Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA490522014

THE IMMIGRATION ACTS

Heard at Field House
On 16 May 2016

Decision & Reasons Promulgated
On 24 May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

Miss SUZETTE MARSHA McDONALD
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Hyatt, Counsel instructed by Greenland Lawyers LLP
For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS

1. This matter comes before me pursuant to permission having been granted by First-tier Tribunal Judge Nicholson dated 12 April 2016. The appeal relates to a decision by First-tier Tribunal Judge Callow promulgated on 14 October 2015. The Judge

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dismissed the appeal against the Respondent's decisions refusing leave to remain and a decision to remove the Appellant.

2. The background to the Appellant's case was that she had established considerable private and family life here in the United Kingdom because she lived here with her twin sister and she looked after her sister's 9 year old son.

3. Ms Hyatt in her submissions said she relied on the grounds of appeal drafted by her instructing solicitors and also to paragraph 5 of the grant of permission by Judge Nicholson. She said that the First-tier Tribunal had accepted that the Appellant had established family and private life with her nephew and in effect had parental responsibility for him. The nephew was British. This was a parental role and therefore it was more important and pivotal. She said it was in the last three or four years that the physical and emotional bond had developed because her twin sister had suffered domestic violence. That had led to depression and there had been medical evidence before the Judge. There were some "very dark days" for the Appellant's twin sister.

4. Ms Hyatt said that none of the facts or the medical evidence was disputed. The Judge had accepted that the Appellant had played a significant role and takes the nephew to school etc. It was in that way that the twin sister was able to go to work. The twin sister did not want the Appellant to rely on public funds.

5. As for the legal aspects it was quite clear from the grant of permission at paragraph 5 and from the grounds themselves at paragraphs 8 and 9 that the Judge had not made adequate findings. In respect of key matters relating to the best interests of the child in respect of section 55 Borders, Citizenship and Immigration Act 2009 and **ZH (Tanzania) v Secretary of State for the Home Department** which were raised in the skeleton argument at the First-tier Tribunal, they have not been dealt with.

6. As for the Rule 24 Reply from the Respondent the position could not be cured. It was quite clear that there was insufficient weight placed by the Judge on the best interests aspect. There was a need to promote and to safeguard the best interests of the child and that these features were nowhere in the decision. Seemingly there was no consideration of not just the emotional support but also the practical support that the Appellant provided to her sister.

7. Mr Whitwell in his submissions said that he relied on the Rule 24 Reply. He said having seen the skeleton argument before the First-tier Tribunal, it did not say that it was an argument run before the Judge. As for the best interests of the Appellant's nephew, he relied on the Rule 24 Reply at paragraph 8. It was implicit in the determination. It was good in law. The nephew was not an Appellant in cases such **EV Philippines** or **Zoumbas**. Those were children as part of a nuclear family and were all removed as a unit.

8. Here the disruption of the family would not have dramatic consequences. Family life was taken into account. A failure to take into account a best interests assessment of someone not a party to an appeal does not amount to a material error of law.

9. It was submitted that I was being asked to decide whether there was an error of law, not whether the outcome ought to have been different.

10. There was also another factor in respect of the facts. At paragraphs 4 and 5 the Judge found that there was back up and in respect of the sister's relationship. It may have been another reason for the finding at paragraph 16. I was invited to dismiss the application.

11. After hearing further from Ms Hyatt I had reserved my decision.

12. In my judgment it is quite clear that there is a material error of law. Although it is trite law that the Judge did not have to specifically refer to the statutory provision or to case law for his conclusions, it was imperative that he at least referred to the correct legal test and legal language. There is no mention at all of the best interests of the child being a primary consideration in the Judge's decision. In my judgment it was necessary to do that.

13. Nowhere does the Judge mention or get close to mentioning the best interests. It is a statutory provision. It is clear from the decision of the *Respondent* and from the Appellant's skeleton argument before the Judge that there was reference by the parties to this provision and to the best interests to be considered. It is therefore more than merely fanciful that the Judge might have come to a different decision had he applied those provisions and that case law. As much of the recent case law at the Upper Tribunal shows in respect of the best interests of children there are important duties which apply to both the Secretary of State and upon the Tribunal. For example, in **MK (Section 55-Tribunal options) Sierra Leone** [2015] UKUT 00223 (Mcloskey P and Perkins UTJ) said,

> We take this opportunity to highlight that in <u>all</u> cases where section 55 of the 2009 Act applies, the requirement to perform the twofold statutory duties is unaffected by the statutory reforms made by the Immigration Act 2014 and, in particular, the insertion of the new Part 5A into the Nationality, Immigration and Asylum Act 2002. There has been no amendment of section 55 of the 2009 Act. It continues to apply with full vigour. It has not been modified in any way by the most recent flurry of statutory activity. Given that "*qualifying*" children feature in Part 5A, per section 117B(6)(a) and section 117C(5), in the context of Article 8 ECHR, there is, of course, some overlap between the two statutory regimes: the section 55 exercise will be duplicated to some extent in the Article 8 exercise. In the present appeal, no specific issue concerning the relationship between these two statutory regimes falls to be determined. Both regimes will have to be given full effect by the Secretary of State in appropriate cases.

14. Therefore I conclude that there is an irremediable error of law. There shall be a rehearing at the First-tier Tribunal.

Notice of Decision

The decision of the First tier Tribunal Judge involved the making of a material error of law and is set aside. None of the findings shall stand.

The Appellant's appeal shall be reheard at the First Tier Tribunal.

No anonymity direction is made.

Signed Date: 16 May 2016

Deputy Upper Tribunal Judge Mahmood