IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/18906/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 June 2015	**On 29 June 2015**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

CM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Ilyas, Blavo & Co Solicitors
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant or his child sibling. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The appellant is a citizen of Cameroon and her date of birth is 18 July 1980.

2. On 24 December 2013 the appellant made an application for a derivative residence card pursuant to Regulation 15A of the Immigration (European Economic Area) Regulations 2006 ("2006 Regulations"). This application was refused by the Secretary of State on 11 April 2014. The decision maker concluded that there was insufficient evidence to show that the appellant's British citizen children JM (date of birth 24 February 2011) and MM (date of birth 5 October 2012) would be unable to remain in the United Kingdom or EEA if the appellant was forced to leave. The decision maker stated that the appellant had not provided evidence to explain why the children's father, BT is not in a position to care for the children should she be forced to leave. There has to date been no decision to remove the appellant

3. The appellant appealed against the decision of the Secretary of State and her appeal was dismissed by a panel comprising Judge of the First-tier Tribunal Froom and Judge of the First-tier Tribunal Kennedy, under the EEA Regulations and Article 8 in a decision that was promulgated on 18 November 2014 following a hearing on 3 November 2014.

4. The appellant appealed against the decision of the First-tier Tribunal and permission was granted on 23 January 2015 by Judge of the First-tier Tribunal Foudy. Thus the matter came before me on 8 April 2015. On this occasion I adjourned the error of law hearing for reasons explained below.

The decision of the First-tier Tribunal

5. The First-tier Tribunal heard evidence from the appellant and BT. It is necessary for me to set out relevant parts of the determination:

> "2. The background to this case has to be set out in detail. The appellant claims to have entered the UK clandestinely on 1 August 2010. She had previously been in France where she obtained a Belgian identity card in the name of SM. She attempted to use this to travel to the UK but was prevented from doing so. On being apprehended she gave another false name, M, which she had also used when applying for a UK visit visa in 2007. Having entered the UK illegally and been served with a notice of liability to removal, the appellant claimed asylum on the basis she was at risk in Cameroon because she was a lesbian. The respondent refused her application and the First-tier Tribunal dismissed her appeal. In a determination promulgated on 18 January 2011, Judge Nicholls was not satisfied that CM born on 18 July 1980 was the appellant's true identity, that she was ever detained or tortured by the Cameroonian police, that she was ever in a homosexual relationship in Cameroon or that she was in truth a lesbian. He found her not credible and rejected the entirety of her account. Remarkably, in our view, there is no mention in the determination of the fact the appellant was in the ninth month of her pregnancy at the time of the hearing.
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> 3. No steps appear to have been taken to remove the appellant. She gave birth to a son [JM], on 24 February 2011. Her subsequent application for a derivative residence card was refused on 23 July 2013 because she failed to provide evidence of nationality. She gave birth to a daughter, [MM], on 5 October 2012.

On 24 December 2013 she made another application for a derivative residence card. The reasons for refusal letter which accompanied the notice of decision, dated 8 April 2014, acknowledged that the appellant's children are British citizens. However, the application was rejected because the appellant had not provided evidence as to why the children's father, [BT], was not in a position to care for them if the appellant had to leave the UK. Matters such as [BT's] unwillingness or work commitments could not be taken into account. Furthermore, the appellant had not established she was the 'primary carer' of the children by showing they lived with her, that she made the day to day decisions about them and was financially responsible for the.

10. The appellant adopted her witness statement. This states that [BT] claimed asylum. He was subsequently granted indefinite leave to remain in 2004 and naturalised in 2007. He is the father of both [JM] and [MM]. She does not say when she started her relationship with [BT] but she states they separated approximately three months after [JM] was born. Around December 2011 they attempted to resolve their differences but separated again in February 2012, by which time she was pregnant with [MM]. Since the separation the children have always lived with her. She is solely responsible for their upbringing and day to day care. [JM] started at nursery school in September 2014. [MM] will start next September. [BT] has regular contact with [JM] and he visits both children on average once every two months. He occasionally gives her money for their upkeep. NASS pays the rent and provides financial support. [BT] lives in a one-bedroom property which he rents in Leeds. He works full-time. He has told her he would not be able to cope with the children. She does not believe their needs would be met by him.

