Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02776/2012

THE IMMIGRATION ACTS

Heard at Field House	**Date Sent**
On 16 October 2013	**On 21 October 2013**
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Before

UPPER TRIBUNAL JUDGE MCKEE

Between

MRS SUNDA DADI SAMBA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Emma King, instructed by Rahman & Co.
For the Respondent: Mr Chris Avery of the Specialist Appeals Team

DETERMINATION AND REASONS

1. This is an appeal by Mrs Sunda Dadi Samba who was born on 2 May 1981 in what was then Zaire and is now the Democratic Republic of the Congo. Her application for asylum in this country was refused on 1 March 2012 and she appealed against the consequential decision to remove her from the United Kingdom as an illegal entrant.

2. Her appeal to the First-tier Tribunal came before Judge Talbot on 13 April 2012 and was dismissed. Subsequently, an appeal to the Upper Tribunal came before Judge Allen, who upheld the First-tier decision on the asylum claim but found that there had been an error of law in determining the Article 8 claim. The appeal therefore was listed for rehearing before the Upper Tribunal on the Article 8 issue only.

3. On 12 March 2013, the Article 8 appeal was heard by Deputy Upper Tribunal Judge Davy. He dismissed the appeal, but subsequently his determination was set aside by Upper Tribunal Judge Jordan, and so it falls to me to remake the decision on the Article 8 appeal.

4. That appeal proceeded today by way of submissions only. The appellant's husband came to Field House but had to stay outside the hearing room to look after the children, and I am grateful to our court interpreter for giving Mrs Samba, the appellant, the gist of the representatives' submissions.

5. Ms King's submissions on behalf of the appellant were based upon her skeleton argument in which she relies in particular upon the judgment of Mr Justice Blake in **MM**, upon the judgment of the Supreme Court in **ZH (Tanzania)** and upon the decision of a Presidential panel of the Upper Tribunal in the case of **Sanade**.

6. The circumstances of the appellant are not in dispute between the parties. As Mr Avery pointed out in his submissions, the appellant is an illegal entrant and her family life with her husband commenced in 2008 when she was outside the United Kingdom and, as Mr Avery stresses, family life between the appellant and her husband continued for some considerable time apart. He was in this country, she was in the Congo. Two children were born to the appellant after her marriage, but they were born in the Congo, not in the UK. Her youngest child was born in the United Kingdom after she arrived here. All three are now British citizens and Mr Masamba, the appellant's husband, is himself now British. So we have the situation where if the three children are to remain in this country and be brought up here, they would be deprived of the company of their mother for a very long time if she had to go back to the Congo and they stayed in this country.

7. It is not in dispute between the parties that the appellant cannot meet the normal requirements of Appendix FM to the Immigration Rules. Her husband, although he has had work in the past and has just signed a contract for zero-hours work with a different company, has not been earning enough and, in all likelihood, will not be earning enough in future to reach the threshold of £18,600 in Appendix FM. The only way in which the appellant could succeed under Appendix FM would be under EX.1(a). She would not only have to have a genuine and subsisting parental relationship with her children, which is not in dispute, but it would also have to be shown that it would not be reasonable to expect the children to leave the United Kingdom.

8. Would it be reasonable to expect them to do so.? It seems to me that there is a tension between the requirements of EX.1(a) and the European Economic Area Regulations which do, at Regulation 15A(4A), envisage third-country nationals being able to stay in this country in order that British children would not have to leave the territory of the European Union. As Mr Avery points out, this can be considered part of a much wider distinction between the rights of European Union citizens and their family members, as compared to the rights of British citizens and their family members. But it does seem to me that the whole tendency of our case law, particularly since the landmark judgment in **ZH (Tanzania)**, is such that British children should not be compelled to leave the United Kingdom if it would be in their interests to be brought up in the United Kingdom. In **ZH** itself, the British father of the children was unable to look after them, therefore they had to be looked after by their mother, and she would have to depart to Tanzania with them if she was not allowed to stay in the United Kingdom. The Supreme Court ruled that it would be contrary to Article 8 if she and the children had to leave.

9. In the present case, the appellant's husband is able to look after the children, so it is not on all fours with **ZH (Tanzania)**, but the children are very young, they are currently aged 2, 3 and 6, and it is universally acknowledged that at that tender age children ought to be looked after by their mother, if at all possible.

10. Ms King has also drawn my attention to a passage in **Sanade** paragraph 95, where the Upper Tribunal says that:

> "Where the child or indeed the remaining spouse is a British citizen, and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so. This serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in **ZH (Tanzania)**. If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

11. In the instant case, the appellant is not facing deportation for criminal behaviour. She has breached our immigration laws by entering the country illegally, but it does seem to me, despite the best efforts of Mr Avery, that in the circumstances of the present case, although when they were younger two of them were in the Congo, it would not be reasonable to expect the children to be brought up in that country when, as British citizens, they have a right to live in the United Kingdom and, as the Supreme Court emphasised in **ZH (Tanzania)**, enjoy all the benefits of being brought up in the country of their nationality, which undoubtedly would be superior to what would be available to them in the Congo.

12. Although the argument today really centred on whether Article 8 outside the Immigration Rules would avail the appellant, it does seem to me that in terms of EX.1(a) of Appendix FM also, it would not be reasonable to expect the British

children to leave the United Kingdom. It is one thing for British parents to emigrate to, say, Australia for a better life, taking the children with them. It is quite another thing to say that it would be reasonable for the children to be taken overseas, when neither parent wants to go and the children would not have a better life abroad. In those circumstances, the appellant succeeds under Article 8 both within the Immigration Rules and outside them.

13. The appeal is allowed under EX.1(a) of Appendix FM to the Immigration Rules and, though this is really superfluous, under Article 8 per se.

DECISION

The appeal is allowed.

Signed Date : 18th October 2013

Upper Tribunal Judge McKee