



IAC-AH-PC-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: IA/27025/2014
IA/27026/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 6 July 2015**

**Decision & Reasons Promulgated
On 15 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

**SM (JAMAICA)
SS (JAMAICA)
(ANONYMITY DIRECTION MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms J Howorth, Solicitor, Irving & Co Solicitors
For the Respondent: Mr T Melvin, Specialist Appeals Team

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against a decision to remove them as persons subject to administrative removal under Section 10 of the Immigration and Asylum Act 1999, their human rights claim having been refused. The First-tier Tribunal made an anonymity direction on account of the second appellant being a minor, and I consider it is appropriate that

the appellants should continue to enjoy anonymity for these proceedings in the Upper Tribunal.

The Reasons for Granting Permission

2. On 20 April 2015 Deputy Upper Tribunal Judge Chapman granted the appellants permission to appeal for the following reasons:
 - “1. The Applicants are mother and daughter (DOB 24.8.10) and nationals of Jamaica. The appeal was heard by Judge Doyle on 15 November 2014. The grounds of appeal allege that: (i) there were errors in consideration of delay on the part of the Respondent; (ii) failure to have regard to the best interests of the child and that the findings on Article 8 are so confused as to amount to a material error of law. The renewed grounds of appeal assert that the decision of FTTJ Frankish is an insufficient consideration of the application made. It is arguable that Judge Doyle erred materially in law in his assessment of the issue of delay at 15(y) in that he has overlooked the fact that representations were submitted on behalf of the Applicants on 25.3.11 and these remained outstanding until 20 June 2014. This may have an impact on the assessment of proportionality under Article 8 of ECHR.
 2. All the grounds may be argued.”

The Appellants' Material Histories

3. The first appellant is the mother of the second appellant. The first appellant was born in Jamaica on 5 February 1987, and the second appellant was born in the UK on 20 August 2010. As the second appellant is to a significant extent a dependant on her mother's claim, I shall hereafter refer to her mother as the appellant (save where the context otherwise requires) and to the second appellant by the initial S.
4. The appellant arrived in the UK on 29 October 2002, and was granted leave to enter as a visitor for one month until 27 November 2002. On 19 May 2003 the appellant applied for leave to remain as a dependant of her mother (S's grandmother) to whom I shall refer by the initial M. The appellant's mother's status at the time of the application is unclear. But M was granted ILR from 20 May 2004 following her marriage to a person present and settled here on 4 October 2002.
5. There was a lengthy delay in the respondent making a decision on the application for leave to remain. Eventually it was refused on 17 July 2007 with a right of appeal. The appellant's appeal against the refusal decision was dismissed by a judge on 6 November 2007.
6. The appellant did not leave the country once her appeal rights were exhausted. On 27 May 2010 she was served with an IS151A notice when she was encountered by immigration officials. According to Home Office records, she was pregnant at that time and she told the enforcement officials that she was no longer with the child's father. On 5 July 2010 the appellant was granted leave outside the Rules until 2 November 2010 in order to have her baby and to make arrangements to leave the UK.

