Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15375/2014
IA/15369/2014
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THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 March 2015	**On 20 March 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

SL
MFL
MEL
MJL
[Anonymity direction made]

Claimants

Representation:
For the claimants: Mr B Hawkin, instructed by Lambeth Solicitors
For the appellant: Ms A Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Khawar promulgated 27.11.14, allowing the claimants' appeals

against the decisions of the Secretary of State, dated 5.3.14, to refuse their applications for leave to remain on the basis of private and family life. The Judge heard the appeal on 23.10.14.

2. First-tier Tribunal Judge Foudy granted permission to appeal on 24.1.15.

3. Thus the matter came before me on 18.3.15 as an appeal in the Upper Tribunal.

Error of Law

4. The relevant background can be briefly summarised as follows. The first claimant (father) came to the UK in 2005 with leave as a student. He was joined by the remaining claimants, his wife, the second claimant, and their children Rebecca and Rachel, third and fourth claimants respectively. Rebecca was 4 years of age when she arrived and is now 13. Rachel was 11 years of age when she arrived and is now 21.

5. Judge Khawar has very carefully set out the circumstances of each of the claimants and summarised the evidence before the First-tier Tribunal. He allowed the appeals of father, mother and the younger child Rebecca under the Immigration Rules and allowed the appeal of the elder child Rachel under article 8 ECHR.

6. However, for the reasons set out herein I find that there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Khawar should be set aside. In an otherwise careful and comprehensive decision Judge Khawar made a number of errors which vitiate other findings and conclusions in the decision.

7. From the outset, it is obvious that at least in relation to the parents and the younger child Rebecca, that if one of them is entitled to remain in the UK then the other two would be entitled to remain as there could be no question of separating parents from the younger child. Different considerations may apply to the older child Rachel.

8. Whilst the judge may have been correct to suggest at §23 that the principle issue is the question of whether it is reasonable to expect the younger child Rebecca to return to Mauritius, the way in which the judge approached that issue is flawed. Before the judge could make a viable assessment of Rebecca's rights, the judge should have considered those of the parents independent of the children. As the judge quoted from Azimi-Moyad at §14, if both parents are being removed from the UK then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.

9. At §37 the judge found that the parents meet the parent route under Appendix FM. That is an error of law. As both parents live with the children, and thus neither has sole responsibility for the children, and neither child is British or settled in the UK, they cannot meet the requirements of E-LTRPT2.3. There was no basis under Appendix FM on which the parents could meet the requirements of the Rules either as parent or partner.

10. The refusal decision makes some strange assertions about the parental route, which Ms Holmes could not explain, but the judge should have assessed whether the

parents had a right to remain under Appendix FM in respect of family life, or under 276ADE in respect of private life. It may have been obvious, as Mr Hawkin suggested to me, that the parents could not meet the Rules, at least Appendix FM, but that argument founders when the judge found that they did. If it had been conceded that the parents did not meet the requirements of the Rules, then surely the judge would have recorded that. There is no 276ADE assessment as to whether either or both parents met the requirements for leave to remain whether, given they have not lived in the UK for 20 years, there are very significant obstacles to their integration into Mauritius after the period of time they have lived in the UK. The refusal decision correctly applied the no ties test, but as the appeal was heard after the revision of 276ADE coming into force on 28.7.14, the judge should have considered 276ADE and the very significant obstacles test. There was no 276ADE assessment for the parents. Finally, in respect of the parents, if they did not meet the requirements of the Rules one would have expected the judge should to go on to consider their article 8 rights outside the Rules, taking into account 117B(6). That was not done. Although the judge considered 117B(6) at §38, he did so in isolation, stating that it "reiterates the legal position under Appendix FM and paragraph 276ADE," which makes no sense.

11. It was relevant and important to have reached a view as to the entitlement of the parents before considering the situation of the younger child. The question whether it was reasonable to expect Rebecca to return to Mauritius had to be considered in the light of at least a provisional conclusion as to the rights of the parents, as, whilst not determinative, it informs the answer to the question of reasonableness of return in relation to the child. Although the judge set out some very cogent reasons why he considered that Rebecca met the reasonableness requirements of 276ADE(iv), having been in the UK some 9 years since the age of 4, that assessment was flawed without having decided whether it was reasonable for the parents to return, subject to the rights of either of their children. In the circumstances, the assessment for Rebecca was flawed.

12. There are also errors of law in the assessment of the adult child Rachel, addressed from §41 onwards. It is not clear why the judge did not make an assessment of her circumstances in relation to the applicability of paragraph 276ADE. Although she was not a child and had not lived in the UK for 20 years, an assessment should have been made as to whether there were very significant obstacles to her return and integrating into Mauritius. Such an assessment may have obviated the need to consider article 8 outside the Rules at all. However, the judge launched straight into an article 8 assessment without any consideration of 276ADE, and appears to have approached the article 8 assessment on the assumption that what had to be considered was the justification of separating Rachel from the parents and younger sibling, rather than an assessment in the first place of her individual private and family life rights to remain in the UK, before bringing into account whether the parents and/or Rebecca were to be removed and then the effect of that on Rachel's rights to family life. For these reasons I also find that the decision in relation to Rachel is flawed and cannot stand.

13. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues. Mr Hawkin submitted that I sould preserve the findings of fact of the First-tier Tribunal, set out carefully as they are. However, the errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal. However, that would make the task of the First-tier Tribunal Judge rather more difficult. The effect of the error has been to deprive the parties of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

14. In all the circumstances I remit the appeal to the First-tier Tribunal on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Conclusions:

15. For the reasons set out herein I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the decision in the appeals to the First-tier Tribunal to be made afresh.

Signed: Date: 18 March 2015

Deputy Upper Tribunal Judge Pickup

Consequential Directions

16. The appeal is remitted to the First-tier Tribunal at Hatton Cross (Richmond);

17. It is to be listed for hearing on 21.8.15, with a time estimate of 4 hours;

18. No findings of fact are preserved;

19. No later than 14 days before the appeal hearing date any further evidence to be relied on must be lodged with the Tribunal and served on the other party so as to form a single paginated and indexed consolidated bundle for the tribunal.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I continue anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

Signed: Date: 18 March 2015

Deputy Upper Tribunal Judge Pickup