Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/00815/2013
AA/00817/2013
AA/00818/2013

THE IMMIGRATION ACTS

Heard at North Shields
On 21 August 2013

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE DEANS

Between

R M J A
J A
N D A
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Selway, Halliday Reeves Law Firm
For the Respondent: Ms P Mangion, Home Office Presenting Officer

DETERMINATION AND REASONS

1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Hands dismissing this appeal on asylum and human rights grounds.

2) The first appellant is a national of the Ivory Coast and the other two appellants are her children. The first appellant claims to have entered the UK clandestinely in November

2004. She claimed asylum in 2008 but her claim was not refused by the respondent until January 2013.

3) The Judge of the First-tier Tribunal did not find the first appellant's asylum claim to be credible. This part of the decision is not challenged.

4) The application for permission to appeal addresses the circumstances of the second appellant, who is the first appellant's daughter and was born in the UK in October 2005. By the time of the refusal decision of January 2013 and the hearing before the First-tier Tribunal in February 2013, the second appellant had been in the UK for more than 7 years.

5) Permission to appeal was granted on the basis that arguably the Judge of the First-tier Tribunal had not properly applied paragraph 276ADE of the Immigration Rules and had not followed the proper approach in relation to Article 8. It was further arguable that the judge had not had proper regard to the delay in deciding the first appellant's asylum claim in terms of EB Kosovo [2008] UKHL 41.

6) The operative paragraphs of the determination by the Judge of the First-tier Tribunal read as follows:

> " 47. Mr Selway in his submission stated the delay by the respondent in reaching a decision in this matter had enabled the appellant and her family to establish a life in this country. Her daughter, born in 2005 started school in 2008 and had now been resident in this country for 8 years, thereby falling within the free standing exception that a person in an existing parental relationship with the child who had lived here for 7 years immediately preceding the application. The "application" in this case was made when the appellant claimed asylum in January 2008, before the child started school. At that time the exception applied but since the introduction of Immigration Rule 276ADE, this exception no longer applies. If, as I am entitled to do, I look at the rules and regulations and the position of the appellant as at the date of the hearing, the exception does not apply and I have to look at the terms of the Rules. In respect of the appellant and her younger child in the United Kingdom, she could not be granted leave to remain because of her private life in the United Kingdom.
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> 48. In respect of her elder child in the United Kingdom, she does fall within part (iv) of the Rule and the question is one of whether it would be reasonable to expect her daughter to leave the United Kingdom. Whilst the sins of their parents should not adversely affect children, it is a matter of fact that the appellant gave birth to her daughter whilst she was present in this country illegally. She waited for two years before claiming asylum and lived here with her daughter illegally during that time. She then, through her representatives, delayed the making of a decision by the respondent for a further two years and has therefore contributed significantly to the delay in the removal of her and her children to the Ivory Coast. The background material provided by the respondent indicates that state funded and private education is available in the Ivory Coast. There is also education at a tertiary level

available. The appellant's daughter would be able to continue with her education there. The appellant's daughter, according to the respondent in their refusal letter speaks French fluently and this has not been disputed. French is the main language of the Ivory Coast and she would, therefore, have no linguistic difficulties. The child will be returned with her mother and her brother. She has siblings in the Ivory Coast as well as a maternal grandmother and at least one cousin of her mother. She has more members of her wider family in the Ivory Coast than she has in the United Kingdom. There is no legitimate basis for the appellant remaining in the United Kingdom and therefore it is in the best interests of her daughter to travel with her to the Ivory Coast where she would be able to integrate into her wider family and form new friendships with children there."

7) The Judge of the First-tier Tribunal misdirected herself as to the law on several points at paragraph 47 of the determination. The "exception" on which Mr Selway sought to rely before the First-tier Tribunal was paragraph EX.1 of Appendix FM of the Immigration Rules. The Judge of the First-tier Tribunal does not appear to have had any regard to this provision whatsoever. She erroneously refers to an "exception" not applying at the date of the hearing. In this regard the judge has failed to have regard to a relevant provision of the Immigration Rules and this constitutes an error of law.

8) The judge appears to have been under the misapprehension that paragraph EX.1 of Appendix FM, if this was the "exception" to which she intended to refer, has in some sense been superseded by paragraph 297ADE. This is clearly erroneous and constitutes an error of law.

9) Both the respondent, in a letter dated 18 February 2013, and the Judge of the First-tier Tribunal have considered the appellants' position under paragraph 276ADE. The judge accepted that the second appellant fell within sub-paragraph (iv) of paragraph 276ADE because she is under the age of 18 years and has lived continuously in the UK for at least 7 years. In terms of paragraph 276ADE this made the second appellant eligible for leave to remain. The judge then proceeded to consider whether it was reasonable to expect the second appellant to leave the UK with her mother and brother. Before addressing this issue, however, the judge should have considered the possible relevance of the of Appendix FM, in particular EX.1.

10) For the respondent Mr Mangion acknowledged at the hearing before me that paragraph 47 of the determination was difficult to follow. He nevertheless submitted that the test of reasonableness considered by the judge in paragraph 48 in relation to paragraph 276ADE was relevant to EX.1 of Appendix FM. In relation to delay he pointed out that there was a delay of two years after the birth of the second appellant before an asylum claim was made. While delay on the part of the respondent would not diminish the value of private life, equally it would not enhance a claim made on the grounds of private life where that claim was weak.

