Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12785/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 November 2018	**On 09 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

DIANA ELSADA DENNIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rees of Counsel, instructed by Chris & Co Solicitors
For the Respondent: Mr McGirr, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica born on 5 December 1966. She arrived in the United Kingdom as a visitor on 11 July 1999 and subsequently extended her leave to remain as a student and made further applications, which resulted in reconsideration and a refusal to grant further leave dated 17 August 2011. The Appellant was subsequently served with documentation as an overstayer in 2016 and made further human rights applications. The Respondent, in a decision dated 12 October 2017, refused her leave to remain. The Appellant appealed against this decision and her appeal came before Judge M A Khan for hearing on 23 August 2018. In a decision

and reasons promulgated on 3 September 2018 the judge dismissed the appeal finding it would not be disproportionate for her to return to Jamaica.

2. Permission to appeal was sought on the basis that the judge had made material errors of law: firstly, in adopting a mean-spirited approach to certain aspects of the evidence *cf. TF and MA* [2018] CSIH 58 at 30. Examples of this were in relation to the judge's approach to the evidence of the Appellant's son at [19] and [21] and the evidence of the Appellant's daughter at [22] to [23]; secondly, it was submitted that the judge had erred in his analysis of whether, following *Dasgupta* [2016] UKUT 28 (IAC) the Appellant is one of the primary carers of her granddaughter, given that her daughter works full-time and whether this amounted to family life over and above normal family ties; thirdly, it was submitted that the judge had erred materially in law in applying the incorrect legal test when looking at the Appellant's private life under the Rules pursuant to paragraph 276ADE. It was asserted that the Judge focussed on subparagraph (iii) when it was not the Appellant's case that she had resided in the UK for more than twenty years but rather whether there were very significant obstacles to her reintegration in Jamaica. In this respect, the judge further erred in applying the test of insurmountable obstacles rather than very significant obstacles and the judge further failed to apply the principles set out by the Court of Appeal in *Kamara* [2016] EWCA Civ 813 at 14; fourthly, it was submitted that the judge had erred in failing to engage with the impact of removal of the Appellant on the remainder of her family, in particular her adult children and her granddaughter given that they all reside together *cf. Beoku-Betts* [2008] UKHL 39.

3. Permission to appeal was granted by First-tier Tribunal Judge Ford in a decision dated 2 October 2018 with reference to the second to fourth grounds of appeal.

4. In his submissions before the Upper Tribunal, Mr Rees sought to rely on the grounds of appeal as pleaded. He began with the third ground of appeal and the fact that the judge had applied the wrong legal test in respect of 276ADE(vi) of the Rules and that the judge had simply failed to address the question of whether there were very significant obstacles to the Appellant's reintegration in Jamaica, given that she had been living in the UK continuously for nineteen years at the date of hearing in August 2018. He submitted that the judge had failed to apply the principles in *Kamara (op cit)* and the need for a broad evaluative judgment. Little consideration had been given to the obstacles she might face on return after such a long time. The Appellant was very vulnerable and would be returning alone without a job and a home and would remain financially dependent on her family in the UK with very limited prospect of obtaining employment.

5. In relation to the fourth ground of appeal, Mr Rees submitted that the judge had failed to engage with the principles in *Beoku-Betts* (*op cit*) and had failed to take into account the impact on the remainder of the Appellant's family, in particular given that the Appellant, her son, daughter and granddaughter all live together and they are a very close-knot family. Mr Rees sought to rely on the decision of the Upper Tribunal in *Dasgupta (op cit)* and also the Strasbourg authorities of *GHB v the UK* Application no. 42455/98 and *Marckx v Belgium* [1979] ECHR 2. The judge failed to consider those authorities, nor any of the *Kugathas* [2003] EWCA Civ 31 line of

authorities including *Ghising* [2013] UKUT 00567 (IAC) and *RP (Zimbabwe)* [2008] EWCA Civ 825 and that this was a material error.

6. Mr Rees submitted that the judge was materially incorrect to find that Article 8 was not engaged at [35] in light of this evidence, nor does he consider section 55 of the BCIA 2009 in relation to the Appellant's granddaughter, despite the fact that she is the major carer of the child and clearly modern methods of communication would not be appropriate given that she is only 1 year of age.

7. In relation to the "*mean spirited approach*" asserted in the first ground of appeal, Mr Rees submitted that the fundamental point was that the evidence of the witnesses had to be considered in the round and that did not happen. The judge had not been entirely fair to the witnesses in suggesting that there was inconsistency when there was not.

