Upper Tribunal
(Immigration and Asylum Chamber)
IA/19729/2014

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 21st August 2015	**On 1st October 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

MRS KAMOLA IBRAGIMOVA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Sufi, Immigration Law Specialists Associates
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant a citizen of Uzbekistan (born 14th January 1985) appeals with permission against the decision of a First-tier Tribunal (Judge Tiffen) in which it dismissed her appeal against the Respondent's decision of 15th April 2014 refusing her leave to remain on the basis of her family/private life in the UK under Article 8 ECHR.

Background

2. From the limited papers before me, it appears that the Appellant entered the UK as a student in 2005. She was granted leave to remain until 2013.

3. In April 2007, she married Khusniddin Musaev (date of birth 3rd May 1979). The marriage ceremony took place at the Uzbekistan Embassy in London. Khusniddin Musaev is also a citizen of Uzbekistan.

4. In April 2008 their child S was born in the UK and in September 2010 their second child Sd was also born here.

5. On 24th January 2014 (before the date of the Respondent's decision to refuse the Appellant's leave), the Appellant's husband was granted indefinite leave to remain in the UK. Accordingly both of the Appellant's children were granted British citizenship on 22nd October 2014 in line with their father's status. These grants of British citizenship to the children post-dated the Respondent's refusal to grant the Appellant leave to remain but importantly the information that the Appellant's husband had applied for indefinite leave to remain was pointed out to the Respondent in the FLR (O) form.

The FtT Hearing

6. When the appeal came before the FtT Judge, she had before her the Respondent's refusal letter dated 15th April 2014. That letter acknowledged that there was a duty under Section 55 of the Border, Citizen and Immigration Act 2009 to consider and factor in to any decision, the welfare of the Appellant's two children who were both present in the United Kingdom.

7. In discharging that duty the decision letter said only this:

> *"Consideration has been given to Section 55 of the Immigration Rules, and it is not considered unreasonable to expect you to return to Uzbekistan and continue your family life there with your children, alternatively, you could make a fresh application from Uzbekistan to re-enter the UK with valid leave to enter."*

This consideration was predicated of course on the basis that the Appellant had no British children in the UK and that neither of her children had lived in the UK for at least seven years.

8. The FtT Judge directed herself on *ZH Tanzania* and then said the following at [20],

> "Although nationality was not a "trump card" it was of particular importance in assessing the best interests of the child. In this appeal the Appellant's children acquired their British citizenship by *the accident of being born here*. (My emphasis)

> It is obvious that the children can live with their parents in a country where the Appellant has spent at least 20 years of her life and where the customs and way of life will be second nature to her and her husband. The children are of such an age that they will be able to integrate easily into Uzbekistan. They do not appear to have any heath difficulties or any other reason why they would not be able to integrate".

The Judge went on to dismiss the appeal.

9. Permission to appeal was sought and granted on a renewed application to the Upper Tribunal in the following terms;

> "The reference now made to *JO* and others (section 55 duty) Nigeria [2014] UKUT 517 (IAC) is to paragraphs 16 and 17; but the general guidance contained in them is more concisely encapsulated in the judicial head-note at 3:
>
> > *The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to the Secretary of State and the ultimate letter of decision.*
>
> Arguably the decision letter, in the now familiar standard form in this case, did not comply with the respondent's duty, and on that basis permission is granted."

Thus the matter came before me in the UT.

Error of Law Hearing/Consideration

10. I heard submissions from both representatives. Mr Sufi on behalf of the Appellant drew my attention to paragraphs 8, 9 and 10 of *JO and others*. He referred to the FtT's decision and submitted that both the Respondent and the FtT had failed in their duty to ensure that the guidance given in *JO* was followed. The FtT's decision was deficient in this respect. The Judge had failed, to step into the shoes of the Secretary of State and thereby make a proper assessment of the best interests of the Appellant's children. By the time of the hearing before the FtT, the children had been recognised as British citizens. The Judge had failed to give proper weight to that factor as could be seen by her use of her language at [20] where she said,

> *"Although nationality was not a "trump card" it was of particular importance in assessing the best interests of the child. In this appeal the Appellant's children acquired their British citizenship by the accident of being born here."*

11. Mr Walker defended the Judge's decision. He submitted that the Judge had directed herself properly following *ZH (Tanzania)*. She had gone through the tests outlined in *ZH* and had found that it would not be unreasonable

for the Appellant, the two children and her husband, who is also a national of Uzbekistan to relocate there. The decision was a sustainable one.

Consideration

12. In this appeal, I find it is necessary to start my consideration by examining the Respondent's decision letter refusing the Appellant's application. When the Appellant made her initial application for leave to remain, it was clear from the proforma application form that she was present in the United Kingdom with her husband and two daughters. Her daughters were born in the United Kingdom and had lived here all their lives. The eldest had already started school. It was also made clear that her husband had applied for indefinite leave to remain here; clearly an application which would impact on the family life of both the Appellant and her children.