7. S was duly born on 24 August 2010. On 2 October 2010 the appellant applied for further leave to remain, but the application was rejected as invalid on 17 November 2010. The appellant made a valid application on 23 October 2010, and the application was refused on 17 December 2010.
8. Although this is not reflected in the respondent's record of the appellant's immigration history, in a letter dated 25 March 2011 Lawmans Solicitors made further representations on the appellant's behalf. They said they were instructed to apply for her case to be reviewed as removal would lead to insurmountable difficulties given their client's circumstances and length of residence. It was accepted that they had imperfect immigration histories, but the Home Office was asked to consider that within the context of the previous lives in Nigeria (sic), the fact that they had been absent from Nigeria for a considerable period of time should be taken into account. The same firm sent a chasing letter on 20 July 2011.
9. On 13 May 2013 Zuriel Solicitors wrote to the CAU in Liverpool, saying they were writing further to various letters written on behalf of the appellant for which they were still awaiting response.
10. On 13 November 2013 the MPs' Liaison Unit within the Home Office wrote to Steve Reed MP responding to an enquiry that he had made in October on behalf of the appellant. Mrs Sajeev of the MPs' Liaison Unit set out the appellant's immigration history. She explained that the appellant was not given a right of appeal against the refusal decision made on 17 December 2010, as she had no valid leave when the application was made. They had received a request for reconsideration of the decision on 10 June 2011, which had been allocated to the appropriate section. She apologised for the delay in dealing with this matter. As the appellant's reconsideration request was submitted before 13 November 2012, it would be considered under the Home Office policy on Legacy reconsideration requests.
11. In the meantime, Home Office records showed that although her application was refused with no right of appeal, an appeal was lodged with the First-tier Tribunal on 14 February 2011. The appeal was due for a hearing on 1 April 2011, but it was withdrawn on 29 March 2011. There was no further information available on the appellant's file regarding this matter. If the appellant had been provided with any documentation in relation to this by the First-tier Tribunal, she (Mrs Sajeev) would be grateful if she could provide copies of such documentation to her.
12. In fact, contrary to Mrs Sajeev's belief, the appeal was not withdrawn: it was dismissed. On 1 April 2011 Designated Judge Manuell dismissed the appeals of both appellants on the grounds that they were not valid.
13. The appellants instructed new solicitors, Irving & Co, who wrote to the UK Border Agency on 22 January 2014. They asserted that their clients continued to await a decision on their application for leave to remain in the UK made on 26 October 2010. They complained that the Secretary of State had also failed to confer on the appellant a right of appeal. It was

their view that the failure to issue an appealable decision was unlawful. They requested that the decision in respect of the appellant be reviewed, or that the Home Office issue a removal decision in respect of her as soon as possible.

14. On 20 June 2014 the respondent gave her reasons for deciding to remove the appellants upon a reconsideration of their applications under Article 8 ECHR, and taking into account Section 55 of the Borders, Citizenship and Immigration Act 2009.

The Hearing Before, and the Decision of, the First-tier Tribunal

15. At the hearing before Judge Doyle at Richmond Magistrates' Court on 5 November 2014 the appellants were represented by Ms Jones of Counsel, and the respondent was represented by a Presenting Officer. The judge received oral evidence from the appellant, and he set out his primary findings of fact in paragraph 11 of his subsequent decision. He concluded at paragraph 12 that the appellants could not fulfil the requirements of the Rules. Indeed, he recorded Counsel for the appellants as candidly conceding that the appellants could not fulfil the requirements of the Rules that had existed in 2010, nor as they existed in 2014. The judge went on in paragraphs 14(a) to 14(ac) to consider at some length, with extensive citation from authority, whether the appellants qualified for Article 8 relief outside the Rules. In subparagraph (n) he concluded that family life within the meaning of Article 8 did not exist between the appellant and her mother. At subparagraph (o) he addressed the question of whether there was family life between child S and her maternal grandmother, and in particular whether the maternal grandmother fulfilled a parental role in child S's life. The judge held that the weight of evidence placed before him indicated there was a normal relationship between grandmother and grandchild. The weight of the evidence indicated that the primary carer for child S was her mother. But even if family life did exist between child S and the maternal grandmother, when he weighed up the nature of their relationship, he could not see the decision to remove the appellants would amount to a breach of the right to respect for family life.
16. From subparagraph (q) onwards, the judge addressed the alternative submission that removal of the appellants would represent a disproportionate breach of the right to respect for their private lives. It is convenient to set out verbatim the judge's findings in subparagraphs (u) to (z).

“(u) When I weigh all of the factors in this case, I come to the conclusion that the respondent's decision is not a disproportionate breach. Family life and private life both exist, but the family life that exists, exists between the two appellants. They will not be separated, so there is no breach of that family life. To a lesser extent, there is family life between the second appellant and her maternal grandmother, however as I have already indicated, there is nothing exceptional or unusual about that relationship. It is a relationship of love and affection which can be maintained from a distance just as the relationship between the

second appellant's maternal grandmother and her own 17 year old son has been maintained for many years.

