MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC). It is a Westernised tourist destination albeit with a distinct culture of its own. There was no evidence before me from which I could conclude that the culture or the environment would be so alien to the second Appellant as to present substantial obstacles to her integration. I note that she spent the first 9 years of her life there and the next 8 years living with her Mauritian family in the UK.

52. Whilst no background country information was relied upon by the Appellants I am aware from having decided other appeals in relation to Mauritius that its citizens have freedom of religion, expression and movement. Education to tertiary level and health care are free. There are several universities and places of higher learning whose courses and qualifications are accredited by universities in the UK.

53. I have found that the first Appellant is capable of supporting her daughter to an acceptable standard upon return to Mauritius where the second Appellant's father, grandparents and wider family reside. It is also reasonable in my view to expect that the first Appellant would seek some form of financial contribution from her husband for her daughter's maintenance.

54. The second Appellant is presently in the first year of an elective and modular course in fashion design in the UK and there was no reliable evidence before me that she would be unable to undertake a similar course in Mauritius. When asked about this her evidence was that she had made no enquiry.

55. The primary languages spoken in Mauritius are English and French and these are the media of tuition in the schools and universities. There is therefore no barrier to the second Appellant's academic advancement. There was no evidence that she would be unable to engage in the same range of sporting activities in Mauritius as in the UK.

56. I accept that she has a network of friends in the UK including a boyfriend although I was told nothing of his immigration status and he did not give evidence or submit a witness statement.

57. If she is removed to Mauritius with her mother there will inevitably be some disruption to her relationships but the reality is that as her education and her life progresses she will have to grow and adapt, learn new skills and establish new friendships and relationships and there are in my view no obstacles preventing her from doing this in Mauritius. She can maintain her relationships in the UK by means of modern communications media and possibly visits. In due course it may be possible for her to return to the UK as a student."

The judge then refers to documents submitted by the second appellant and found that it was clear that she had had a volatile relationship with both of her parents but that no intervention or support had been contemplated or required after June 2014. He was also referred to a letter from the Tower Hamlets Child and Adolescent Mental Health Services team (CAMHS) dated 16 September 2015 which details the effects on the appellant of the consequences of the breakdown in the relationship between her parents.

8. The judge, having looked at the documents in the round, found that it was clear that the second appellant had suffered a degree of psychological distress and depression arising from the breakdown of her parents' relationship. He continued: this particular driver has now disappeared although her evidence was she maintains intermittent contact with her father. With the support of her mother and the various mental health and young people's services available in the UK she has now made a good recovery."

9. The determination concludes as follows:

"62. She is now extremely concerned about the prospect of her removal to Mauritius. This is in my view entirely natural and understandable. I have found that there are no social, cultural, financial or educational factors that would indicate that her removal would be contrary to the obligation to safeguard and promote her welfare. She will continue to benefit from her mother's support on return.

63. I find the reference in the CAMHS letter to her being 'highly vulnerable to change' to be perplexing. She is a 17½ year old girl on the verge of

womanhood. Change is part of her life. Setting aside the breakdown of her parents' relationship she has recently changed schools. She will change again if she progresses to university. This may involve relocation, independent living and making a new set of friends and associations in the process. When she enters the world of work her circumstances will change again. As regards her network in the UK there was no evidence before me as to the nature and extent of that network and the reality is that very few people maintain their close school/college ties into adulthood.

64. When giving her evidence I find that the second Appellant displayed a degree of petulance which also comes across in her letter to the Tribunal. She has clearly set her mind against a return to Mauritius. Whilst, given her background, it possible that she may require some professional support in coping with the natural and understandable distress caused by the transition in the short term, it is in my view reasonable to expect her to access such services as are available in Mauritius. If she was suffering from a physical disease for which treatment was available in Mauritius it could not be suggested that it would be contrary to her best interests to do so. The 2011 WHO Mental Health Atlas records that free mental health care provision is available in Mauritius.

65. The best interests of the children are a primary consideration not the primary consideration and have to be balanced against the requirements of immigration control and looking at the evidence before me in the round I find that I have not been satisfied that requiring the second Appellant to return to Mauritius with her mother would be contrary to the obligation to safeguard and promote her welfare so as to place the UK in breach of its obligations under Section 55 of the 2009 Act or Article 8 ECHR. To put it another way I am satisfied that it is reasonable to expect her to leave the UK."

10. The judge accordingly dismissed the appeal both under the Immigration Rules and on human rights grounds.

11. The appellants applied for permission to appeal and permission was granted by the First-tier Tribunal on 23 April 2016 on the following point:

> "Given the finding that the second appellant was lawfully resident in the UK for seven years and was a qualifying child ... it is arguable that Judge Hembrough may have erred materially in law in the consideration of Section 117B(6) of the NIA 2002 (as amended) and the best interests of the second appellant (see **PD and Others (Sri Lanka) [2016] UKUT 108**)."

