Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03981/2017

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals, Liverpool	**Decision & Reasons Promulgated**
On 12th September 2018	**On 25th October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

M D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Sills (Counsel)
For the Respondent: Mr Tan (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Brookfield, promulgated on 14th December 2017, following a hearing at Manchester on 4th December 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Mali, and was born on 11th July 1991. She appealed against the decision of the Respondent dated, refusing her application for further leave to remain in the UK on the basis of her relationship with her daughter, who was born in the UK on 21st June 2009, and is not a British citizen.

The Appellant's Claim

3. The basis of the Appellant's claim is that, although her asylum claim was refused on 8th December 2009, she was allowed to remain in this country because of her daughter. She had been taken into care by the local authority when she was 1 year old. The care order was dated 1st March 2012. The daughter is in long term foster care. Although the Appellant did not have direct contact with her daughter since June 2011, because the daughter herself did not wish to see the Appellant, she had made further submissions on 23rd April 2012 on the basis of her relationship with her daughter. Even though her submissions were rejected by the Home Office on 13th March 2014, her appeal against that refusal was allowed by the Tribunal on the basis that the local authority was considering instigating a care plan for the daughter which included a role for the Appellant. The Appellant was accordingly granted discretionary leave for 30 months up to 12th September 2016. In the meantime, the Appellant gave birth to a second daughter on 14th February 2016 in the UK. This daughter, however, enjoys DRC nationality, through her father and Malian nationality through the Appellant herself. This daughter does not, as a result, have British citizenship.

The Judge's Decision

4. The judge, in refusing the Appellant's appeal, came to the following findings of fact. First, that although the Appellant had a partner, who was a national of the DRC, he was not her husband nor her civil partner, and they had not lived in a relationship akin to marriage for a period of two years.

5. Second, the Appellant's partner, the national of the DRC, had been granted LTR as the sole carer for his own daughter until April 2018, and even so, he had not seen his daughter since September 2015.

6. Third, the Appellant's own child, her first daughter (who has so far been referred to above), was a citizen of Mali, and there was no evidence to indicate that she had been naturalised as a British citizen. She had been living in the UK for a period of seven years. The Appellant had a second daughter, who had Congolese nationality through her father, and Mali nationality through her mother. The second daughter was also not a British citizen.

7. Fourth, the Appellant did not meet the requirements of paragraph E-LTRPT.2.3 of Appendix FM, because she could not demonstrate that she had sole responsibility for her child's upbringing, given that the first daughter was in foster care, and a care order was made which transferred parental responsibility for this first daughter to the City of Stoke-on-Trent Social Services on 1st March 2012. That aside, the Appellant could not qualify for leave to remain on the basis of her private life because she was 25 years old at the date of her application and had lived in the UK only since June 2009.

8. Importantly, the judge went on to conclude that the Appellant's leave was granted to her in June 2014 on the basis that there was evidence before the Tribunal that a care plan for her first daughter had included future contact with the Appellant.

9. That contact, however, had not materialised since 2014, and the Appellant had not provided any current care plan for social services

> "which includes that they intend to continue to include the Appellant in their care plan for [her first daughter]. There is no evidence placed before me from any professionals to suggest that [her first daughter] benefits from knowing that her mother remains in the UK" (see paragraph 12(xvii)).

10. The appeal was dismissed.

Grounds of Application

11. The grounds of application state that the judge failed to take a previous decision by Judge Frankish, dated 13th March 2014, as a starting point, as was required by the Rule in **Devaseelan**. Second, that the "best interests of the child" a principle had been overlooked by the judge.

12. On 12th July 2018, permission to appeal was granted by the Upper Tribunal.

Submissions

13. At the hearing before me, Mr Sills, appearing on behalf of the Appellant, submitted that when Judge Frankish allowed the appeal in 2014 (see AA/16517/2009 which appears at C2 of the Respondent's bundle) that he had done so expressly on the basis that it was not anticipated that the Appellant (as mother) and her first daughter (as her child) would have contact for many years.

14. However, despite this realisation, Judge Frankish had allowed the appeal, on the basis that, "I suggest that her immigration team is told that [the first daughter] will need, Dr Freedman's emphasis, in future to have contact with her mother. This means that it is very much in [the first daughter's] interest that her mother is allowed to remain in this country

and available or contact, even though we cannot predict at present when that will occur (see paragraph 13).

15. The judge also referred to the CAFCASS Report of 1st March 2012, and observed that,

> "as made clear by Dr Freedman, in order to meet [the first daughter's] ongoing needs, it is imperative that [the Appellant] remains in the United Kingdom. This will enable [the first daughter] in the future to have contact with her birth family and hopefully be able to start to resolve the trauma that she has suffered in her early childhood" (see paragraph 14).

