Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/01880/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 January 2018	**On 08 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MISS K M K
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER KINGSTON/NEW YORK

Respondent

Representation:

For the Appellant: Mr J M Rene
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a national of Jamaica whose date of birth is 19 September 1977. She has lived in the UK since 1992 and was granted ILR in 2005 on the basis of long residence. The appellant has 2 children in the UK. She made an application for entry clearance as a returning resident having

visited Jamaica for a holiday. Whilst in Jamaica she lost or had her passport stolen. The Entry Clearance Officer refused the application on 18 June 2015 because the appellant had failed to disclose her criminal convictions in the application form and that she was a persistent offender so that exclusion from the UK was conducive to the public good.

The appeal to the First-tier Tribunal

3. The appellant appealed to the First-tier Tribunal against the respondent's decision. In a decision promulgated on 13 March 2017, First-tier Tribunal Judge C M Phillips dismissed the appellant's appeal. The First-tier Tribunal found that the appellant made a false representation when stating 'no' on her application form giving rise to a mandatory refusal. The judge also found that he appellant was a 'persistent offender'. In relation to Article 8 the judge found that refusal of entry clearance was proportionate to the legitimate aim of effective immigration control.

4. The appellant applied for permission to appeal against the First-tier Tribunal's decision to the Upper Tribunal. On 5 October 2017 First-tier Tribunal Judge Pickup refused the appellant permission to appeal. She renewed her application for permission to the Upper Tribunal and on 17 November 2017 Upper Tribunal Judge Rimington granted the appellant permission to appeal.

The hearing before the Upper Tribunal

The appellant's submissions

5. The grounds of appeal set out that the approach of the judge denotes a closed mind to the credible aspects of the appellant's evidence and in paragraph 35 the judge discredits the appellant from the outset. The judge's reasoning is not clear and difficult to follow. The judge's findings are unreasonable and that an irrelevant consideration was taken into account (paragraph 39) in order to discredit the appellant. The judge failed to consider appropriately the evidence that the previous representative was negligent, failed to take the appellant's explanation into account and that steps had been taken to obtain the appellant's file.

6. It is submitted that the judge misdirected herself by considering that the label 'persistent offender' is a permanent state and that there is no analysis by the judge as to why she should still be regarded as a persistent offender – **Chege [2016] UKUT 187 (IAC).**

7. The judge when considering the evidence about the appellant's youngest son ('J') has cherry picked points to justify dismissing the appeal – paragraph 71. She has failed to consider appropriately the best interests of the child and therefore the court cannot be confident that significant weight has been given to his best interests. The judge has failed to take account of the child's opinion when considering s55. The judge made speculative findings regarding the child's father.

8. The judge did not demonstrate a fair approach to the balancing exercise and erred by concluding that it is not unduly harsh for the child to remain in the UK without his mother. If it was in the public interest for the appellant to be deported the Secretary of State would have taken steps to deport her.

9. In oral submissions Mr Rene submitted that the judge when considering the allegation of dishonesty should have first considered whether there was an innocent explanation. The approach taken poisoned the judge's mind from the outset. The respondent has not argued that on the incorrect form (the incorrect form completed by her for entry clearance) she filled in she did not disclose her convictions. Surely they would have done so if that was the case. We could infer from that that the appellant did declare her convictions on the incorrect form. In answer to my query Mr Rene indicated that he did not have instructions as to whether or not the appellant asserted that she did declare her convictions on the incorrect form. He argued that the failure of the previous solicitors to provide the appellant's file to her current solicitors is indicative of their failings and from which we can draw an inference that their conduct was negligent in failing to complete the form correctly by declaring her convictions.

10. He submitted that the judge has failed to undertake a proper assessment of the label persistent offender as set out in the case of Chege. There has to be an assessment in terms of fact and law. The judge simply says that there were 23 offences so the appellant is a persistent offender. The judge has not taken into account that her has been no offending since 2012 and has not undertaken an assessment of the nature of the offences and if there has been an escalation.

11. The judge did not undertake a proper assessment of the best interests of the appellant's youngest son. She found the appellant's mother to be a credible witness who explained the effect on her life and the difficulties she faces looking after J. The judge has failed to properly take into account J's letter and that he has lived all his life with his mother. The judge accepted that his father had had little involvement in his life. Reliance is placed on **Kaur** and the approach required i.e. the best interests of the child must be considered first. With regard to the letter from the school the judge has ignored this because it does not refer to J's failings in school as attributable to the absence of the appellant. This however ignores the letter from J which stated that it was hard for him to do well at school because his mother might not come home.

