Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/10122/2015

OA/07592/2015
OA/10123/2015
OA/10124/2015
OA/10125/2015

THE IMMIGRATION ACTS

Heard at: Field House	**Decision and Reasons Promulgated**
On: 16 October 2017	**On: 30 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

ENTRY CLEARANCE OFFICER: AMMAN

Appellant

and

S A
L M M A
3 MINORS, M, H, S
(ANONYMITY DIRECTIONS CONTINUED)

Respondents

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr M Symes, counsel (instructed by Selva & Co)

DECISION AND REASONS

1. For the sake of convenience I shall refer to the respondents as "the claimants" and to the appellant as the ECO. Unless and until a tribunal or court directs otherwise, the claimants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the ECO and to the claimants. Failure to comply with this direction could lead to contempt of court proceedings.

2. The ECO appeals with permission against the decision of First-tier Tribunal Judge GA Black who allowed the claimants' appeals on human rights grounds.

3. The claimants are the children of their sponsor, a former refugee, who is now a British citizen. Two of the claimants are adults, born in December 1994 and August 1996 respectively. The remaining children were aged 15, 16 and 17 at the date of the hearing before the First-tier Tribunal. The claimants' mother is currently living in Jordan.

4. The claimants originally appealed from abroad against the decisions of the ECO revoking and refusing their applications for entry clearance as children/dependent relatives under Appendix FM. The appeal arose out of the decisions to refuse their human rights claims and to revoke entry clearances previously granted to the three minor claimants and the two adults. They applied to join their natural father.

5. The ECO granted each of them a right to appeal.

6. Judge Black set out the background facts in some detail. The claimants had been separated from their father although he had had sole responsibility for their upbringing and exercised parental responsibility in the absence of their mother, whom their father believed was dead. Their father had been rendered unconscious after a bomb at the family home. When he awoke in hospital he was led to believe that his wife had died in the explosion by her relatives, who successfully sought to deprive him of her land.

7. However the sponsor admitted at interview in August 2015 that their mother was alive and that a false declaration had been made [5].

8. Pursuant to that interview the ECO revoked and refused the applications for entry clearance. The ECO was satisfied that family life could continue as it had in the past with visits from the sponsor.

9. The claimants, however, had in the meantime made their way to the UK and claimed asylum here. The claims are yet to be determined – [8].

10. The claimants nonetheless proceeded with their entry clearance appeals. Judge Black accepted that the appeals had not lapsed by operation of law as there was no statutory provision that deemed appeals abandoned merely because the individuals pursuing them had made their way to the UK [9-10]. That finding has not been challenged by the ECO before the Upper Tribunal.

11. Judge Black found that the sponsor was lacking in credibility. She considered that the revocation of the entry clearances had been justified. She noted, however, that circumstances had changed and that the children had now entered the UK. Having regard to the circumstances at the date of hearing their private and family life would face disproportionate interference if they were required to depart the UK. They had lived with their father for just over one year. They had travelled to the UK using Brazilian passports provided by their mother and then claimed asylum.

12. She found at paragraph [16] that family life was established between the sponsor and the children, given the visits made by him to see his children in Jordan which he had done over the past ten years. He had maintained contact with them,

provided financial support and paid for their education. This he had done with their mother and other relatives.

13. She noted that the claimants have lived with their father for just over a year in the UK. There was no evidence to show why the children cannot return to Jordan where they have lived since 2005 and had been educated at school and university as well as having been financially supported by their father. They could be looked after by their mother or by one of the adult children who were capable of caring for her siblings.

14. However, she found that there would be disruption to their lives if returned, albeit that they had lived in the UK for a relatively short period. The children were 15, 16 and 17 and are at a significant time educationally. She took into account that there is a parental responsibility agreement signed between the claimants' mother and their father and that a hearing was scheduled on 7 February 2017 at the family court. The evidence showed that one of the claimants was a vulnerable adult.

