Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/01270/2012
IA/01271/2012

THE IMMIGRATION ACTS

Determined on the Papers at Bradford	**Determination Promulgated**
On 9th July 2012	**On 12th July 2013**
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Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

J J F (FIRST APPELLANT)
J S X R M (SECOND APPELLANT)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. This is the Appellants' appeal against the decision of Immigration Judge Chohan made following a hearing at Birmingham on 14th February 2012.

Background

2. The first Appellant arrived in the UK on 26th June 2002 with leave to enter as a visitor and overstayed. On 3rd October 2006 her daughter, the second Appellant, was born. The first Appellant and the second Appellant's father are now separated and the father is in another relationship from which he has a 3 year old son.

3. On 10th August 2008 the Appellants made an application for leave to remain in the UK for a purpose not covered by the Immigration Rules which was refused on 29th July 2009. She then requested her case to be considered under the ECHR, particularly Article 8 and the application was refused again in a notice of decision dated 4th January 2012.

4. The Immigration Judge accepted that the Appellants enjoyed family life in the UK and that Article 8 was engaged. He said that the Appellant had a working relationship with her ex-partner who had a pending application before the Home Office and therefore had no status in the UK but was in a relationship with a British citizen and had a British citizen son. The Immigration Judge considered the relevant case law namely ZH Tanzania v SSHD [2011] UKSC. The second Appellant attends nursery school and the oral evidence was that her father collects her from school and every other weekend she stays with him and his family, although there was no independent evidence to verify it. There was a letter from the school confirming the arrangement but he did not treat the letter as independent because the contents appeared to be based on information provided by the Appellant himself. He then said that he was prepared to accept that the father collects his daughter from school and that she resides with him at the weekends but he was not satisfied that the father actually had a son since there was no birth certificate and no evidence from his present partner. Even if he did accept that there was a new partner and son, the Appellant's and her daughter's removal would not have much impact on him because he is only 3 years of age and adaptable. They could keep in contact by telephone, letter and email and visits could be made as and when financially possible. The decision in ZH was dealt with on its own facts and each case has to be decided on its own merits. He considered the Appellants' private life in the UK but counted it against the principal Appellant that there was no evidence that she had sought to regularise her stay and the daughter with the support of her mother should have no difficulties in establishing herself in Jamaica.

5. On that basis he dismissed the appeal.

Grounds of Application for Permission to Appeal

6. The Appellants sought permission to appeal on the grounds that the Immigration Judge had failed to consider or reach any findings on the issues relating to Section 55 and the impact of that decision upon the child and had consequently erred in carrying out the balancing exercise of proportionality. The Judge fails to consider correctly and apply the principles set down by the Supreme Court in ZH which establishes that the interests of the children is a factor that has to be given primary consideration. There was no detailed and anxious consideration of the effect on the second Appellant or her father of her removal. Nor has he considered the fact that the Appellants face exclusion for a minimum period of five years, a relevant factor in determining the appeal. The Immigration Judge heard oral evidence from the father of the second Appellant who was present in court and had given oral evidence.

7. Permission to appeal was granted by Judge of the First-tier Tribunal E B Grant on 3rd April 2012 who stated that it was arguable that the judge had erred in law in distinguishing the second Appellant's circumstances from those of the child referred to in ZH and in failing to go on and consider the best interests of the second Appellant.

8. Directions were sent out with the grant of permission stating that the Appellant must inform the Tribunal within 21 days whether an oral hearing is required and putting the parties on notice that a failure to comply may lead the Upper Tribunal to proceed on the basis that nothing further is to be said or advanced in support of that party's case before the Upper Tribunal.

9. There was no response to those directions and, on 9th May 2012 Judge of the Upper Tribunal P D King stated that the appeal should be determined on the papers. Should the Upper Tribunal find there to be a material error of law it may proceed to determine the substantive merits of the appeal also on the papers or issue further directions.

10. On 11th May 2012 the Appellants' representatives requested that the matter be heard orally. A further letter on 16th May 2012 stated that there was no further information available to them at the time that the directions were sent out but they had since been instructed that the minor Appellant's father had been granted leave to remain. There was now a problem between the mother and the father who abducted the child and the first Appellant had to resort to the police to get the child back. She has now lodged an application to the family court.

11. In response, on 1st June 2012, Upper Tribunal Judge Latter stated that there was no adequate reasoning why the appeal should not be determined without a hearing since the directions made it clear that if an error of law is found the judge will either remake the decision or issue further directions. The Appellants' representatives were given permission to file further written submissions and evidence updating the position as far as the minor Appellant was concerned.

12. On 7th June 2012 the representatives submitted the following further submissions:

> "We rely on the grounds of application to the First-tier Tribunal and we are grateful that an error of law is found.
>
> In light of recent circumstances we have been instructed that a prohibited steps order has been lodged by our client in the Birmingham family courts in respect of the recent abduction of the minor Appellant by her father. The matter is now being dealt with by the Family Courts Division and I herewith enclose copies of the Order.
>
> We have also been instructed that the minor Appellant's father Mr M M has been granted leave to remain in the UK. However as the courts

will appreciate we are in some difficulty in providing the relevant proof in the light

of the recent issues surrounding the minor Appellant. However we feel that the Home Office are better placed to find an answer to this vital point.

The family courts have ruled on page 1 of the order that Mr M M is prohibited from removing the minor Appellant from the care of the mother. The matter has been referred to CAFCASS for further investigations and reports. The family court would be mindful about allowing contact with the father of the minor Appellant and this outcome is still open.

In light of the above issues and the pending family court matter it is my respective submissions that the following outcomes of the case should be considered:

(i) The SSHD withdraws her decision with a view to granting the Appellants six months' leave to remain whilst the family courts deal with the matter.

