



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

Appeal Number: IA/30576/2013

THE IMMIGRATION ACTS

Heard at Manchester

On 3rd June 2014

Determination

Promulgated

On 6th June 2014

**Before
DEPUTY UPPER TRIBUNAL JUDGE MCCLURE**

**Between
MRS S K
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Afzal of International Immigration Advice

For the Respondent: Miss Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, Mrs S K, date of birth 24th July 1983 is a citizen of Namibia. The Appellant is married. Her husband is also a citizen of Namibia as are her two children. The children are aged 5 and nearly 2 years of age. Both the children were born in the United Kingdom. The Appellant's husband and children are to be treated as dependants upon this appeal.
2. I have considered whether any of the parties to the present proceedings requires the protection of an anonymity direction. Taking account of the fact that this determination impacts upon the interests of children I consider it appropriate to make an anonymity direction.

3. By a determination promulgated on 25th November 2013 First-tier Tribunal Judge Lloyd-Smith dismissed the Appellant's appeal against the decisions of the Respondent to refuse to grant leave to remain in the United Kingdom and a decision to remove the Appellant from the United Kingdom thereafter. The Appellant appealed against those decisions to the Upper Tribunal. By a decision taken by Upper Tribunal Judge Chalkley on 24th March 2014 leave to appeal to the Upper Tribunal was granted in the following terms:-

“The First-tier Tribunal Judge may have erred by failing to take account of the evidence he heard of the Appellant's husband. On that challenge only I grant permission.”

4. The Grounds of Appeal to the Upper Tribunal are in two parts. The original Grounds of Appeal identify in paragraphs 2 and 3 the issue that the judge noted the testimony of the Appellant's husband but made no reference to it thereafter. The renewed application identifies that a two page statement was submitted by the husband. He was cross-examined but the judge makes no comment on the husband's evidence.
5. If one looks at paragraph 11 of the determination the judge quite clearly sets out the evidence of the husband. The husband entered the United Kingdom in 2004 as a working holidaymaker and his visa expired in 2006. Since that time he has had no legal status. Thereafter other than the husband's relationship to the Appellant there is no material detail either with regard to other family members or with regard to any private life that the husband has developed in the United Kingdom. There is no suggestion of integration within the community or commitments within the community. The issue relates purely to his relationship to the Appellant and to his children. Since 2006 the husband has had no legal right to be in the United Kingdom and he has done nothing to seek to regularise his status. There was reference within the husband's statements and his evidence to the fact that he had relatives in Namibia and that they lived some distance away from the home area of the Appellant. The husband's evidence does no more than establish that he is part of a family unit with the Appellant and the children. That was accepted by Judge Lloyd-Smith.
6. The position with regard to the Appellant appears to be that she last had leave in or about November 2009. The Appellant entered the UK in 2004 as a working holiday maker and had at various stages had her leave extended as a student. There is a period in October to December 2007 when the Appellant had no leave. She was then granted further leave as a student but that leave expired in 2009. Since that time she also has had no right to be in the United Kingdom.
7. The judge's findings are contained from paragraph 14 onwards. Whilst it is correct to say that there is no reference to the evidence from the husband there is nothing of substance and materiality that adds to the Appellant's case in what the husband has said. The husband and the Appellant are living in the United Kingdom neither one of them have any

leave. They have two children. The judge notes the medical condition of the parties. The judge has given proper consideration to all the evidence. The judge then goes on to consider fully the circumstances of the Appellant in the United Kingdom and her family in the United Kingdom.

8. Before me it was suggested that the judge has failed to make reference to Section 55 of the 2009 Act, that is the best interests of the children. With respect if one examines paragraph 18 there is a clear reference to the judge assessing the best interests of the children. The judge has also in paragraph 14 set out the medical condition of one of the children.
9. There is no requirement that the judge makes a reference to a specific statutory provision as being the duty so to do. Provided the judge has in practice assessed the best interests of the children and the judge has carried out the duty that she is obliged to do under the statute that is sufficient in law. There is no need to refer to each and every specific statutory provision which affects an appeal.
10. The issue therefore is whether or not the judge has properly assessed the family circumstances of the Appellant and her husband and children. The issue thereafter would be whether or not there was anything of any substance and materiality in the evidence of the husband that the judge has failed to take account of. The husband's evidence appears to be that he is in the United Kingdom with the Appellant enjoying a family life. The judge noted that the family would be removed as a unit. That is consistent with the case law [Azimi-Moayed 2013 UKUT 197 (IAC)] and is clearly an assessment not only of the rights of the Appellant and her husband but also the best interests of the children.
11. Looking at the matter on the basis of the determination the judge clearly took account not only of the evidence of the husband as is evident from paragraph 11 and the references thereafter to the family life that the family enjoyed within the United Kingdom and the circumstances they would face if returned to Namibia, but also the best interests of the children. That is clear and evident from paragraph 18.
12. Accordingly I do not find that there is any material error of law within the determination as it appears at the moment.
13. Even if the judge has failed to take account the evidence of the husband it has to be noted that neither the Appellant nor her husband nor any of the children would meet the requirements of the Rules. I draw attention to the case of Gulshan [2013] UKUT 640, Nagre [2013] EWHC 720, and the case of Haleemudeen [2014] EWCA Civ 558. They make plain that where a person does not meet the requirements of the Rules there has to be something exceptional or something within the circumstances which warrants consideration of an Appellant outside of the Rules on Article 8 grounds.

14. It is not contended that the Appellants meets any of the requirements of the Immigration Rules. It is accepted that they cannot meet the requirements of Appendix FM or even the exceptions within Appendix FM with regard to children under EX.1. The Appellants therefore not meeting those requirements and not meeting the requirements of paragraph 276ADE the Appellants have to prove that there is something exceptional within the facts which would warrant consideration outside of the Rules.
15. The only circumstances which are in any way exceptional are alleged to be the fact that the two children were born in the United Kingdom and the medical condition of the one of the children. However the children were born at a time when ostensibly there was no right in either parent to be in the United Kingdom. It may be that the Appellant for a short period of time had leave after the birth of the first child but that leave soon expired and the Appellant and her family remained in the United Kingdom without leave. It would have been open to the Appellants at that stage to return to their home country but they chose not to do so. Judge Lloyd-Smith has considered the medical condition of the child and I agree with her assessment. The condition of the child does not approach an Article 3 claim taking into account the case of N (FC) v SSHD [2005] UKHL 31
16. In the circumstances there is nothing exceptional in the fact that a child was born in the United Kingdom where the parents are remaining here unlawfully. There is no other factor either which engages any of the case law to show exceptionality or any circumstances warranting consideration outside of the Rules.
17. Accordingly even if there were an arguable error of law within the determination, which I find not to be the case, there is nothing on the facts of this case which would warrant consideration of the appeal outside of the Immigration Rules.
18. Therefore I uphold the decision to dismiss this appeal on all grounds.

Signed

Date

Deputy Upper Tribunal Judge McClure

Direction regarding anonymity- rule 45 (4)(i) holds the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify the appellant or any member of the appellant's family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed

dated

Appeal Number: