Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11122/2016

THE IMMIGRATION ACTS

Heard at Field House
On 8th January 2018

Decision and Reasons Promulgated
On 27th February 2018

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

AWA SANOGO
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Parakos (counsel, instructed by Kamberley Solicitors)
For the Respondent: Ms N Willocks-Briscoe (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Mali. The Appellant applied for leave to remain in the UK on the basis of her family life with her husband, a British citizen. The Appellant entered the UK illegally in 2002 and remained until an application for leave was made on 11 March 2014. The application was refused on 8 April 2014. A further Article 8 ECHR application was made on 3 March 2016. This was refused in a decision dated 8 April 2016.

2. The Appellant appealed to the First-tier Tribunal, the appeal was heard by Judge Herbert OBE who allowed it in a decision promulgated on the 29th of September 2017 and again on the 11th of October 2017.

3. The Judge allowed the appeal finding that the Immigration Rules were met. In doing so he found that there were insurmountable obstacles to the Appellant's husband adapting to Mali and that paragraph EX.1. of Appendix FM was met. Further, He was not familiar with the country although he was from Cote d'Ivoire and spoke French. He would not be able to find work and the couple would have no accommodation there.

4. The decision on insurmountable obstacles also took into account the appellant's French nephew who had come to live with her and her husband in 2017. The evidence was that the child's biological father, the appellant's brother, was having difficulty caring for him. At [21(6)] the First-tier Tribunal found that if the appellant and her husband went to Mali, the child would face disruption and detriment if he had to return to live with his father in France. Further, at [21(7)] the Judge referred to the child as a qualifying child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and to it being unreasonable for the child to go to Mali.

5. The Secretary of State sought permission to appeal to the Upper Tribunal in grounds dated 9th of October 2017. It was argued that the Judge erred in finding that the Appellant's husband would be unable to find work in Mali. It was also submitted that the findings in respect of the child were unsustainable, there was no documentary evidence showing the immigration status of the child who could not, in any event, be considered a qualifying child for the purposes of the Article 8 assessment under or outside the Immigration Rules.

6. Permission was granted by First-tier Tribunal Judge Robertson on the 26th of October 2017. Judge Robertson observed that it was arguable that Judge Herbert erred in finding that the child was a qualifying child. It was difficult to say how that had affected the decision as the new appeal regime applied and the appeal had been allowed under the Immigration Rules which was not open to the Judge.

7. At the start of the hearing Mr Paraskos sought to take a preliminary point on jurisdiction on the basis that the respondent's permission application pre-dated the promulgation of the First-tier Tribunal's decision. An examination of the Tribunal file showed that the decision had been promulgated twice, as indicated above. There was no explanation why such a course of action was followed and a reading of the decisions sent out showed that they were identical. We decided that although the decision being issued twice was puzzling there was nothing material arising therefrom and that we did have jurisdiction to entertain the appeal.

8. At the conclusion of the hearing we indicated that our decision was that the decision of Judge Herbert did contain errors of law and that the decision would be set aside and the case remitted to the First-tier Tribunal for re-hearing with no findings preserved. The written decision giving the reasons for the findings was reserved.

9. It is unarguable that the child here did not meet the definition of a qualifying child for the purposes of Appendix FM or s.117B(6) of 2002 Act and that including the reasonableness of his going to Mali in the assessment amounted to a material error of law. Further, at the date of the decision the child had been in the UK for less than a year. No documentary evidence showed him to be the nephew of the appellant or that the father had agreed to him coming to the UK. Nothing indicated that Social Services in France or the UK had assessed how the child was being cared for in the UK with relatives other than his parents. There was very little evidence on which to conduct a best interests assessment. The position of this child living with the Appellant and the Sponsor in those circumstances gave us serious concern.

10. With regard to the position of the Appellant's husband, a chef, it was for the Appellant to show that he would be unable to obtain work in Mali and there was no evidence before the First-tier

Tribunal from the Appellant on that point other than assertion. Further, the finding in [21(7)] that the couple would be without accommodation immediately on return to Mali was not in our view a significant factor which would be a normal incident of relocation even within the UK.

11. In addition the Judge did not explain why, if little weight was attracted to the Appellant's relationship as it was formed whilst she was in the UK illegally, this factor was not significant in the insurmountable obstacles assessment and the assessment as a whole. The Judge gave no consideration to the Appellant's illegal presence in the UK since her arrival and the heavy delay before this application was made. That would be a weighty factor in the balancing exercise when assessing whether the public interest in the enforcement of immigration control was outweighed by other factors.

12. In our view the decision of Judge Herbert was fundamentally flawed in the approach taken to the child, to the relationship with the Sponsor, her immigration history and their ability to live in Mali. We therefore set aside the decision. No material findings remain and it is therefore appropriate to remit the appeal to the First-tier Tribunal to be re-made.

CONCLUSIONS

The decision of the First-tier Tribunal involved the making of an error on a point of law.

We set aside the decision and remit the appeal to the First-tier Tribunal for re-making with no findings preserved, not to be heard by First-tier Tribunal Judge Herbert OBE.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and we make no order.

Fee Award

In setting aside the decision and remitting it to the First-tier Tribunal we make no fee award which remains an issue for the First-tier Tribunal.

Signed: 

Deputy Judge of the Upper Tribunal (IAC)

Dated: 22nd February 2018