UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 24 March 2014

Decision Promulgated:
On: 31 March 2014

Before

Upper Tribunal Judge Pitt

Between

TD
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Royston, instructed by TRP Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND DIRECTIONS FOR REMITTAL TO FIRST-TIER TRIBUNAL

1. This is an appeal by the appellant against a determination dated 7 November 2013 of First-tier Tribunal Judge Parkes and Mr H G Jones MBE JP which refused her appeal against an automatic deportation order made on 13 June 2013.

2. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, her partner or their children. I do so in order to avoid the likelihood of serious harm to the children arising from their identification.

3. The background to this matter is that the appellant came to the UK in April 2000 with her daughter, P. They initially had leave as visitors and then overstayed. The appellant claimed asylum in 2006. The asylum claim was refused and failed on appeal in March 2007 but the Article 8 claim of the appellant and her daughter was allowed and discretionary leave granted.

4. The appellant formed a relationship with DK, a national of the Democratic Republic of Congo who had no leave. The couple had a son, S, born on 2 February 2008. During her pregnancy with S, the appellant was diagnosed as HIV positive and S is also HIV positive.

5. On 2 November 2010 the appellant, her daughter, DK and S were granted indefinite leave to remain.

6. On 29 March 2011, the appellant and DK had another son, M. He is a British national.

7. In 2004 the appellant made a fraudulent application for a British passport using a false birth certificate. The appellant admits doing so but no charges were brought.

8. In 2005 the appellant was cautioned for shoplifting.

9. On 26 June 2012, the appellant was sentenced to 20 months' imprisonment for conspiracy to defraud, dishonestly making false representations to make gain for self and knowingly being concerned in a fraudulent activity. The sentence was subsequently reduced to 16 months imprisonment. The offences were, in essence, benefit fraud of over £60,000 which she conducted with her sister who was also convicted and sentenced to imprisonment. The deportation order of 13 June 2013 followed.

10. The challenge to the decision of the First-tier Tribunal was that it:

1. failed to treat the best interest of the children as a primary consideration

2. was procedurally unfair as written submissions made after the hearing were not put before the judge

3. contained a misdirection on the correct burden of proof in the Article 8 proportionality assessment

4. was factually wrong on whether the assessment of the risk of reoffending in the probation service letter dated 23 September 2013 included the appellant's fraudulent passport application

11. I found that the first ground had merit. At [21] to [26] and [31] to [34] the First-tier Tribunal set out the circumstances of the children. At [31] the panel states that it has considered "the best interests of the children". At [26] and [32] to [34] the panel set out how the children's best interests had not been well served in the past and identified how their care might be managed in future if the appellant was deported.

12. At no point, however, does the panel identify what the best interests of the children were, notwithstanding the statement in [31]. There is no indication at any point in the determination that the panel was aware of their duty weigh the best interests of the children as a primary factor. The skeleton argument that was before the panel requested consideration of the children's best interests as a primary consideration. It set out relevant factors such as the length of residence of P and that she would be without a parent were the appellant deported and the role of the appellant as the primary carer of all three children. At [33] and [34], the panel sets out actions of the adults that have had a negative impact on the best interests of the appellant and in doing entangles the best interests of the children with the conduct of the appellant and the father of the two boys, offending the principle set out at [33] and [42] of ZH (Tanzania) v SSHD [2011] UKSC 4. The absence of any reference to the duty under s.55 of the British Citizenship, Immigration and Asylum Act 2009 or to case law setting out the correct approach to that provision such as ZH (Tanzania) v SSHD makes it difficult to read into the paragraphs concerning the children that the panel had the correct approach to their best interests in mind.

13. I concluded that, albeit the best interests of the children in any appeal are not a "trump card", they must be indentified and weighed as a primary factor and that did not happen here. I found that sufficient to amount to an error on a point of law such that the Article 8 decision should be set aside and re-made.

14. I also found that the second ground had merit, albeit no criticism of the First-tier Tribunal panel attaches thereto. It is not disputed that the appellant's legal representatives sent in written submissions dated 25 October 2013 following the hearing on 22 October 2013. The submissions addressed the respondent's failure to apply or address at all her own policies on deportation cases concerning families with children, including obtaining advice from Social Services and the Office of the Children's Champion.

15. The grounds of appeal state that the submissions were sent on 28 October 2013. The date stamp for receipt on the written submission is not clear and could be 25 October 2013 or 29 October 2013. The latter would seem more likely given the assertion in the grounds that the submissions were sent on 28 October 2013. In any event, it is common ground that the determination was not promulgated until 7 November 2013. The written submissions were with the Tribunal prior to promulgation, therefore.

16. There is nothing, however, to indicate that the submissions were brought to the attention of the panel prior to promulgation. The determination makes no reference to them. Rather, as identified at paragraph 12 of the grounds of appeal, the panel identified aspects of the evidence concerning that appeared to be lacking, those aspects being capable of being addressed had the respondent applied her policies. The reported case of MM (unfairness; E & R) Sudan [2014] UKUT 105 (IAC) provides that a failure to show why the material could not have been provided for the hearing and a failure on the part of legal advisers are not principles to be applied "with full vigour" in appeals such as this. That case also cautions against straying into an evaluation of the substantial merits of the material in the written submissions and the appeal when deciding whether the decision making process was adequate.

17. In the light of these matters I accepted that procedural unfairness arose where the written submissions were not put to the First-tier Tribunal panel for them to decide on how to deal with them and that this amounted to a material error on a point of law such that the determination had to be set aside to be re-made. The parties were also in agreement that if such an error was found it would mean that the appellant had been deprived of a fair hearing before the First-tier Tribunal and that the appeal should remitted to the First-tier Tribunal to be re-decided following paragraph 7.2 of Part 3 of the Senior President's Practice Statement dated 25 September 2012.

18. I did not find that the other two grounds had any merit. It is not entirely clear what aspect of the decision is being referred to at [10] where the panel states that the burden of proof was on the appellant to the balance of probabilities. Part of the decision relates to the provisions of paragraphs 398 and 399 of the Immigration

Rules and the stated burden and standard of proof is correct in that regard although it would not be had it referred specifically to the proportionality assessment where the burden passes to the respondent. I was not taken to any part of the proportionality assessment which suggested that, in substance, the wrong approach was taken, however.

19. I also did not find that the panel was in error at [18] in querying the risk of reoffending where it did not include the appellant's fraudulent application for a false passport. The probation service letter dated 23 September 2013 states in terms on the first page that the fraudulent passport application "it is not included in the statistical analysis made which calculates re-offending rates." It is my view that it was this statement that the panel had in mind when it commented as it did at [18] and [22] on its concern about the fraudulent passport application. I did not find that the First-tier Tribunal was in error in doing so.

DECISION

20. The decision of the First-tier Tribunal under Article 8 discloses an error on a point of law such that it should be set aside and re-made. That part of the appeal is remitted to the First-tier Tribunal to be re-made *de novo*.

DIRECTIONS

21. The appeal will be heard at the Birmingham hearing centre on Thursday 1 May 2014 before a panel other than First-tier Tribunal Judge Parkes and Mr H G Jones MBE JP.

22. By 17 April 2014, the parties are to file with the First-tier Tribunal and serve on the other party any further material that is to be relied upon.

Signed:  Date: 25 March 2014

Upper Tribunal Judge Pitt