- (v) The key to this case is consideration of the first appellant's immigration history. The first appellant's mother, in a candid passage in cross examination, admitted that when she arranged for the first appellant to come to the UK, she had no intention (and never has had any intention) of returning the first appellant to Jamaica. In 2002, the first appellant was a vulnerable young teenager and her mother was acting to protect her. Although the extension of that protection was not in accordance with the law or in accordance with the Immigration Rules, as a matter of fact, the first appellant was able to complete her education and live out her teen years in the UK. The turning point in this case is the respondent's decision in July 2007. By that time, the first appellant was an independent adult (as my brother immigration judge found in his determination promulgated on 6 November 2007). Notwithstanding the terms of my brother immigration judge's decision on 6 November 2007, the first appellant made a conscious decision to stay in the UK. Everything that has come to pass since November 2007 must be viewed against the decision of an independent adult not to accept my brother immigration judge's decision and not to remove from the UK, but instead to pursue life in the UK in the full knowledge that she had no right to remain in the UK.
- (w) It is argued that the respondent's delay in dealing with the appellants' case weighs heavily in the appellants' favour. Counsel for the appellants stated that the delay comes in two stages, the initial delay in the period to 2007 and then a delay from 10 June 2011 to 2014. I revisit my brother immigration judge's decision promulgated on 6 November 2007. He commenced the final paragraph of his determination with the following sentence, "*I do not consider that the delay in reaching a decision in this case a disadvantage to the appellant in any material respect.*"
- (x) In **Devaseelan 2002 UKAIT 00702**, the Tribunal was concerned with a human rights appeal which followed an asylum appeal on the same issues. The Tribunal said that, in such circumstances, the first Tribunal's determination stands as an assessment of the claim the Appellant was making at the time of that first determination. It is not binding on the second Tribunal but, there again, the second Tribunal is not hearing an appeal against it. The Tribunal set out various principles: the first decision is always the starting point; facts since then can always be considered; facts before then but not relevant to the first decision can always be considered; the second Tribunal should treat with circumspection relevant facts that had not been brought to the first Tribunal's attention; if issues and evidence on the first and second appeals are materially the same, the second Tribunal should treat the issues as settled by the first decision rather than allowing the matter to be re-litigated. The Tribunal also gave a caveat and said that there will be occasional cases where the circumstances surrounding the first appeal were such that it would be right for the second Tribunal to look at the matter as if the first determination had never been made. The question of delay up to 2007 has already been dealt with.

- (y) It is argued that the respondent delayed between 10 June 2011 and issuing a decision on 20 June 2014. That argument must be viewed against the history of applications in this case. I have already found in fact that the matters calling before me for consideration commence when the appellant submitted an application on 23 October 2010. That was the first appellant's last application for leave to remain. It was refused on 17 December 2010. There was no delay, the decision was issued within two months. It was not until 29 months later, in May 2013, that the first appellant submitted an application for reconsideration. The clock stopped between December 2010 and May 2013. The passage of 29 months is marked by inactivity on the part of the first appellant, not by inactivity on the part of the respondent. There was no delay.
- (z) The clock started to tick again in May 2013. Nothing happened between May 2013 and January 2014; the appellants' solicitor's pre-action protocol letter was the catalyst which led to the respondent's letter of 20 June 2014. 13 months passed between May 2013 and June 2014. I view those 13 months against the 12 years that the first appellant has spent in the UK and find that there was no disproportionate delay – and that even if I am wrong about that, any delay that there was forms a small fraction of the time that the appellant has spent in the UK and did not encourage the first appellant to pursue any further significant aspect of private life within the UK.”

