



**Upper Tribunal
(Immigration and Asylum Chamber)**
IA/14697/2015

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Field House
On 18 September 2017**

**Decision & Reasons
Promulgated
On 26 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

KELLIA [B]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms N. Mallick, Counsel, instructed by Cleveland Law Ltd.

For the Respondent: Mr L. Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica, born on [] 1991. She arrived in the United Kingdom on 4 December 2009 as a visitor, accompanied by her younger sister and grandmother and was granted leave to enter until 9 May 2010. An in-time application for leave to remain as the dependant of her mother, [EG], was unsuccessful and she became appeal rights exhausted on 7 July 2011. On 17 November 2011, the Appellant applied for leave to

remain outside the Immigration Rules but this application was refused, however, following judicial review proceedings, the Respondent reconsidered her application and in a decision dated 5 January 2015, upheld her decision to refuse the Appellant leave to remain in the United Kingdom.

2. The Appellant appealed against this decision and her appeal came before Judge of the First tier Tribunal Sullivan for hearing on 2 November 2016. By this time the Appellant had given birth to twins on 31 December 2015, by [KS], a family friend. The Appellant was in a relationship with a British citizen, [BH] and they planned her pregnancy. The Appellant, her partner, her mother and her sister, [N], gave evidence.

3. In a decision promulgated on 25 November 2016, the First tier Tribunal Judge dismissed the appeal. An application for permission to appeal to the Upper Tribunal was made on the following bases:

(i) the Judge erred in failing to give any consideration to whether the Appellant's children are British, in light of the fact that the biological father of the twins was given indefinite leave to enter on 24 December 2008, thus the twins are British by birth. The Judge thus further erred in failing to consider section 117B(6) of the NIAA 2002;

(ii) in failing to consider whether it was reasonable to expect the Appellant's partner to leave the UK, in light of the fact that she is a British citizen of Guyanese origin;

(iii) the Judge's decision is inadequately reasoned and/or perverse in respect of her consideration of Article 8 outside the Rules, including at [22] a misdirection as to the position of the Appellant and her partner in Jamaica in light of the documented difficulties faced by same sex partners;

(iv) in failing to take account of material evidence viz the status documents of [KS];

(v) in failing to make any or adequate findings as to the best interests of the Appellant's children.

4. Permission to appeal to the Upper Tribunal was refused by First tier Tribunal Judge Robertson but upon renewal to the Upper Tribunal, permission to appeal was granted by UTJ Grubb on 27 July 2017 in the following terms:

"2. There appears to be a fundamental error in the Judge's approach to the position of the appellant's two children. The Judge accepted the evidence of [KS] who was their father. However, contrary to what the Judge states in para 20, his Jamaican passport showed he had been granted indefinite leave to enter (p141 of the bundle). As a result, as he was living in the UK, he was arguably "settled" and as both children

were born in the UK and, as a result, British citizens (s 1(1)(b) of the BNA 1981) not as the Judge found only Jamaican citizens. On that basis they were each a "qualifying child" for the purposes of Part 5A of the NIA Act 2002. The Judge found they were not (para 24). In particular, therefore, s117B(6) was relevant and was not considered by the Judge. That was an arguable error of law."

3. Whilst the remaining Grounds may be less meritorious, I would grant leave generally as the s.117B point is central to the case."

5. The rule 24 response from the Respondent dated 11 August 2017 asserts *inter alia* that: *"it will be submitted that there was no evidence from [KS] in relation to his passport and little evidence in Home Office systems to verify this claim."*

Hearing

6. At the outset of the hearing Mr Tarlow helpfully informed the Upper Tribunal that he was not seeking to rely on the rule 24 response and that he accepted that at page 141 of the bundle there is a vignette to show that [KS] was granted Indefinite Leave to Enter [ILE] and entered the UK on 13 February 2009. Mr Tarlow further provided copies of [KS]'s GCID notes dated 8 February 2015, which confirmed that he had been granted ILE.

