Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/24121/2014
IA/19921/2014
IA/20120/2014
IA/20122/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 July 2016	**On 7 July 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ROBERT ALEXANDER BOSWELL
GEORGIA FELICIA FORSYTHE-BOSWELL
(AND TWO DEPENDENTS)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J. Norman, Counsel
For the Respondent: Mr S. Pritchard, Counsel

DECISION AND REASONS

1. In a decision promulgated on 02 December 2015 the Upper Tribunal set aside a decision of the First-tier Tribunal dismissing the appellants' appeal against the respondent's decision to refuse leave to remain on human rights grounds [annexed].

A brief summary of the appellants' immigration history is contained in the error of law decision [1-3].

2. In November 2015 the central issue in the appeal was whether it would be reasonable to expect the two dependent children of the family to leave the UK. Directions were made for the parties to serve detailed skeleton arguments. In the intervening period the Upper Tribunal discussed many of the relevant legal issues in *PD and Others (Article 8 – conjoined family claims) Sri Lanka* [2016] UKUT 00108.

3. At the date of the resumed hearing the appellants' oldest daughter "R" had just turned 18 years old. She entered the UK in December 2002 and has been continuously resident for a period of over 14 years. Their youngest daughter "A" was born in the UK in October 2006. At the date of the hearing she is nine years old and has been continuously resident in the UK for a period just short of the 10 years required for her to be eligible to register as a British citizen.

4. The first and second appellant attended the hearing and gave evidence. I was told that R also attended the tribunal. She decided that she did not want to give evidence and waited outside the hearing room. I have taken into account the evidence given by the witnesses as well as the documentary evidence before the tribunal. I have also taken into account the submissions made by both parties before coming to a decision in this appeal.

Legal Framework

5. Article 8 of the European Convention on Human Rights protects the right to private and family life. However, it is not an absolute right. The state is able to lawfully interfere with an appellant's private and family life as long as it is pursuing a legitimate aim and it is necessary and proportionate in all the circumstances of the case. The starting point is the basic principle that a state has the right to control the entry and residence of people. There is a strong public interest in maintaining an effective system of immigration control. This is done through the immigration rules and policies, which set out the requirements for leave to enter or remain in the UK.

6. The immigration rules are said to reflect the respondent's view of where a fair balance should be struck between the right to respect for private and family life and public interest considerations relating to the maintenance of an effective system of immigration control (paragraph GEN.1.1 Appendix FM). The rules should be read in a way that reflects a proper interpretation of Article 8 of the European Convention. However, there may some cases where the rules do not address relevant Article 8 issues. In such cases it may be necessary to consider whether there are compelling circumstances that might justify granting leave to remain outside the immigration rules: *Huang v SSHD* [2007] 2 AC 167 & *SSHD v SS (Congo)* [2015] EWCA Civ 387. The assessment should be made with reference to the five stage test outlined by the House of Lords in *R v SSHD ex parte Razgar* [2004] 3 WLR 58.

7. In assessing what weight to place on the public interest, where relevant, the Tribunal must take into account section 117B (general) and 117C (deportation) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), which outlines a number of factors that the Tribunal must consider when assessing whether an interference with a person's right to respect for private and family life is justified and proportionate.

Decision and reasons

Article 8 assessment – immigration rules

8. The appellants applied for leave to remain on human rights grounds on 10 October 2012. At the date of the application none of the appellants had leave to remain. It is not argued that the first and second appellants met any of the requirements of Appendix FM. The only immigration rule that could possibly be relevant is paragraph 276ADE, which relates to applications for leave to remain on the grounds of private life in the UK. The respondent refused the applications in a notice of decision dated 15 April 2014. At the date of the decision paragraph 276ADE(1) stated that the requirements to be met by an application for leave to remain on the grounds of private life in the UK were to be met "at the date of application".

