



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

Numbers: IA/38881/2014

Appeal

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**THE IMMIGRATION ACTS**

**Heard at: Field House**

**On 14 October 2015**

**Promulgated**

**Decision and Reasons**

**On 18 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**MS C A R  
MISS K R**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr S Nwaekwu, Solicitor

For the Respondent: Mr A Holmes, Senior Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondents are citizens of St Lucia born on 3 March 1972 and 2 January 2002. They are mother and daughter. However, for the sake of convenience I shall refer to the latter as the “appellant” and to the Secretary of the State as the “respondent”, which are the designations they had in the proceedings before the First-tier Tribunal.

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2. The appellants appeal to the First-tier Tribunal was against the decision of the respondent to refuse their applications for leave to remain in the United Kingdom under paragraph 276 ADE of the Immigration Rules as over stayers.
3. A Judge of the First-tier Tribunal, Youngerwood allowed both their appeals. First-tier Tribunal Judge JM Holmes in a decision dated 16 July 2015 granted the respondent permission to appeal to the Upper Tribunal, it being found to be arguable that the First-tier Tribunal Judge approach to this appeal was flawed.
4. Thus the appeal came before me.

### **First-tier Tribunal's findings**

5. The First-tier Tribunal allowed the appellant's appeal, concluding the following which I summarise. It is absolutely clear that the appellant brought her daughter into this country when she was aged 16 months old in 2003 and has lived continuously in the UK since then. This has not been challenged by the respondent. Now the first appellant seeks to rely on her daughter's continuous residence in the United Kingdom to support a claim under Article 8.
6. The reliance is made even clearer by the fact that the appellant has produced absolutely no evidence as to any problems being encountered by her daughter in the United Kingdom, or any anticipated problems in relation to her education in general welfare, were she to be returned to St Lucia-although something was said in oral evidence. The appellant, to some extent still has roots in St Lucia given that she spent most of her life there, still has a family home, albeit, it is asserted, in a poor state of repair, and some, albeit apparently limited, contact with one or more friends there.
7. The appellant's case has been approached on the well-established principle in **Razgar** in relation to the Convention. Article 8 was engaged given the simple fact that the appellant's have been in the United Kingdom for over 11 years and ultimately would have had to consider whether the respondent has established that the removal decisions were are lawful and proportionate. Especially taking into account the daughter's best interests as a primary consideration. The best interests might have been finely balanced because there is absolutely no evidence, as I say, to indicate that the second appellant would have any problems in assessing the provisions of public education and medical facilities in St Lucia. I am certainly not willing to infer that these facilities would not be available, in the absence of any evidence from the appellant, especially as they were put on notice, in the second

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refusal letter especially, that there is according to the respondent, a functioning public education system and signature. There are of course countries in the world where even in the total absence of evidence from an appellant, the Tribunal would be able to find, or refer, that return to that country would not be in the best interests of a child because of the well-established conditions in that country. This is not the position in relation to St Lucia, where clear evidence would be needed right to be invited to find to the contrary.

8. Given that the first appellant, on any basis, has been in the United Kingdom entirely unlawfully, her only apparent visit these are having been obtained by deception on her own evidence, I would ultimately have concluded that removal decisions pre-July 2012 would have been lawful in the interests of immigration control and economic well-being of the country, the public being rightly concerned by the appellant's actions, driving a coach and horses through lawful immigration control, and relying upon her daughter, in respect of whom there would be no significant obstacles on returning to St Lucia.
9. Given that there is no challenge to the genuine relationship between the appellant and her daughter, it is clear that the only real issue on this appeal before me is whether the appellant establishes that it would not be reasonable to expect the child to leave the United Kingdom paragraph EX 1 of the Rules.
10. In the absence of any guidance case law, my view might well have been that, in the total absence of any evidence from the appellant to establish any anticipated problems for her daughter on return to St Lucia, she has simply not established the essential burden to show that it would not be reasonable to expect her daughter to leave the UK for Saint Lucia. Children of all ages frequently accompany their parents than the parents choose to immigrate and to countries with a child has little or no knowledge and in the absence of evidence to the contrary, where there is no reason 20 sic paid that they cannot adapt to their new lives. Finding on that basis would in my view be reasonable and understood by the public concerned by the appellant's flagrant breach of immigration law.
11. Taking into account the relevant case law, the case law makes it clear that long residence of a child must be relevant to the proportionality of removal but that in particular residents of seven years or more and seven years from the age of 4 to 11 is particularly relevant. The second appellant of course meets all those criteria. Therefore even in the absence of any evidence from the appellant to indicate problems to be anticipated in St Lucia, the appellants are entitled to argue that it must be inferred from the length of residence of the second appellant, that

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she has put down effective routes and social relationships in the United Kingdom.

