Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42404/2014
IA/42407/2014
IA/42416/2014
IA/42426/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd June 2016	**On 3rd June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS MARIAM AFOLAKE FANU
[O F]
[M F]
[S F]
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:
For the Appellant: Mr. I Jarvis; Home Office Presenting Officer
For the Respondent: Mr. A Cooray; Joint Council for the Welfare of Immigrants

DECISION AND REASONS

1. This is an appeal against a decision by First-tier Tribunal Judge Colyer promulgated on 9th May 2015 2015, in which he allowed the appeals against the decisions of the Secretary of State for the Home Department of 26th September 2014, to refuse the application made by Mariam Afolake Fanu and her three dependent children, for leave to remain in the UK pursuant to Article 8 ECHR.

2. The appellant before me, is the Secretary of State for the Home Department and the respondents to this appeal, are Mrs Mariam Fanu, her two sons [OF] and [MF], and her daughter [SF]. However for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to Mrs Fanu and her three dependants as the appellants and the Secretary of State as the respondent.

3. The appellants are all Nigerian national. The background to the decision of the First-tier Tribunal is set out at paragraphs [1] to [6] of the decision of the First-tier Tribunal Judge. At paragraph [5] of her decision, the Judge refers to a preliminary point raised on behalf of the appellants. It was submitted on behalf of the appellants that as their first application for leave to remain was made in July 2009, the respondent should have considered the rules applicable on that date. At paragraph [6] of her decision, the Judge records that he considered the matter raised, as having some considerable merit.

4. The findings of the First-tier Tribunal Judge are to be found at paragraphs [8] to [13] of the decision. The Judge notes at paragraph [8] that the application for leave to remain made on 27th July 2009 was refused on 18th June 2012. The Judge notes at paragraph [9] that the appellants applied again on 12th October 2012 for leave to remain outside the rules and that application was refused on 13th September 2013. Following a challenge to that decision by a claim for Judicial

Review the parties agreed, by consent, that the respondent withdraw her decision. The respondent made a further decision dated 26th September 2014 that gave rise to the appeal before the First-tier Tribunal Judge.

5. The Judge accepted the submission advanced on behalf of the appellant that the applicable rules are those in force prior to 13th December 2012, because the application was made before that date. At paragraph [12] the Judge states:

> "*12. The initial decision regarding these Appellants was made by the Respondent on 13th September 2013 after the change. No further application was made. The decision was withdrawn and remade and therefore the appeal still concerns an application made prior to 13th December 2012. I accept the argument put forward by the Appellants' representative that this is significant because HC 760 amends the applicable Immigration Rule paragraph 276ADE.*

6. At paragraph [13] of his decision, the Judge refers to paragraph 276ADE(iv) in its original form and post the amendment introduced by HC706. The Judge states:

> "*13. … The Respondent has applied the amended Rule and considers that it would be reasonable to expect the Appellants to leave the United Kingdom. I accept the arguments put forward by the Appellants that under the unamended Rule no such requirement applied.*"

7. The respondent now submits that the First-tier Tribunal Judge erroneously concluded that the reasonableness requirement (inserted into 276ADE(iv) by virtue of HC 760) was not applicable this appeal, as the application was made prior to 13th December 2012.

8. Permission to appeal was granted by First-tier Tribunal Judge Dineen on 24th April 2016. The matter comes before me to consider whether or not the determination by First-tier Tribunal Judge Colyer involved the making of a material error of law, and if so, to remake the decision.

9. Before me, Mr Cooray on behalf of the appellants conceded that the decision of the First-tier Tribunal Judge discloses a material error of law. In my judgement he was right to do so.

10. When paragraph 276ADE(1)(iv) was first introduced into the Immigration Rules by HC194, paragraph 276ADE(1)(iv) it simply required applicants, such as the children in this case, to establish that they were under the age of 18 and had lived in the UK continuously for 7 years. However, paragraph 276ADE(1)(iv) was amended from 13th December 2012 by HC760, such that the requirement is that an applicant must establish that they are under the age of 18 and have lived continuously in the UK for at least 7 years and it would not be reasonable to expect the applicant to leave the UK. Although the transitional provisions set out in HC760 provided that the introduction of the reasonableness requirement did not apply to applications made before 13th December 2012, that was subsequently changed by HC820 such that the reasonableness requirement applies to all applications decided on or after 13th December 2012, regardless of the date the application was made.

11. The rules therefore required the Judge to consider whether it would be reasonable to expect the applicant to leave the UK. The Judge did not do so.

12. It follows that in my judgment, the decision of the First-tier Tribunal discloses a material error of law and the decision of the First-tier Tribunal is set aside.

13. The decision needs to be re-made and I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012 which states;

> '7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that;
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact-finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.'

14. In my view the requirements of paragraph 7.2(a) and (b) apply. The Judge has failed to set out and consider in his decision any of the evidence that was before him beyond the evidence of the length of time that the three children have spent in the UK. The nature and extent of any judicial fact-finding necessary with regard to the claim claim under the immigration rules, and if necessary, outside the rules will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

15. The decision of the First-tier Tribunal is set aside.

16. The matter is remitted to the First-tier Tribunal for hearing afresh.

17. No anonymity direction is applied for and none is made.

Signed Date 3rd June 2016

Deputy Upper Tribunal Judge Mandalia

FEE AWARD

The First-tier Tribunal made no fee award. As I have set set aside the decision of the First-tier Tribunal and remitted the matter for re-hearing I make no fee award.

Signed Date 3rd June 2016

Deputy Upper Tribunal Judge Mandalia