Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/31910/2014**
IA/31911/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18 December 2015

Decision and Reasons Promulgated
On 5 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Mrs ERNESTINA LIMA

First Appellant

and

PAULO CESAR De OLIVEIRA

Second Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Vaughan (counsel)
For the Respondent: Ms A Fijiwala, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of

this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Perry, promulgated on 13 January 2015, which dismissed the Appellants' appeals

Background

3. The first appellant is the second appellant's wife. The first appellant was born on 24 February 1961. The second appellant was born on 14 October 1960. Both appellants are nationals of Brazil.

4. The first appellant entered the UK on 2 October 2003 with entry clearance as a visitor. The second appellant entered the UK soon after. The appellants were married in the UK on 13 March 2004. The first appellant's son from a previous relationship entered the UK in July 2004 as the dependent of the first appellant. The appellants were granted further leave to remain which expired on 31 July 2007.

5. On 12 December 2008 the first appellant submitted an application for leave to remain outside the rules on the basis of her article 8 ECHR rights. The second appellant and the first appellant's son were listed as dependants on the first appellant's application. The respondent refused that application initially on 3 August 2009. It was discovered that the decision was made in error because the appellants then representatives had submitted an application which contain matters which did not relate to these appellants, but in fact related to another of their clients. When the mistake was discovered, further representations were made leading to a refusal decision from the respondent dated 23rd of August 2013. In the face of a judicial review challenge from the appellants the respondent reconsidered that decision & made a fresh refusal decision on 24 July 2014.

The Judge's Decision

6. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Perry ("the Judge") dismissed the appeal against the Respondent's decision. The Judge considered the appeal of the first appellant's son at the same time and, in the same decision, allowed the appellant's son's appeal on article 8 ECHR grounds only. The decision in relation to the first appellant's son is the subject matter of a separate appeal brought by the respondent to the Upper Tribunal (IA/31913/2014).

7. Grounds of appeal were lodged and on 10 June 2015 Upper Tribunal Judge Rintoul gave permission to appeal stating

> "Permission to appeal to the Upper Tribunal has been granted to the Secretary of State in respect of the linked appeal of the appellant's son (IA/31913/2014) which was allowed. The factual matrices of all three appeals are inextricably linked, and the appeal of the son was allowed, and while accepting that if the decision in favour of the son were to be overturned on appeal there would be significantly less merit in the grounds it is arguable that there is merit in ground 2. While

there is less merit in ground 1 and 3, permission is nonetheless granted on all grounds."

The decision in relation to the first appellant's son is the subject matter of a separate appeal brought by the respondent to the Upper Tribunal (IA/31913/2014).

The Hearing

8. (a) Mr Vaughan, counsel for the appellants, moved the grounds of appeal. He took me through the appellant's immigration history and the history of applications and decisions on reconsideration, leading to the decision which is the subject matter of this appeal. He took me to [63] of the Judge's decision, where the Judge finds that the respondent is responsible for the delay from 20 August 2009 to 24 July 2014. He then referred me to the respondent's statutory guidance entitled "*Every Child Matters*". He reminded me that at [65] the Judge finds that the respondent failed to adhere to the terms of that guidance, and argued that the Judge erred in law by not finding that the failure to follow statutory guidance amounted to illegality. He argued that because the Judge found that the respondent had not adhered to statutory guidance the delay was unlawful and therefore illegal.

(b) Mr Vaughan argued that the respondent had considered this application timeously, a decision would have been reached when the appellant's son was still in minority and he argued (because of the *dicta* of Blake J in EM and others (returnees) Zimbabwe CG [2011] UKUT 98) the applications of both appellants and the first appellant's son would have inevitably met with success. He argued that the Judge should have found that the delay caused significant prejudice to the appellants, which was not acknowledged by the Judge. He argued that this amounts to a material error of law.

