IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51923/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 23rd October 2014	**On 10th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MS MARY TIYA KALAWI
(ANONYMITY NOT RETAINED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Poutney
For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellant born on 17th May 1978 is a citizen of Malawi. The Appellant who was present was represented by Mr Poutney. The Respondent was represented by Miss Johnstone a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant had made her original application for leave to remain in the United Kingdom outside of the Immigration Rules and Article 8 of the ECHR on 29th April 2010. Further representations were made on her behalf in that respect on 24th June 2011. The Respondent had refused the Appellant's application on 17th November 2013 and the matter came on appeal before Judge of the First-tier Tribunal Malik sitting at Manchester on 24th March 2014. The judge had dismissed the Appellant's appeal.

3. Application for permission to appeal was sought on 8th April 2014 and granted by First-tier Tribunal Judge Cox on 12th May 2014. The Respondent had opposed such application by letter dated 9th June 2014. Directions were issued directing the matter first be decided as to whether an error of law had been made by the First-tier Tribunal and the matter came before me in accordance with those directions on 16th July 2014.

4. I found an error of law had been made by the First-tier Tribunal for reasons provided in a determination promulgated on 22nd July 2014 and set aside that decision and issued directions for the remaking of that decision.

5. The matter comes back before me in the Upper Tribunal in accordance with those directions.

The Proceedings - Introduction

6. The Respondent's bundle consists of:

    - immigration history;

    - those documents listed within the bundle including the refusal letter of 12th November 2013 and removal directions in respect of the Appellant. I was also provided with removal directions in respect of the child dated 18th November 2013 which were not before the First-tier Tribunal Judge or before myself on the error of law decision.

7. The Appellant's documents consist of:

    - those documents listed at pages 2 to 219 on the index sheet to the original bundle;

    - skeleton argument;

    - supplementary documents listed at pages 1 to 45 on the index to the supplementary bundle of 15th October 2014.

8. Application had been made under Rule 15(2A) for the supplementary bundle documents to be admitted. I allowed the admission of such documents.

9. It was noted as a preliminary point that at the error of law decision it was believed that no removal directions had been issued in respect of the child although it appears that such removal directions had been issued but not served either on the Appellant's representatives or on the Tribunal.

10. I further noted to the representatives the existence of the Section 117B(6) of the 2002 Act brought into force by the Immigration Act 2014 which apply to all fresh decisions made after 28th July 2014. It was accepted that the child in this case was a qualifying child having lived in the United Kingdom for a continuous period of seven years or more (having been born in the UK and lived here all her life now a period of some ten years). Accordingly the question that would have to be asked in respect of Section 117B(6) is whether it was reasonable to ask a qualifying child to leave the United Kingdom. I took the view which I expressed to the parties that I was of the view that the best approach to this case was to provide an answer one way or the other to that question which I was obliged to consider in respect of current statutory provisions.

The Proceedings - Evidence

11. The Appellant was called to give evidence. She identified her name. She identified the two witness statements appearing at page 4 of the original bundle and page 1 of the supplementary bundle as being true and correct. She confirmed that her daughter was at school. She said that she had spoken to her daughter about going to Malawi and her daughter had been shocked by the suggestion as she regarded the UK as her home. The Appellant said that she had no-one in Malawi given that both her grandmother and uncle who had previously supported her were now dead.

12. In cross-examination she said that she had come to the UK as a student with her grandmother as a Sponsor before she died in 2008. Her grandmother had had cattle which she had sold to support her. Thereafter her uncle had provided for her between 2008 and 2011. He was in employment and had no family. He died in 2011. In terms of any inheritance she said that when her grandmother died the elders in the village took over her belongings. She said that when her uncle was alive an individual used to bring money to her from her uncle but she had not seen him or had contact from him since her uncle had died. She had had no contact from her ex-partner since he had left the UK in August 2010. She said that she had in fact had no contact with him for a period of time prior to him leaving the UK and she had not tried to make contact with him nor did she have any other means of contacting him in Malawi. She said that his parents had died some time ago and therefore her child did not have living paternal grandparents. She said that she had only known her child's father whilst in the UK as he was a student in this country.

13. She said it would be difficult to find a job in Malawi and that she had nowhere to live. She said that she was living alone with her daughter in the UK.

14. In re-examination she said that she and her partner had split up because he wanted to return to Malawi.

15. At the conclusion I heard submissions from both representatives and I reserved my decision to consider the documents and evidence submitted. I now provide that decision with my reasons.

Decision and Reasons

16. In this case the burden of proof lies on the Appellant and the standard of proof required for both immigration and human rights issues is a balance of probabilities. As the Appellant and her dependent child are within the UK I am entitled to look at all circumstances existing as at the date of hearing.