9. At the date of application the first and second appellants did not meet the long residence requirement of 20 years (paragraph 276ADE(1)(iii)) and were unable to show that they had no ties (including social, cultural or family) with the country to which they would have to go if required to leave the UK (paragraph 276ADE(1)(vi)).

10. R had been continuously resident in the UK for a period of well over seven years for the purpose of paragraph 276ADE(1)(iv). At the date of the application, her sister A fell a few days short of a continuous period of residence of seven years. At the date of decision the respondent appeared to exercise discretion. For the purpose of the rules it was accepted that she had been continuously resident, at that stage, for a period of seven years. However, both applications relating to the children were refused on the ground that it would be reasonable to expect them to return to Jamaica as a family unit.

11. R reached her majority two weeks before the hearing. Ms Norman sought to argue that I should consider whether the third appellant met the requirements of the immigration rules at the date of the hearing. She argued that, despite the clear wording of paragraph 276ADE(1), the provisions of paragraph 276AO should allow the third appellant to rely on the private life requirements contained in paragraph 276ADE(1)(v) (aged 18 years and under 25 years and has spent at least half her life living continuously in the UK). The current wording of paragraph 276AO is as follows:

> "276A0. For the purposes of paragraph 276ADE(1) the requirement to make a valid application will not apply when the Article 8 claim is raised:
> (i) as part of an asylum claim, or as part of a further submission in person after an asylum claim has been refused;
> (ii) where a migrant is in immigration detention. A migrant in immigration detention or their representative must submit any application or claim raising Article 8 to a prison officer, a prisoner custody officer, a detainee custody officer or a member of Home Office staff at the migrant's place of detention; or
> (iii) in an appeal (subject to the consent of the Secretary of State where applicable).

12. It would appear to be an anomaly that an applicant who raises human rights issues at one of the later stages outlined in paragraph 276AO can benefit from the provisions of paragraph 276ADE without being required to make a valid application and would therefore be able to have their case assessed at the date of decision or date of appeal hearing when those who have made a valid human rights application have to be assessed "at the date of the application".

13. However, I see nothing in the wording of paragraph 276AO that would allow me to ignore the clear wording of paragraph 276ADE, which requires a person who has made a valid application to meet the requirements "at the date of the application". In this case the appellant's parents made a valid application for leave to remain for the family on human rights grounds. The clear wording of the rule states that the requirements should be assessed at the date of the application and not the date of the hearing. At the date of application it is evident that R was under 18 years of age and did not meet the requirements of paragraph 276ADE(1)(v). However, even if I cannot allow the appeal with reference to the immigration rules it is clear that if she made an application for leave to remain at the date of the hearing she would now meet the requirements. Neither her age nor her length of residence are in dispute.

14. For the reasons noted above A did not meet the strict requirements of paragraph 276ADE(1)(iv) of the immigration rules because, at the date of application, she had not been continuously resident in the UK for a period of at least seven years.

15. The immigration rules are said to reflect the respondent's view of where a balance should be struck in relation to human rights issues under Article 8. The strict requirement for a private life claim to be considered at the date of application might restrict a tribunal from considering the immigration rules as they stand at the date of the hearing. This would appear to conflict with the general principle regarding the importance of assessing protection and human rights issues at the date of a hearing: see *Ravichandran v SSHD* [1996] Imm AR 97 and *R v SSHD ex parte Razgar* [2004] UKHL 27. However, in order to comply with the Human Rights Act 1998 it is open to a court or tribunal to consider the situation in relation to Article 8 issues arising outside the rules. In practical terms the "reasonable to expect the child to leave the UK" test set out under section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") is the same as the one contained in paragraph 276ADE(1)(iv) so there is nothing to restrict the tribunal from considering all the relevant circumstances at the date of the hearing.

Best interests of the child

16. At the date of the hearing R is no longer a child. Her sister A is nine years old so it is necessary to consider her best interests.

17. In assessing the best interests of the child I have taken into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.*" I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child.

