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Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/39099/2014
IA/39101/2014

THE IMMIGRATION ACTS

At Field House
On 29th October 2015

Decision and Reasons Promulgated
On 21st December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between
MS A.A.A
MISS B.C.C.
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Iqbal, Counsel, instructed by Davjunnel Solicitors.
For the Respondent: Mr. C. Avery, Home Office Presenting Officer.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. This is because the second appellant is a child. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

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DECISION AND REASONS

Introduction

1. Although it is the respondent who is appealing for convenience I will continue to refer to the parties as they were in the First-tier Tribunal.

2. The first appellant, A, was born in September 1983. She is the mother of the second appellant B, born on 14 November 2007. Both are nationals of Nigeria.

3. On 4 July 2012 application was made on their behalf for leave to remain. This was refused on 27 February 2014 with no right of appeal. Following the issue of judicial review proceedings the respondent agreed to reconsider the decision. This took place on 21 September 2014 with the refusal being maintained. The appellants were granted a right of appeal which they exercised.

4. The first appellant claimed she came to the United Kingdom in 1994 when she was 11 years old. Her mother and stepfather were already here. A few months later she was joined by her younger brother and sister, AD and OA.

5. In refusing the applications the respondent did not accept the first appellant had been in the United Kingdom since 1994. The earliest record of her presence was in 2003. They did not meet the requirements of 276 ADE or of appendix FM and the respondent concluded, consistent with their article 8 rights, that there were no exceptional circumstances which would mean their removal was inappropriate.

The First-tier Tribunal

6. Their appeal was heard at Taylor House before First-tier Judge Miller on 13 May 2015. In a decision promulgated on 3 June 2015 their appeals were dismissed under the immigration rules and allowed on freestanding article 8 grounds. A month before the appeal hearing the first appellant gave birth to her second child. He was not a party to the proceedings.

7. In submissions the appellants' representative had conceded that neither of them could succeed under the immigration rules.

8. First-tier Judge Miller at paragraph 36 stated there was very little available evidence to support the first appellant's claim that she had been in the United Kingdom since 1984. Her mother had given evidence and said that out of fear she never sent her daughter to school nor did she register her with a doctor. The judge accepted this. Despite the lack of evidence the judge found as a fact the first appellant had been in the United Kingdom for 21 years at the time of hearing. The reason advanced was the success on appeal in 2011 of her two siblings, AD and OA, and the acceptance they arrived in 1984.Judge Miller accepted the first appellant's claim that she was not a party to these proceedings because she could not afford it and concluded had she been joined she to would have succeeded.

9. At paragraph 35 the judge concluded the link with the earlier appeals and the consequent finding the first appellant had been here 21 years amounted to an exceptional situation and justified the article 8 consideration. The judge stated it would be unduly harsh for the appellants to go to Nigeria: the first appellant had not been Nigeria for 21 years and her daughter has never been there. Furthermore, if removed the second appellant would not have the regular contact she has with her grandmother, aunts and uncles. The judge also stated there had been little effort made to remove the appellants or other members of her family. The final sentence of the decision records that the judge took into account the public interest considerations under section 117 B without identifying these.

The Upper Tribunal.

10. The respondent contended that the immigration judge erred in law in carry out the freestanding article 8. The assessment did not have regard to the fact they could not meet the immigration rules and the public interest consideration was cursory. It was also contended that the immigration judge erred in law in concluding the first appellant had lived here 21 years bearing in mind the lack of evidence.

11. Mr Avery relied upon the grounds stated. Ms Iqbal submitted that the judge did consider the high threshold involved and referred me to the decision of Dube (ss117A-117D) [2015] UKUT 00090 and that it was not an error of law to fail to refer to section 117 considerations provided the substance of the section had been applied.

Conclusions.

12. Judge Miller stated there was very little evidence the first appellant had lived in the United Kingdom since 1984. The evidence of presence in United Kingdom was primarily from the birth of her daughter, the second appellant. The judge however, accepted the first appellant’s claim based on the appeals of her two siblings being allowed.

13. The decision of First-tier Judge Ranagaratnam dated 13 April 2011 is in the appeal bundle. The judge accepted those two appellants had been here since 1994. I cannot see anything in the decision to support the first appellant's contention she was here then. Her statement at paragraph 4 is that she has five full blood siblings and a stepbrother and stepsister born to her mother in the United Kingdom. In the decision relating to her two siblings the judge records at paragraph 4 their evidence was they came to the United Kingdom to join their mother, their stepfather and stepbrother and stepsister. There is no reference to the first appellant. Paragraph 6 records the evidence of the first appellant's mother, who also makes no reference to the first appellant. The judge accepted the explanation given as to why the first appellant did not join her siblings in their appeal and the explanation for the lack of documentation, including school and medical records. The judge does not give any further reasons as to the lack of proof. I find Judge Miller has not indicated adequately the evidential basis and reasons for making this material finding.

14. Furthermore, the judge does not set out as a yardstick how the immigration rules are not met. An article 8 consideration outside the rules must be informed by the greater specificity in the rules and the importance the Secretary of State attaches to the public interest.

15. Judge Miller does not set out adequately why the appellants could not go to Nigeria. There is no evaluation of family support there; employment prospects; education; health care and so forth. No special needs are identified.

16. The decision of Dube (ss117A-117D) [2015] UKUT 00090 makes the point that is not necessarily an error of law to fail to recite section 117 provided the decision demonstrates the relevant consideration has been given. In the present decision. There is reference to section 117 but nowhere are the relevant considerations set out. There is no reference to the fact any private life the first appellant established was when she was here illegally nor is there reference to her employment or finances.

Conclusion

17. The decision of Judge Miller contains material errors of law. There has been inadequate reasoning behind the finding that the first appellant had been in the United Kingdom for 21 years. Furthermore, the decision does not adequately reflect the public interest. There is inadequate consideration of fact the immigration rules are not met. The judge has not demonstrated that the factors in section 117 have been factored into the decision. There is no reference to the fact the first appellant has been here illegally and no details are given as to her financial standing. The judge also appears to criticise the respondent for delay yet there is no foundation for this. It is my conclusion that the decision cannot stand but has to be remade *de novo*.

Decision.

The decision of immigration judge Miller, allowing the appeal is materially errs in law and cannot stand. That decision is set aside.

The appeals are remitted to the First-tier Tribunal for a *de novo* hearing; none of the facts found being preserved.

Deputy Upper Tribunal Judge Farrelly

DIRECTIONS

1. Relist for a *de novo* hearing in the First-tier Tribunal, excluding First-tier Judge Miller.

2. Bundles should be exchanged mutually no latter than four weeks before the indicated date of hearing.

3. The first appellant's representative should focus in particular upon the proofs in support of the long residence claim.

Deputy Upper Tribunal Judge Farrelly