
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/14527/2015
IA/14513/2015

**THE IMMIGRATION ACTS**

| **Heard at Bradford, Phoenix House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 16 May 2016** | **On 19 May 2016** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**TAMILYN THIRKILL**
**[M T]**
**(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Madubuike a Legal Representative
For the Respondent: Mr Diwyncz a Home Office Presenting Officer

**DECISION AND REASONS**

Background

1. The respondent refused the appellants' applications for leave to remain on 21 March 2015. Their appeal against that decision was dismissed by

First-tier Tribunal Judge Wilson ("the Judge") following a hearing on 1 September 2015. This is an appeal against that decision.

2. The 1st appellant was born on 29 October 1974. She is an American citizen. The 2nd appellant was born on [ ] 2005. He is an American citizen and it was also claimed in both the application and grounds of appeal that he was a British citizen as his father, the 1st appellant's husband, was a British citizen. At the date of hearing he was 9 years and 11 months old.

The grant of permission

3. First-tier Tribunal Judge Nicholson granted permission to appeal (25 February 2016) on the grounds that it is arguable that the Judge erred in relation to the approach to article 8 because;
   (1) he should have proceeded on the basis that their family life arose prior to the family coming here in 2014,
   (2) it was unclear whether he found the family could not live together in the United States,
   (3) there was no assessment of the 2nd appellant's best interests, and
   (4) it is arguable that the 1st appellant's husband's ability to meet the financial requirements of Appendix FM could have had some bearing in the proportionality assessment.

Respondent's position

4. The respondent asserted in her reply (1 March 2016) in essence that the 1st appellant was not a genuine visitor and had employed deception in the application. It was unclear if the 1st appellant's husband gave evidence at the hearing (I have checked the record of proceedings – he did not) or if he could return to the United States. The husband's financial circumstances was not a "Robinson obvious" point.

5. When I raised the point that it appeared that the 2nd appellant could well be a British citizen and there was no consideration of that or the impact it had on the 1st appellant's position it was submitted orally that he did not apply for registration as a British citizen until June 2015 and that had to be granted for him to be recognised as such.

The Judge's findings

6. The Judge found that the 1st appellant was not a genuine visitor to the United Kingdom, she gave up her home and her employment and transferred all her funds from the United States to the United Kingdom, the 2nd appellant was enrolled in full-time education here, and they had both remained unlawfully here for 7 months [9].

7. There is nothing about their private life that allows him to determine the appeal within the Strasbourg jurisprudence [13].

Discussion

8. I raised what to me was an obvious point upon which both representatives were given the opportunity of making submissions. The 2nd appellant claimed to be a British citizen. That issue was never determined by the Judge despite it having been raised in the application and grounds of appeal. The appellants were not represented at the hearing. If the 2nd appellant was a British citizen, he did not have to make an application for leave to remain. In addition, if he was a British citizen the Judge should have asked himself the question as to whether it was reasonable to require him to leave the United Kingdom with the 1st appellant or whether it was reasonable to separate him from her whilst she left the country and made an application for entry clearance.

9. I was provided with a letter from the respondent (26 October 2015) referring to the registration received in relation to the 2nd appellant. It states that (my underlining)

> "… from the information provided it appears that [M] <u>is</u> a British citizen under section 2 (1) (a) of the British Nationality Act 1981."

I was told that the application in relation to that matter was submitted in June 2015. Therefore at the date of hearing the application had been submitted but had not been determined.

10. Given the appellants were not legally represented at the hearing before the Judge and the issue had been raised within the application and grounds of appeal, I am satisfied that there was a material error of law in the Judge failing to adjourn the proceedings to enable the relevant documentation to be produced, namely the 2nd appellant's birth certificate, the parent's marriage certificates, and father's British passport, as adjourning proceedings in those circumstances was the only fair way to proceed. It was not fair to determine the appeals without determining that issue as a preliminary matter.

11. As a separate point within that and in response to the respondent's submission, it is clear to me that section 2 (1) (a) of the British Nationality Act 1981 merely provides confirmation of a state of affairs that already exists and accordingly had retrospective application. Section 2 (1) (a) states that;

> "A person born outside the United Kingdom … shall be a British citizen if at the time of the birth his father … (a) is a British citizen otherwise than by descent …"

12. If therefore the 2nd appellant was able to establish he was a British citizen, that state of affairs existed prior to the application and his British citizenship was not dependent on the registration process.

13. It is my judgement that the Judge then failed to determine the question that naturally flowed from this namely whether or not it was reasonable to require the 2nd appellant to leave the United Kingdom within the terms of EX1 of Appendix FM of the Statement of Changes in Immigration Rules HC 395 ("the rules") as the 2nd appellant may well have been a qualifying child, and what impact that had on the eligibility requirements for the 1st appellant to have leave to remain as his parent. That was a material error of law.

14. The Judge appears to have determined that there were no compelling circumstances enabling him to consider article 8 outside the rules. However, having set out the law, he fails to adequately explain why if the 2nd appellant was a British citizen that would not amount to a compelling circumstance enabling consideration of article 8 outside the rules. That is a material error of law.

15. In relation to the grounds on which permission to appeal was granted, I am satisfied that the failure to consider the family life that existed prior to the family coming to the United Kingdom is a material error of law. That is because the impact of a potential separation of a family life that has existed for 9 years as against 6 months is a material difference when assessing the quality of the family life.

16. In addition, it was not considered whether circumstance of gravity could flow from the respondent's decision as the strength of the family life of some 9 years inevitably is greater than one lasting 6 months and therefore less needs to be shown to establish the possibility of there being consequences of gravity that may flow from the respondent's decision where there are many years of family life as opposed to only a few months. That in my judgement is a material error of law.

17. Had the Judge gone on to consider the appellants' family life, which in my judgement he materially erred in not doing so, he would have been required to determine the best interest of the 2nd appellant which he plainly has not done because apart from the reference that he had been here for 7 months and was about to start school he did not engage with the question of what was in his best interest. That in my judgement is a material error of law.

18. In addition, he would have been required to ask whether it would be reasonable to require the 2nd appellant to leave the United Kingdom with the 1st appellant while she made an application for entry clearance within the human rights jurisprudence. He did not do so. This failure to do so in my judgement was a material error of law.

19. In addition, the Judge did not consider the financial circumstances of the 1st appellant's husband and his ability to meet the requirements of Appendix FM of the rules. That was a factor that should have been considered in the proportionality exercise. The failure to do so in my judgement was a material error of law.

20. In addition, there was no clear finding as to whether the family could live together in the United States. The failure to do so in my judgement was a material error of law.

21. I set the decision aside.

22. It was submitted on behalf of the appellants that I could proceed to determine all of the issues as the 1st appellant had been ill with cancer. I did not agree as the findings were so inadequate in relation to the issues to be determined that it was more appropriate for the matter to be remitted.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of a material error on a point of law.

I set aside the decision.

The matter shall be remitted to the First-tier Tribunal for a de novo hearing before a Judge other than Judge Wilson.

Signed:
Deputy Upper Tribunal Judge Saffer
17 May 2016