8. In his submissions, Mr McGirr accepted that the judge had not applied the correct test in relation to 276ADE(vi) of the Rules, but he submitted it was not material in that, on the basis of the evidence before the judge, the Appellant was a very healthy normal person, does not seem to be vulnerable in any way and there was no evidence to show that she could not have a normal life in Jamaica. Her immigration history shows that the Appellant has been an overstayer all the time she has been here and whilst it was not disputed that she has a family life with her adult children and granddaughter, the issue is whether it was sufficient to engage Article 8 and whether there are more than normal emotional ties and he submitted that that test was not met.

9. In reply, Mr Rees submitted that the evidence strongly suggests that the level of family life between the Appellant and her grandchild was very strong and whilst being a carer in itself does not engage Article 8, one needs to look at the whole situation and given the mother of the baby is in full-time work it was clear that Article 8 was engaged on the facts and evidence and that more than normal emotional ties were present.

10. Mr Rees submitted it was self-evident that the Appellant was an overstayer. He submitted that Mr McGirr had accepted the judge made an error and this was material given that there was an absence of consideration of whether there were very significant obstacles to the Appellant's integration in Jamaica which was the very basis of paragraph 276ADE(vi) of the Rules. He submitted there would be a huge contrast between the Appellant's life in the UK where she is very well-integrated and her life in Jamaica where she has no home to go to and would be in serious difficulties.

Decision and Reasons

11. I find material errors of law in the decision of First-tier Tribunal Judge M A Khan. Firstly, I find that the failure to apply the correct test in relation to paragraph 276ADE(vi) of the Immigration Rules is a material error. It is of concern that, despite summarising the basis of the refusal decision and the issues under appeal at [5] of the decision and reasons, the reference therein is to whether there are insurmountable obstacles for the Appellant to reintegrate in Jamaica. There is no direct reference to

paragraph 276ADE(vi) at all. In the section of the decision setting out the judge's conclusions in the appeal, there is no reference to paragraph 276ADE(vi) nor to the relevant test of whether there are very significant obstacles to the Appellant's integration. It follows that there is no analysis of whether or not the factors that the Appellant sought to rely on amount to very significant obstacles.

12. Whilst that, in itself, is sufficient to set aside the decision I will go on to address the further grounds of appeal. At [32] the judge finds "*their family life with the Appellant is no more that normal emotional ties,*" however, no reasons are provided for that finding which, in light of the fact that the Appellant is the primary carer of her granddaughter whilst her daughter is working and given that the Appellant resides with her son, daughter and granddaughter I find amounts to a material error of law in that more by way of reasoning needed to have been provided so that the parties can understand why the judge reached that conclusion. I further find that there is no consideration of the potential impact on the Appellant's adult children and granddaughter if she were to be removed to Jamaica and no consideration of the House of Lords judgment in *Beoku-Betts*.

13. Looking at the judge's findings as a whole, whilst there is reference to the public interest considerations set out at sections 117A-D of the NIAA 2002, there is no proportionality analysis, despite the judge's reference to the judgment in *Razgar* [2004] UKHL 27 at [34]. Whilst I take note of the submissions and reliance on the judgment in *TF and MA* [2018] CSIH 58 at [30] I find that the judge's comment at [32] that "*the Appellant's daughter is more concerned about the care of her daughter than anything else it is more about the Appellant acting as a carer for her granddaughter than the Appellant's wellbeing*" may potentially fall into the category of being "*mean spirited*" given that the evidence of the Appellant's daughter went above and beyond the fact that the Appellant looks after her daughter whilst she is at work, although clearly this was an important issue for her in her evidence.

14. In respect of the evidence of the Appellant's son, his evidence was that he would support her and visit his mother if she had to relocate to Jamaica, but that he would struggle to do so given that he also had to support himself and his sister on his income of £25,000 a year. The judge held at [31]: "*I am not impressed with the evidence of the Appellant's son based on an erroneous understanding of his evidence as to his ability to financially support his mother*". I find that more in the way of reasoning was required to justify this finding.

Notice of Decision

15. For the reasons set out above, I find material errors of law in the decision of First-tier Tribunal Judge M A Khan. I set that decision aside and remit the appeal for a hearing *de novo* at York House.

16. There is no order for anonymity in this case.

Signed *Rebecca Chapman* Date 12 December 2018

Deputy Upper Tribunal Judge Chapman