15. Judge Black had not seen any independent report or assessment as to the children's emotional, social or educational circumstances. She accepted that family proceedings had been initiated which "in themselves are encompassed in the right to family life." She had some concerns in the light of the medical records for one of the adult claimants which appeared to show that she is a vulnerable adult, and which referred to problems with her father. Social services have been involved.

16. The final decision would lie with the family court who would have the benefit of a full assessment.

17. Whilst finding that the level of deception and manipulation had been great, the children were not to be punished for the actions taken by their father. They are now settled in school and appear to be attending well and getting good results.

18. Judge Black considered the proportionality of the decision. The position of one of the other young adults had not been addressed in the skeleton argument. However, she found that the pragmatic approach was for the family to remain together as a unit. There was no evidence how or where the two relatively young adult children would live if removed. She accepted the argument that they would be "stranded siblings" - Gurung [2012] EWCH 1629 (Admin).

19. On 16 August 2017 First-tier Tribunal Judge JM Holmes granted the ECO permission to appeal. In granting permission, he stated that it is arguable that the Judge inferred that the Article 8 appeal concerned a removal decision when none had been made and in any event, even if there had been a removal decision, she approached the Article 8 appeal from the wrong premise. The claimants could resume the status quo that had endured for many years, living in safety with their mother and extended family and being visited by their father as and when he chose to do so.

20. Mr Clarke relied on the ECO's grounds. There were two challenges to the decision. First, he submitted that the decision appealed against was the revocation of entry clearance on the grounds of dishonesty. There had been no decision to expel the claimants from the UK. There was thus no link between the ground on which the appeal was allowed and the original decisions.

21. The second ground contended that the decisions were not disproportionate. The Judge identified no features that had been overlooked. Reference was made in the reasons for appealing, to the factors considered by the Judge which informed the proportionality of the decision. Those had been identified at [16] of her decision. Accordingly, it was contended that she had used Article 8 in this instance as a general dispensing power in a way not permitted following Patel.

22. Mr Clarke identified and set out the relevant paragraphs in Judge Black's decision including at [11] and [15-16]**.**

23. The burden was on the claimants to demonstrate that the decision had been unlawful under s.55. There was no evidence before her to justify her finding that the decision in the family courts would likely be successful. Having identified the matters which appeared to be inconsistent with the children's s.55 rights, the ultimate finding was perverse in the circumstances. It is difficult to see how such a decision could properly have been made.

24. In reply, Mr Symes relied on his response. He also referred to his skeleton argument produced to the First-tier Tribunal. He emphasised that family proceedings are afoot. The Court of Appeal had recognised in MS (Ivory Coast) [2007] EWCA Civ 133 that the right to private and family life encompasses an opportunity to establish and maintain family relationships on a firm legal footing which may require the grant of leave to remain rather than merely an undertaking not to remove [72]. What was not appropriate was to have left the appellant in that case in limbo in this country with temporary admission and the promise not to remove her until the contact application had been concluded.

25. He submitted that there was accordingly no alternative option for family life to be enjoyed other than the claimants' relocation to the UK. Their father had worked here and had a business in Egypt. The claimants had no right to live in Egypt and were at present unlawfully in Jordan.

26. The reality before the Judge was that the children were in school and were doing well. He submitted that in an appeal under s.82(1) against the decision, the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

27. This was an appeal on human rights grounds although the Rules were clearly relevant.

28. He submitted that it is also clear from the recent decision of the Upper Tribunal President in AT (Eritrea) [2016] UKUT 227 that the fact that the interests of a child

are in issue would be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the State authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989).

29. This does not simply provide a trump card so that a child applicant for positive action to be taken by the State in the field of Article 8(1) must always have their application acceded to. However, the interests of the child are a primary consideration. The age of the child, the closeness of their relationship with the other family members in the UK and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

30. He submitted that the First-tier Judge acted compatibly with the governing legal principles in her decision.

Assessment

31. The ECO treated the decision to involve the refusal of a human rights claim. The claimants' decisions carried a right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act 2002. It is provided under s.92 of the 2002 Act that an appeal against the entry clearance must be brought from outside the UK. As contended by Mr Symes there is no limitation that it must also be continued only from abroad.