12. Mr Walker (in response to Mr Rene's submission that the Entry Clearance Officer had not submitted the previous incorrect application form and had not argued that the appellant had failed to declare her convictions on that form) checked the file. In respect of the previous incorrect form completed for entry clearance that was not on the file. However, the appellant's application for ILR was on file and he noted that she had not declared her convictions on that form. At that point she had a number of criminal convictions. This was a matter that the Home Office would now need to consider.

13. With regard to the persistent offender issue Mr Walker submitted that although the judge was required to consider the issue as at the date of the hearing the appellant's suggestion that the fact that there had been no convictions since 2012 ignores the fact that the appellant has not been in the UK since late 2014.

14. The judge has considered the best interests of the appellant's son. He is being perfectly well looked after by his grandmother. The judge did consider his best interests in isolation form the other factors in the case.

15. In reply Mr Rene submitted that the judge has not taken into account the fact that the appellant's mother cannot carry on looking after him for ever.

Discussion

16. There are essentially three grounds:

    (a) The judge failed to consider the appellant's innocent explanation for the fact that her convictions were not declared on her application form

    (b) The judge failed to consider appropriately whether the appellant should be considered to be a 'persistent offender'

    (c) The judge failed to consider the best interests of J as a separate issue and it is not clear that the judge gave significant weight to his interests in the proportionality balancing exercise.

17. The judge correctly considered the evidence with regard to the application noting the findings in **Shen** about the approach to evidence where dishonesty has been alleged. The judge found (not disputed) that the application form was false as the appellant answered no to the criminal convictions question and the appellant accepted that she had 17 convictions for 23 offences. The judge then considered the explanation proffered by the appellant as to why the convictions were not declared on the form. These are set out with the judge's findings from paragraphs 36 – 45. The judge took into account the fact that the representative had made other errors on the form and that there had been attempts by the new representatives to obtain the appellant's file. The evidence was considered carefully and in some detail. The judge was not persuaded by the appellant's account having taken into consideration various factors including: the appellant had not obtained her file in person from the former representative despite being invited to do so, there was no evidence from the appellant's former representative, there was nothing in the grounds of appeal that suggested she had informed her former representatives about her convictions but they had failed to include them on the form, and the fact that the appellant, having recently completed a rejected application, would have been well aware of the need to check her application particularly in such an important regard. The judge was entitled to reach the conclusion that the appellant had failed to declare material facts and that she therefore had made a false representation.

18. When considering the refusal on the basis of the appellant as a persistent offender the judge referred to the case of **Chege** setting out the relevant findings from that case in respect of the approach to determination of whether a person is to be considered a persistent offender. The judge took into account the extent and nature of the offending noting that she had 23 offences spanning the period from October 1999 to 9 January 2012, a period of over 12 years. She took into account the fact that the offences were not committed whilst the appellant was a youth. Counterbalancing those factors the judge took into account that there was not an escalation in the type of offence and the time that had elapsed since her last court appearance. There was no explanation for the offences or sustained failure to comply with the requirements of a community order. It is clear that the judge conducted an appropriate fact specific exercise and on the evidence reached a finding that was open to her.

19. With regard to the best interests of J, the judge noted that the respondent had not carry out an assessment of the appellant's rights under Article 8 despite the fact that the appellant set out her family circumstances in her application form. The judge considered the respondent's obligations to be as set out in the Home Office guidance which states:

> You must carefully consider your statutory duty to children under section 55 of the Borders, Citizenship and Immigration Act 2009, before you apply the instructions in this guidance either to children or to people with children.

20. The judge considered that the ECM review which asserted no grounds had been raised that J's welfare has been compromised did not engage properly with the ground of appeal that refers to J.

21. It is clear that the judge understood that J's best interests must be considered properly. However the approach adopted by the judge was incorrect. At paragraph 56 the judge set out:

> 56 I find by reference to Chege that to comply with Article 8 and the respondent's section 55 duty, the appellant's application should have been considered in a way that is no less favourable than the consideration given to in country deportation decisions made on the same ground of persistent offending.
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> …
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> 58 In the interests of equivalence and as a framework, having heard the evidence about the circumstances of the appellant's minor son in the United Kingdom, I have considered if this evidence shows that the appellant meets the exceptions set out in paragraphs 399 and/or 399A of the Immigration Rules.