11. In cross-examination the appellant was challenged over her failure to disclose her relationship with [BT] at her previous appeal, at which she had maintained that she was a lesbian. However, she denied she had been lying. She was asked about her separation from [BT]. She said it was when [JM] was three months' old. She said they restarted the relationship, although they did not live together. She specifically confirmed they were still in a relationship now. She agreed the reason they did not live together as a family was that his job was in Leeds. The reason she did not join him in Leeds was that he did not have enough space in his accommodation. She said she saw him about once a month. He gave her sums of £50 or £100 occasionally. Re-examined, the appellant again confirmed she is currently in a relationship with [BT]. She said they would make plans to live together in the future but she would not be drawn about when that might take place.

12. [BT] also adopted his witness statement. This also gives the impression the couple separated in February 2012 since when they have not resumed their relationship although he sees the children in London. He fears that, if he had to assume responsibility for the children, they would be neglected. He does not have space for them and he has two jobs. He says he has lost all his ties with Cameroon and cannot return there as he regards the UK as home.

13. Cross-examined, [BT] said it was impossible to find work nearer to where the appellant and the children are living. Asked why the appellant had not joined him in Leeds he said they were no longer in a relationship. When told that the appellant had said they were, he seemed nonplussed. He said they were in

contact for the sake of the children. Re-examined he described their relationship as that of close friends.

15. Having considered all the available evidence with care we have made the following findings. The appellant is a person whose evidence must be approached with considerable circumspection. She has a history of seeking to enter the UK by deception and using multiple identities when it suits her purposes. Having entered clandestinely she claimed asylum on a factual basis which was found by Judge Nicholls to be wholly false. Although she denied lying about her reasons for claiming asylum her position was untenable given the fact she had been in a relationship with [BT] for at least nine months by the time of the hearing. Given she was claiming to be a lesbian we infer that the reason she made no mention of her relationship or advanced pregnancy was to avoid having to reconcile that with her claimed sexual orientation. We regard her as manipulative.

16. In the circumstances that there was an irreconcilable inconsistency between the appellant and [BT] as to whether they are still in a relationship, we are unable to attach weight to anything we were told regarding the relationship. We considered whether the appellant had been confused or perhaps the meaning of the word 'relationship' had become lost in translation. However, the appellant had several opportunities to amend her evidence and even confirmed it in re-examination. We therefore regard the discrepancy as unexplained and highly damaging to the credibility of the appellant's case.

17. In the light of these matters, whilst we find it is more likely than not that the appellant is the children's primary carer as she is their mother and [BT] appears to live in Leeds, we are unable to accept that [BT] would not look after his children such that they would be unable to reside in the UK if the appellant were required to leave. We infer from our rejection of the claim to be contrary that he would.

19. We found propositions (iv), (v) and (vi) [paragraph 18 of R (Sanneh) v SSWP and HMRC [2013] EWHC 793] particularly helpful to our understanding in this case. It is a question of fact whether the children in this case would not be able to reside in the UK if the appellant were to leave. It is not a matter of convenience, diminution of quality of life or practical difficulties but rather of compulsion.

20. As said, we are nowhere near to accepting the account given by the appellant in view of the unsatisfactory nature of the evidence. Even if we took her claim that [BT] believes he could not cope with the children, has a small flat and works full-time at face value, we would still be unpersuaded that the test was met. We would not be satisfied that [BT] was not willing or able to make suitable care arrangements if there were no other alternative. This would be less than ideal from the children's point of view and we must regard their best interests as a primary consideration. Their interests would probably be better served by having both parents around, whatever the exact nature of their current relationship, and the attachment to their mother is plainly of very great significance at their current ages. However, many children are brought up successfully by single parents. [BT] is established in work and accommodation. He is an English speaker. We see no reason he could not care for his children, even if this led to some diminution in the quality of their lives.

