In the Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/27402/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 September 2018	**On 28 September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

SANDRA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Mahmud, a legal representative
For the Respondent: Mr Esen Tufan, a Home Office presenting officer

DECISION AND REASONS

Introduction

1. This is an appeal by the respondent against the First-tier Tribunal's (F T T's) decision to allow the appellant's appeal against a refusal by the respondent to grant the appellant further leave to remain in the UK.

2. Throughout this decision I will refer to the parties by their designations before the FTT.

The Appellant's Immigration Background and History

3. The appellant is a citizen of Jamaica who was born on 4 of October 1968.

4. The appellant entered the UK on 1st May 2002 as a visitor. The appellant was refused further leave to remain on 28th of February 2003. However, on 24th of July 2012, having remained in the UK for the intervening 10 years, the appellant applied further leave to remain on human rights grounds (article 8). It seems from the decision of Upper Tribunal Judge Blum dated 27 October 2016, that application was on the basis of the appellant's relationship with a Mr [L], a British citizen, as well as her relationship with her daughter Ms [M]. Ms [M] was and is a Jamaican national who at the time of the application for further leave to remain on 24 July 2012 had discretionary leave to remain in the UK. The appellant also claimed that her daughter suffered mental health problem and the applicant was her main carer. She claimed that she resided with Mr [L], who provided financial support and accommodation. It was asserted in support of the judicial review application that the appellant's removal would be "very detrimental" to both Ms [M] and Mr [L] and would result in a breach of article 8 of the European Convention on Human Rights (ECHR). The application to the respondent on human rights grounds was refused on 5 August 2013 without any right of appeal. The appellant applied for permission to apply for judicial review of the decision, which was refused by Judge Blum on 27 October 2016. Following Judge Blum's decision, on 22 November 2016 the respondent decided to grant the appellant an in-country right of appeal relating to her application for leave to remain in the UK. However, the respondent subsequently refused that application. It was against that decision that the appellant appealed to the FTT. Accordingly, the appeal which became the came before the FTT was the appellant's appeal against the respondent's decision dated 22nd of November 2016 to refuse the appellant's application for leave to remain in the UK on human rights grounds. That appeal was brought under section 82 (1) of the Nationality Immigration and Asylum Act 2002 (2002 Act) which, since the respondent's decision post-dated the commencement into force of the Immigration Act 2014, could only be made on human rights grounds.

The decision of the FTT

5. Following a hearing on 15 March 2018, First-tier Tribunal Judge Lal (the immigration judge) decided that the appellant's removal from the UK would constitute an unlawful interference with her protected human rights and specifically her right under article 8 of the ECHR to enjoy a private or family life in the UK. This was on the basis that the risk the FTT was satisfied on the evidence that the appellant was an active and committed parent of her adult child (Ms [M]), that her removal would end the relationship between her and her daughter and that it was not in the public interest or indeed in the interests of effective immigration control to

require the appellant to leave the UK and return to Jamaica. The immigration judge noted that the Ms [M] by the date of the hearing had been given British citizenship but, I was informed at the hearing, has retained her Jamaican nationality also.

The hearing

6. The respondent submits that based on the case of **Agyarko [2017] UKSC 11** the appellant's status in the UK was "precarious". Accordingly, there had to be "very compelling "reasons for allowing her to stay in the UK. It was noted that the appellant was financially independent and had dual nationality (Jamaica and the UK). The reference in paragraph 18 of the decision to "paragraph 276 (vi) should have been a reference to o paragraph 276 A D E (vi). That sub-paragraph provides that an applicant seeking leave to remain on the grounds of private life in the UK, who is aged 18 years or above, who lived continuously in the UK for less than 20 years, must show "very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK" before the requirements of the Immigration Rules would be met. Mr Tofan argued that the appellant plainly did not surmount this high hurdle as no "very significant obstacles" existed to her return to the country to which she would be sent – an English-speaking Commonwealth country. As far as the appellant's daughter's health needs were concerned, if necessary, social services could pick up the functions currently discharged by the appellant. I was referred to several cases by Mr Tofan including the case of **B L Jamaica [2016] E W C A C iv 357** where the Court of Appeal said (at paragraph 53) that the U T were entitled to work on the basis that social services will perform their duties under the law, as was required of them, where this was an issue in a case of this type. I was also referred to the case of **Rhuppiah [2016] EWCA Civ 803** where the Court of Appeal said at paragraph 61 of their judgment that it did not follow that because a person is able to speak English that it is in the public interest that they should be given leave to enter or remain. Section 117B (2) of the Nationality, Immigration Asylum Act 2002 (2002 Act) requires the court or tribunal hearing the matter to assume that the maintenance of immigration control is in the public interest and one public interest factor is the ability of the appellant to speak English. As the Court of Appeal point out in that case, the ability of the appellant to speak English was only a neutral factor in the case. I remind myself of the contents of section 117B of the 2002 Act and pointed out to the parties that subsection (4) and (5) of that section provide that "little weight" should be given to a private life formed when the person was in the UK unlawfully or precariously. Mr Tofan invited me to set aside the decision of the FTT.

