



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: IA/37123/2013

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 24 October 2014**

**Decision and Reasons  
Promulgated  
On 23 December 2014**

**Before**

**MR C M G OCKELTON, VICE PRESIDENT  
UPPER TRIBUNAL JUDGE DEANS**

**Between**

**R K  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Caskie, Advocate instructed by Latta & Co  
For the Respondent: Mr M Matthews, Home Office Presenting Officer

**DETERMINATION AND REASONS**

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Scobbie dismissing this appeal under the Immigration Rules and under Article 8. The appellant is a citizen of the USA. Her husband is a British citizen. They were married on 11 June 2009. Together they have 3 children, born in 2005,

2009 and 2010. The appellant's husband had, in addition, a daughter with a different mother who lives with the family. Until recently the parents and all the children lived together in the USA.

- 2) In 2011 both parents were convicted in the USA of trafficking a controlled substance. The appellant was sentenced to 3 years' probation and her husband 5 years' probation. He was deported from the USA and the entire family are now living in the UK.
- 3) The appeal to the First-tier Tribunal was brought against a decision dated 28 August 2013 by the respondent to refuse to vary leave and to remove the appellant. It is recorded in this decision that the appellant entered the UK on 22 September 2012 with leave to enter as a visitor valid until 22 March 2013.
- 4) The Judge of the First-tier Tribunal found that the appellant would not succeed under Appendix FM. She would not qualify as a partner because she had entered as a visitor. She would not qualify as a parent because she shared responsibility for the children with her husband, who is a British citizen. The judge found, in addition, that the appellant would not succeed under paragraph 276ADE.
- 5) The judge then considered the application of Article 8 outwith the Rules. The judge found that the appellant "is the author of her own unfortunate circumstances together with her husband". The judge nevertheless accepted that the children were not at fault and their best interests had to be taken into account. The judge noted that the children were dual nationals and the children could make a choice as to the parent with whom they would reside.
- 6) Permission was granted on the basis that the judge had not carried out a proper balancing exercise under Article 8. The judge had dismissed the appeal for reasons that the respondent had not relied upon in the refusal decision, which was not based upon the offences committed in the USA. It was arguable that the judge had not adequately considered the position of the children.
- 7) The application for permission to appeal also criticised the judge's approach under the Immigration Rules. Mr Matthews acknowledged at the hearing that the way in which the judge had dealt with the issues under the Immigration Rules was probably not sufficient.
- 8) For the appellants, Mr Caskie submitted there was a presumption that it was in the best interests of the children to be with both parents. It was pointed out that there was no presumption in the law to this effect but in many cases it would be in the best interests of the children. There was a lack of evidence before the

First-tier Tribunal to allow the judge to consider the best interests of the children properly.

- 9) Having heard submissions we were satisfied that the decision of the Judge of the First-tier Tribunal should be set aside on the basis of an error of law. The judge had failed properly to address the submissions made on the appellant's behalf as to the position of the family under Article 8 outside the Immigration Rules. We did not consider that it would be appropriate to re-make this decision ourselves because of the paucity of evidence as to the best interests of the children. In our view it would be appropriate for the appeal to be remitted to the First-tier Tribunal for a proper fact finding exercise to be carried out as to the circumstances of the family and the best interests of the children.
- 10) In deciding to remit the appeal a number of directions were issued orally at the hearing. The first of these was a direction to the respondent to indicate her view on how an attempt by the appellant to return to the UK if she left would be regarded, bearing in mind the circumstances of her most recent entry to the UK as a visitor, seemingly without declaring her conviction in the USA or the circumstances in which the family were entering the UK.
- 11) The second direction was to the appellant to submit any evidence upon which reliance was placed as to the best interests of the children in the UK. It was anticipated that this would include expert evidence from a suitably qualified person.
- 12) In addition the appellant was to submit evidence showing the exact consequences of her husband's sentence and deportation in terms of how this would affect his re-admission to the USA and whether he would be liable to continue his probation there. The respondent was to provide any assistance appropriate in relation to the question of the possibility of the husband being re-admitted to the USA. The respondent might also adduce evidence on the best interests of the children.
- 13) The additional evidence was to be submitted by 9 January 2015 for the purpose of a hearing on 16 January 2015.

## **Conclusions**

- 14) The making of the decision on the First-tier Tribunal did involve the making of an error on a point of law.
- 15) We set aside the decision.
- 16) We remit the decision to the First-tier Tribunal for hearing before a judge other than Judge of the First-tier Tribunal Scobbie.

## **Anonymity**

- 17) Although the Judge of the First-tier Tribunal did not consider it appropriate to make a direction for anonymity, having regard to the circumstances of the four children we consider it appropriate to make such an order (pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.) No report of these proceedings shall directly or indirectly identify the appellant or any member of her family.

Signed

Date **22 December 2014**

Upper Tribunal Judge Deans