21. We repeat that the paucity of reliable evidence about the family make-up has made it impossible to reach clear conclusions about the factual background. What is clear is that the test involves a high threshold and the appellant has not discharged the burden of proving the facts on which she needs to rely.

24. In *Harrison (Jamaica) v SSHD* [2012] EWCA Civ 1736 Elian LJ indicated that, in situations such as the present case, article 8 rights may come into the picture to protect family life and Hickinbottom J indicated that a breach of article 8 might be such as to bring about circumstances which would compel the EU citizens to leave. We therefore turn to consider article 8.

25. We see no inconsistency in this approach. Our decision in relation to Regulation 15A is that the children are not *compelled* to leave as a result of the appellant's removal and therefore the appellant is not entitled to a derivative residence card. We are now considering what the impact of removal is on family life in the event the appellant might choose to take the children with her."

6. The panel made the above findings in relation to the EU law ground of appeal. In relation to Article 8 they made the following findings:

"27. The appellant's case was argued on the basis that removing the appellant would interfere with her family life with her children whose best interests were a primary consideration. Much reliance was placed on the case of *ZH (Tanzania)* [2011] UKSC 4, given some similarities on the facts. Mrs Widdison did not attempt to argue that the appellant could bring herself within the applicable rules which now operate so as to apply article 8.

33. We are obliged to assess the public interest in removal by reference to primary legislation in the form of section 117B of the 2002 Act, which was inserted by section 19 of the Immigration Act 2014 with effect from 28 July. The section sets out the applicable public interest considerations which must be considered when applying article 8.2. These include the following:

'(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.'

34. Section 19 only amends the 2002 Act, not the EEA Regulations, but we cannot conceive that a person bringing an appeal under the latter should be treated differently. It is clear that [JM] and [MM] are 'qualifying children' under section 117C (1). The appellant is not liable to deportation. The issue is whether subsection 117B(6)(b) applies. If so, we must have regard to it when considering the public interest question, as we must to subsections 117B(1) to (5). We would have reached the same conclusion whether or not the section applies in an EEA appeal.

35. There is self-evidently family life here which would be affected by the appellant's removal. In this case, it is appropriate to move straight to the last of the five questions identified in paragraph 17 of *Razgar*, that is, whether the refusal of leave to enter or remain, in circumstance where the life of the family (or private life) cannot reasonably be expected to be enjoyed elsewhere, taking full account

of all considerations weighing in favour of the refusal, prejudices the family life (or private life) of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8 (see *Huang and Kashmiri* [2007] UKHL 11, paragraph 20). A fair balance must be struck between the rights of the individual and the interests of the community. However, decisions taken pursuant to the lawful operation of immigration controls will be proportionate except in a small minority of exceptional cases, identifiable on a case by case basis (*Razgar*, paragraph 20).

36. Having assessed the evidence and balanced the respective interests of the parties, including the matters set out in section 117B, we have concluded that the decision, in consequence of which the appellant can be removed, amounts to a proportionate exercise of immigration control in furtherance of the legitimate aim identified, which in this case would be preserving the economic wellbeing of the UK. The decision does not amount to a disproportionate interference with the appellant's fundamental rights, even taking into account the right to family life of her partner, if that is what he is, and the best interests of the children, both of which we have considered.