7. Miss Mahmud agreed that the appellant was here illegally. But, she said, the immigration judge had considered all the evidence, and this included a psychological report. I was particularly referred to paragraphs 14 – 15, where the immigration judge had found the account to be credible and

consistent as well as supported by objective and other evidence. She also found that the appellant's daughter had needs under the mental health legislation and that the appellant was designated as a person who required a protective environment under the "mental health act". The immigration judge had noted the medical and other expert evidence from an educational and child psychologist as well as other professionals. The immigration judge had taken all relevant matters into account. The appellant's continued presence in the UK is of the upmost importance in terms of long-term care arrangements for Ms [M]. The relationship between them was beyond the normal parent-child one and it would be disproportionate to return the appellant to Jamaica. Accordingly, even if one applied the high threshold that Mr Tofan had set (very compelling circumstances) there were indeed very compelling circumstances in this case and that test was therefore met. Furthermore, the appellant would not be a burden on taxpayers she and her daughter were in full-time employment. In particular, the appellant had been employed as an administrative officer in a company. I was invited to leave the decision in place and to dismiss the respondent's appeal.

8. Mr Tufan had nothing further to add. At the end of the hearing I reserved my decision as to whether there was a material error of law and if so what steps to take to rectify it. I note that in doing so that the FTT had made fact findings upon which I would be relying if I decided that the decision had to be set aside. Accordingly, I pointed out to the parties that I was likely to remake the decision without the need to hear any further evidence. This was, of course, in accordance with the directions that had been given.

Discussion

9. The immigration judge had medical evidence in the form of a report from Dr Jochen Binder–Dietrich dated 22nd of December 2014, which notes that appellant has cared for Ms [M] since approximately 2010 when she became hospitalised and subject to the Mental Health Act. She has a diagnosis of bipolar affective disorder for which she takes regular medication to control the symptoms. She has been a danger to herself on occasions as she leads a chaotic, aggressive and sexually disinhibited lifestyle. Ms [M] tends to avoid mental health services and can deteriorate rapidly. There is also a letter from a Ms Calloway who records the level of care provided by the appellant for her daughter and a psychological report from Mr Simon Claridge dated 5 September 2017 which notes at page 18 of the report (page 41 of the appellant's bundle at the FTT) that the appellant provides a sufficient level of support that the removal of her from the UK would be "extremely likely" to cause Ms [M] to suffer "a relapse into mental illness".

10. Faced with this evidence it is unsurprising that the Immigration Judge considered this to be a case where "unjustifiably harsh consequences" for

the appellant and her family unit would flow from her removal UK (see paragraph 28 of the decision).

11. However, Judge Grimmett in granting permission not only pointed out that the appellant's daughter is in full-time employment but also noted that she had been able to travel to Jamaica two years before unaccompanied by the appellant. Also, it was plain, that the immigration judge had erred in saying that this was "not a case where private and family life developed when immigration status was precarious". Plainly it was precarious immigration status.

12. There are several obvious errors in the immigration judge's decision, for example, her characterisation of the case (inn paragraph 23) as one where the private and family life had "not" developed whilst the appellant's immigration status was precarious. It was accepted by Ms Mahmud that her client had been in the UK unlawfully for much of her stay in the UK. Consequently, in part based on that erroneous finding, there was a failure to properly apply sections 117A – B of the 2002 Act and consider the requirements of the Immigration Rules and apply the relevant law to the facts of this case. For example, earlier in the same paragraph (paragraph 23) the Immigration Judge erroneously stated that if the appellant is removed from the UK "… This will end this relationship between her and her daughter in terms of its current protective quality". That is a dubious conclusion to reach based on the evidence which, as I have indicated, shows that the appellant travelled to Jamaica and had managed to retain full time employment. There was also a failure on the part of the Immigration Judge to give proper reasons for her decision, for example, the fact that the appellant spoke English and has "never been a burden on the taxpayer" paragraph 25 of the decision) was merely a neutral factor and not a reason for allowing appeal.

13. On any view that decision has to be regarded as generous, having regard to the appellant's precarious immigration status. Parliament directs that little weight is to be given to a private life formed whilst an applicant's status is precarious or illegal. Mr Tufan submitted this applied equally to a claim to having established family life in the UK.

