Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05390/2019 (P)
HU/05395/2019 (P)
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THE IMMIGRATION ACTS

Decided under Rule 34
On 25 August 2020

Decision & Reasons Promulgated
On 26 August 2020

Before

UPPER TRIBUNAL JUDGE LANE

Between

MBK
RKK
JKK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. By directions dated 15 June 2020, Upper Tribunal Judge Sheridan expressed the provisional view of the Upper Tribunal that the question of error of law in this appeal might fairly and appropriately be considered without a hearing. Both parties have responded to those directions with written submissions. Neither party has requested that there be an oral initial hearing I have considered the submissions and the file carefully, and I have decided that I can and should fairly and appropriately determine the appeal without a hearing.

2. This appeal is brought by two brothers and a sister against a decision of the Entry Clearance Officer refusing them entry clearance as the children

of the sponsor, their mother, MM (hereinafter referred to as the sponsor). The children were born respectively in 2001, 2002 and 2011. They are citizens of the Democratic Republic of Congo. Their father died in June 2012. The judge recorded [24] that the sponsor had been 'wholly absent' from the appellant's lives for the period 2012 – 2017. The father of the children, the sponsor's husband, supported the children financially until his death. At home in the Democratic Republic of Congo, and during the mother's absence from their lives, the children have been cared for by a friend, F, who was described in court by the sponsor herself as being "like a mother" to the children. At the conclusion of her decision [29], the judge wrote:

> "This is a human rights appeal. I am asked to find that there is family life between the appellant and the sponsor. On the very limited information available to me, including absence of any evidence from the appellants themselves, I am not satisfied that they do exercise family life with the sponsor. Even if I am wrong about that, given the findings I have already made, I do not find the refusal of entry clearance will amount to a substantial interference with it, since the appellants have been carrying on their relationship with the sponsor at a distance, using modern means of communication, for the last 2-3 years. There is no reason why they could not continue to do so, and possibly also meet on occasions for family visits. Even if the refusal of entry clearance does amount an interference with family life (which I do not find) nevertheless, the interference would in all the circumstances of this case, be proportionate, in my judgement, given my findings."

3. I am grateful to both representatives for providing clear and succinct written submissions. The appellants submit that the judge gave inadequate reasons for finding that there was no family life between the appellants and the sponsor. The appellant asserts that the sponsor has shared sole responsibility with F, notwithstanding her physical separation from them. She submits that telephone calling cards are capable of acting as corroborative evidence of contact. Given evidence that the appellants father is dead, that there has been contact between the appellants and sponsor since 2017 and that the sponsor claims to exercise control and direction over the lives of the appellants and has provided financial support, the sponsor claims that the judge should have found that family life existed.

4. The burden of proof in the appeal rested on the appellants and the judge has found that that burden has not been discharged. The judge noted the 'very limited information' available to her. The matters listed by the appellants may be capable of supporting a claim for the existence of family life but they do not compel a finding that such family life exists. In my opinion, it was open to the judge, on a proper consideration of the evidence including the matters referred to by the appellants, to conclude that family life of a kind which may attract the protection of Article 8 ECHR had not been proven to exist. The submissions of the appellants

amount to no more than a disagreement with the legitimate findings of the tribunal.

5. Given that this is a human rights appeal, the judge's finding that family life did not exist was determinative; in any *Razgar* [2004] UKHL 27 analysis, the appeal could not get as far as a proportionality assessment. The appellants assert that, because the father of the children had died, paragraph 297(i)(d) of the Immigration Rules had been met, a fact which should have informed the judge's findings on family life. I disagree. This was a human rights appeal only; there was never any appeal in respect of the immigration rules *per se.* In their submission, the appellants refer to the judgement of the Court of Appeal in *TZ and PG [2018]* EWCA Civ 1109. At [34], the Court of Appeal held:

> "That leaves the question of whether the tribunal is required to make a decision on article 8 requirements within the Rules i.e. whether there are insurmountable obstacles, before or in order to make a decision about article 8 outside the Rules. The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted leave to remain. Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control 'in the case before it', which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, ***provided their case engages article 8(1),*** for the very reason that it would then be disproportionate for that person to be removed." [my emphasis]

In the present appeal, the judge has found that family life does not exist and that article 8(1) is not engaged. The death of the children's father may have been enough to satisfy the black letter of the immigration rule but the judge was required to determine whether family life existed by reference to all the evidence not merely that single fact. The proviso inserted by the Court of Appeal which I have highlighted in the passage quoted above remains of fundamental importance even when an ability to satisfy the immigration rule should be treated as "positively determinative". The passage shows that there will be cases in which article 8(1) is not engaged even though the requirements of a rule may be met.

6. For the reasons I have given, this appeal is dismissed.

Notice of Decision

This appeal is dismissed

Signed Date 25 August 2020

Upper Tribunal Judge Lane

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.