32. At the date of hearing, Judge Black noted that the claimants had arrived in the UK. In those circumstances, the Tribunal was entitled to consider any matter thought to be relevant to the substance of the decision including a matter arising after the date of decision – s.85(4).

33. Judge Black found that there was no statutory provision that in principle prevents an appellant from continuing with an out of country appeal in country and entering and making an asylum claim [9].

34. She had regard to the relationships between the claimants and their father, noting that s.92(4) only provides that appeals must be instigated and issued out of country. Thereafter, the section is silent. There is no provision in the Act as to the procedure to be followed in a variety of circumstances including when an appellant has entered the UK [10].

35. In the circumstances Judge Black properly considered the situation as at the date of hearing on 24 January 2017 on the basis that they were now established in the UK and the child claimants were the subjects of pending family proceedings.

36. Nor is there any substance in the contention that the Judge might have inferred that the Article 8 appeal concerned a removal decision when none had been made. The Judge was aware that the claimants had outstanding asylum applications which

had yet to be decided. In the circumstances there was no basis for any contention that she might have wrongly concluded that there were removal decisions.

37. It is evident from the assessment and findings from her lengthy paragraph [16] that there were pending Family Court proceedings and that the children were at a significant moment of their lives educationally.

38. She had regard at [17] to the statutory factors in s.117A-C of the 2002 Act. She concluded that on the evidence as it stood, '….the family life for the children and their interest which are of primary consideration is capable of outweighing the public interest' (sic). She also had regard to the two young adults and found that the pragmatic approach was for the family to remain together as a unit including the relatively young adults. Nor was their any evidence as to how or where they would live if removed.

39. Judge Black was referred to the Court of Appeal decision in MS (Ivory Coast), supra. This had been set out in some detail in counsel's skeleton argument before her.

40. In MS it was accepted that a decision to remove an applicant in the process of seeking a contact order may violate Article 8, particularly because their removal during such proceedings would both prejudge their outcome and threaten the applicant's subsequent meaningful involvement therein: outcomes which might breach Article 6 of the Human Rights Convention.

41. As submitted by Mr Symes from decisions such as RS (India) [2012] UKUT 002018, it is evident that there will be cases where an appeal should be allowed pending the final determination of family law proceedings .

42. Mr Clarke also expressly submitted that the decision of Judge Black was in the circumstances, perverse. The very factors relied on by the ECO as rendering removal proportionate were found by the Judge to make such removal disproportionate.

43. A very high hurdle must be mounted in a "perversity" challenge. In Hayes v Willoughby [2013] UKSC 17 at [14], relied on by Mr Symes, rationality is not the same as reasonableness. Lord Sumption stated that reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. The question is whether a hypothetically reasonable person in his position would have engaged in the relevant conduct for the purpose of preventing or detecting crime. A test of rationality, by comparison, applies a minimum objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.

44. Contrary to Mr Clarke's assertion, however, I find that the Judge has properly considered the basis upon which the claimants' Article 8 appeals should succeed.

45. Her decision under Article 8 was in effect a holding position, pending the outcome of the Family Court proceedings scheduled for a few weeks after the date of hearing. Judge Black has properly identified the relevant factors on both sides of the balancing exercise. She referred to the father's deception and manipulation, against the other circumstances including in particular, the family court proceedings, the fact that the children were at a significant moment of their lives educationally and the vulnerability of one of the adult claimants.

46. She properly applied RS (India), supra, allowing the appeal pending the final outcome of the family law proceedings. Judge Black has come to a conclusion available to her on the evidence presented. There was an obvious logical connection between the evidence and her reasoning. Her decision was in the circumstances was neither irrational nor perverse.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any error on a point of law. The decision shall accordingly stand.

Anonymity direction continued.

Signed Deputy Upper Tribunal Judge Mailer 23 October 2017