7. In light of Mr Tarlow's concession I indicated to the parties that I found a material error of law in the decision of the First tier Tribunal Judge and that I proposed to re-make the decision. Ms Mallick sought to rely upon further evidence relating to [KS]'s status and contact with his daughters, thus I gave the parties time to prepare for the further hearing and for Ms Mallick to have [KS]'s statement faxed through to the Upper Tribunal.

8. I also heard submissions from the parties in respect of the remainder of the grounds of appeal, given that permission to appeal to the Upper Tribunal was granted in general terms. I also found that First tier Tribunal Judge Sullivan further erred:

8.1. in applying an incorrect legal test at [22] in respect of her finding that the Appellant (and her partner) would not be at risk of persecution in Jamaica because she would be discreet about her sexual orientation, without making any findings on the key issue of why the Appellant would be discreet. She thus misapplied the guidance set out in SW (lesbians - HJ & HT applied) Jamaica CG [2011] UKUT 251 (IAC);

8.2. in finding that this is not a case in which there are sufficiently compelling circumstances to justify a grant of leave under Article 8 outside the Rules, which fails to take account of the evidence of the Appellant's mother, sister and partner and

of course, the fact that the Appellant's twin daughters are British.

9. For the avoidance of doubt, I do not find that the challenge to the Judge's findings of discrepancies in the evidence [Ground 3] is made out nor that the Judge erred in failing to consider whether it was reasonable for the Appellant's partner to leave the United Kingdom, in light of her sustainable finding at [21] that whilst the Appellant and [BH] had established family life for the purposes of Article 8, she was not satisfied that they had cohabited for 2 years, due to discrepancies in the evidence as to when the relationship had started and when the parties had begun to live together and thus the Appellant was ineligible for a consideration of leave under the Immigration Rules as a partner.

10. It materialised (from the Appellant's evidence) that her relationship with [BH] has broken down and that the Appellant moved back in with her mother and sister in February 2017.

11. Thus the issues to be determined upon reconsideration are:

11.1. whether the Appellant meets the requirements of the Immigration Rules *viz* R-LTRPT;

11.2. in the alternative, whether there are compelling circumstances justifying consideration of Article 8 outside the Immigration Rules and consequently consideration pursuant to section 117B(6) of the NIAA 2002 of whether it is reasonable for the Appellant's British citizen children to leave the United Kingdom;

11.3. whether the Appellant would be at risk of ill-treatment amounting to a breach of Article 3 of ECHR on return to Jamaica due to her sexual orientation.

12. The Appellant attended and gave evidence before me. Her mother and sisters were not present, having apparently been informed by the Appellant's solicitors that there was no need for their attendance. I was shown texts and video recordings showing that [KS] was caring for their children whilst the Appellant attended the Upper Tribunal and that he was in regular contact with the children. I was also provided with an unsigned statement from [KS] (confirmed by him by way of a text message).

13. The Appellant confirmed the contents of her unsigned statement of 25 October 2016, with two material changes: firstly, that she is now living at her mother's house with her children, her mother and one of her sisters and secondly, that she is no longer in a relationship or living with [BH], although [BH] continued to have contact with the children.

14. In respect of the relationship between the children and their

biological father, [KS], she stated that he had not attended the Upper Tribunal as they were simply unaware that he was required to attend and that he was looking after the children because she had to attend Lunar House that morning and only became aware that she should attend the Upper Tribunal hearing when she telephoned her barrister that morning. The Appellant confirmed that [KS] visits the children at the weekends, at least two or three times a month; that he spent the whole week of their birthday last December with them and that he has stayed over and spends time with them during the University holidays. The Appellant stated that their father changes their nappies; takes them to the park and he took them to McDonald's but they did not like the food because she normally cooks for them. The Appellant stated that the twins are learning to speak; they are swimming on their own and that both she and [KS] take them swimming as well as her sister and that they go once a week every week. The Appellant confirmed that they saw their grandmother every day since they were living with her.

