Upper Tribunal
(Immigration and Asylum Chamber)

T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 29 November 2011	

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Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER-KINGSTON

Appellant

and

T

Respondent

Representation :

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer

For the Respondent: Mr I Palmer, instructed by Immigration UK Partnership

(i) Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children who are outside the United Kingdom.

(ii) Where there are reasons to believe that a child's welfare may be jeopardised by exclusion from the United Kingdom, the considerations of Article 8 ECHR, the "exclusion undesirable" provisions of the Immigration Rules and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in certain circumstances should all be taken into account by the ECO at first instance and the judge on appeal.

(iii) When the interests of the child are under consideration in an entry clearance case, it may be necessary to make investigations, and where appropriate having regard to age, the child herself may need to be interviewed.

(iv) Where the appeal can be fairly determined on the merits by the judge, it is inappropriate to allow it without substantive consideration simply for a decision to be made in accordance with the law.

(v) It is difficult to contemplate a scenario where a s. 55 duty is material to an immigration decision and indicates a certain outcome but Article 8 does not.

A copy of the statutory guidance “Every Child Matters, Change for Children” issued by the United Kingdom Border Agency in November 2009 and referred to in paragraph 18 of this determination, can be accessed at the following link:

http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/legislation/bci-act1/change-for-children.pdf?view=Binary

DECISION AND DIRECTIONS

Introduction

1.
This is a case concerned with a child born on 12 December 1995 in Jamaica who at the time of the hearing before us was a few days short of her 16 th birthday. We will direct that she should be referred to as T and there shall be no publication of her name and address or that of her mother to whom we shall refer as C.

2.
The subject matter is an appeal against the decision of the Entry Clearance Officer, Kingston to refuse to issue T with entry clearance to join C in the United Kingdom under paragraph 298 of the Immigration Rules HC 395. The ECO, Kingston was originally the respondent to T’s appeal but is now the appellant before us. For the avoidance of confusion we will call the ECO the defendant. The case was listed before us with the Secretary of State as the appellant, but although the ECO acts pursuant to instructions issued by the Secretary of State we conclude that the ECO is the proper party to this appeal and accordingly appears as such in the title to this determination.

3.
On 7 July 2011 Judge VA Osborne determined the appeal on a preliminary point without hearing any evidence or making any findings of fact. She allowed the appeal to the extent that it was remitted to the Entry Clearance Officer to give proper consideration to matters arising under s.55 of the Borders, Citizenship and Immigration Act 2009 (“BCIA”). The defendant sought permission to appeal on the basis that the s.55 duty did not apply to the ECO. Permission was granted on 1 August 2011 and directions were issued by Upper Tribunal Judge Freeman on 30 August 2011 when he indicated his view that “the judge was clearly wrong not to deal with the case herself” and that the Upper Tribunal was likely to re-make the decision without any further evidence.

4.
The issues before us are:-

a.
Did the First-tier Tribunal Judge make a material error of law in reaching the conclusions that she did?

b.
If so, what should now be done to determine this appeal?

5.
At the conclusion of the hearing we indicated our conclusion that:-

a.
The judge had made a material error of law.

b.

This appeal should be remitted to the First-tier Tribunal with directions for a hearing at the first available date after six weeks from the date of this decision, and that further directions be given to assist in the hearing of this appeal.

6.
We now give our reasons for these conclusions.

The outline facts

7.
The following facts are drawn from the papers. They are necessarily provisional until they are either agreed between the appellant and defendant or the Judge who hears the evidence reaches conclusions on contested matters.

8.
The sponsor C was born in Jamaica in May 1977. Her father was a British citizen. In her witness statement she says she obtained a British passport through her father in 2000. This may be either because she was a British citizen by descent from birth or she was registered as such a citizen later. It seems that C first went to the United Kingdom in 2000. She has made visits back to Jamaica since then.

9.
T was born to C and her unmarried partner CL in 1995. C makes no mention of any other children by CL, but in the course of investigating this application, the ECO spoke by phone to CL on 30 November 2010 and he said that he has two other children by C, NL who was 6 in 2010 (born approximately 2004) and KL 12 (born approximately 1998). If that is right there appears to have been an intimate relationship between C and CL between at least 1995 and 2004.