12. That being so, the appeals must succeed, notwithstanding my confirmation that I regret having to make this decision in this particular case, in light of the first appellant's behaviour. That, however is the outcome of the respondent's policy, enacted in immigration rules, being in effect more generous to applicants that under the Convention.

### **Grounds of appeal**

13. The grounds of appeal state the following which I summarise. It is submitted by the respondent that the Judge made a material misdirection of law. The judge reaches the conclusion that it would not be unreasonable to expect the second appellant to leave the United Kingdom notwithstanding her earlier finding that the first appellant has been in the United Kingdom entirely unlawfully. Her finding that it would not be reasonable for the appellant to return to St Lucia without any evidence of significant obstacles amounts to an error.
14. Any consideration of reasonableness in this context must be holistic and could not be assessed without for example, consideration of something as fundamental as to whether the first and second appellant would be leaving the United Kingdom with their parents. It is generally the case that it is on the child best interests to remain with their parents and therefore generally it is reasonable to expect the child to leave the United Kingdom with their parent, particularly if the parents have no right to remain in the United Kingdom. The Judges' comments that "in the absence of any guidance" is not accurate in light of the case law on the subject.

### **Decision as to whether there is an error of law**

15. The Judges approach to the appeal was materially flawed. The Judge having found that there is no evidence of any anticipated problems for the second appellant to return to St Lucia, nevertheless found that it would not be reasonable for her to return to merely because she has been in this country for more than seven years.
16. The Judge failed to take into account that the second appellant is not a British citizen and will be returning to her country with her mother as a family unit. The Judge has not applied the case law to this appeal in a holistic manner but has concentrated one aspect of the case that the second appellant has been in this country for 11 years.

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17. The Judge has fallen into material error by her analysis of the second appellant's best interests. He failed to take into account that the appellants are not lawfully settled in this country. They have always been here unlawfully in the first appellant is deception when she entered the United Kingdom. He also failed to take into account that that as a starting point the best interests of children is to be with their parents. Having found that there are no obstacles to both appellants returning to St Lucia, the conclusion that the second appellant should not have to leave is perverse.
18. I find that the Judge has made a material error of law and the determination cannot stand. I therefore set it aside in its entirety.
19. I find that the appellants can return to St Lucia as have been in this country unlawfully. The first appellant was deceptive in the original grant of entry as a visitor. They lived here for a lengthy period unlawfully. The best interests of the second appellant is to remain with her mother. There is no evidence that it would be unreasonable for the second appellant to return to St Lucia with her mother and carry on with life in that country.
20. I have considered all the case law including **Agyarko [2015] EW CA Civ 440** the Court of Appeal held that where a party who had overstayed unlawfully and married or formed a relationship with a British citizen sought leave to remain, the "insurmountable obstacles" test as to return under the Immigration Rules was a stringent test and more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom, although the test was always to be interpreted in a sensible and practical rather than purely literal way. I find that there are no obstacles insurmountable or otherwise for both appellants returning to St Lucia.
21. **In the case of EV Philippines [2014] EW CA Civ 874.** In **EV** it was stated that notwithstanding a finding that the best interests of the children lay in continuing with education in the United Kingdom with both parents also remaining in the United Kingdom, the Tribunal has been entitled to find that the need to maintain immigration control outweighed the children's best interests.
22. Section 117B makes public interest considerations applicable to all cases and states:
  - "(1) The maintenance of effective immigration controls is in the public interest

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.....

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

23. The first appellant's immigration status in the United Kingdom has always been unlawful. The second appellant's best interest lies with remaining with her mother. There are no insurmountable obstacles to the second appellant accompanying her mother to St Lucia and continuing with their life in that country.

### **Decision**

For the reasons given above, the determination of the First-tier Tribunal is set aside.

I remake the decision on appeal and dismiss the appellants' appeals pursuant to the Immigration Rules and Article 8 of the European Convention on Human Rights.

Appeal is dismissed for both appellants

Signed by

Mrs S Chana  
Deputy Upper Tribunal Judge  
November 2015

16<sup>th</sup> day of