14. The medical evidence relating to Ms [M]' stated mental ill-health and the effect of the appellant's removal on the wider family unit, and in particular on Ms [M], were only part of the evidence in the case and this evidence was not necessarily decisive.

15. I was referred by Mr Tufan to a number of other decisions which deal with healthcare issues. The Upper Tribunal in the case of **R (on the application of Sison) v Secretary of State for the Home Department [2016] UKUT 33 (IAC)** had to consider a case in which the applicant sought leave to continue as a carer of an elderly couple. She sought leave to remain outside the Immigration Rules, arguing that there were exceptional compassionate circumstances and that the care of the couple concerned would be adversely affected by her returning to her own

country, the Philippines. However, one distinction between that case and this was that the applicant there did not seek to establish that she continued to have a family or private life with the person she was caring for. The judge, Upper Tribunal Judge Andrew Grubb, decided that the appellant had not established that she was the only adequate carer for the couple concerned and it was properly open to the respondent to refuse under both the Rules and the ECHR. The burden lay on the appellant to show that she was really the only adequate carer. The respondent's decision was not unlawful, and, for the purposes of a judicial review application, there were no compelling reasons which the respondent had failed to attach proper weight to. Whilst the judge had sympathy with the position the appellant found herself in, the respondent's decision was not unlawful.

16. In **Rajendran [2016] UKUT 138 (IAC)**, the Upper Tribunal had to consider the case in which the appellant was a 62-year-old citizen of Canada who suffered from her own problems in that she was blind. She had come to the UK as a visitor in 2013 and returned to Canada but have subsequently come to the UK in 2014 when she was admitted for three months only. Her daughter looked after her. The respondent rejected the application under paragraph 276 ADE (1) of the Immigration Rules and decided there were no exceptional circumstances to justify granting leave to remain outside the Immigration Rules under article 8. The appellant appealed. The judge concluded that the appellant would receive adequate care on her return to Canada whether provided by the Canadian authorities or by the appellant's elder daughter, who lived there. The judge in that case made adverse credibility findings in any event.

17. I was also referred to the leading case of **Rhuppiah** [2016] EWCA Civ 1803, in which the Court of Appeal said that the relevance of precariousness of immigration status is the effect it has on the extent of protection afforded to private life for the purposes of article 8 in the proportionality balancing exercise. The more the immigrant is expected to have understood their time in the host country would be limited, the more the host state is able to show a fair balance between the public interest in the effective enforcement of immigration controls and the rights of the appellant been struck. This often came down in favour of the removal of the individual concerned. There were no compelling circumstances in that case which was a case in which the appellant had come to the UK on a student visa expired many years previously. The appellant had sought leave to remain under the Immigration Rules, relying on her article 8 rights. The appellant had taken up with a friend, who suffered ill health. The appellant had significant commitment to helping out the friend as well as being engaged in charitable activities the local church. The respondent had dismissed the application saying there was no basis under the Immigration Rules for the appellant to remain in the UK and the appellant should be returned to her native country, Tanzania.

18. Finally, I was referred to **BL (Jamaica) [2016] EWCA Civ 57** Court of Appeal had to deal with a deportation case. The case also involved

children, and therefore is distinguished from the present case. However, the public interest in that case demanded the appellant's deportation. The relevance of the case, from the respondent's point of view, was the reference to the fact that support will be available from social services which would you after the family whilst the criminal concerned remained in prison. It was concluded there were no exceptional circumstances could lead to the conclusion that the criminal should not be deported. The errors of law was such that the Court of Appeal decided the decision of the Upper Tribunal should be set aside.

19. Turning to the evidence in this case, in relation to harm to Ms [M], this came principally from Dr Simon Claridge. He reported that Ms [M] would suffer a relapse into mental illness as if the appellant were removed from the UK. The relationship is not merely one between carer and cared for. The importance of relationship is that the appellant could do things for Ms [M] that a paid carer could not do. Dr Claridge said the absence of Ms [M] mother would be "unbearably anxiety provoking".

Conclusions

20. Without hearing Dr Claridge give oral evidence it is impossible to know whether or not the immigration judge was correct to accept all his evidence. Nevertheless, as his evidence was unchallenged, it seems that the immigration judge was entitled to give weight to this evidence, which contained clear conclusions. Furthermore, it appears that his evidence in this case went beyond the more common scenario where the person to be removed is the principal carer for a relative. In that situation, which was the situation in a number of authorities that Mr Tufan referred me to, it is possible for third party take on the role of carer – usually employed by the local authority or National Health Service. The situation here, based on Dr Claridge's evidence, was that a third-party professional would not necessarily be able to take over the role of a carer for Ms [M]. For example, on page 42 of the appellant's bundle (page 19 of the report) Dr Claridge said:

> "… in my opinion it is extremely unlikely that in this scenario (the appellant being removed from the UK) without the help, guidance, emotional support of Ms [S], Trudy would [not] recover any discernible level of true independent functioning".