10.
C says that she decided to migrate to the UK in 2006, although it appears she was already spending most of her time there before then. She married a Jamaican national in 2007; he was granted entry clearance as a spouse and is settled in the UK where they both work and live in accommodation in Kent, where they live with C’s elder sister S.

11.
In 2009, T made her first application for entry clearance sponsored by her mother. This was refused on 7 July 2009. The ECO concluded that C had left Jamaica in 2000 when T was 5 years old, and that T was supported by her father who she saw regularly and her mother who sent remittances and visited in 2002, 2006, 2007 and 2008. There was an appeal that T asked to be decided on the papers and it was dismissed by a judge of the First-tier Tribunal on 8 March 2010. The judge was not satisfied either that C had sole responsibility for T or that there were compelling circumstances making exclusion undesirable. The judge also concluded that refusal of the application did not breach C and T’s right to respect for family life under Article 8 of the ECHR.

12.
In September 2010 a second application for entry clearance was made supported by more information including a letter dated 29 June 2010 from a medical centre in Kingston giving details of a medical examination and complaint made by T of sexual assault on 30 June 2006; a statement from someone who says that she has looked after T since July 2010 and evidence of remittances and contact by C.

13.

The second application was refused on 30 November 2010 shortly after the telephone call with CL referred to above, when it was assessed that T lived with her half brother, saw her father regularly and accordingly the ECO was not satisfied under either head of the Immigration Rules. The decision was reviewed by the Entry Clearance manager on 18 April 2011 who concluded that no case had been made of compelling circumstances making exclusion undesirable and that the decision did not interfere with family life and if it did it was justified and proportionate having regard to the factual foundation of the rejection of the claim under the Immigration Rules.

14.
When the case came before Judge Osborne in June 2011 it was submitted to her that the ECO had not considered the s.55 duty with respect to T. The Presenting Officer then appearing for the defendant apparently took instructions and conceded that the appeal should be allowed on this ground.

Section 55

15.
Section 55 BCIA 2009 came into force on 2 November 2009. It states that:

"(1) The Secretary of State must make arrangements for ensuring that –

(a)
the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom; and

(b)
any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2)
The functions referred to in sub-section (1) are-

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any customs function of the Secretary of State; and

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

Subsections (4) and (5) impose similar duties on the Director of Border Revenue.

16.
Mr Saunders's core submission to us is that this statutory duty imposed no obligations on the ECO, Kingston, as the subject matter of the duty is the welfare of children who are in the United Kingdom and T has never been to the United Kingdom.

17.

Mr Palmer does not dispute that T is outside the scope of section 55(1) but submits that the guidance actually issued by the Secretary of State indicates that a duty is imposed on Entry Clearance Officers in like manner as on immigration officers.

18.
The statutory guidance, “Every Child Matters, Change for Children” was issued in November 2009. Under the heading “Children and UK Border Agency Staff Overseas”, paragraph 2.34 reads:

“The statutory duty in section 55 of the 2009 Act does not apply in relation to children who are outside the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention.”

19.
Despite the clear statement in the first sentence of this guidance confusion arises with respect to the UKBA operational guidance. We were handed a UKBA document said to be valid from 31 August 2011 entitled “General reasons for refusing section 2 of 5 – Considering Entry Clearance”:

“This page contains guidance for entry clearance officers on what to consider when an applicant under the age of 18 applies for entry clearance without the permission of their parent(s) or legal guardian. This relates to general reasons for refusing under paragraph 320(16) of the rules.

You must carefully consider your statutory duty to children, under section 55 of the Borders Citizenship and Immigration Act 2009 before you apply the instructions in this guidance either to children or people with children”.

20.
Mr Palmer develops his submission by reference to:

a.
the case law on the welfare of children as a primary consideration in all immigration decision-making as set out in the lead decision of the Supreme Court in ZH (Tanzania) [2011] UKSC 4 and

b.
the principle that an immigration decision must be in accordance with the law and is not in accordance with the law if it fails to take into account or have regard to relevant policies.

Conclusions

21.
We agree with Mr Saunders that there was no statutory duty on the ECO to take account of or apply statutory guidance issued under s. 55(3) because the scope of the duty under s. 55(1) is clearly and unambiguously restricted to children in the UK and because the guidance itself accurately reflects the duty in explaining that there is no such duty in respect of children abroad.

22.
The operational guidance relating to general reasons for refusing has no purchase in this case:

a.
It is not statutory guidance within the meaning of s.55;

b.