22. The judge then commenced consideration of his J's best interests. However, it is difficult to discern a specific consideration of J's best interests as a primary consideration rather than as part of the balancing exercise under paragraph 399 of the Immigration Rules. As set out in **Kaur (children's best interests / public interest interface) [2017] UKUT 00014 (IAC)** at 16:

> 2. Secondly, the assessment of a child's best interests must focus on the child, while simultaneously evaluating the reality of the child's life situation and circumstances. Factors such as parental immigration misconduct must not intrude at this stage. See EV (Phillipines) (infra) at [33]. This requires care and discipline on the part of decision makers and Judges. The child's best interests, once assessed, are an important component of the overall proportionality balancing exercise. However, they have a free standing character. Avoidance of error is likely to be promoted if the best interests assessment is carried out first. Parental misconduct typically takes the form of illegal entry, unlawful overstaying or illegal working. Factors of this kind may legitimately enter the equation at a later stage of the overall proportionality balancing exercise as they are clearly embraced by the public interest in the maintenance of immigration control. This is the stage at which a child's best interests, though a consideration of primary importance, can potentially be outweighed by the public interest. I shall revisit this issue infra in the context of a more detailed examination of Part 5A of the 2002 Act.
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> 3. Thirdly, in every case of this kind, there is an Article 8(2) proportionality balancing exercise to be performed. At the outset of the exercise, the scales are evenly balanced. The exercise is then performed by identifying all material facts and considerations and attributing appropriate and rational weight to each. The best interests of an affected child feature in the balancing exercise. It is incumbent upon the court or tribunal concerned to make an assessment of those interests. The balance must then be struck, treating the child's best interests as a primary consideration. As these do not have the status of the primary consideration they are capable of being outweighed by other public interest factors, singly or cumulatively, in any given case. If the "sins of the parents" principle has the unwavering potency which the Applicant's amended ground of challenge in substance advances, Zoumbas would have been decided differently.

23. As set out in **Kaur** normally the best interests assessment should be carried out first. It should be a primary consideration in the balancing exercise. In this case there is no initial consideration of J's best interests. Whilst this may be remedied by specific findings on a child's best interests that have been considered in isolation to other factors, in this case there is no identification of what the judge considers J's best interests are. That is an error of law. The judge has meticulously undertaken a thorough and appropriate proportionality balancing exercise considering and weighing all the relevant factors. However, I do not consider that this remedies the error of law in this case and it cannot be considered that an appropriate assessment of J's best interests and findings on what his best interests are could have no material effect on the outcome of this case.

24. I find that there was a material error of law in the First-tier Tribunal's decision. I set that decision aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA').

25. Mr Rene submitted that if I were to find a material error of law the matter should be remitted to the First-tier Tribunal. This was, at least partly, based on the disclosure by the Home Office that the appellant had not declared her convictions on her application for ILR. This is not a factor that had any relevance to the error of law hearing before me (there was no

suggestion that I should take it into account). As set out above it came to light purely in response to Mr Rene's oral submissions. It may, however, be a relevant factor in assessing the proportionality of refusal of entry clearance. Therefore, I consider that it is appropriate to remit this case for a re-hearing on the Article 8 and section 55 issues only. The judge's findings on the mandatory refusal under paragraph 320(7A) and the finding that the appellant is a persistent offender stand.

26. I considered the Practice Statement concerning transfer of proceedings. I am satisfied that the nature and extent of judicial fact finding that is necessary in order for the decision in the appeal to be re-made is such, having regard to the overriding objective, that it is appropriate to remit the matter to the First-tier Tribunal.

27. I remit the case to the First-tier Tribunal for the case to be heard at the First-tier Tribunal at Taylor House before any judge other than Judge C M Phillips pursuant to section 12(2)(b) and 12(3)(a) of the TCEA. A new hearing will be fixed at the next available date.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law. I remit the case for a new hearing on the Article 8 and section 55 issues only. The judge's findings on the mandatory refusal under paragraph 320(7A) and the finding that the appellant is a persistent offender stand.

Signed P M Ramshaw Date 5 February 2018

Deputy Upper Tribunal Judge Ramshaw