Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34075/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 1 June 2017	**On 13th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ULETT BEVERLEY MCLEARY
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Waithe (counsel instructed by Greenland Lawyers LLP)
For the Respondent: Mr P Singh (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Ulett Beverley McLeary, a citizen of Jamaica born 5 October 1959, against the decision of the First-tier Tribunal of 27 September 2016 dismissing her appeal, itself brought against the decision of 29 October 2015 to refuse her application for leave to remain on human rights grounds.

2. The immigration history supplied by the Respondent sets out that she entered the UK as a visitor from 17 February 2002 until 17 August 2002; an application for leave to remain as a student was rejected on 11 September 2002, but then granted from 31 October 2002 until 31 August 2003; she was refused a further application for leave as a student on 7 August 2007, when she was given a notice that she was liable to removal. An application of May 2012 was refused on 1 August 2013.

3. The application was refused because it was not accepted there was evidence establishing the reality of the relationship and as the Appellant was not accepted as facing very significant obstacles to integration in Jamaica, where she had lived for the first 42 years of her life. Hedging its bets as to the genuine nature of the relationship, the refusal letter added that any family life in the UK had been established in the knowledge that her position here was precarious.

4. Her case was set out in greater detail in the grounds of appeal to the First-tier Tribunal, which set out that she and her partner Abu Bakarr Kamara had met in August 2003 in the UK and cohabited since 2004; he was a British citizen present and settled in the UK. There were insurmountable obstacles to relocation abroad, given the impact the Appellant's departure would have upon her stepchildren who had lived with the couple since joining their father here. Mr Kamara had two children from a previous relationship, and would face numerous obstacles to life in Jamaica: he had never lived there, had no permission to enter or work in the country, and the Appellant would not have any home or job to return to there.

5. The First-tier Tribunal set out the basis of the case as it had developed before it. The Appellant and Mr Kamara met when both were working in a nursing home in Birmingham. He had three children who had joined him here, the youngest of which, Linda, remained a minor, living in the family home. The Appellant often looked after her, including when Mr Kamara worked nights. He was diabetic and had high blood pressure; the Appellant reminded him to take his medication and ensured he had a balanced diet. The Appellant gave evidence that one of Mr Kamara's daughters was in prison, where she suffered psychological trauma, and had had a child; another was at university, but suffering from depression.

6. Mr Kamara explained that he came to the UK on 14 July 2000 and was a registered mental health nurse; he had a grandchild as well as his three children here. None of his children attended the hearing to give evidence, and nor did they provide witness statements supporting the appeal, for reasons of which he appeared uncertain at the hearing below.

7. The First-tier Tribunal dismissed the appeal. As to the Appellant's relationship with her partner's daughter Linda, who on balance it accepted had entered the country in 2009 and was presumed not to be a British citizen, she was not a qualifying child at the date of decision (the application having been made in May 2012); it was in her best interests to remain with her father pending resolution of

the Appellant's status. The Appellant's relationship with Mr Kamara was plainly genuine and subsisting, but there were no insurmountable obstacles to their relocation abroad: Mr Kamara had lived most of his life abroad, notwithstanding that he was a British citizen, and his children could doubtless adjust to life in Jamaica if required. Alternatively, the Appellant could return to Jamaica to apply for entry clearance like any other applicant. The First-tier Tribunal concluded that there was nothing calling for consideration of the appeal outside the Immigration Rules by reference to a proportionality balancing exercise vis-á-vis Article 8 of the ECHR.

8. Grounds of appeal argued that the First-tier Tribunal had failed to take account of relevant considerations:

(a) as to the question of insurmountable obstacles, overlooking Mr Kamara's complicated family circumstances;

(b) as to the possibility of return abroad to seek entry clearance, the general refusal reasons, which at Rule 320(11) might lead to the refusal of an application to return because of the Appellant's history of overstaying;

(c) as to the reasonableness of a qualifying child's relocation outside the Immigration Rules, failing to apply the test specified in section 117B(6) of the Nationality Immigration and Asylum Act 2002.

9. Permission to appeal was granted by the by the Upper Tribunal on 30 March 2017. Tribunal.

10. Before me Mr Waithe concentrated his attention on the submission that the First-tier Tribunal had been wrong to decline to consider the appeal outside the Immigration Rules. Mr Waithe stated his understanding during the hearing that Linda had been born in September 1998, and had accordingly been aged seventeen and (just) still a minor at the date of the decision of the First-tier Tribunal in August 2016. In the light of that chronology, Mr Singh speedily accepted that there was force in the submission that section 117B(6) necessitated consideration in this case given the child Linda's age at the date of hearing.

Findings and reasons

11. The most relevant part of the Immigration Rules is the exception within Appendix FM:

"**Section EX: Exception**
EX.1. This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
(bb) is in the UK;
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and
(ii) it would not be reasonable to expect the child to leave the UK; or
(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

12. The Nationality Immigration and Asylum Act 2002 provides:

"**PART 5A**
Article 8 of the ECHR: public interest considerations
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 …
117B Article 8: public interest considerations applicable in all cases
...
(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.
117D Interpretation of this Part
(1) In this Part— ...
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;"

13. Given Mr Singh's pragmatic stance, I can shortly state my reasons for finding that the Appellant's grounds of appeal are made out.

14. There was no recognition of the appropriate starting point identified as relevant by section 117B(6). Linda was not a qualifying child for the purposes of the Rules as she had not lived in the UK for 7 years "immediately preceding the date of

application", and so Appendix FM Ex.1 was not with respect to her circumstances. However, by the time of the appeal hearing in August 2016, she remained a child, and had then lived in this country for more than seven years.

15. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, section 117B(6) "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary"; albeit that §73: "It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling." Accordingly it was incumbent on the First-tier Tribunal to fully engage with the best interests of Linda, having regard to the starting point that it was necessary to identify powerful reasons justifying the reasonableness of her departure. Any further consideration of this issue will need to evaluate the relatively complex family relationships present in the case, including the ostensible vulnerability of the Sponsor's adult children and the support he provides them (and society more generally) via his expertise as a mental health nurse.

16. This is not an appeal where there are meaningful findings upon which the Upper Tribunal can build, and thus it is allowed to the extent that it is remitted to the First-tier Tribunal for hearing afresh.

Decision

The appeal is remitted to the First-tier Tribunal for hearing afresh. The Appellant expressly requested that the matter be relisted nearer to her home area than the Hatton Cross hearing centre where it has recently been heard. I accordingly direct that it is appropriate for hearing in the Birmingham area.

Signed Date 1 June 2017

Judge Symes
Deputy Judge of the Upper Tribunal