37. We find subsection 117B(6) does not carry decisive weight in this appeal because we find it would be reasonable for the children to accompany their mother to Cameroon. We confirm we have had regard to the summary of the applicable legal principles set out in paragraph 10 of *Zoumbas v SSHD* [2013] UKSC 74. In light of our finding by inference that the appellant is likely to have a home and close family members to return to in Cameroon, there is no reason the children, who are currently aged only 3 and 2 years, would not be able to adapt to life in Cameroon with their mother. We are not seeking to 'punish' the children for the actions of their mother. They are entirely innocent. Nor do we overlook the fact they are British, which was a matter of some significance in the reasoning in *ZH (Tanzania)*, although the children in that case were much older. Article 8 must be forward-looking and, even though the exercise of the rights of citizenship currently has relatively little meaning for the children, in the future it would count for a great deal, at least while they remain dependent on parental care, particularly in terms of their education. We were not told of any health issues. We give the children's right of citizenship significant weight. However, it is not a decisive factor which must lead inexorably to a decision in favour of the appellant (see, for example, *AF v SSHD* [2013] CSIH 88).

38. Given the paucity of reliable evidence in this case we are unable to reach any firm conclusions about the precise extent of [BT's] role in the children's lives. We have found the appellant is a primary carer. It is likely responsibility is shared to some extent, perhaps equally. [BT] may have claimed asylum but he has not shown he was successful in that endeavour and we see no reason he could not visit his children in Cameroon and maintain contact through the usual means.

39. We have reminded ourselves of the former President's guidance on the best interests principle provided in the case of *Azimi-Moayed and Others (decisions affecting children; onward appeals*) [2013] UKUT 00197 (IAC), which was decided on its unusually weak facts. The Upper Tribunal pointed out that, in the generality of cases, it is in the best interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country can lead to the development of social, cultural and educational ties that it would be

inappropriate to disrupt but what amounts to lengthy residence is not clear cut. Past and present policies have identified seven years as a relevant period. Seven years from the age of four is likely to be more significant to a child than the first seven years of life. Very young children are focused on their parents rather than their peers and are adaptable (see paragraph 13). We believe that [JM] and [MM], being only very young, are readily adaptable. They have not yet commenced their mainstream education. We assume their mother-tongue is French.

41. The children would not experience any separation from their mother in the scenario we are positing and we were told that they only have limited contact with their father at present. They would doubtless miss that contact in the event they relocate to Cameroon but the impact would be far less than if they lost contact with their mother. We are satisfied that the best interests of the children are adequately protected in this way. We do not need to consider the alternative scenario whereby the appellant chooses to leave them with [BT]. We find that the appellant is unlikely to do so unless she were satisfied they would be adequately cared for.

42. The best interests of the children are an important consideration and, indeed, a primary consideration. However, they are not a 'trump card' and this case can be distinguished from *ZH (Tanzania)* on its facts. The appellant has an appalling immigration history and there is substantial public interest in ensuring she is removed. Her personal circumstances and those of her children and [BT] do not outweigh the public interest in this case. Put another way, the decision as it stands does not produce unjustifiably harsh consequences and the outcome does not breach article 8 rights."

Grounds of Appeal and Submissions

7. The grounds seeking leave to appeal are insufficiently particularised and conflate EU law and Article 8. I adjourned the hearing on 8 April 2015 because I wanted written submissions from both parties about whether or not the First-tier Tribunal should have considered the appeal under Article 8 on the basis that the children would remain in the UK. The matter was adjourned until 24 June 2015. Both Mr Ilyas and Ms Holmes submitted written submissions in accordance with the directions that I gave at the previous hearing. Mr Ilyas's written submissions were a vast improvement on the grounds and helped clarify issues. I heard extensive oral submissions from both parties.

Conclusions

Credibility Findings

8. It is argued in the grounds that the panel misread the determination of Immigration Judge C J E Nicholls which led to unfairness. Reliance is placed upon MM (unfairness; E and R) Sudan [2014] UKUT 105 (IAC), R (Iran) and Ors v SSHD [2005] EWCA Civ 982, and E and R v SSHD [2004] EWCA Civ 49. It is asserted that the rejection of the appellant's account and that of BT stemmed from this mistake. The mistake being that the panel at [2] found that it was remarkable that there is no mention in Judge Nicholls' determination of the fact that the appellant was in the