18. I have also taken into account the decisions in *ZH (Tanzania) v SSHD* [2011] UKSC 4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of the child are a primary consideration in this case but may be outweighed by the cumulative effect of other matters that weigh in the public interest. I take into account that the younger the child the more important the involvement of a parent is likely to be: see *Berrehab v Netherlands* (1988) 11 EHRR 322.

19. I take into account the fact that A was born in the UK and has known no other life. She is nine years old and will be eligible to register as a British citizen when she is ten years old in October 2016. While I do not seek to treat this as a 'near miss', the fact that a child who was born and has been resident in the UK for a period of ten years can apply to register as a British citizen is a reflection of the ties that a child is likely to have developed over that period of time. The fact that A was born in the UK and has lived here for a period of nine years and eight months reflects the strong ties that she is likely to have developed to the UK.

20. It is in A's best interests to remain with her parents as part of a single family unit. Although her sister is now 18 years old she still lives as part of the family unit. It is likely that, in time, her sister will mature and develop an independent life of her own. However, at the current time her sister forms part of the support network provided to A within the family unit. A is not currently a British citizen and could be removed to Jamaica. Unchallenged evidence from her mother and various other members of the family, as well as her teacher, indicates that A is a child who is likely to find it difficult to adapt to change. While this does not mean that she could not

overcome the transition to living in another country with the assistance and support of her parents it is a factor that I take into account in assessing her best interests.

21. In evidence A's parents told me that they lived in difficult circumstances in Jamaica. They lived in a poor neighbourhood where crime was rife. A's mum lived in a one room house with her mother and R prior to coming to the UK. A's father said that he lived in a compound with a number of other people where he had to sleep in a makeshift bed in a disused toilet. Although both parents were working they earned very little and their evidence indicates that they lived in circumstances of economic deprivation. Both parents expressed their concerns about being able to protect their daughter from the harmful experiences they had while growing up in Jamaica, which included witnessing violent crime. One of the motivating factors for Mr Boswell to join the British army appears to have been his desire to provide a better life for his children.

22. While the mere fact that a child is likely to return to a country where they would face less favourable economic conditions, standards of education and healthcare to the UK is not a matter that would normally be given significant weight, having assessed A's circumstances in the round, I conclude that her best interests point quite strongly towards her remaining in the UK with her family.

Article 8 assessment – outside the rules

23. The first appellant has been resident in the UK for a period of 14 years. His wife and oldest daughter for a period of about 13 ½ years. Their youngest daughter was born in the UK and has been resident here for nearly 10 years. While the family could be removed as a single unit without any significant interference with their right to family life I accept that the appellants' length of residence and other ties to the UK show that removal is likely to interfere with their right to private life in a sufficiently grave way as to engage the operation of Article 8 of the European Convention (questions (i) & (ii) of Lord Bingham's five stage approach in *Razgar v SSHD* [2004] INLR 349)

24. The appellants do not meet the strict requirements of the immigration rules. The normal course of action would be to require them to leave the UK. While the maintenance of effective immigration control is an important factor the balancing exercise under Article 8 is a complicated one and must take into account a number of different factors. In this case the immigration rules relating to private life, in effect, stopped the clock at the date of the application (four years ago) and therefore do not provide an adequate vehicle to assess whether removal in consequence of the decision would amount to a disproportionate interference with the appellants' rights at the date of the hearing.

25. I give significant weight to the maintenance of immigration control as a public interest consideration (section 117B(1) NIAA 2002). The first and second appellants

entered the UK with leave to remain but since May 2007 they knowingly remained without leave. I give little weight to the private life established by the first and second appellants at times when their immigration status was either precarious or unlawful (section 117B(4)-(5)). However, they both speak English and have, when they had permission to do so, worked to support the family. The evidence would appear to show that, if permitted to remain, they are unlikely to be a burden on the taxpayer. The public interest considerations outlined in section 117B(2)-(3) are neutral. The fact that they can speak English and are able to achieve financial independence does not add anything to their case.