Indeed, Judge Frankish went on to conclude (at paragraph 16) that,

> "it is not possible for [the first daughter] to be rehabilitated into the care of her mother due to the reasons stated above … It is proposed that [the Appellant] will have no role in the day-to-day arrangements for [her first daughter] … The [Appellant] will continue to be consulted in regard to subsequent Statutory Reviews and will be granted once every twelve weeks. This will include photographs of [the first daughter] and an update therapy progress of any direct contact" (paragraph 16).

The fact was, submitted Mr Sills, that the Appellant was then also provided with photos and information by telephone regarding [the first daughter] as Judge Frankish had also found at paragraph 8 of his determination back in 2014.

16. Mr Sills went on to say that he had a letter from Stoke-on-Trent Social Services dated 6th September 2018, just a week before the present hearing before this Tribunal, whereby Sharon Davies (the social worker) states that,

> "since my last correspondence to you, progress has been made in respect of contact between [the Appellant] and her daughter, ….. The [Appellant] has sent photographs to [the first daughter] who has recently been able to view the photographs and <u>not</u> dismiss them <u>as she has in the past</u>. The [Appellant] sent a card to 'mamma' which is significant progress".

17. Mr Sills accepted that, although this was information after the date of the hearing before Judge Brookfield, nevertheless, it demonstrated that there was a continuity of the kind of progress that had been envisaged precisely by Judge Frankish back in 2014. It was significant that this was at the time when he had allowed the appeal on the basis that the Appellant, as the mother, is allowed to remain in this country, and available for contact, "even though we cannot predict at present when that will occur" (at paragraph 13).

18. For his part, Mr Tan submitted that at the time that the decision had been made by Judge Frankish, the first daughter, the Appellant's first child was only 3 years old. The decision was based on a care plan that had been put into effect. The family contact, it was envisaged, would develop on the basis of that. However, there was no development of contact and the Appellant was not in "direct contact" with her first daughter. Therefore, the relationship had not developed. What had been hoped for, back in 2014, had simply not happened. Accordingly, the judge was correct in concluding that the Appellant could not succeed.

Error of Law

19. I am satisfied that the making of the decision by the judge did involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows.

20. First, the judge is wrong as a question of a fact to conclude that, "there was no evidence placed before me from any professionals to suggest that the first daughter benefits from knowing that her mother remains in the UK" (paragraph 12(xvii)).

21. He is wrong to conclude that:

> "there appear to be no current plans for the Appellant to have direct contact with [the first daughter] at any time in the near or distant future, as the first daughter] does not wish contact with her mother and the professionals treating [the first daughter] have made a decision that contact with the Appellant is not in [the first daughter's] best interest" (IBID).

22. The fact is that the Appellant has remained in contact with social services in Stoke-on-Trent. At the same time, as Judge Frankish made it clear, it was not possible to say how the first daughter would be rehabilitated into the care of her mother, or when that would take place (see paragraph 16).

23. Second, the judge had to take the decision by Judge Frankish on 13th March 2014, as a starting point under the principles of **Devaseelan**. That being so, Judge Frankish (at paragraph 14) had accepted that it was in the best interests of the Appellant's child that the Appellant remain in the United Kingdom. He had said that "the [first daughter's] needs can only be met if mother is entitled to continue to remain mentally well and emotionally available for the [first daughter]".

24. Judge Frankish had also quoted the local authority in Stoke-on-Trent, in stating that "the [first daughter] will need to continue to have regular correspondence from her mother since the mother is the only link to her birth family that she has now …" (paragraph 16). That has indeed been the position throughout this case.

25. In fact the letter at page 70 of the bundle, dated 6th September 2017, which was before the judge below, is to the effect that:

> "Dear Mariam,
>
> I have passed the letters and photos to the [first daughter's] foster carers who are going to sit with her to explain you are interested to know how she is doing",

and it is signed off by Sharon Davies, the social worker.

26. This, indeed, is the clearest evidence that, even as long as a year ago, in September 2017, exactly that which had been envisaged by Judge Frankish, was beginning to take place, and that the social worker, was forwarding letters sent by the Appellant for her daughter, to the foster carers, with the undertaking that they would sit the first daughter down and explain to her that her mother was interested to know how she was doing.

27. All the evidence, accordingly, demonstrated that the process envisaged by the care plan was taking effect just as well as intended. The decision by the judge below, failed to acknowledge this and in fact reached a view that was contrary to the evidence before the Tribunal. That being so, the decision cannot stand.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge Brookfield, pursuant to Practice Statement 7.2(b) because the nature or extent of any judicial fact-finding, which is necessary in order for the decision and the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it was appropriate to remit the case to the First-tier Tribunal.

This appeal is allowed.

An anonymity order is made.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant

and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Juss 25th October 2018