Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/42943/2013
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IA/42945/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination Promulgated**
On 22 April 2015	**On 9 June 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MS RUTH GOTO
MISS KUDZAI MUTSIWA
MASTER FARAI MAGAISA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Byrne, Advocate instructed by Drummond Miller
For the Respondent: Mr M Matthews, Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellants are a mother and two children from Zimbabwe. They appeal against a decision by Judge of the First-tier Tribunal Fox dismissing their appeals under the Immigration Rules and under Article 8.

2) At the start of the hearing I drew attention of the parties to the fact that a complaint had been referred to me against Judge Fox arising out of his determination, in which at paragraph 23 he made what was alleged to be an

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unjustified criticism of the appellants' solicitor, which could be construed as damaging to his professional reputation. Consideration of this complaint had been deferred pending the outcome of the appeal to the Upper Tribunal. None of the parties had any objection to my hearing the appeal.

3) Mr Byrne indicated that there were preliminary matters on which he wished to address me. He sought to vary the grounds on which the application for permission to appeal was made. On behalf of the respondent Mr Matthews indicated that he had no objection to the proposed variations, which he had had the opportunity of discussing with Mr Byrne.

4) Mr Byrne indicated that he did not wish to proceed with the allegation of bias on the part of the judge at paragraph 6 of the grounds. Instead he intended to show that the judge had erred in law at paragraphs 21-23 of the determination. He would argue that the judge had erred by failing to take into account material factors and by failing to allow evidence to be produced to rebut allegations made on behalf of the respondent. In relation to the opportunity to rebut these allegations he referred to the decision of the Inner House in Koca [2005] CSIH 41.

5) Mr Byrne then addressed me on the grounds set out in the application for permission to appeal. He pointed out that in terms of a skeleton argument lodged before the Tribunal the third appellant relied not only on sub-paragraph 276ADE(iv) but also on sub-paragraph (v). In terms of sub-paragraph 276ADE(iv), the third appellant had spent 7 years in the UK while under the age of 18 and this raised the question of reasonableness of expecting him to leave. The judge failed to address this issue. In addition, by the date of the hearing before the First-tier Tribunal the third appellant met the requirements of sub-paragraph 276ADE(v) as set out in the skeleton argument, because he was aged between 18 and 25 and had spent at least half of his life living continuously in the UK. Mr Byrne acknowledged that in terms of paragraph 276ADE(1) the requirements in that paragraph had to be met as at the date of the application but he submitted that the fact that the third appellant satisfied 276ADE(v) was relevant to an assessment outwith the Immigration Rules.

6) In addition, it was pointed out that at paragraph 10 of the determination, in relation to sub-paragraph 276ADE(iv), the judge referred to there being "no evidence before me that he meets any of the restrictions imposed by the Immigration Rules." It was difficult to ascertain what the judge meant by this phrase. The question for the judge to decide under sub-paragraph (iv) was a question of reasonableness.

7) Mr Byrne continued that paragraphs 5 and 42 of the determination indicated that the judge had been focused on the significance of family life rather than private life. Only at paragraph 39 did the judge refer to private life. If the third appellant were to succeed under paragraph 276ADE only then would family life arise. Paragraph 276ADE itself related to private life. This was a

significant error by the judge as if the family returned together there would be no interference with family life.

8) Mr Byrne then turned to the judge's treatment of an email from an Admissions Officer at the University of Abertay, which was submitted on the day of the hearing. This email related to the second appellant and stated that she was given home fee status on the basis she was a UK national and ordinarily resident in the UK since 2000. The judge then questioned at paragraph 22 why no attempt had been made to produce evidence from the University and the "clearing system" (presumably meaning the admissions service, UCAS) to support the view of the second appellant that she had at all times declared her nationality. The judge then concluded that evidence to support the second appellant's position did not exist.

9) Mr Byrne submitted that the issue of the fee status of the second appellant had arisen for the first time only on the day of the hearing. It was unfair of the judge to found on a supposed failure by the second appellant to produce evidence when she had not had fair notice of the point at issue. The judge was wrong to take this matter into account as material. It might have been permissible for the judge to find that the evidence he had heard was not sufficient to satisfy him that the appellant had declared her nationality in applying for a place at university and in taking up that place, but the judge went further and criticised the lack of any attempt by the second appellant to provide evidence from the university.

10) Mr Byrne concluded by saying that the grounds on which he relied referred to the second and third appellants, who where the children, rather than to their mother, who was the first appellant, but if the position of the children had been properly considered and an appeal by either of them had succeeded, then the issue of proportionality would have arisen in relation to the mother.

11) For the respondent Mr Matthews emphasised the proviso in paragraph 276ADE to the effect that the private life requirements of that paragraph must be met at the date of the application. Although by the date of the hearing before the First-tier Tribunal the third appellant had spent half his life here, this was not the material date for consideration, which was the date of the application. Accordingly the third appellant could not meet the requirements of the sub-paragraph (v) in this appeal and would require to make a further application. Mr Matthews further submitted that it was not proper to look at whether the third appellant satisfied sub-paragraph (v) in relation to proportionality. This was a "near miss" argument of the sort considered by the Supreme Court in Patel. It was difficult to succeed in making an application under the Rules and then rely on grounds outside the Rules, as considered by the Upper Tribunal in Hamid [2014]. The judge could not be criticised for not considering sub-paragraph (v).