ninth month of pregnancy at the time of the hearing. The panel went on to find at [15] that the appellant's evidence was to be treated with "considerable circumspection" and that it regarded her as "manipulative". Mr Ilyas referred me to [8(f)] of Judge Nicholl's determination which records the appellant's evidence that she was pregnant and the anticipated date of delivery was 21 February 2011. It is obvious the panel overlooked this. However, I do not accept that this led to fairness or adverse consequences for the appellant. Mr Ilyas submitted that if it were not for the mistake the Tribunal would not have made adverse credibility findings in relation to the appellant and to BT. I totally reject this proposition because there were many reasons given by the Tribunal at [15] for concluding that this appellant's evidence should be treated with considerable circumspection. Not only were there significant adverse credibility findings made by Judge Nicholls (who rejected the appellant's asylum claim as wholly false), but the appellant and BT's evidence was wholly at odds about the fundamental issue of whether they were in a relationship or not. It is unarguable that the mistake resulted in unfairness to the appellant.

EU Law

9. It is argued that the evidence before the First-tier Tribunal established that the children would be compelled to leave the UK. Reliance is placed on the judgment in Hines v LB Lambeth [2004] EWCA Civ and MA and SM (Zambrano: EU children outside EU) Iran [2013] UKUT 00380. It is argued that BT's evidence was that he is incapable of looking after the two children and that there was in this case more than a suggestion of incapability but a clear unwillingness on his part to play an active role in his children's lives thus far. It was argued that the case of S (A child) [2010[EWCA Civ 705 clarifies the position that there is no power which allows a court to impose provisions as to one parent "caring for" or "having care of" a child in the form of contact order. BT cannot be compelled to look after his children if he does not wish to do so.

10. It was for the appellant to establish that the children would be unable to reside in the UK if she was required to leave. The panel considered the case of R (Sanneh) v SSWP and HMRC [2013] EWHC 793 (Admin) at [18] of the determination. Even where a non-EU ascendant relative is compelled to leave the EU territory, the Article 20 rights of an EU child will not be infringed if there is another ascendant relative who has the right of residence in the UK and who can, and will in practice care for the child. BT produced a very brief witness statement dated 25 October 2014 which was before the First-tier Tribunal and in that statement he maintained that it would be impossible for him to look after the children because, he is incapable of looking after two young children, it was never his intention to take the children with him when he and their mother separated and he fears that they would be neglected if he were to assume responsibility. Finally, in his view it is natural for children to be with their biological mother. His evidence was that he lives in a one bedroom flat with a very small front room and he does not have any space for the children.

11. There is a letter from BT to the respondent of 14 December 2013 in which he maintains that he is certain that he would not be able to cope with two young

children and that he would be concerned that they would be taken away from him. There is a letter from Kingsley Chambers representing the appellant to the respondent of 17 December 2013. In this letter it is maintained that BT would not be able to assume care responsibilities for his children as he feels that he would not be able to cope with the children on his own and that the children belong with their biological mother. It is further asserted that it would not be suitable to BT to assume responsibility, although it cannot be argued that he has expressed an unwillingness to look after the children, but he would not be able to. This is in stark contrast to the position put forward by Mr Ilyas which is that BT was not only unable to but he was unwilling to look after the children.

12. The panel rejected the evidence that BT would not look after his children in the event of their mother's removal. The panel stated at [20] that they were "nowhere near to accepting the account given by the appellant in view of the unsatisfactory nature of her evidence. They stated at [20] that they would not be satisfied, even if they had accepted the evidence, that BT was not willing or able to make suitable care arrangements for the children. They accepted it would be less than ideal, but they could see no reason why he could not look after the children even if this led to some diminution in the quality of their lives. In the light of the evidence, this decision that the children would not be compelled to leave the UK was inevitable. The panel did not accept that BT would refuse or be unable to take care of the children, this was not the evidence before the First-tier Tribunal in any event. They did not accept that the appellant had established that the lives of the children would be seriously impaired and that they would effectively be compelled to leave the UK. The decision must be viewed in the context of the unsatisfactory evidence before the Tribunal and the serious adverse credibility findings and the inability of the panel, in the light of this, to make "firm conclusions" about BT's role in the lives of his children.