(c) Mr Vaughan turned to the second ground of appeal and argued that at [68] and [69] of the decision the Judge failed to analyse the impact separation of the appellants from the first appellant's son would have. He argued that there is clear evidence of the significant bond of affection & dependence placed before the Judge which had simply been ignored. He argued that there were no findings in relation to the impact of separation and that the absence of such findings was both significant and material.

(d) Turning to ground 3, Mr Vaughan argued that the appellants have been the victims of a bogus legal adviser who had been prosecuted and convicted for offences relating to the dishonest provision of immigration services. Notwithstanding the terms of [54], he argued that at [60] the Judge makes findings which amount of adverse credibility findings against the first appellant, even though the evidence that the first appellant was the victim of a bogus legal adviser went without challenge and was supported by the conviction of that bogus legal adviser. He argued that the adverse credibility findings are unfair and amount to irrationality. He argued that the findings at [60] undermine the overall article 8 proportionality assessment carried out by

the Judge. He urged me to set the decision aside and to fix a second stage evidential hearing to determine the case of new.

9. (a) Ms Fijiwala, for the respondent, told me that the decision does not contain any errors of law, material or otherwise. She said that the decision is, in fact, a carefully worded decision demonstrating that a flawless fact finding exercise had been carried out by the Judge, who had correctly directed himself in law before reaching unassailable conclusions which were well within the range of conclusions open to the Judge. She argued the grounds of appeal amounted to little more than an attempt to re-litigate matters which have now been judicially determined. She relied on [13] to [16] of EB Kosovo. She told me that a fair reading of the decision indicated that the Judge had taken full account of the delay in reaching the respondent's decision in the applications made by the appellants, and that the Judge had given correct weight to the impact of that delay.

(b) Ms Fijiwala told me that at [54] the Judge finds that family life exists between parents and the first appellant's son and that at [70] he had taken account of the first appellant's son's age and the shifting balance now that his relationship with a long-term girlfriend was becoming more important than his relationship with his mother. She told me that a fair reading of the decision clearly demonstrates that a full proportionality balancing exercise had been carried out by the Judge, who took account of every facet of these appellants cases.

(c) Turning to the third ground of appeal, Ms Fijiwala drew my attention to [60] of the decision and insisted that there has been no unfairness and that the Judge took full account of the fact that appellants have been victims of deception

Analysis

10. The first ground of appeal is in two parts. Ground 1(a) is an argument that the Judge was wrong to find that the failure to follow the exact wording of the respondent's paper "*Every Child Matters*" was not unlawful. The central issue relates to delay which is dealt with by the judge between [62] and [67]. At [65] the Judge clearly engages with counsel's argument in relation to illegality, and rejects the argument. Ground 1(a) does not identify an error of law but is, quite simply, a refusal by the appellants to accept findings that were competently made by the Judge.

11. Ground 1(b) relates directly to the question of delay, and is without substance. The Judge manifestly engages with the issue delay. He commences [62] by finding that there has been serious delay. At [64] he finds that there are two chapters to the delay, the first being the responsibility of the appellants the second being the responsibility of the respondent.

12. In EB (Kosovo) (FC) v SSHD [2008] UKHL 41 the House of Lords said that delay could be relevant in three ways. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots

in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. To the extent that it is true the applicant's case will be strengthened. Secondly, delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as relevant to the quality of the relationship. With delay the sense of impermanence in such a relationship will fade. Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results.

13. Between [62] and [67] the Judge carefully considered the impact of delay, and factors that delay into the overall proportionality balancing exercise. Ground 1(b) is framed on the basis that the Judge *"wrongly concluded …"*. Once again it is a ground of appeal whose foundation is simply a disagreement with a finding in fact which was open to the Judge to make. In **Green (Article 8 – new rules) [2013] UKUT 254 (IAC)** (Blake J) the Tribunal said that "*Giving weight to a factor one way or another is for the fact finding Tribunal and the assignment of weight will rarely give rise to an error of law*".