11) Mr Mangion's argument in relation to paragraph EX.1 would be stronger had the judge addressed her mind at any point to the terms of Appendix FM and, in particular, to

paragraph EX.1. As she did not do so, her error is not cured by reading into the determination matters which the judge did not address.

12) For the reasons set out above, I am satisfied that the Judge of the First-tier Tribunal erred in law in her consideration of family life under paragraph 276ADE and Appendix FM. Accordingly, her decision insofar as it relates to family life is set aside and will be re-made.

13) In his submission before me Mr Selway referred to paragraph EX.1 as being a free-standing provision but this is not correct. Paragraph EX.1 must read alongside the further provisions of Appendix FM which appear under the heading "Family life as a parent of a child in the UK." Under this heading the relevant provision is section R-LTRPT.1.1, which sets out the requirements for limited leave to remain as a parent. This provision was considered by the respondent in the original reasons for refusal letter of 11 January 2013. The first requirement under this provision is that the applicant and the child must be in the UK. This is satisfied.

14) The second requirement is that the applicant must have made a valid application for limited leave to remain as a parent. This requirement, however, does not apply to these appeals in terms of paragraph GEN.1.9 of Appendix FM as the appellants have raised Article 8 in the course of these proceedings.

15) The third requirement of R-LTRPT.1.1 refers to the eligibility requirements at section E-LTRPT. These are not met as the second appellant is not a British citizen or settled in the UK. As an alternative, the fourth requirement applies where an appellant cannot meet all the requirements of section E-LTRPT. The fourth requirement states that the suitability requirements of section S-LTR must be met and also paragraph EX.1.

16) In relation to the first appellant it has not been alleged that any of the suitability requirements in S-LTR have not been met. The appellant used a false passport to enter the UK but this is not relevant to the suitability requirements under S-LTR.2.2. Accordingly the application of paragraph EX.1 can be considered.

17) Paragraph EX.1 will apply if the first appellant has a genuine and subsisting parental relationship with a child who is under the age of 18, is in the UK, and has lived in the UK continuously for at least the 7 years immediately preceding the date of application. It is not disputed that these requirements are satisfied in respect of the relationship between the first appellant and the second appellant. The further requirement is that it would not be reasonable to expect the child to leave the UK.

18) Mr Mangion submitted that the view taken by the Judge of the First-tier Tribunal in respect of the reasonableness of requiring the second appellant to leave the UK was properly considered in the context of paragraph 276ADE. I have two difficulties with this submission. First of all, as already stated, the Judge of the First-tier Tribunal was not directing her mind at all to the application of EX.1 in considering the issue of reasonableness. Secondly, the reason she gives are redolent of her disapproval,

seemingly on moral grounds, of the behaviour of the first appellant and relative to this she attaches little weight to the circumstances of the second appellant, whose best interests she was obliged to consider as a primary consideration. Thus at paragraph 48 the judge records that the second appellant speaks French and could continue her education in Ivory Coast, where she has family members and where she would be accompanied by her mother and her brother. The judge does not appear to consider at all the weight which should be given to the second appellant having lived the entire 8 years and more of her life in the UK and to her attendance at school in the UK, as well as the friendships and relationships she will have formed here. The judge's reasoning in relation to the reasonableness of expecting the second appellant to leave the UK is inadequate, not just specifically in relation to the failure to consider paragraph EX.1 but also in terms of the way those reasons are themselves expressed.

19) In my view the length of time the second appellant has been in the UK, taken into conjunction with her age and her education, are matters to be given considerable weight in the balancing process. As the Judge of the First-tier Tribunal stated, but then seemingly disregarded, the second appellant should not be held to blame for any misbehaviour by her mother. The evidence indicates that the second appellant is entirely settled, in the ordinary meaning of that word, in the UK and living as normal a life as any other child born in the UK of the same age. I would require strong reasons indeed to be satisfied that it was reasonable to expect a child in these circumstances, who satisfies in her own right the requirements of paragraph 276ADE(iv), to leave the UK. I am not so satisfied in relation to the second appellant.

20) The position is that the appeal by the second appellant succeeds under paragraph 276ADE (iv) of the Immigration Rules. The appeal by the first appellant succeeds under section R-LTRPT1.1 read in conjunction with paragraph EX.1.1.

21) The third appellant will not succeed under paragraph 276ADE (iv) because he was born more recently, in 2010, and has not lived in the UK for at least 7 years. I ought first to consider whether he satisfies the requirements for leave to remain as a child in section R-LTRC of Appendix FM. In this regard, however, I have been given no evidence to show that the maintenance and accommodation requirements of this section are satisfied. Turning to Article 8, it is clearly in the best interests of the third appellant that he should remain in a family unit with his mother and older sister. As I have found that they are entitled to remain under paragraph 276ADE and Appendix FM, I have little difficulty in finding that it would be a disproportionate interference with the family life of the younger child to separate him from his mother and sister. Accordingly all three appeals will succeed.

Conclusions

22) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

23) I re-make the decision in the appeals by allowing them.

Anonymity

24) The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum & Immigration Tribunal (Procedure) Rules 2005. I continue that order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Fee Award Note: This is not part of the determination

No fee is paid or payable and therefore there can be no fee award.

Signed Date

Judge of the Upper Tribunal