(ii) The Upper Tribunal set aside the decision of the First-tier Tribunal with a view to remaking the decision in favour of the Appellants by allowing the appeal under Article 8 ECHR."

Consideration of Whether there is a Material Error of Law

13. The Immigration Judge, at paragraph 10 of the determination, said that the Supreme Court in ZH said that the best interests of the child must be a primary consideration and that meant that they must be considered first.

14. However, at paragraph 14 he wrote as follows:

> "Mr Peer submitted a High Court decision (case number CO/15561/2009) which deals with ZH Tanzania and Section 55 of the Borders, Citizenship and Immigration Act 2009. I have considered that decision but it does seem that that case was dealt with on its own facts and there seems to be a general discussion regarding ZH Tanzania and the 2009 Act. The bottom line is that each case has to be decided on its own merits, facts and circumstances. On the evidence before me for the reasons outlined above I find that Article 8 would not be infringed by the removal of the Appellant and her daughter."

15. The observation that each case must depend on its own merits is plainly not an adequate consideration of the duty to consider the interests of the second Appellant first. As the Immigration Judge who granted permission stated, that is not an adequate consideration of the case of ZH. She quoted Baroness Hale who said

> "This is a binding obligation in international law and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty because the UK had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and as a result Section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK'."

16. On the evidence before the Immigration Judge, which he appeared to accept, the second Appellant was collected by her father from school and every other weekend she stays with him and his family. Whilst the Immigration Judge said that there was no independent evidence to verify it, commenting that the evidence from the school was not independent, he did say that he was prepared to accept that the arrangement was as claimed.

17. The Immigration Judge said that there was no evidence before him that the father had a 3 year old son but he did not believe that the daughter's removal would have such a great impact on him because he was only 3 years of age and adaptable. They could keep in contact through telephone etc.

18. It is not entirely clear whether the Immigration Judge accepted that the second Appellant had a half brother and clearly this is a matter upon which a finding should have been made. Assuming that he did accept that there was a half brother the Immigration Judge was then obliged to consider the best interests of the second Appellant as a primary consideration in considering whether the severance of that relationship was proportionate to the legitimate aims sought to be achieved. There is no such consideration in this determination.

19. Accordingly the decision is set aside.

20. Since the hearing before the First-tier Tribunal events have moved on and there are outstanding matters in the Birmingham County Court.

21. In RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 the Tribunal held

> "1. Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider:

(i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?

(ii) Are there compelling public interest reasons to exclude the claimant from the UK irrespective of the outcome of the family proceedings or the best interests of the child?

(iii) In the case of contact proceedings initiated by an Appellant in an immigration appeal is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not promote the child's welfare?

2. In assessing the above questions the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials if any are already available or can be made available to identify pointers to where the child's welfare lies?

3. Having considered these matters the judge will then have to decide:

(i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?

(ii) If so should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision in MS Ivory Coast [2007] EWCA Civ 133?

(iii) Alternatively is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?

(iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the Appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and the child resident here?"

22. Although the Appellant in RS was seeking contact as a non-resident parent nevertheless the same principles apply. In this case there are no compelling public interest reasons to exclude the Appellants from the UK irrespective of the outcome of the family proceedings and no reason to believe that the proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare. The contact arrangements here appear to be of long standing. In this case it seems that the most appropriate course is for a short period of an adjournment to be granted so that the outcome in the family proceedings is known, since that will inform the decision in where the best interests of the second Appellant lie. Accordingly the following directions are made.

(i) The Respondent is to produce evidence of the second Appellant's father's status within fourteen days of these directions.

(ii) The Appellant is to adduce evidence of the outcome of the hearing on 11th June 2012 at Birmingham County Court in relation to the prohibited steps order.

(iii) The matter is to be set down for a resumed hearing before Mrs D Taylor at Field House not before three months of the date of these directions.

The Resumed Hearing

23. Although the hearing had been adjourned for a period of three months, in fact there was a delay of some eleven months before this case came back before me. In the interim the Family Court in Birmingham had concluded its proceedings. Mr Peart told me that his firm had been liaising with the Family Court in Birmingham who were mindful of the immigration proceedings in this matter and had made the relevant orders in the full knowledge of the immigration status of both parties. He produced a draft order stating that the second Appellant is to reside with her mother, the first Appellant, save for specified occasions when she will reside with her father, namely every other weekend, and specified weeks within the school holidays.

24. Miss Everett, when she had had an opportunity to look at the order did not make any submissions save to raise a rather forlorn hope that the matter might be adjourned so that the Respondent could decide what action should be taken.

Findings and Conclusions

25. There is no justification for an adjournment of this case.

26. The second Appellant's father has been granted discretionary leave to remain until May 2015 on the basis of his relationship with a British citizen and their British child.

27. I am satisfied that the second Appellant enjoys family life with her natural father whom she stays with on a regular basis, and with her half brother, his son. It is implicit in the order of the Birmingham Family Court that the judge in that case considered that the best interests of the second Appellant were to live with her mother but to have extensive and residential contact with her father.

28. Removal of the second Appellant would clearly interfere with her ability to enjoy family life with her father and half brother. The best interests of the second Appellant are for her relationship with her father and his family to be allowed to continue and the respondent did not seek to argue otherwise. No reliance was put upon any countervailing argument to

suggest that the best interests of the second Appellant should not be followed. It has not been argued that the first Appellant, as the primary carer of her daughter, should be separated from her.

Decision

29. The decision of the original judge has been set aside. It is remade as follows. The appeals of the first and second Appellants are allowed on Article 8 grounds.

Signed Date

Upper Tribunal Judge Taylor