The Rule 24 Response

17. In response to the granting of permission to appeal, a member of the Specialist Appeals Team settled an extensive Rule 24 response on the part of the Secretary of State opposing the appeal for the following reasons:

- “2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the judge of the First-tier Tribunal directed himself appropriately.
3. The respondent will submit that the grounds advanced by the appellant raise no material arguable errors of law that would be considered capable of having a material impact upon the outcome of the appeal. Moreover it is clear that the Appellants were legally represented at the hearing and the FTJ records correctly that the Appellant's counsel conceded that they could not succeed under the Immigration Rules.
4. As regards Article 8, it was properly open to the FTJ to find that the first and second appellant will be returning together and conclude that there will not be interference with their enjoyment of family life together. It was also properly open to the FTJ to find that family life within the meaning of Article 8 ECHR does not exist between the first Appellant and her mother, beyond ordinary familial ties. [Paragraph 15(h) of the determination]. The FTJ further finds that the relationship between the second appellant and her grandmother is the normal relationship of a grandmother and grand child, the primary carer of the second appellant properly being found to be the first Appellant on the evidence. Therefore the FTJ provided sound reasons to support his findings that the respondent's decision to remove the appellants from

the UK would not amount to a breach of the right to respect for family life. [Paragraph 15 (o) determination.]

5. As regard the Appellant's grounds relating to private life it is submitted that the Judge had regard to all of the relevant evidence, and applied the relevant principles to the facts of the Appellants' case. It cannot be said that the Judge conflated matters or failed to consider relevant factors in respect of his findings on Article 8 private life. Read overall the determination shows a fair and balanced approach and does not reveal any material arguable errors of law. The FTJ correctly directed himself to the application of Section 117B of the Nationality Immigration and Asylum Act 2002 [paragraph 15(s) determination] in finding that little weight should be given to private life developed in the UK when the persons immigration status was precarious because the first appellant made a conscious decision '*to pursue life in the UK in the full knowledge she had no right to remain*'. [Paragraph 15(v) Determination.]
6. Moreover it is clear from paragraph 15(w, x, y and z) of the determination that the Judge has properly considered the impact of the delay in the round and provided adequate and sustainable reasons to support those findings. The appellants' grounds are advanced in mere disagreement with the negative outcome of the appeal."

The Hearing in the Upper Tribunal

18. At the hearing before me, Ms Howorth developed the arguments raised by her in the grounds of appeal, and Mr Melvin adhered to the line taken by his colleague in the Rule 24 response.

Discussion

19. Ground 1 is that the judge erred in law in considering the impact of delay for which the respondent was responsible. Ms Howorth has two complaints. Her first complaint is that the judge wrongly adopted the finding of Judge Afako on delay in his decision on the appellant's 2007 appeal. Judge Afako found the lengthy delay preceding the eventual refusal decision in July 2007 did not cause a disadvantage to the appellant in any material respect.
20. There is no merit in Ms Howorth's first complaint. In adopting Judge Afako's finding, the judge was not misapplying **Devaseelan**. Apart from the fact that the period for which the appellant was awaiting a decision on her dependency application represented a significant proportion of the total period of residence which she had accrued in the United Kingdom, the delay was otherwise completely irrelevant to the assessment of proportionality in 2014. The finding of Judge Afako was completely sound, and Ms Howorth does not identify by way of appeal any consideration which undermines it. She cites **EB (Kosovo) [2008] UKHL** for the proposition that the House of Lords in that case decided delay was potentially relevant in three ways. But she does not go on to explain how the analysis in **EB (Kosovo)** assists the appellant's case on

proportionality. She indicated in oral argument that the lengthy delay had arguably given rise to a sense of permanence and a legitimate expectation that the appellant would be granted ILR. But the delay was not long enough to bring the appellant within an applicable Rule or policy at the eventual date of decision.