21. However, Ms [M] does not need round-the-clock care and, as has been pointed out by the respondent, she has held down a regular job. In addition, she is otherwise in good health and still only a 34. It is also true that she could choose to return to Jamaica, utilising the dual nationality, with the appellant, although that would involve giving up her current employment. I will consider this point in greater detail below.

22. The immigration judge did not consider adequately or at all the effect of section 117B of the 2002 Act. The immigration judge failed to take account of the appellant's poor immigration history and much of her reasoning is sparse or, in places, non-existent. Despite these errors it is necessary to look at the findings she made and consider whether they were justified on the evidence before her and then ask whether these errors were material.

23. The finding that the appellant would face "very significant obstacles" to her integration back into Jamaica was plainly wrong despite the fact the appellant have "no family and close friends or contacts". Even if the latter finding was justified on the evidence, the appellant, who is now aged 50, had spent the bulk of her life in Jamaica, which of course is an English-speaking country. The question of whether the appellant faces "very significant obstacles" involved not only looking at her ties with Jamaica but also all other relevant factors and asking the question whether there were sufficient hurdles to her re-integration into Jamaican society to make it unduly harsh to return her there having regard to the other balancing factors in the case. The factors on the appellant's side must add up to more than mere hardship or difficulty in relocating. The immigration judge was therefore wrong to reach this conclusion and that amounts to a material error of law.

24. Secondly, the immigration judge did not give any adequate explanation for her conclusion that family life between the appellant and her adults daughter could not continue in Jamaica, a country from which the appellant's daughter had come in 2002. Interestingly, at the date of the hearing before Upper Tribunal Judge Blum, on 5 August 2016, there was no evidence that Ms [M] was actually living with the appellant. I note that, without going into any detail in their witness statements, both the appellant and Ms [M] now give the same address and therefore appear to be living under the same roof. I have no doubt that, faced with the evidence from Dr Claridge, the immigration judge was entitled to conclude that Ms [M] was maintained by her mother, the appellant, in the sense that she derived material daily support, moral and practical from her. The fact that it would have materially adverse impact on her to remove her mother from that role, was also a conclusion open to the judge. However, where the judge erred was in failing to consider whether the proportionality test was satisfied. The judge ought to have asked whether unjustifiably harsh consequences flowed from the appellant's removal from the UK. Ms [M] clearly had developed a family life with the appellant in the UK. However, in the appellant's case, this had been whilst she had been in the UK unlawfully. Furthermore, they could continue the family life they had developed in Jamaica.

25. In my view the immigration judge carried out no proper balancing exercise and the conclusion that she came to, even on strong medical evidence summarised above, was not reasonably open to her on totality of the evidence. The immigration judge failed to take any proper account of the respondent's interest in the enforcement of proper immigration controls. The factors outlined by the immigration judge, at paragraph 25 of her

decision, were merely neutral factors and did not sway the matter one way or the other.

26. Despite the high degree of mutual support between the appellant and her adult daughter and despite the fact that there is undoubtedly be hardship caused to Ms [M], it does not appear, when a proper balancing exercise is carried out that it was disproportionate for the respondent to conclude that the appellant should return to Jamaica.

27. Accordingly, there are a material errors of law which require the FTT's decision to be set aside.

28. There was no application to adduce any additional evidence. In any event there appear to have been no additional developments in the case since the hearing before the FTT. I have therefore carried out a balancing exercise on the evidence summarised above.

29. In the circumstances, I have decided to re-make this decision which is to substitute a finding that the appellant's appeal to the FTT is dismissed.

Notice of Decision

The decision of the FTT does containing material error of law. I set aside that decision.

The respondent' s appeal to the Upper Tribunal is allowed.

I substitute a decision that the appellant's appeal against the respondent's decision to refuse her application for indefinite leave to remain on human rights grounds is dismissed. This was the sole appeal before the FTT but, insofar as it would have been relevant to do so, I would also have dismissed the appeal under the immigration rules.

No anonymity direction is made.

Signed Date 25th of September 2018

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have substituted a dismissal of the appellant' s appeal to the FTT and therefore there can be no fee award.

Signed Date 25th September 2018

Deputy Upper Tribunal Judge Hanbury