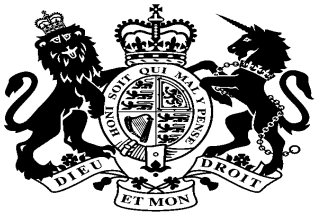

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/35035/2013
IA/35036/2013
IA/35037/2013

THE IMMIGRATION ACTS

Heard at Sheldon
On 13th August 2014
Prepared 14th August 2014

Determination Promulgated
On 19th August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

RITA EMMANUAL-OLEH

First Appellant

And

OMOREGBE OLEH-EMMANUEL

Second Appellant

And

SHARON OLEH-EMMANUEL

Third Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity directions not made

For the Appellant: Mr T Okunowo (Legal Representative, Toltops solicitors)
For the Respondent: Mr N Smart (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellants are a mother and two children who are nationals of Nigeria who had been living in Spain. Having previously travelled to the UK on multi entry visit visas they entered the UK on valid visit visas on the 25th of January 2012 and on the 30th of May 2012 applied for leave to remain on form FLR(O). The applications were refused for the reasons given in the Refusal Letters of the 6th of August 2013. The Appellants appealed by Notice and Grounds of Appeal of the 19th of August 2013.

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2. The appeals were heard by First-tier Tribunal Judge Holmes at Stoke on Trent on the 18th of February 2014. In a determination promulgated on the 26th of March 2014 the appeals were dismissed under the Immigration Rules but allowed under article 8 of the ECHR and section 55 of the Borders, Nationality and Immigration Act 2009. The Secretary of State sought permission to appeal to the Upper Tribunal in an application of the 4th of April 2014 and this was granted on the 17th of April 2014.

3. The First Appellant is the mother of the other Appellants. Their history is set out in the First-tier Tribunal determination and I do not need to repeat it here, it is referred to below. The Judge found that the Appellants could not meet the requirements of the Immigration Rules as they stood on the 8th of July 2012 nor the requirements of Appendix FM.

4. The appeals were allowed for the reasons given in paragraphs 20 to 25 of the determination. The Judge found that the children did not have any health difficulties but that they had been disrupted by their move from Spain. In paragraph 22 the Judge found that although the Appellants must have declared an intention to leave the UK in order to have been granted visit visa he was "satisfied that this was not the Appellants intended" and went on to consider the explanations given. He inferred that with possible homelessness they could not afford the delay that an entry clearance application would have entailed.

5. In paragraph 25 he considered proportionality. He accepted that the Appellants had established themselves in the UK with the help of their church and friends and that they are supported by the Sponsor. He did not analyse the finances available to the Sponsor or compare that with the requirements of Appendix FM. The Judge noted that the Sponsor is a British citizen with all the rights that entails.

6. The determination is flawed in a number of ways. Although the children may be entitled to British citizenship that is not the route that the family have taken and until they obtain citizenship they remain foreign nationals subject to immigration control along with their mother. The finding in paragraph 22 is effectively that the Appellant entered the UK by deception, i.e. that they did not intend to leave the UK despite having made a declaration to the contrary and that this was to avoid making a proper entry clearance application. That is a significant feature which was not weighed in the assessment of the circumstances that they had created against the public interest in the maintenance of immigration control.

7. It may the case that they were about to be required to leave the accommodation that they had but there appears to have been no enquiry by the Judge about the efforts that they might have made to obtain alternative accommodation. Given the recent and continuing financial crisis one of the well publicised issues from Spain is the overall surplus of accommodation and the significant fall in property values. There is no finding that the family could not obtain accommodation or that it would be unreasonable for them to do so.

8. The Appellants cannot apply using Appendix FM as they entered as visitors and so cannot rely on EX.1. However the provisions form the background for the assessment of the public interest and the extent to which the Appellants do or do not meet the analogous requirements are relevant.

9. The Sponsor's income requirements to support a spouse and two children amount to £24,800: £18,600 for the spouse; £3,800 for the first child and £2,400 each for subsequent children. In the Grounds of Appeal to the First-tier Tribunal it was stated that the Sponsor had earnings of over £21,000 but it was not given exactly. Taking £21,000 as the figure there was a shortfall of £3,800. Savings of two and half times the shortfall would be required to make up the shortfall.

With savings of £25,000 the funds would be inadequate as the Sponsor would need a minimum of £16,000 and a further £9,500. On the figures given that is £500 short but a near miss is not relevant. The Judge erred in not analysing the finances and not weighing the failure of the Sponsor's earnings to meet the requirements in the balance.

10. The best interests of the children are a relevant factor. However, as foreign nationals the presumption relating to their length of residence arises after 7 years and less weight is attached to first four years of a child's life. The fact is the Appellants only entered the UK in the circumstances outlined in 2012, with no expectation of being permitted to remain and by deception. The disruption to their lives in leaving Spain has been brought about by their actions and decisions for which they alone are responsible. The Judge mentioned the Sponsor's rights as a British national without noting the obligation on British citizens to obey the law and not to circumvent its provisions for personal convenience.

11. As matters stood before the First-tier Tribunal the Judge was faced with foreign nationals who had entered by deception in circumstances in which they could not have met the Immigration Rules relating to the entry of a spouse and children. They had been in the UK for a limited period with no expectation of being permitted to remain. There was nothing in those circumstances that would justify the Judge considering their position outside the Immigration Rules and if such a step were taken there was nothing that could be said to be compelling or exceptional to justify granting leave outside the rules.

CONCLUSIONS

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the decision.

I re-make the decision in the appeal dismissing the appeal of the Appellants.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order or direction.

Fee Award

In dismissing the appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 19th August 2014