26. At the date of the hearing R is now 18 years old. The facts of her age and length or residence are not disputed. As such, if she made a further application for leave to remain at the date of the hearing it seems clear that she would meet the private life requirements of paragraph 276ADE(1)(v) of the immigration rules. In a real world assessment of her situation the fact that she now meets the requirements of the immigration rules is a compelling circumstance that weighs strongly in her favour.

27. Although she is now an adult I take into account the fact that the fact that her age is not a bright line whereby she suddenly reaches maturity. The evidence shows that R has begun to develop social ties and relationships outside her immediate family but she is still dependent upon her parents and has not yet developed an independent life of her own. She is still very much a member of the family. In the circumstances I am satisfied that her relationship with her parents and younger sister is still such that their separation would amount to an interference with her right to family life: see *PT (Sri Lanka) v ECO, Chennai* [2016] EWCA Civ 612.

28. On behalf of the respondent is was argued that the appellant could live with her family if they returned to Jamaica but either way it would engage her rights under Article 8. She would have to choose between giving up a well established private life in the UK or being separated from her family.

29. In this case the crux of the proportionality assessment under Article 8(2) is the public interest consideration outlined in section 117B(6), which states that the public interest does not require a person's removal if they have a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom.

30. In relation to the test of "reasonableness" the tribunal in *PD (Sri Lanka)* made the following finding [39]:

> "We remind ourselves that the test to be applied is that of reasonableness. Other legal tests which have gained much currency in this sphere during recent years – insurmountable obstacles, exceptional circumstances, very compelling factors – have no application in the exercise we are performing. Self-evidently, the test of reasonableness poses a less exacting and demanding threshold than that posed by the other tests mentioned."

31. In considering whether it would be unreasonable to expect a non-British citizen child to leave the UK the respondent's policy[1] states at paragraph 11.2.4:

> "The requirement that a non-British citizen child has lived in the UK for a continuous period of at least the seven years immediately preceding the date of application, recognises that over time children start put down roots and integrate into life in the UK, to the extent that being required to leave the UK may be unreasonable. The longer the child has resided in the UK, the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case with continuous UK residence of more than seven years."

32. The policy goes on to outline a number of relevant considerations including whether there would be a significant risk to the child's health, whether they would leave the UK with their parents, the extent of wider family ties in the UK and whether the child is likely to be able to integrate into life in another country as well as any other factors that might have been raised.

33. In this case I have already found that A's best interest point strongly in favour of her remaining in the UK with her parents and, perhaps to a lesser extent, with her sister who still forms an integral part of the family unit. The fact that A was born in the UK, has spent over nine years here and has other close family relationships in the UK with her grandmother and other relatives are factors should be given weight. The Supreme Court in *ZH (Tanzania)* made clear that the best interests of a child are a primary consideration, albeit not a paramount consideration, which could only be outweighed by the cumulative effect of weighty public interest considerations. The respondent's own guidance suggests that the longer a child has resided in the UK "the more the balance will begin to swing in terms of it being unreasonable to expect the child to leave the UK" and that "strong reasons" will be required to refuse a case with continuous residence of more than seven years.

34. In this case the first and second appellants remained in the UK for a considerable period of time in the full knowledge that they had no permission to do so. While that is a matter that should be given weight as a public interest consideration there is no evidence to suggest that they committed immigration offences at the more serious end of the scale e.g. use of deception or false documents. It is trite law that a child should not be penalised for the actions of her parents.

35. While it is not a matter that is in any way determinative of this appeal, I also take into account the fact that the first appellant came to the UK in order to serve in the British army. He served for three years during which time he was deployed to Iraq. Little detail is provided about his time in the army or the nature of his dishonourable discharge. However, there is some evidence to show that the appellant is likely to have been treated for mental health issues as a result of his

[1] Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0b (Family Life (as a Partner or Parent) and Private Life: 10-year Routes) August 2015

experiences in Iraq and has, in the past, been treated for Post-traumatic Stress Disorder. The extent to which that might have contributed, if at all, to the incident that led to his discharge is unclear on the limited evidence before me.

