Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/27595/2014
IA/27602/2014
IA/27606/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 4 September 2015	**On: 8 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS RACHAEL OLUBUNMI OJUTALAYO
MISS SARAH TAIWO AJUTALAYO
MASTER ABRAM KEHINDE OJUTULAYO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr J Reynolds, Daniel Aramide solicitors

DETERMINATION AND REASONS

1. This is an appeal against a decision of FTTJ's Gibb and Kelly, promulgated on 27 March 2015.

Background

2. The first respondent (hereinafter referred to as the respondent), who is the mother of the second and third respondents, claimed to have arrived in the United Kingdom in 2004, after entering unlawfully in order to join her husband who it was said arrived in 1994. The respondent also has an older child, born in the year 2000, however that child and the respondent's husband were not included in the application under Appendix FM of HC 395 (as amended). The Secretary of State refused the respondents' applications on the basis that they could not meet the requirements of Appendix FM, paragraph 276ADE and that there were no exceptional circumstances.

3. At the hearing before the FTTJ's, the respondent and her husband gave evidence and the panel considered supporting documentary evidence. The panel found that the respondents could not meet any of the requirements of the Rules but allowed their appeals on the limited basis that the Secretary of State's decision was not in accordance with the law owing to the lack of any consideration of the circumstances of the respondent's eldest child or her husband's claimed 20 year residence in the United Kingdom.

4. The appellant's grounds sought an extension of time for making the application. It was argued that the Secretary of State had not made an unlawful decision as the respondent's eldest child and husband were not included in the application and furthermore the Secretary of State had no records of any outstanding applications by the eldest child and husband.

5. FTTJ Cheales granted permission, finding that the application was made in time and that the grounds advanced showed an arguable error of law.

6. No Rule 24 response was lodged by the respondents.

The hearing

7. The application for permission to appeal was made one day out of time. Mr Reynolds made no submissions on this matter. The explanation provided is that Good Friday and Easter Monday fell within the 14-day period for appealing. While Rule 33 of the First-tier Tribunal procedure rules does not make any reference to working days, I was prepared to extend time given the very short period of the delay and the reasonableness of the explanation provided.

8. Mr Avery advised me that at the time the grounds of appeal were drafted, there was no outstanding application for the respondent's husband. An application for leave to remain had been made subsequent to the grounds being drafted and this had been refused with a right of appeal. There was also no outstanding application for the respondent's eldest child and she had not been included in the latest application for leave to remain.

9. Mr Reynolds conceded that this was the position. He advised me that the respondent and her husband had not intended to mislead, in that there had been a previous application for the husband but that fees were not taken. The application had been made again in May 2015, after the grounds of appeal were received.

10. Mr Avery sought to rely on AJ (India) v SSHD [2011] EWCA Civ 1191. He submitted that the tribunal, who had heard evidence from the respondent and her husband, ought to have gone ahead and determined the appeals. The Tribunal was under a misunderstanding that there was an outstanding application for the respondent's husband, which ought to have been linked to the appeals. There was no reason for the case to be remitted.

11. Mr Reynolds agreed that the Tribunal had erred based on the misunderstanding identified by Mr Avery. He informed me that the application of the respondent's husband had been refused for a number of reasons, including that he was not in a genuine or subsisting relationship with the respondents. The respondent's husband had lodged his appeal with the First-tier Tribunal and was awaiting confirmation of a hearing date. He invited me to remit the appeals to the First-tier Tribunal so that they could be linked to the appeal of the respondent's husband.

12. Mr Avery was of the view that the appeals, including that of the respondent's husband could be linked and heard together in the Upper Tribunal.

13. The Tribunal erred in finding that the Secretary of State's decision was not in accordance with the law. At [22] of the decision the following is said;

> "However, it appears to us that it is not possible to conduct a proper assessment of the impact on the children of removal until it is clear what is to happen to both parents. The Secretary of State is in possession of the Appellant's husband's application, and it would not therefore be overly complex to link that application to those that generated these appeals, and to request further information about the older child."

14. As conceded by Mr Reynolds, there was no outstanding application before the Secretary of State in relation to the respondent's husband and nor had any application been made or information provided regarding the respondent's eldest child. Mr Reynolds advised me that no application had been made in relation to that child at the time because of her relatively short period of residence in the United Kingdom.

15. The panel's decision to find that the respondent's decision was not in accordance with the law was based on their mistaken belief that there were two unresolved applications in relation to two other members of the family unit. In this they, unwittingly, erred.

16. The Secretary of State's decision referred to the respondent's eldest child, notwithstanding that she had not been included or even mentioned in the respondents' application. The panel heard evidence from the respondent and her husband and there was a substantial quantity of documentary evidence adduced on the respondent's behalf.

17. The Tribunal was in at least as good a position as the Secretary of State to consider the circumstances of the eldest child along with the rest of the family and indeed noted that at the age of 14, she was likely to be "approaching a critical stage of her secondary education." The panel therefore ought to have reached a conclusion on the merits of the appeals as all the facts were before them.

18. In these circumstances I am satisfied that there are errors of law such that the decision be set aside to be re-made.

19. In terms of the venue of any future hearing, I bear in mind paragraph 7.2 of the Practice Statements, in that I consider that the effect of the error of law has been to deprive both parties of any real consideration of their respective cases. Furthermore, in view of the fact that the respondent's husband has an outstanding appeal before the First-tier Tribunal, it would be appropriate to remit these appeals to that venue in order that they all be heard simultaneously.

20. Further directions are to follow.

Conclusion

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 to be re-made.

Directions

These appeals are remitted to be heard afresh, at a hearing at Taylor House, with a time estimate of 2 hours, on a date to be confirmed.

These appeals are to be linked with the appeal of Mr Kehinde Adebola Ojutalayo (DOB 27 February 1967).

Signed Date: 6 September 2015

Deputy Upper Tribunal Judge Kamara