12) Mr Matthews acknowledged that there was no direct reference to sub-paragraph (iv) in the determination. The judge acknowledged at paragraph

11 that at the date of the application the third appellant was under the age of 18 and had lived continuously in the UK for at least 7 years. The judge clearly did not consider that this was sufficient for the third appellant to succeed. Although the judge did not refer to reasonableness as such, paragraphs 12-15 of the determination referred to the relevant circumstances and made findings of fact which were material to the question of reasonableness.

13) Mr Matthews pointed out that the skeleton argument before the First-tier Tribunal referred to the first appellant seeking to satisfy sub-paragraph 276ADE(vi) on the basis that she had no ties with her country of origin. The judge had considered this and referred to the evidence of the uncle of the second and third appellants, who referred in his evidence to having numerous relatives in Zimbabwe. The judge was entitled to take this evidence into account. The judge pointed out at paragraph 14 that the third appellant had secured a good education in the UK despite being here unlawfully. Although at paragraph 15 the judge referred to family life, rather than to private life, he also referred to Article 8.

14) In relation to the second appellant and the issue of fairness, Mr Matthews submitted that at the hearing before the First-tier Tribunal evidence was lodged on behalf of the respondent showing that the second appellant was treated by her university as a UK national. This evidence cried out for an explanation as to how she was able to remain without leave to obtain her degree. This should only have occurred if she had leave as a Tier 4 Migrant and paid fees as an overseas student. Or, alternatively, the university believed her to be a UK national and ordinarily resident in Scotland. Although this cried out for an explanation the second appellant had not submitted documentary evidence in relation to this. When the evidence was produced by the respondent, the second appellant had been entitled to ask for an adjournment. Steps could even have been taken on the day of the hearing to provide further evidence. Although the judge may have gone too far in criticising the second appellant for not producing evidence, the judge was entitled to take into account possible reasons why the evidence was not produced.

15) Mr Matthews continued that there was no apparent challenge to the decision made in respect of the first or principal appellant. The judge decided she would not succeed on the basis of paragraph 276ADE and found against her on the question of whether she had ties with Zimbabwe. There was no error in relation to the outcome of her appeal.

16) Mr Byrne responded that in relation to sub-paragraph 276ADE(v) the judge was entitled to take into account the circumstances at the date of the hearing. The purpose of paragraph 276ADE was to protect private life. As the third appellant met the requirements of sub-paragraph (v) at the date of the hearing there was no public interest in removing him. This was an issue of proportionality and there was no need for him to make another application.

17) In addition, Mr Byrne emphasised that the judge failed to address the question of reasonableness under sub-paragraph 276ADE(iv).

18) In relation to the email produced from the second appellant's university on the day of the hearing before the First-tier Tribunal, Mr Byrne submitted that the judge had gone too far in saying that the second appellant had failed to produce rebuttal evidence. The whole decision was unfair.

19) Having heard the submissions of the parties, I am satisfied that the judge made significant errors of law in his decision. He failed to address properly the question of reasonableness under sub-paragraph 276ADE(iv) of the Immigration Rules. Although Mr Matthews submitted that the factors relevant to reasonableness were addressed by the judge at paragraph 12-15 of the determination, it is not clear from the judge's discussion of the factors set out in this paragraph whether the judge had directed his mind towards the question of whether it was reasonable to expect the third appellant to leave the UK. This is the first error of law.

20) The second error of law relates to the second appellant and the question of whether she had fair notice of the evidence from her university in the form of an email, which was lodged on the day of the hearing. The judge used this email as the basis of a significant adverse credibility finding. It cannot be said, however, that the second appellant had fair notice of this evidence and the reliance which was to be placed upon it. Mr Matthews questioned why the second appellant had not sought an adjournment. I was not addressed directly on this issue on behalf of the second appellant. It may be that the appropriate course would have been to seek an adjournment but this was not pursued. In my view it does not follow that the absence of an application for an adjournment at the hearing renders the action taken by the judge fair in procedural terms. The judge himself ought to have been aware of the lack of notice with which this evidence was produced. Although the evidence itself appears to have been relevant and material, the judge should have been alert to the needs of fairness.

21) It is not necessary for me to comment in further detail on the submissions made before me. On the basis of the errors identified above I am satisfied that the decision of the Judge of the First-tier Tribunal should be set aside, with no findings preserved, and the appeals should be remitted to the First-tier Tribunal for the decisions to be re-made. Although as Mr Matthews pointed out, there did not appear to be an error of law arising in the case of the first appellant, as the appellants present themselves as a family unit I consider that all the appeals should be remitted to be considered together under the Immigration Rules relating to private and family life, and under Article 8 so far as appropriate. In view of the extent of judicial fact finding required, remission to the First-tier Tribunal is appropriate.

Conclusions

22) The making of the decision of the First-tier Tribunal did involve the making of errors on points of law.

23) I set aside the decision.

24) The appeals are remitted to the First-tier Tribunal with no findings preserved for the decision to be re-made before a judge other than Judge Fox.

Anonymity

25) The First-tier Tribunal did not make an order for anonymity. It has not been submitted before me that an order should be made and I see no significant reason for making such an order.

Signed Date

Judge of the Upper Tribunal