IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/06385/2014
OA/06388/2014
OA/06389/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2016	**On 15 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

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(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellant: Ms. G. Mellon of Counsel, instructed by Wilson Solicitors LLP
For the Respondent: Mr. N. Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Callow promulgated on 16 June 2015 in which he dismissed the Appellants' appeals against the Respondent's decisions to refuse to grant entry clearance as the relatives of the Sponsor, a refugee.

2. Permission to appeal was granted as follows:

> "The decision shows that, when considering Article 8 issues, the Judge placed emphasis on the fact that the appellants could not be adequately maintained without recourse to public funds when, arguably, there is little specific consideration of the nature and extent of the family life which the Judge accepted existed and the best interests of the child appellants. Even though the appeal related to entry clearance, the Upper Tribunal made clear in *Mundeba (S55 Para 297(i)(f)) [2013] UKUT 88 (IAC)* that, although Section 55 only applied to children within the United Kingdom, the duty to consider the best interests of the children remains. Further, although the decision makes copious reference to relevant case law, the analysis of the appellants' position and the Article 8 claim is limited to one short paragraph (15) and so is arguably inadequate. An arguable error is shown."

3. At the hearing I heard submissions from both representatives, following which I announced that I considered that the decision involved the making of a material error of law and I set the decision aside. My reasons are set out in full below.

Submissions

4. Ms Mellon relied on the grounds of appeal and the skeleton argument which was before the First-tier Tribunal. There were five children living in the United Kingdom, three of whom were under 18. One of the Appellants is only five years old. Nevertheless, there had been no identification of the children's best interests or a balancing of their best interests in the proportionality assessment. I was referred to paragraphs [11] and [13]. It was submitted that the application of the caselaw to the facts was inadequate. The judge had focused on maintenance and had not balanced this with the other factors which should have been considered. He had accepted the vulnerability of the Appellants, but had not factored this in to the balancing exercise. Further there was nothing regarding the children living in the United Kingdom. There was ample evidence before the judge of the close family life that the Appellants had had with their brothers and sisters in the United Kingdom. The judge had been obliged to consider that under section 55.

5. The case of AAO [2011] EWCA Civ 840 to which the judge referred was decided before section 117 had come into force, and was an entirely different factual scenario involving an adult dependent where a weak family life had been found. In summary, the decision was inadequately reasoned and the Appellants had a strong Article 8 case.

6. Mr. Bramble accepted that a large proportion of the decision consisted of a setting out of the requirements of the approach to be taken. However, the judge was entitled to take into account the financial circumstances and the fact that the Sponsor was unable to support the Appellants. He submitted there was nothing wrong in the approach and the assessment was not unbalanced. The judge was aware of the vulnerability of the Appellants. Although paragraph [15] was brief, all the relevant factors had been taken into account. The best interests were not set out in one particular paragraph, but they were listed and had been taken into

account. The judge had come down against the Appellants having considered all of the relevant factors.

7. In response Ms Mellon submitted that the findings were not disputed, but only the proportionality exercise. There was no indication that the judge had taken all of the Appellants' circumstances into account when carrying out the proportionality exercise. The best interests of the children in the United Kingdom had not been taken into account. Paragraph [8] was no answer to the criteria set out in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC).

8. I was referred to paragraph [19] of the skeleton argument. The fact that the Appellant's Sponsor was a refugee and therefore that family life could not be enjoyed elsewhere had not featured in paragraph [8] at all.

Error of law

9. Although the findings are set out from paragraphs [8] to [15], as agreed by Mr. Bramble, much of this is taken up with a rehearsal of the approach to be taken in such cases with reference to case law, rather than findings specific to the Appellants. The main paragraphs which contain specific findings are paragraphs [8] and [15].

10. Paragraph [8] states as follows:

> "This is a difficult case charged with much emotion. The witnesses were credible in giving their evidence. The facts of the appellants' applications summarised in para 4 above have been established on a balance of probabilities. Of critical importance, weight is attached to the fact that the sponsor is a refugee and that she and the immediate members of her family have been granted leave to live in the UK. It is neither practical nor desirable for any of them to return to Kenya to attempt to live with the appellants. The appellants are undoubtedly vulnerable children. They live alone without consistent adult care. They have no status in Kenya and are at risk of return to Somalia. Their living conditions are undesirable exceptional compassionate circumstances compared with the lot of children living in Somalia."

11. Paragraph [15] states as follows:

> "In all of the circumstances I conclude that the interference with the appellants' family life rights and those of the sponsor is justified and proportionate. The appellants cannot be adequately maintained without recourse to additional public funds. In considering the public interest question weight is attached to s.117B(1), (2) and (3) of the Act. The maintenance of effective immigration control is in the public interest. It counts against the appellants that they are unable to speak English and that they are not financially independent. Accordingly the appellants' appeals fall to be dismissed under Article 8."

12. Paragraph [15] contains the entire analysis of the Appellants' position and the proportionality exercise. I find that it is an inadequate assessment of their circumstances, and inadequate reasons are given for the finding that the interference is proportionate and justified. Paragraph [15] contains no reference to any of the factors set out in paragraph [8]. The judge refers

to the factors in section 117B(2) and (3), the inability of the Appellants to speak English and the fact that they are not financially independent, but he has not referred to any of the factors in favour of the Appellants when giving reasons for his decision that interference with the family life rights of the Appellants and Sponsor is not disproportionate.

13. Further, there is no assessment in the decision of the best interests of the Appellants or the children in the United Kingdom, and accordingly no factoring of their best interests in the proportionality exercise in paragraph [15]. Although the judge has referred to the family living in the United Kingdom [8], there is no identification of the best interests of the children who form part of this family.

14. Further there is no reference in paragraph [15] to the fact that family life could not be enjoyed elsewhere, and the weight to be given to that. Although the judge has found in paragraph [8] that the Appellants are living in "undesirable exceptional compassionate circumstances" there is no consideration of the weight to be attached to this. Paragraph [15] is an inadequate assessment of the circumstances of the Appellants and an inadequate proportionality assessment. The judge has placed weight on the fact that the Sponsor cannot maintain the Appellants, but has not given reasons for why the weight to be attached to this outweighs the weight to be attached to the factors in favour of the Appellants.

15. I find that the decision is inadequately reasoned, and the Article 8 proportionality assessment is inadequate. There has been a failure properly to consider the best interests both of the Appellants and of the children living in the United Kingdom.

Decision

The decision does [involve] the making of an error on a point of law and I set it aside.

The appeal is remitted to the First-tier Tribunal to be remade in respect of Article 8.

Direction Regarding Anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 15 January 2016

Deputy Upper Tribunal Judge Chamberlain