36. Recent evidence indicates that the appellant has been suffering further difficulties with his mental health, which to some extent may be exacerbated by his uncertain immigration status. Ms Norman sought to argue that The Armed Forces Covenant recognised the duty that society owes to support members of the armed forces who have been injured (including mental injury) in the course of their duty. While the Covenant provides important recognition of the service provided by members of the armed forces nothing in the Covenant or the immigration rules suggests that the mere fact of service would justify granting leave to remain. However, the service that the appellant gave to the UK, albeit that it ended in dishonourable discharge, is a matter that, in my view, can be taken into account as part of the overall assessment of what weight should be given to the public interest. It is also in the public interest that the service provided by members of the armed forces, whether they are British citizens or not, is recognised.

Conclusion

37. Having weighed all the circumstances of this case I find that the fact that the third appellant would now meet the requirements of the immigration rules relating to private life is a compelling circumstances that would render her removal disproportionate in all the circumstances of her case.

38. The best interests of her younger sister point strongly towards her remaining in the UK within the family unit. Her length of residence, her strength of connections to the UK, as well as to some extent, the difficulties she would face in adapting to life in Jamaica in circumstances where the family is likely to live in very difficult economic circumstances, are not outweighed by strong public interest considerations. While not seeking to diminish the fact that her parents overstayed for a number of years it is the only factor that might weigh in the public interest. The fact that her father served the UK in the army is a factor, albeit not a determinative one, which reduces the weight to be placed on the public interest considerations.

39. Each case is fact sensitive. On the facts of this case I find that it would be unreasonable to expect A to leave the UK. It is not disputed that she is a "qualifying child" who has been continuously resident in the UK for a period of seven years. There is no dispute that the first and second appellants have a genuine and subsisting parental relationship. Section 117B(6) states that in such circumstances the public interest does not require removal.

40. I conclude that the removal of the appellants would interfere with their right to private life in a sufficiently serious way to engage the operation of Article 8. For the

reasons given above I find that removal in consequence of the decision would amount to a disproportionate interference with the appellants' rights under Article 8 of the European Convention (points (iv) & (v) of Lord Bingham's five stage approach in *Razgar*).

DECISION

I re-make the decision and ALLOW the appeals on human rights grounds

Signed  Date 06 July 2016

Upper Tribunal Judge Canavan

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House
On 11 November 2015

Decision Promulgated

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Before

LORD TURNBULL
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE CANAVAN

Between

ROBERT ALEXANDER BOSWELL
GEORGIA FELICIA FORSYTHE-BOSWELL
(AND TWO CHILDREN)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D. Balroop, Counsel instructed by Greenland Lawyers
For the Respondent: Mr S. Kotas, Home Office Presenting Officer

DECISION AND REASONS

Background

1. The first appellant entered the UK as a visitor in July 2002. He applied for further leave because he had joined the British army. His wife and daughter R (who is now 17 years old) entered the UK in December 2002 with leave to enter for three years in

line with the first appellant. He was discharged from the army in April 2006. They were granted a further period of leave to remain on a discretionary basis until February 2007 because his wife was heavily pregnant and unable to fly. Their second daughter A was born in the UK on 25 October 2006 and is now 9 years old. The appellants applied for further leave to remain but the application was refused in May 2007. Thereafter the parents took the decision to overstay in the full knowledge that they had no leave to remain.

2. In October 2012 the family applied for leave to remain on human rights grounds. The application was refused without a right of appeal. They sought to challenge the decision by way of judicial review and during the course of those proceedings the respondent agreed to reconsider the case. An appealable decision was made on 15 April 2014. The respondent refused the application on the ground that the parents did not meet the requirements of paragraph EX.1 of Appendix FM and none of the appellants met the private life requirements of paragraph 276ADE because the respondent considered that it would be reasonable to expect the children to leave the UK with their parents in order to continue their family life together in Jamaica.