15. In cross-examination, the Appellant confirmed that the twins are currently 20 months. When asked if there was any reason why they could not go with her to Jamaica, she replied that it would only be her looking after them and it is hard just being her. She said there was nowhere she could stay in Jamaica. The Appellant acknowledged that she had spent a large part of her life in Jamaica, until 2009 and whilst she was familiar with the customs and culture there she did not know how much has changed since she left.

16. In response to questions from the Upper Tribunal, the Appellant stated that she has an aunt living in Jamaica but she is not sure where she lives because they do not really speak. The Appellant stated she previously lived in Clarendon. She stated that she has not worked formally in the United Kingdom - she had done some babysitting but never a job with payslips. The Appellant stated that she has not formed a relationship with anyone else in the United Kingdom and that she did not get over someone that easily.

17. Mr Tarlow made brief submissions that the Appellant has acknowledged she has spent time in Jamaica and is familiar with the culture. Her children are still very young and she could relocate to Jamaica and recreate a life there. She is a resourceful person and could create a family environment in Jamaica and there is no reason why she could not return there.

18. Ms Mallick submitted that in respect of the requirements of R-LTRPT of Appendix FM of the Immigration Rules, the only issue is that of reasonableness. This had not been considered in the refusal decisions because the Appellant's children were born after the second decision of 5 January 2015. She submitted that it was not reasonable for the children to be separated from their biological father and their mother's family, her sisters and her mother and that

there are strong emotional bonds between them, particularly given that the Appellant's aunts do not have children. Ms Mallick submitted that it was clear that the children have a relationship with their father, whose evidence was that he says he sees them at every opportunity he gets when he is not at the University of Buckinghamshire. He provides financial support for them every two weeks and sees them on a regular basis.

19. Ms Mallick submitted that, in respect of the family in the United Kingdom, the Appellant has three sisters in the United Kingdom and the Appellant's mother is here. All are British except for the Appellant's younger sister, [MB], who has ILR. Even if there were family members in Jamaica, the twins' father is in the United Kingdom and it would be a disproportionate breach of their family life and in turn that of the Appellant. The children's father visits and assists with the children and this is all the more important given the breakdown of the Appellant's relationship with [BH]: the Appellant has been truthful about this and has provided an account of how often their father visits. The best interests of the children are to be considered and it is in their best interests to remain in the United Kingdom as they should not be separated from their extended family.

Findings of fact

20. I consider first whether the Appellant qualifies for leave under the provisions of R-LTRPT of the Immigration Rules as the parent of children in the United Kingdom. This is not a matter that was considered by the Respondent in the refusal decision of 5 January 2015 in light of the fact that the Appellant's daughters were not born until 31 December 2015. It was also not considered by the First tier Tribunal in light of the Judge's erroneous understanding of the immigration status and nationality of the children. The parties were in agreement that all the provisions of the Rule were met except for the provisions of EX1 (ii) *viz* taking into account their best interests as a primary consideration, it would not be reasonable to expect the children to leave the United Kingdom.

21. I have carefully considered the evidence before me and the submissions of both parties and I have concluded that it would not be reasonable to expect the Appellant's children to leave the United Kingdom. My reasons are as follows:

21.1. The Appellant is a single parent who is residing with her mother and one of her sisters. I accept her evidence that, as the single mother of twins now aged 20 months, caring for them on her own is challenging and that she is supported by her mother, sisters and the twins' biological father. The children also remain in contact with their mother's former partner, who took on a parental role during the first year of their life. I bear

in mind and take into account that none of those individuals would be returning to Jamaica with the Appellant and her children, given that they are British citizens and thus the Appellant would be returning to Jamaica with her children on her own. I also bear in mind that none of her extended family continue to live in Jamaica apart from an aunt with whom she is not in contact. The Appellant's grandmother has relocated to Grand Cayman to live with her son and the Appellant and her children are not eligible to join them. The Appellant has never been employed apart from informally as a babysitter.

