



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/00485/2017
HU/00501/2017
HU/00507/2017

THE IMMIGRATION ACTS

**Heard at Bradford
on 30 October 2018**

**Decision & Reasons Promulgated
on 8 November 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**ALK
BM
TM**

(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Read instructed by Iras & Co Solicitors

For the Respondent: Mr Diwnycz - Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellants are a mother and her two children, all nationals of the DRC, born on 8 February 1966, 2 August 1995 and 10 July 1997. They

are three of four appellants before the First-Tier Tribunal, the fourth, MM born on 19 September 2000, not being a party to these proceedings for the reasons set out below.

2. The First-Tier Tribunal dismissed the appeals of the above appellants on human rights grounds but allowed the appeal of MM under the Immigration Rules. Permission to appeal was granted by another judge of the First-Tier Tribunal, the relevant part of the grant being in the following terms:

(iii) Altogether there appeared arguable error of law in the inconsistent evaluation of the Appellants and Sponsors combined family and private life, with arguably the appearance of inconsistency of weight as between the Appellants deriving there appeared from a narrow finding concerning the 4th Appellant meeting the IRs, while when assessing proportionality there appeared alone in respect of the Appellant mother and two older Appellant siblings finding against them for failure to meet the IRs, again on a narrow ground, but nevertheless concluding also concerning them, that although the HO decision had not been shown to be disproportionate, to split the family would be “unconscionable”;

(iv) In omitting to dispose of the 4th Appellant’s human rights appeal which compounded by an application for permission to appeal only in respect of the above three Appellants, there arises arguably the unresolved status of the minor Appellant MM’s appeal, HU/00511/2017. Oddly given the differential outcomes between the Appellants there appeared to have been no cross-appeal on behalf of the Respondent.

Error of law

3. The Judge makes a key finding at [42] of the decision under challenge in the following terms:

42. I accept that this is a close-knit family with all 3 children living at home in the UK with their parents, financially supported by the hard-working sponsor. I am satisfied that they share family life together. It would be unconscionable in my view to split the family and the Home Office policy in that regard suggest that there would need to be strong grounds to justify separating the family.

4. The Judge concluded that the 4th appellant, MM, met the Immigration Rules for Leave to Remain and allowed his appeal on that basis. The appeals of the remaining appellants were not allowed under the Rules and in relation to Article 8 ECHR the Judge finds:

43. However, in considering whether the appeals of the remaining appellant should be allowed outside the Rules pursuant to article 8 ECHR family and private life, I accept that article 8 is engaged, but not satisfied that in applying the Razgar stepped assessment, of which the proportionality

balance exercise is the key consideration, that the decision is disproportionate. That is because in balancing on the one hand the rights of the appellants and the sponsor and on the other the legitimate and necessary aim of protecting the economic well-being of the UK through immigration control, I find that the Secretary of State has demonstrated that the decision is not disproportionate. Article 8 is not a shortcut to compliance with the Immigration Rules. The appellant's claim to be able to meet the requirements of the Immigration Rules for LTR under Appendix FM and the financial threshold provisions, but failed or neglected to submit the correct documentation, all of which should reasonably have been available. I cannot see that it can properly be disproportionate to require them to make a fresh application, taking care to submit the specified evidence required under Appendix FM – SE.

5. The Judge had before him in relation to MM an appeal under both the Immigration Rules and article 8 ECHR. In allowing the appeal under the Rules the Judge was not, arguably, required to go on to consider the article 8 aspects although it may have been preferable if this aspect had been disposed of briefly, if only to avoid later criticism. It was accepted by the advocates that it can be inferred from the finding under the Rules that the Judge would have found any interference with a protected right disproportionate in relation to MM and to have allowed the appeal on article 8 grounds too.
6. Whilst, as the Judge finds, the appellant's may be able to make a fresh application for leave to remain supported by the documents to meet the requirements of the Immigration Rules, the issue before the Judge was a human rights appeal.
7. The advocates support the finding of the Judge that it would be unconscionable to split up this family unit. The Judge fails to adequately analyse the findings under article 8 in relation to a decision that allows MM to remain in the United Kingdom but leaves the other family members vulnerable to a decision that they should be removed. I find the failure of the Judge to consider matters as a whole and to properly analyse the appeal outside the Immigration Rules amounts to material error sufficient to warrant the appeal being set aside.
8. The advocates agree the decision can be re-made today, the respondent's representative accepting the reality of this case in light of the finding relating to MM and lack of evidence to justify any alternative finding, that the remaining family members should be permitted to remain in the United Kingdom on the basis their removal will be a disproportionate interference with the family life they enjoy with MM and with each other.
9. I therefore substitute a decision to allow the appeal on human rights grounds in relation to the above-named appellants.

Decision

10. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remake the decision as follows. These appeals are allowed.**

Anonymity.

11. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 31 October 2018