3. The appellants appealed against the respondent's decision dated 15 April 2014. First-tier Tribunal Judge Molloy dismissed the appeal in a decision promulgated on 05 December 2014.

4. The appellants applied and were granted permission to appeal to the Upper Tribunal. They seek to challenge the decision on the following grounds:

   (i) The First-tier Tribunal erred in failing to assess the best interests of the two children and whether it would be reasonable to expect them to return to Jamaica with their parents properly.

   (ii) The First-tier Tribunal made findings that were not in accordance with the evidence and made inconsistent findings.

   (iii) The grounds were amended at the hearing (without opposition) to include an argument that the First-tier Tribunal failed to make findings as to whether the children met the private life requirements of paragraph 276ADE(1) of the immigration rules.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments we are satisfied that the First-tier Tribunal decision involved the making of an error on a point of law.

6. In a lengthy decision the First-tier Tribunal sought to assess the circumstances within the relevant legal framework. While we accept Mr Kotas' point that this is a detailed decision the structure and style of it means that it is somewhat difficult to read and it

is not always easy to follow the judge's reasoning. The judge summarised the oral evidence taken at the hearing [22-36] and the submissions made by both parties [37-53]. The judge's main findings appear to start at paragraph 54 of the decision.

7. The judge began by considering whether the first appellant met the private life requirements contained in paragraph 276ADE(1)(vi) of the immigration rules but concluded that there were no "very significant obstacles" to his reintegration in Jamaica. Despite the fact that the respondent quite clearly dealt with all four members of the family under paragraph 276ADE the judge declined to do so on the ground that it was not formally pleaded in the grounds of appeal [67]. Although he accepted that R met the requirement for seven years continuous residence he concluded that A did not meet the requirement because she had not lived in the UK for the required period of time at the date immediately preceding the date of the application [69]. While this is correct it should have been noted that in the reasons for refusal letter the respondent exercised discretion and accepted that A met the continuous residence requirement at the date of decision and proceeded to assess the case on that basis.

8. The judge then went on to consider whether the parents met the requirements of paragraph EX.1 of Appendix FM [70-97]. In doing so he assessed whether it would be reasonable to expect R to return to Jamaica. He directed himself to the decision in *MK (Best interests of child) India* [2012] Imm AR 2. He also took into account the respondent's duties contained in section 55 of the Borders, Citizenship and Immigration Act 2009 (BCIA 2009). He noted that the best interests of the child are a primary consideration [73-74]. He took into account R's length of residence and the fact that she wanted to remain in the UK to continue her education. He found that it was in R's best interests to remain in a family unit with her parents [80]. He found that there were no practical obstacles to the family being able to return to Jamaica and that as a citizen of Jamaica R was not divorced from her parents' cultural and religious practices. She had no health problems and would have no difficulty in communicating in Jamaica. She would be able to continue her education in Jamaica [82-88]. The judge went on to consider her links outside the family and took into account the fact that she had other family members in the UK and Jamaica and had developed links to the community through friends, church and youth clubs [91-92]. It is not clear why the judge thought information relating to the property the family lived in might be relevant but on the face of it this issue was immaterial to an assessment of whether it would be reasonable to expect the child to leave the UK [90].

9. Having concluded that the first appellant did not meet the requirements of paragraph 276ADE, and that the first and second appellants did not meet the requirements of paragraph EX.1, the judge went on to consider the case outside the immigration rules [98]. In considering whether the appellants' circumstances engaged the operation of Article 8(1) of the European Convention (points (i)-(ii) of the five stage approach in *Razgar v SSHD* [2004] UKHL 27) the judge concluded that

all four appellants had lived in the UK for a sufficiently long period of time to have "acquired a private life which is deserving of respect" [101]. However, this finding appears to conflict with his subsequent finding that the appellants had failed to show that there would be a sufficiently grave interference with their rights to engage the operation of Article 8 [103-104]. Again, the judge made reference to "evidential shortcomings" in relation to housing and employment, as well as in relation to R's education, but it is not clear how those shortcomings affected his decision. In light of the above we conclude that the First-tier Tribunal's findings as to whether the appellants had established a private life that engaged the operation of Article 8 are somewhat confused and contradictory.