It inaccurately states the legal position with respect to s.55(1) and internal guidance cannot be used to interpret a statute;

c.
It is dealing with a specific issue (a child under 18 making an application without consent of the parent/guardian) that does not arise here.

23.
We do not accept that the request in paragraph 2.34 of the statutory guidance to have regard to the spirit of s.55 means that the present decision is “not in accordance with the law”. We observe:

a.
The statutory duty to take measures to safeguard welfare does not arise, and the guidance itself cannot extend the duty to overseas cases.

b.
The reference to “the spirit of s.55” is too vague as to the subject of a separate common law duty to take a particular course when assessing the case.

c.
“The spirit of s.55” would apply where the ECO had reason to suspect that the child was in need of protection, and it appears from the decision letter that the ECO did not conclude that was the case.

d.
Whether the ECO was right or wrong to reach that conclusion depends on a resolution of disputed issues of fact rather than a remittal back to the ECO for compliance with an unspecific policy that neither imposes a duty nor directs a particular response to this application.

24.
We would add further that the function of judges in the Immigration and Asylum Chambers of both the First-tier and Upper Tribunals is to decide appeals, rather than supervise the exercise of public law functions by a general judicial review jurisdiction. When judges determine appeals they can decide what the material facts are, and proceed from those factual findings to reach conclusions on the statutory grounds set out in s.82 of the Nationality, Immigration and Asylum Act 2002. These are essentially:

a.
whether the decision is in accordance with the Immigration Rules applicable to the situation in question;

b.
whether any discretion afforded by the Rules should have been exercised differently;

c.
whether the decision is in accordance with international obligations reflected in UK law and practice and

d.
whether the decision is in accordance with the law.

We accept that “law” in this context includes the duty to act fairly which in turn includes the duty to have regard to policies that are material to the decision in question.

25.
Where an immigration decision is flawed for failure to have regard to an applicable policy outside the Immigration Rules, then immigration judges of both Tribunals have no appellate function to review the merits of the exercise of discretion or a judgment that is required to be made. Except in most unusual circumstances the most that can be done is for the appellate decision to record that the decision- making process is flawed and incomplete and so the application or decision in question remains outstanding and not yet properly determined (see AG and others) (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082).

26.
In this case, any policy requirement to take into account the welfare needs of the child who is abroad would run alongside two other legal duties that do certainly apply to Entry Clearance Officers namely:

a.
The duty to assess the application under the Immigration Rules including whether there any compelling reasons why T should not be excluded from joining C in the UK. This may well include the mother's suggestion that T had not been properly looked after by her father, has been the victim of a sexual assault while in the father's care, is underperforming at school because of lack of such care, and has been moved to other temporary guardians through absence of an appropriate quality of care to a vulnerable teenager.

b.
The duty on the ECO to act compatibly with T and C's Article 8 rights and to grant entry clearance if an assessment of what those rights required indicated that this was necessary.

27.
There is obviously family life enjoyed between T and C as mother and teenage daughter. The question is whether the notion of respect for such family life requires her admission under Article 8(1). In making any such assessment, T's best interests are a primary consideration (see the sequence of decisions in Strasbourg and the higher courts to this effect applying Article 3 of the UN Convention on the Rights of the Child to all administrative decision making: see Singh v Entry Clearance Officer, New Delhi [2004] EWCA Civ 1075, 30 July 2004; Tuquabo-Tekle v the Netherlands (Application no. 60665/00) [2005] ECHR 803 (1 December 2005) ; Uner v the Netherlands (Application no. 46410/99) [2006] ECHR 873 (18 October 2006) ; Maslov v Austria (Application no. 1638/03) [2008] ECHR 546 (23 June 2008) and ZH (Tanzania) [2011] UKSC 4.

28.
These duties can be directly enforced by Tribunal judges in determining appeals. It is for the judge to decide on all the relevant evidence what the best interests of the child are in the particular circumstances of the case, whether there are compelling circumstances requiring admission, and whether if the case fails under the Immigration Rules, there remains a lack of respect for family life Article 8(1)).