12. The respondent filed a response on 4 May 2016 contending that the judge had considered all relevant factors in relation to both appellants including the age, length of residence, ties and impact of removal on the second appellant. He had given

proper consideration to all relevant factors in light of the best interests of the child and had given proper reasons for finding that return was reasonable for both appellants.

13. Mr Kannagara submitted that the only issue was the question of reasonableness in relation to the second appellant who had spent over seven years in the United Kingdom lawfully. Although Mr Kannagara acknowledged that the judge had referred to relevant case law and legislation, he had erred in paragraph 65 of the determination in finding as he did. If the appeal of the second appellant had been allowed the first named appellant could also have remained with her in the United Kingdom. The judge had erred in applying less weight to the second appellant and what she had done in the UK. She had needed mental health treatment and support and Mr Kannagara referred to paragraph 61 and the reference to the second appellant having suffered a degree of psychological distress and depression following the breakdown of the parental relationship. The letter from the CAMHS team was a crucial document which the judge had not accepted. He had erred in giving insufficient weight to this letter. He had also erred in referring to the need for short term support in Mauritius in paragraph 64. It was not clear why he had reached the opinion that support would only be needed in the short term.

14. The appellant had arrived as a 9 year old at a crucial point in her life and had been at school and was now at college. She was a qualifying child and it was not in the public interest to remove her. She had gone through a difficult period following her parents' divorce. The case of **PD and Others** had not been available at the time of the judge's decision and the facts were very similar. The child in that case was younger.

15. The appellant had said in her statement that she knew little about Mauritius and the judge had materially erred in law.

16. Mr Tarlow submitted there was no material error of law. The issue of weight to be given to a particular matter was a question for the First-tier Judge. The judge had noted the length of residence correctly in paragraphs 62 to 65 of the decision. He had made findings open to him and the grounds were no more than an expression of disagreement with the judge's conclusions.

17. In reply Mr Kannagara argued that in view of the appellants' length of residence the judge should have found in their favour and the second appellant needed professional help and removal was unreasonable.

18. At the conclusion of the submissions I reserved my decision. I remind myself that I can only interfere with the judge's decision if it was flawed in law.

19. The judge directed himself by reference to the authorities available to him and the case of **PD (Sri Lanka)** was heard and promulgated after the judge's decision. In that case the Tribunal decided that when considering Article 8 claims of multiple family members:

> "Decision-makers should first apply the Immigration Rules to each individual applicant and, if appropriate, then consider Article 8 outside the Rules. This exercise will typically entail the consideration and determination of all claims jointly, so as to ensure that all material facts and considerations are taken into account in each case."

20. I note that in paragraph 40 of **PD (Sri Lanka)** the Tribunal stated as follows:

> "Judicial decision making in the sphere of immigration and asylum law is rarely straightforward. The present appeals are no exception in this respect**.** We consider that the application of the reasonableness test involves a balance of all material facts and considerations. The application of this test will invariably be intensely fact sensitive, see **EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41**, at [7] - [12], per Lord Bingham. ..."

21. This was a case in which the appellants' advocate had invited the judge to concentrate on the question of whether it was reasonable to expect the second appellant to leave the United Kingdom but the judge expressly stated that he should make some preliminary findings in relation to the child's mother. In other words he looked at the family in the holistic manner commended by the Tribunal in the case of **PD (Sri Lanka)**. Having considered the position of the mother and the statutory provisions it appears to me that the judge gave very careful attention to the position of both parties and had full regard to the period of residence of the appellant in the United Kingdom, noting that she had spent the first nine years of her life in Mauritius and the next eight years with her Mauritian family in the UK.

22. The judge had the benefit if hearing oral evidence from both witnesses and it is quite clear that he gave the evidence full and careful scrutiny. He also had regard to the documentary evidence and I do not find that he misdirected himself in referring to that evidence and summarising the effect of it in paragraph 61 of his decision. His comments on the CAMHS letter in paragraph 63 of the decision were open to him. As Mr Tarlow submits the complaints about the determination are in reality no more than an expression of disagreement with findings of fact conscientiously made by a judge who had full regard to all the material before him giving it such weight as he deemed appropriate. I do not find that his approach would or might have been different had he had the benefit of the guidance of the Tribunal in the case of **PD (Sri Lanka)**.

23. For the reasons I have given this appeal is dismissed and the judge's decision is confirmed. The judge made an anonymity order which it is appropriate should be continued.

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 him or any member of their 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.

TO THE RESPONDENT
FEE AWARD

The judge made no fee award and I make none.

Signed Date 8 June 2016

G Warr
Judge of the Upper