



**Upper Tribunal  
(Immigration and Asylum Chamber)  
IA/49711/2013**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 13 November 2014**

**Determination  
Promulgated  
On 21 November 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

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

**and**

**CH**  
**ANONYMITY DIRECTION MADE**  
Respondent

**Representation:**

For the Appellant: Ms Johnstone (Home Office Presenting Officer)  
For the Respondent: None

**DECISION AND REASONS**

1. The appellant ('the SSHD') appeals against a decision of First-tier Tribunal Judge Gurung-Thapa dated 8 July 2014 in which the respondent's appeal was allowed under Article 8 of the ECHR.
2. I have made an anonymity direction because this decision

refers to confidential matters relevant to the respondent's young son.

### **Background**

3. The background to this case can be summarised for the purposes of this appeal. The respondent entered the UK as a visitor in 2000 and overstayed. Her son was born in 2011 and is a British citizen. Judge Gurung-Thapa took into account that the son is a British citizen, and therefore an EEA citizen. She concluded that he would not be compelled to leave the UK if the respondent is removed [26]. The Judge rejected the respondent's evidence that his father would not be able to care for him. The Judge however went on to consider and found that Article 8 would be breached by the respondent's removal [37].

### **Procedural history**

4. The SSHD appealed against this decision on the basis that the Judge failed to consider whether or not there were compelling reasons to support her view that Article 8 would be breached, when it was plain that the respondent could not meet the relevant Immigration Rules. When granting permission on 10 September 2014 Designated Judge Macdonald observed that it was arguable that the Judge had failed to approach Article 8 on the basis of the correct legal framework.
5. The matter now comes before me to decide whether or not the determination contains an error of law.

### **Error of law**

6. Having heard from the respondent and Ms Johnstone, I accept that the Judge has erred in law. Judge Gurung-Thapa accepted that because the respondent's son is a British citizen it automatically follows that he cannot be expected to relocate to Jamaica [37]. This seems to have been the focus of her reasons for allowing the appeal under Article 8. Whilst a British citizen cannot be compelled to leave the UK, the Judge was obliged to consider whether in all the circumstances of this particular case it was reasonable to expect him to do so in order for family life to continue with his primary carer, his mother. The Judge has failed to make this assessment and has erred in law in assuming that family life between the respondent and her son cannot take place in Jamaica.

### **Re-making the decision**

7. I explained to the respondent that I would now proceed to re-hear the appeal. She told me all the reasons why her son

should not be expected to relocate to Jamaica and why she should be permitted to remain in the UK in order to care for her British citizen son in the country of his birth and nationality. The respondent explained that she had been in the UK since she was 17 and therefore nearly 15 years. She had little or no contacts in Jamaica and her life would be one of destitution in Jamaica, which would not be in her son's best interests.

#### *Decision under the Rules*

8. Judge Gurung-Thapa did not consider the Immigration Rules within her determination but the parties accepted that the respondent is a long standing overstayer and cannot meet the requirements of the Immigration Rules.

#### *Consideration of Article 8 within the Rules*

9. I note that under EX.1 of Appendix FM the respondent may argue that she should not be removed from the UK because her son is under 18, a British citizen and it would be unreasonable for him to relocate to Jamaica. I do not accept that it would be unreasonable for him to relocate. The respondent and her son are currently living in local authority accommodation with local authority financial support under the Children Act 1989. Whilst the state is providing them with basic support, such conditions are temporary. The fact that the respondent is dependent upon the local authority in this way suggests that she does not have strong family, employment or friendship links. The child has only very recently started school and is very young. It is in his best interests to remain with his mother and in my view he is young enough to adapt to life in Jamaica. I do not accept that they will be destitute and without accommodation in Jamaica. Although the respondent does not have immediate family in Jamaica, she told me that she has cousins. She also told me that her father has a job in the Lake District as a joiner. He could help her with basic start up costs. In any event the respondent could obtain a job in Jamaica. She told me she has experience in waitressing, cleaning and hairdressing. She was in my view overly pessimistic about getting a job in Jamaica. I do not accept that the respondent will be destitute in Jamaica as she claims. She will be entitled to work there and has links there. She has not had permission to work in the UK until recently (given her application to remain as the dependent of an EEA citizen). I find that the respondent will be able to adequately care for her son in Jamaica and it would be reasonable to expect him to relocate to Jamaica with her.

#### *Consideration of Article 8 outside the Rules*

10. As the respondent cannot show that the immigration rules can

be met this identifies and gives weight to the SSHD's case that she should be removed. This part of the rules cannot be described as a 'complete code' as in the case of deportation and in such circumstances I consider the five step **Razgar** [2014] UKHL 27 bearing in mind that the best interests of the respondent's British citizen child are a primary consideration and should form an integral part of the proportionality assessment under Article 8 - see **ZH Tanzania** [2011] UKSC 4 and **Zoumbas** [2013] UKSC 74. I accept that the child must not be blamed for matters which he is not responsible. The child is very young although he was born in the UK and is a British citizen. His father is settled in the UK and he has other relatives in the UK. He has recently started school. I accept on balance that it is in his best interests to remain in the UK, and for his mother to be with him. I must also consider the factors set out in section 117B of the Nationality Immigration and Asylum Act 2002. The respondent speaks English but is not financially independent. She formed her relationship with her ex partner when she was in the UK unlawfully. She has been in the UK for a lengthy period but much of that time has been spent unlawfully. Her child is a qualifying child as he is a British citizen but in my view it would be reasonable to expect him to relocate to Jamaica for the reasons I have already outlined. In my view it is undoubtedly in the public interest that the respondent is removed from the UK. The cumulative effect of the countervailing considerations I have identified are such that it is proportionate for the respondent to be removed.

11. The respondent will have to decide whether to take her child with her but in my judgment in all the circumstances of the case it would be reasonable to expect him to relocate with his mother.

### **Decision**

12. The decision of the First-tier Tribunal contains an error of law. I set it aside and I re-make the decision by dismissing the respondent's appeal.

### FEE AWARD

13. As I have dismissed the appeal the respondent is not entitled to any fee award.

Signed:

Ms M. Plimmer  
Deputy Judge of the Upper Tribunal

Date:  
19 November 2014