13. The Respondent therefore had a duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to consider, when making her decision, as a primary consideration, the best interests of those children.

14. Section 55 of the Borders, Citizenship and Immigration Act provides;

> *"(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."*
>
> *(2) The functions referred to in sub-section (1) are –*
>
> *(a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
>
> *(a) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …*
>
> *(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)".*

15. In purporting to discharge that duty the Respondent said,

> *"Consideration has been given to Section 55 of the Immigration Rules, and it is not considered unreasonable to expect you to return to Uzbekistan and continue your family life there with your children, alternatively, you could make a fresh application from Uzbekistan to re-enter the UK with valid leave to enter."*

I find that this cursory consideration is insufficient to show that the Respondent has discharged the duty imposed upon her under Section 55. t

16. I draw strength for that finding from the conclusion of the decision in *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC) wherein the Upper Tribunal said at [8],

> "What is required of the Secretary of State's case workers and decision makers by section 55 of the 2009 Act, where it applies, was considered *in extenso* recently by this Tribunal in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC). This case decided that, fundamentally, it is manifestly insufficient for a decision maker to pay mere lip service to the two, inter-related duties imposed by section 55. The substance of the primary duty must be properly acknowledged, the relevant children must be identified and their best interests must then be considered, to be followed by a considered balancing exercise. In assessing the best interests of each affected child, the decision maker must be properly informed. Furthermore, it must be apparent from the terms of the decision that the best interests of each affected child, as assessed, are ranked as a primary consideration and accorded a primacy of importance, as required by ZH (Tanzania) 2011 UKSC 4, at [26] and [33] especially. See [7] – [10] of JO (Nigeria) and, in particular, the following passage in [11]:
>
> "*I consider that, properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors ….. Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared.*"

17. Following on from the above, I am satisfied that the Respondent did not conduct a careful consideration of the best interests of the Appellant's children. For example I return to the point that when the Appellant's application was made, evidence was put before the decision maker that the Appellant's husband, the father of the two children, had made a long residence settlement application. The children had both been born in the UK and had lived here all their lives. It follows that any consideration should have factored in the relationship of the children with their father and their mother and how that played out in the family unit as a whole.

18. Therefore, I am satisfied that the Respondent's consideration of this in her decision falls far short of that required under the duty imposed her by Section 55.

19. When the matter came before the FtT, it is correct to say that there was an opportunity to put right that failure.

20. In doing so this required the FtT to step into the shoes of the Respondent and effectively become the primary decision maker. This entailed carrying

out a careful examination of all relevant factors and giving appropriate weight to those factors. This I find the FtT has not done. I say so for the following reasons. At [20] the Judge has directed herself properly that she must take into account *ZH (Tanzania)*. However, whilst she has set out the compendium of questions asked in *ZH (Tanzania)* instead of answering those questions the Judge has formed conclusions by saying,

> *"In this appeal the Appellant's children acquired their British citizenship by the accident of being born here. It is obvious that the children can live with their parents in a country where the Appellant has spent at least 20 years of her life and where the customs and way of life will be second nature to her and her husband. The children are of such an age that they will be able to integrate easily into Uzbekistan. They do no appear to have any health difficulties or any other reason why they would not be able to integrate. "*

21. I find it hard to see why the Judge concluded that "it was obvious" that the children can live with their parents in a country where the appellant has spent at least 20 years of her life. There is no analysis explaining why she finds it obvious that the Appellant's children can live with their parents which includes their father in Uzbekistan. More particularly there is no analysis of what must be regarded as the important considerations in this case; the children are British citizens, their father who is the main breadwinner of this family unit has been granted indefinite leave to remain. He enjoys a settled status and works here earning a good salary. The children have lived all their lives in the UK; and by the time of this decision not only has the eldest started school here, but I would expect that their youngest will have as well.

22. I have no hesitation in finding therefore, for the foregoing reasons, that the FtT erred in its decision and that decision must be set aside.

The Way Forward

23. I have considered how best to deal with this matter since I am conscious that this family unit involves two young children. I return therefore to the original decision made against the appellant which was a decision against a refusal to grant her leave to remain outside the Immigration Rules. I am satisfied that proper consideration has not been given to that application by the Respondent.

24. The correct way forward therefore is for me to allow the Appellant's appeal, on the basis that the Respondent's refusal is not in accordance with the law.

25. This leaves the application outstanding. It will now be incumbent upon the Secretary of State to remake the decision, after making proper enquiry and giving proper consideration to all the relevant factors in this Appellant's case particularly those concerning the best interests of the two children.

26. It is to be hoped, bearing in mind that young children are involved in this process, any decision would be made sooner rather than later.

Decision

27. The appeal of Kamola Ibragimova is allowed in that the Respondent's decision is not in accordance with the law.

28. Appeal allowed.

No anonymity direction is made

Signature **Dated**

Fee Award

As I have allowed the appeal to the extent set out above, I make a fee award.

Signature **Dated**