29.
There is accordingly no need to declare that a lawful decision remains outstanding that should be made good before the appeal is disposed of. Although the matter is not before us in the present appeal, we would be minded to reach the same conclusion even where a clear s.55 duty did arise because the immigration decision affected a child who was in the United Kingdom. We find it difficult to contemplate a scenario where a s.55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not. Not least is this the case because in a case where the

immigration decision was an interference with the right to respect for private and family life, compliance with the scheme of s.55 is a pre-requisite for justification of the interference as being in accordance with law.

30.
We are also conscious of the Court of Appeal's decision in AJ (India) [2011] EWCA Civ 1191 that compliance with the s.55 duty is a matter of substance rather than form, and if the decision maker's mind is directed to the situation of the child under the rules, Article 8 ECHR or s.55, it is difficult to contend that there has no consideration of the statutory duty in substance.

Error of Law

31.
For these reasons we conclude that the judge was misled by the concession of the Presenting Officer in reaching the conclusion she did. That involved a material error of law. We set aside the decision and now give consideration as to how it should be re-made.

Directions for remaking

32.
There has been no hearing of the substance of the appeal at all and no findings of any kind. The scheme of the Tribunals, Court and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal.

33.
When we have set aside a decision of the First-tier Tribunal, s.12(2) of the Tribunals, Courts and Enforcement Act 2007 requires us to remit the case to the First-tier with directions or re-make it for ourselves. Where there has been no hearing at all before the First-tier and the facts are disputed or unclear, we conclude that the decision should be remitted to the First-tier judge to determine the appeal.

34.
There are still a number of primary questions of fact that remain uncertain:-

a.
What were the living arrangements for T and C before 2000?

b.
When did C decide to settle in the UK and what arrangements did she make for T between 2000 and 2006?

c.
When did C's relation with CL cease; how many children did they have together and what arrangements were made for any other children and by whom?

d.
Where was T living during the period 2000 to 2006; 2006 to 2010, and from 2011 to date?

e.
Who feeds, clothes and materially supports her? Who makes the decisions on important questions in T's life and gives her moral guidance and support?

f.

Has T been neglected while in her father's care, if so how and why? This includes the question whether T has been sexually assaulted.

35.
Whatever the ECO may have concluded having spoken to father on the phone, the claimant had submitted material capable of suggesting some threat to her welfare. More such material has now been submitted in support of the appeal. The judge deciding this case will be assisted by the ECO's response to this material.

36.
Apart from the policy requirement to consider the spirit of s.55 if there is reason to suspect that the welfare of the child may be compromised by refusing her application, the ECO will be conscious that the best interests principle includes some requirement to sufficiently explore disputed material to reach a conclusion. Lady Hale in ZH (Tanzania) indicated at [34] to [37] (set out in Appendix A below) that this includes taking into account the views of the child herself.

37.
The child is of an age when she can be interviewed. We understand that C will promptly send written confirmation of what she told us, that she is willing for the ECO to interview T about these matters. In our judgment it is important for the ECO to explore the questions posed at [34] with T. At the very least T should have the benefit of a telephone interview where she can comment on what her father has said and explain her position. It will be for the ECO to consider whether a face-to- face interview is practicable and desirable.

38.
T has been seeking to come to the UK since 2009 and all delay in cases affecting children is highly undesirable. Accordingly, we will issue the following directions for the effective and expeditious hearing of this appeal:

a.
C to confirm in writing to Mr Saunders at the Senior Presenting Officers Unit by Monday 5 December that she is willing for the ECO to interview T.

b.
The defendant to make inquiries set out at [34] and [37] above with T by 13 January 2012;

c.
C's representatives serve any fresh evidence on which they seek to rely at this appeal on the defendant by 6 January 2011;

d.
The defendant to lodge a statement setting out the outcome of the further inquiries under b. and the response to any evidence filed by C not already considered by 20 January 2012;

e.
C to lodge any submissions by way of reply by 27 January 2012;

f.
Appeal to be heard at Taylor House on the first open date after 30 January 2012. Time estimate 3 hours. Parties to inform the Resident Judge at Taylor House promptly if this estimate is considered inaccurate;

g.
C, and her husband to be available for cross examination at the hearing.

Signed

Mr Justice Blake

President of the Upper Tribunal

Immigration and Asylum Chamber

Appendix A - Extracts from ZH (Tanzania)

Consulting the children

1. Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

2. There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64; [2009] 1 AC 1198, at para 49:

"Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."

3. The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview.

The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.

4. In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

"in many cases . . . there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative."

Children can sometimes surprise one.