14. The second ground of appeal argues that the Judge failed to make findings of the impact of these two appellants separation from the first appellant's son (whose appeal was successful). The first appellant's son is now an adult. At [55] the Judge finds that family life exists between these appellants and the first appellant's son. But the reason for the first appellant's son's success at appeal are set out at [70]. It is there that the Judge finds that family life exists between the first appellant's son and his long-term girlfriend, who he intends to marry. In doing so, the Judge clearly draws a balance between the development of family life and the fact that the dependency the first appellant's son has had on these two appellants is coming to an end. The evidence in this case was clearly that a new family unit is in the course of creation between the appellant and his long-term girlfriend. There is no inconsistency between [55] and [70]. When the two paragraphs read together it is clear that the Judge has considered the natural progression of family life and the age of the first appellant's son.

15. In Kugathas v SSHD [2003] INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD [2009] EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behaviour was "*no way exceptional or beyond the norm*". In JB (India) and Others v ECO, Bombay [2009] EWCA Civ 234 the Court of Appeal reiterated that the approach in Kugathas must be applied to the question of whether family life for the purposes of Article 8 subsists between parents and adult children.

16. The Judge's finding that family life exists between the appellant's son and his long-term girlfriend is entirely consistent with the established case law. It is also consistent with the implicit finding that the article 8 rights of these appellants and the first appellant's son are entirely separate, so that it was correct to consider them independently of one another. Because family life is established between the first appellant's son and his girlfriend, it is not necessary to consider the impact of separation of the first appellant from her adult son. The creation of a new, independent family unit was one of the determinative factors in each of the separate appeals. The inevitable separation caused by the first appellant's son's intention to marry is part of the ordinary life cycle of a family.

17. The third ground of appeal alleges procedural unfairness caused by the Judge's credibility findings. At [54] the Judge finds that a Miss Vivieros was convicted for fraudulently providing immigration services to the appellant and others; the Judge goes on to find that that is a factor which he must take into account in his overall proportionality assessment. At [60] the Judge finds that the first appellant does not give a flawless account of her involvement with Ms Vivieros, however, the Judge concludes that he must take the deception practised on the first appellant into account. What the Judge clearly does is take a balanced view of the overall evidence and consider which parts of the appellant's evidence are reliable and which parts are not. He does not say that he finds the first appellant to be wholly incredible, nor does he rejects the appellant's account of being a victim of deception. Instead he carefully weighs all of those matters to inform his proportionality assessment. That is precisely what a Judge should do.

18. Taken together, the grounds of appeal amount to a challenge to the Judge's article 8 proportionality assessment, but they do not identify a material error of law. In R (on the application of Luma Sh Khairdin) v SSHD (NIA 2002: Part 5A) IJR [2014] UKUT 00566 (IAC) it was held where the Upper Tribunal is considering, pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, whether there is an error of law in the decision of the First-tier Tribunal involving Article 8 proportionality, the task of the Upper Tribunal is confined (at that point) to deciding if the First-tier Tribunal's assessment of where to strike the balance was unlawful, according to the error of law principles set out in R (Iran) [2005] EWCA Civ 982. In R (Iran) v SSHD [2005] EWCA civ 982 the Court of Appeal took the firm view that a decision on proportionality of an Adjudicator or Immigration Judge who has properly directed himself can only be overturned on reconsideration on traditional public law grounds. In Akaeke [2005] EWCA Civ 947 Carnwath LJ said much the same thing when he observed that the weight given to a relevant factor, such as unreasonable delay of the Home Office, is a matter for the Tribunal, "*subject only to the constraints imposed by judicial review principles".*

19. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the

relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

20. In each of these cases, the Judge carefully considered each strand of evidence placed before him. He carefully records the submissions that were made and then, after correctly directing himself in law, makes reasoned findings of fact before reaching conclusions which were manifestly open to him to reach.

21. I find that the Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

22. No errors of law have been established. The Judge's decision stands.

DECISION

23. The appeals are dismissed. The decision of the First tier Tribunal stands.

Signed Date 2 January 2016