17. The Appellant's dependent child is 10 years of age. She is female. The only family member that the evidence discloses is the child's mother namely the Appellant. The child's father has on the evidence available returned to Malawi some four years ago but the Appellant and her partner had separated whilst in the UK a short time prior to his leaving the UK. There has been no contact between her partner and the Appellant or her child since that time. The evidence available does not disclose any efforts made by the father to make contact with either the Appellant or his child or indeed of the Appellant seeking to make any real efforts feasible or not to make contact with her ex-partner. There is in my view little likelihood of the Appellant making any such efforts even if those were feasible and on balance the evidence indicates that it is highly unlikely that even on return to Malawi there would be any contact between the Appellant and her ex-partner either generally or more specifically for the purposes of contact with the dependent child.

18. I am examining this case outside of the Immigration Rules but in accordance with statutory provisions which have recently been brought into force in order to clarify Parliament's views as to circumstances when, particularly in respect of a child, it could be said that an exercise of proportionality would be deemed at face value to indicate whether removal would be proportionate or not.

19. Section 117B(6) of the 2002 Act brought into force on 28th July 2014 regards the continuing presence of a qualifying child in the UK as being proportionate unless it would be reasonable in all the circumstances of a specific case to ask such qualifying child to leave the UK. The test of qualification is whether a child has been in the UK for a period of seven years or upwards.

20. In this case the dependent child was born in the UK and has lived all her life in the UK and at no stage, so far as the evidence discloses, has she returned to Malawi or indeed left the UK. She is now 10 years of age and therefore is a qualifying child having lived in the UK for over seven years.

Given her young age she has lived in the UK for a not insignificant period of time over and above the qualifying period of seven years.

21. In terms of whether or not it is reasonable to ask such a child to leave the UK it is necessary to examine firstly the personal circumstances of the family and the circumstances that would be met on return to Malawi and secondly to perhaps examine in general terms the country information regarding the circumstances that would in general terms impact on such a child.

22. On the evidence available as provided by the Appellant (and there is nothing to gainsay that which she has said), the Appellant would be returning to Malawi with no living family members or family support. She has no home that she could return to and no evidence that she would be able to find employment. There is nothing intrinsically inconsistent or lacking in credibility in those assertions based on the evidence before me.

23. The general information concerning Malawi contained within the documents before me do not suggest that the Appellant as a woman would find it easy to either find employment or lodgings on her own and without any family or financial support or backing. The plight facing female children in Malawi is referred to within the Human Rights Watch Report within the supplementary bundle as well as within documents that were provided within the original bundle. That report notes that one out of two girls in Malawi will be married before their 18th birthday, some being as young as 9 or 10 when they marry. Such early marriages and the attendance problems and abuse that can flow from such activity is often as the result of poverty and those are all factors that I have noted and in my view are not without significance in the circumstances of this case.

24. It may well be, that there are those cases where it would not be unreasonable to remove a qualifying child from the UK if the specific and country circumstances suggest little difficulty or problems in such removal. However for the features that I have summarised above it would in my view be unreasonable to ask a 10 year old Malawi girl who has lived all her life in the UK to return to Malawi with her mother when set against the personal circumstances that would be faced by the mother and the circumstances within the country generally.

25. This is not a case where there are other adults who are able to look after the child in the UK nor are there circumstances that suggests separation of mother and dependent female child would be anything other than seriously disproportionate.

26. I find therefore the answer to this case lies in the clear unreasonableness of removing the dependent child from the UK under the terms of Section 117B of the 2002 Act and the absence of any facts or circumstances that suggest that it would be proportionate to remove the Appellant alone and separate mother and daughter.

27. It is with those factors in mind therefore that I find the dependent child qualifies to remain the UK within the terms of Section 117B of the 2002 Act and that it would be wholly unreasonable and disproportionate in those circumstances to require the removal of the mother namely the Appellant in this case.

28. The application in this case was made prior to the major changes to the Immigration Rules on 9th July 2012 although the decision was not made until after that date. However as I noted in the error of law decision the transitional provisions in the case of **Edgehill** would indicate that given the application remained outstanding then the old Rules and presumably the old approach to Article 8 is applicable. I am bound to follow and observe the changes to primary legislation brought about by the Immigration Act 2014 in this fresh decision and accordingly my examination of Article 8 of the ECHR is a combined analysis of proportionality under the **Razgar** test and the statutory provisions referred to above. If it was incumbent upon me to find exceptional circumstances prior to an examination of this case under Article 8, following the guidance in **Gulshan** and other cases then in my view the length of time that the dependent child has remained in the UK (namely ten years) indicating she is well above the qualification period, would be those exceptional circumstances.
29. For all the reasons provided above I find that it would be disproportionate to remove the Appellant and her dependent child.

Notice of Decision

I allow this appeal under Article 8 of the ECHR.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever **10th November 2014**

TO THE RESPONDENT
FEE AWARD

A fee has been paid in this case but given my decision there should be a refund.

Signed Date

Deputy Upper Tribunal Judge Lever **10th November 2014**