21.2. I also take into account the Appellant's sexual orientation. Whilst she has not made a claim for asylum on this basis, it is clear from the manner in which her case was put before the First tier Tribunal that she feared that she would be at risk of harm in Jamaica due to her same sex relationship. Whilst that relationship is no longer subsisting, it is reasonable to suppose that, if returned to Jamaica, the Appellant would at some stage in the future form a same sex relationship. The CG decision in SW (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 251 (IAC) was considered by the First tier Tribunal Judge who found that, because the Appellant said she would not tell people about her relationship because they are judgmental, she would be discreet and thus not at risk of persecution. The FtTJ failed, however, to consider why the Appellant would be discreet and whether this would be motivated in part by a fear of harm, as she had stated. The circumstances have now changed however and the Appellant would be returning to Jamaica without her former partner. However, given that this aspect of the appeal was not the subject of additional argument, I simply find that the Appellant's sexual orientation is a factor, along with those set out at 21.1.above, to be considered in the overall assessment of whether or not it would be reasonable for her children to leave the United Kingdom with her, bearing in mind the context of Jamaica, as is set out in the country guidance case.

21.3. The most important factor, however, is where the best interests of the Appellant's twin daughters lie. They are British citizens and are aged almost 21 months. The Appellant is their primary carer and I find it would be in their best interests to remain with her. I have considered Mr Tarlow's submission that the children are young enough to adapt to life in Jamaica and that the Appellant is familiar with the customs and culture having lived there throughout her childhood. I have also had regard to the Home Office guidance Appendix FM 1.0 Family Life (as a Partner or Parent): 10-Year Routes, August 2015. I note that, unlike the 5 year route guidance, which was updated in August 2017, this has not been updated. Section 11 makes provision for the best interests of a child and provides *inter alia*

as follows:

11.2.3. Would it be unreasonable to expect a British Citizen child to leave the UK?

Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano ...

Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;**
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.”**

21.4. I find that, whilst the Appellant is an overstayer, having arrived as a visitor with her sister and grandmother on 4 December 2009 at the age of 18 years, she made an in-time application for leave to remain as a dependant of her mother and when this was refused, she made a further application for leave to remain on the basis of her private and family life, which lead ultimately to the extant proceedings. This is not, therefore, a case where the Appellant has “gone to ground” or sought to evade immigration control but has actively sought to regularise her stay. In these circumstances, I find that the Appellant does not have a “very poor” immigration history, so

as preclude a grant of leave on the basis of the fact that she is an overstayer. No issues of criminality arise on the facts of the case. Consequently, I find that the effect of the decision to remove the Appellant would effectively force the Appellant's British citizen children to leave the EU, to return to Jamaica with her and this would be unreasonable.

22. In light of my decision that the Appellant meets the requirements of the Immigration Rules for leave to remain as a parent, there is no need to go on to consider whether there are compelling circumstances meriting consideration of the appeal outside the Immigration Rules in respect of Article 8 of ECHR.

Decision

23. For the reasons set out above, I find that the Appellant meets the requirements of R-LTRPT 1.1. (a), (b) and (d) of the Immigration Rules and is thus entitled to the grant of leave to remain in the United Kingdom as the parent of British children. I further find that, whilst this is ultimately a matter for the Respondent having regard to D-LTRPT.1.2. and GEN 1.11A, consideration should be given, upon receipt of requisite evidence from the Appellant, to waiving the prohibition on recourse to public funds at least in respect of the first period of leave of 30 months, given that the Appellant has no income of her own, is the sole carer for twins under the age of 2 years, is living with her mother and is entirely supported by her mother, siblings and in respect of the children, their biological father.

Notice of Decision

24. The First tier Tribunal Judge made material errors of law in her decision of 25 November 2016. I substitute a decision allowing the appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

25 September 2017