10. Despite finding that Article 8 was not engaged the First-tier Tribunal went on to consider whether removal would be disproportionate. In doing so the judge reminded himself that the best interests of the children were a primary consideration [110]. He went on to make findings regarding the best interests of A, which were in very similar terms to those outlined in relation to her sister. The focus on his assessment was the fact that A could return to Jamaica with her parents, continue her education and had "ancestry rooted in Jamaica". He concluded that her best interest lay in remaining with her parents [112-124].

11. The judge took into account the immigration history of the parents. He accepted that they initially entered and remained in the UK on a lawful basis but found that the fact that they had overstayed for a period of over five years was a matter that "counts heavily against them in the proportionality assessment" [127]. Once again he seemed concerned that there was no up to date evidence relating to their domestic arrangements, employment history and health. The absence of such evidence was said to "count against them" [128-129]. The judge considered the factors outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) before concluding that their removal would be reasonable and proportionate in all the circumstances of the case [130-141].

12. While the First-tier Tribunal mentioned the relevant circumstances of the case we find that on an overall reading of the decision the judge failed to conduct a proper evaluative assessment of what weight to place on those matters. The assessment of whether it is "reasonable" to expect the children to return to Jamaica with their parents within the context of the human rights framework contained in the immigration rules (paragraphs EX.1 and 276ADE(1)(iv)) and the relevant statute (section 117B(6) NIAA 2002) cannot be devoid of any consideration of the strength of the connections that the family might now have in the UK. The mere fact that there may not be practical obstacles to the family returning to Jamaica, and that they derive their cultural heritage from that country, does not preclude the need to consider the effect of removal given their length of residence, which the judge recognised was a sufficiently long period to acquire a private life "deserving of respect".

13. We accept the submission made by Mr Kotas that it is not an error to fail to refer to specific case law. However, if in substance the First-tier Tribunal fails to adequately engage with the relevant legal principles that failure can amount to an error of law. In this case we find that the First-tier Tribunal failed to apply the principles outlined in decisions such as *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74 and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874 in a coherent and structured way.

14. We conclude that the First-tier Tribunal decision involved the making of an error on a point of law and set aside the decision. The appeal will be listed for a resumed hearing to remake the decision with further argument relating to the interpretation of the "it would not be reasonable to expect the child to leave the UK" test contained in the immigration rules and statutory provisions.

DIRECTIONS

15. It is agreed that the factual circumstances of the appellants' immigration history and length of residence in the UK are not in dispute and that no further oral evidence will need to be called at the resumed hearing.

16. Both parties are directed to prepare and serve skeleton arguments at least **10 days** before the next hearing, which should address the following issues.

    (i) Arguments relating to the proper assessment of the "it would not be reasonable to expect the child to leave the UK" test outlined in paragraphs EX.1 and 276ADE(1)(iv) of the immigration rules and section 117B(6) of the NIAA 2002.

    (ii) How the history of the seven year concession contained in DP5/96 (as amended), and any other policy statements, informed the current wording and application of the immigration rules.

    (iii) How existing judicial guidance on the best interests of children contained in cases such as *ZH (Tanzania)*, *Zoumbas* and *EV (Philippines)* might be relevant to the assessment of the "it would not be reasonable to expect the child to leave the UK" test.

    (iv) How the statutory duties contained in section 55 BCIA 2009 and associated statutory guidance interrelate with the "it would not be reasonable to expect the child to leave the UK" test.

17. Both parties are to serve any further bundles of evidence, including any up to date evidence relating to the strength of the children's connections to the UK and the likely effect of removal, at least **10 days** before the next hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and the case will be listed for a resumed hearing

Signed  Date 30 November 2015

Upper Tribunal Judge Canavan