Article 8

13. The appellant was not able to meet the requirements of the Immigration Rules. It is not the appellant's case now that she and BT are in a relationship (despite her oral evidence before the First-tier Tribunal). In any event, it was not accepted that he would be able to meet the maintenance requirements of the Rules. If the appellant was able to meet the Rules relating to limited leave to remain as a parent (and it is not clear that she would) she would then have to satisfy EX.1. The Tribunal found that the appellant could not satisfy 276ADE (see [31]). In terms of reasonableness the panel properly directed itself in relation to section 117B (6) (b) of the 2002 Act. It was argued by the appellant before the First-tier Tribunal that section 117 of the 2002 Act does not apply to cases under the 2006 Regulations. This is a misconceived argument. It applies so far as article 8 is concerned. In any event, the panel having considered section 117B (6), stated at [34] that whether or it applied they would have reached the same conclusion. No point was taken by Mr Ilyas on the issue. In any event, I am satisfied that reasonableness was properly considered.

14. The First-tier Tribunal did not determine Article 8 on the basis that the children would remain with their father in the UK. Ms Holmes' view is, given that the

Tribunal were unable to come to firm conclusions about what the appellant might do as regards the children, that the Tribunal should have considered the possibility that she might return to Cameroon on her own. However, in oral submissions she expanded on this and stated that if this amounted to an error of law it would not be material because the panel went on to consider Article 8 on an alternative basis and their decision is lawful and sustainable.

15. If Ms Holmes is right and the panel should have considered Article 8 on the basis that the children would remain in the UK and therefore be separated from their mother, whether or not the failure to do so amounts to a material error turns on whether the Tribunal were entitled to dismiss the case under Article 8 on the basis that they did and if so whether or not the balancing exercise is flawed for the reasons identified in the grounds.

16. The challenge to the balancing exercise conducted by the panel is that the panel did not properly consider the children's nationality and ZH (Tanzania) [2011] UKSC 4 and that there was no consideration of Section 55 of the 2009 Act. I disagree with this. The panel properly considered the best interests of the children at [37], [39] and [41], taking into account that the children are British citizens and properly attaching significant weight to this. The panel's unequivocal findings that it was in their best interests to stay with their mother and return to Cameroon with her (see [41]). (At [42] the panel obviously meant to state that nationality is not a "trump card" and not best interests. The panel was entitled to conclude that nationality was not a decisive factor in this case, given the ages of the children, and that they had not yet started mainstream education. The argument before the First-tier Tribunal and before me was based on the nationality of the children, rather than any other factor that might be relevant to their best interests (e.g. separation with their biological father and life in Cameroon with their mother). The panel was entitled to take into account the appellant's appalling immigration history when considering proportionality in the context of Article 8. Indeed it was incumbent on the panel to attach little weight to the appellant's private life (or family life) accrued when she has been here unlawfully in accordance with section 117 of the 2002 Act.

17. Should the appellant and her children be separated as a result of the decision it is likely that this would result in a breach of Article 8 of the 1950 Convention on Human Rights. It was accepted by the Tribunal that she was the primary carer of the two young children. The appellant's case was that her children would be compelled to leave the UK. The Tribunal did not accept this, but found that it is likely she would take the children with her and, in any event, their best interests lay in returning to Cameroon with their mother despite their nationality. There no tension between the decision under the EU Regulations and the Article 8 decision.

Notice of Decision

18. There is no arguable error of law in the decision of the panel and the decision to dismiss the appeal under the EEA Regulations and Article 8 is lawful and sustainable.

19. I made an anonymity order to protect the identity of the children in this case.

Signed Joanna McWilliam Date 29 June 2015.

Upper Tribunal Judge McWilliam