21. Ms Howorth is on stronger ground in her second complaint, which relates to the second period of delay. Ms Howorth submitted that there had been a delay of three years between the representations made on 10 June 2011 and the issuing of a decision to remove the appellants on 20 June 2014.
22. At the beginning of subparagraph (y) the judge acknowledged the case that was being put forward by Ms Howorth. But when reviewing the history of the applications in the remainder of subparagraph (y), he did not acknowledge that representations had been made in June 2011, and that in 2013 the MPs' Liaison Unit had apologised to the appellant's local MP for not responding to these representations. Accordingly, the argument runs, the judge was wrong to find that the clock stopped between December 2010 and May 2013, and wrong to find that this passage of 29 months was marked by inactivity on the part of the appellant, as opposed to inactivity on the part of the respondent.
23. An oddity of this aspect of the case is that Ms Howorth was unable to show me in the extensive appellants' bundle any representations that were made on 10 June 2011. She submitted that the representations referred to are those which were made by Lawmans Solicitors on 25 March 2011. But these were purportedly posted on 28 March 2011.
24. As indicated earlier, the representations made by Lawmans Solicitors in March 2011 were inaccurate and confused, and they added nothing to the application for leave to remain that had been refused on 17 December 2010.
25. So I am not persuaded there was any material error by the judge in treating the appellant as being inactive between December 2010 and May 2013. For in that period she is not shown to have submitted any representations which were worthy of consideration.
26. What triggered the appealable decision to remove the appellants was the letter from the appellants' current solicitors dated January 2014. Before that, there was not a request to make a removal decision. So arguably the judge was being generous in treating the clock as stopping at May 2013, rather than in January 2014.
27. But even if I am wrong about that, and even if it could be said that the respondent culpably delayed in making an appealable decision to remove the appellants, I do not consider that this vitiates the judge's proportionality assessment.

28. As the judge held in subparagraph (v), the simple fact is that the appellant, an independent adult, made a conscious decision in November 2007 to ignore the outcome of her Article 8 appeal, and to carry on pursuing her life in the UK in the full knowledge that she had no right to be here. Her position is not improved by the fact that from 2010 onwards she periodically made representations through various solicitors for a reconsideration of what was essentially always the same unmeritorious case, save that from 2010 the appellant relied additionally on her parental relationship with child S.
29. Ground 2 subdivides into an argument that the judge failed to have regard to child S's best interests, and an argument that the judge's findings on Article 8 are so confused as to amount to a material error of law.
30. I do not understand Ms Howorth to pursue the first limb of ground 2 in oral argument before me. But, for the avoidance of doubt, the argument has no merit. The judge expressly addressed the child's best interests in subparagraph (h) where he observed that it had never been the respondent's intention to separate child S from her mother. It was in the interests of child S to remain with the parent who was her primary carer, namely the appellant, and the judge recorded that the parties in this case agreed that this was the correct approach. The judge went on to address the circumstances which mother and child would face in Jamaica in subparagraph (ab).
31. Ms Howorth expanded on the second limb of ground 2 in oral argument. Essentially, her complaint was that the judge was inconsistent on the question of whether child S enjoyed family life with her grandmother. I cannot see that the judge was inconsistent on this question. His conclusion was that they did not enjoy family for the purposes of Article 8; but if he was wrong about that, the separation of child S from her grandmother consequential upon her going to Jamaica with her mother would not constitute a disproportionate breach of family and/or private life. Ultimately, it is the analysis of the precise facts which matters, not the label which is applied. This is illuminated in **Singh v Secretary for the Home Department [2015] EWCA Civ 630**. At paragraph [25], Sir Stanley Burnton, giving the leading the judgment of the court, said:

“However, the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case, I am agreement with Solomon LJ's comment when refusing permission to appeal, the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in **AA**, in the judgment which I found most helpful, the facts to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the court is whether those factors lead to the conclusion it would be disproportionate to remove the applicant from the United Kingdom. I reject Mr Malik's submission that the Upper Tribunal Judge's assessment of proportionality was flawed because she, on his case wrongly, based it on the appellant's private life rather than on their family and private life. In my judgment, she took all

relevant factors into account, and a conclusion on proportionality is not able to challenge. Indeed, I go further, in my judgment, no reasonable Tribunal, on the facts found, could properly have come to a different conclusion.”

32. In conclusion, I find that the judge has given adequate reasons for dismissing the appeals of both mother and child, and that the grounds of appeal are no more than an expression of disagreement with findings that were reasonably open to the judge, and which are entirely in line with case law and with the public interest considerations set out in Section 117B of the 2002 Act.

Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. These appeals to the Upper Tribunal are dismissed.

Signed

Date

Deputy Upper Tribunal Judge Monson