



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

Appeal Number: HU008662015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 May 2017**

**Decision & Reasons Promulgated  
On 30 May 2017**

**Before**

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

**Between**

**MS CHANICE OPAL JOHNSON  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr P Deller, Home Office Presenting Officer

For the Respondent: Mr I Komusana, Counsel instructed by Igor & Co Solicitors

**DECISION AND REASONS**

1. The appellant (hereafter the Secretary of State or SSHD) brings a challenge to the decision of First-tier Tribunal Judge (FtTJ) M A Khan sent on 29 September 2016 allowing the appeal of the respondent (hereafter the claimant), a citizen of Jamaica, against a decision made by the SSHD refusing her leave to remain.
2. The SSHD's ground of appeal is short and blunt. It is submitted that the FtTJ materially erred in law because he treated the claimant's child as if he were British and on that basis treated this fact as a "trump card" without

carrying out a proper proportionality assessment, contrary to **MA (Pakistan) [2016] EWCA Civ 705**.

3. Having heard the submissions of both representatives and noted in particular Mr Deller's stated position that the error alleged was not material, it is unnecessary for me to give my analysis and reasons in detail.
4. The principal target of the SSHD's grounds appears to be what was said by the judge at paragraphs 22 and 23, the latter which reads:

"23. I find on the evidence that it would not be right to seek to remove a child from the United Kingdom who has lived in this country for more than 10 years and is entitled to register as a British citizen. It is almost saying that a British child should be removed from the UK because his mother had done wrong by overstaying and therefore the child should also pay the price of his mother's wrong doing. I find in this case that the best interests of [MM] are to remain in the UK where his whole life of over 10 years has been spent".
5. It is also pertinent to set out what the judge said in paragraphs 19 and 20:

"19. The appellant entered the UK on 2<sup>nd</sup> of December 2002 as a visitor. She was given 6 months leave to enter until June 2003, she has never left the country and remained as an overstayer. On [ ] 2005, her son [MM] was born, he will be 11 years of age on [ ] 2016. The appellant has no leg to stand on, she is not in a relationship and does not meet any of the requirements of the Immigration Rules. She has not been residing in the UK for 20 years and therefore private life does not fall to be considered. He immigration history has been precarious to say the least. The appellant was 25 years of age when she entered this country, having spent formative years of her life in Jamaica.

20. However, the story does not end there, she has a son who was born in the UK in November 2005, he has lived all his life in this country. Under Section 1 (4) of the Nationality Act 1981, he is entitled to be registered as a British Citizen after 10 years of residence in this country. The application was made in July 2016. For all intents and purposes, I consider the appellant's son to be a British national. The appellant's son is in a primary school education and I have been provided evidence of his schooling. In considering the appellant's case, I must also consider the best interest of her son. This consideration has to be both under Section 55 of 2009 Act and the case law".
6. I fail to discern any error here on the part of the judge. If he had said that "I consider the child should be regarded as a British citizen already", then he would arguably have fallen into error. However, in essence what the judge says is that the appellant's child is someone who has an entitlement to be registered as a British citizen and that that is a relevant consideration. Entitlement of course is not the same as possession and there are known cases of persons entitled to be registered who are not in the event granted British citizenship, although, that said, entitlement is based on specific requirements distinct from the discretionary criteria that

apply to naturalisation. In my view the judge did not err in treating the child's entitlement as a relevant consideration. It meant this child was clearly in a different category from a third country national child with no such entitlement.

7. It is submitted that the judge also erred in treating the child's entitlement to British citizenship as a "trump card" contrary to authority. I also fail to see that he did this. It is clear from his determination read as a whole that he:
- (i) conducted a best interests of the child assessment, concluding that it would be in the child's best interests to remain in the UK where his whole life of over ten years had been spent (paragraph 23);
  - (ii) carried out a proportionality assessment in the course of which he counted against the claimant her poor immigration history and its precariousness (paragraph 19).

Although somewhat telescoped, the judge's decision makes clear that he concluded that there were compelling circumstances warranting a grant of leave to the claimant outside the Immigration Rules (see paragraphs 16-23 as a response to paragraphs 5 and 15). I would observe that whilst the SSHD in her refusal decision has maintained that the child could reasonably be expected to relocate with the claimant to Jamaica, the judge emphatically rejected that assessment and the SSHD's grounds raise no challenge to that rejection.

8. For the above reasons, I conclude that the judge did not err in law and accordingly his decision to allow the claimant's appeal must stand.
9. I would observe that even if I had allowed the SSHD's appeal (despite Mr Deller's acknowledgement that it was not viable, albeit on grounds of materiality), the decision I would then have gone on to re-make would have been to allow the claimant's appeal. That is because the claimant's child has now been granted British citizenship and, as Mr Deller acknowledged, that means that the claimant is entitled to succeed under Section 117B(6) as it is an unchallenged finding in the claimant's case that it would not be reasonable to expect the child to leave the UK.

No anonymity direction is made.

Signed

Date: 26 May 2017



Dr H H Storey  
Judge of the Upper Tribunal