



(IMMIGRATION AND ASYLUM CHAMBER)

UPPER TRIBUNAL

APPEAL NUMBER: PA/10320/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 15 May 2018

Decision and Reasons Promulgated
On: 13 June 2018

Before

Deputy Upper Tribunal Judge Mailer

Between

MRS B H A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Jaisri, counsel, instructed by Freemans Solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.
2. The appellant is a national of Somalia, born on 18 May 1998. She appeals with permission against the decision of the First-tier Tribunal Judge

promulgated on 23 February 2018, dismissing her appeal against the respondent's decision to refuse her protection and human rights claims.

3. The background to the appeal is as follows. The appellant's sponsor is also from Somalia. He came to the UK in 1990 and subsequently became a British national. He returned to Somalia from time to time. He made a trip to Burao in 2008 and met and married the appellant. On 7 June 2009 the appellant gave birth to their eldest daughter. She gave birth to their second daughter on 16 March 2012, claiming that the child was born in Addis Ababa, Ethiopia. On 5 January 2017 she gave birth to a third daughter in the UK.
4. The Judge attached no credence to the appellant's claim of past persecution or future risk. He found that the appellant did not qualify for recognition as a refugee [80]. Nor would she face ill treatment on return to Somalia under Article 3 of the Human Rights Convention.
5. The Judge had regard to her Article 8 claim. It was accepted that she could not take the benefit of EX.1 (a) as she is not a single parent. Nor did she qualify under paragraph 276ADE(1)(vi) of the Rules.
6. He considered her claim under Article 8 outside the Rules. He found that Article 8 was not engaged at the date of hearing as the factual matrix had fundamentally changed since the date of decision.
7. In the light of the "transformation of the factual matrix," the Judge noted at [87] that the appellant now has a claim under the policy discussed by the Upper Tribunal in SF and Others (Guidance - Post 2014 Act) Albania [2017] UKUT 00120 (IAC).
8. He noted at [89] that there was no express prohibition against assessing the case on the basis that it would be reasonable to expect a British citizen child to leave the UK *with both parents* - (italics in the original). He sought to distinguish the facts in SF from the facts of the present case [92].
9. He stated that if the appellant's case fell squarely within the terms of the policy, he would be inclined to allow the appeals on SF grounds. However, it did not fall within the scope of the policy. The parents can choose to keep the family unit intact by relocating to Somalia. He considered that the secretary of state should be the primary decision maker in the application of the policy to the appellant's case [93].
10. He accordingly dismissed the appeal on Article 8 grounds outside the Rules as the respondent has yet to give substantive consideration as to whether the appellant should be allowed to remain in the UK with her three British national children [96].

11. On 28 March 2018 First-tier Tribunal judge Brunnen the granted the appellant permission to appeal. He found that the Judge's approach is arguably erroneous. The appeal had already been adjourned by the respondent to consider this and she had apparently maintained her decision in relation to the appellant. Accordingly if the appellant were to fail in her appeal she would face removal. It was arguably the task of the Judge to decide whether the respondent's decision to refuse the appellant leave to remain breached her Article 8 rights or those of the members of her family. It was also arguably erroneous that the policy was not applicable to the circumstances of this appeal.
12. Mr Jaisri contended that the Judge erred in his assessment of family life. The first Tribunal's records show that the appeal had already been adjourned for the respondent to consider the impact on the children when they did arrive in the UK. That has been at the request of the respondent and subject to the Court's directions.
13. Mr Jaisri referred me to a direction from the First-tier Tribunal dated and issued on 11 December 2017.
14. According to the direction, the appellant's counsel agreed that the appellant would provide no later than 21 December 2017 all relevant evidence relating to her children upon which she wishes to rely to the respondent. Upon receipt of that information the Home Office presenting officer agreed that the respondent will consider the application taking s.55 into account. This was to be undertaken as a priority matter. The response should be expected by 21 December 2017.
15. Mr Tufan accepted that there was no such response.
16. In the circumstances Mr Tufan accepted that the First-tier Tribunal Judge was seized of the matter which required a decision to be made with in the light of the issues identified in SF.
17. He accordingly submitted that it would be appropriate for the matter to be referred back to the First-tier Tribunal for a decision to be made on that basis. He also stated that insofar as necessary, he gives consent on behalf of the secretary of state for this matter to be referred and considered.
18. Mr Jasiri accepted that it would be appropriate to remit the case to the First-tier Tribunal.

Assessment

19. I accept that the appeal had already been adjourned at an earlier date for the respondent to consider the application of the relevant policy to the three British children. She had apparently maintained her decision in

relation to the appellant. She accordingly would seek removal if the appeal failed.

20. The Judge was required to make an assessment of the best interests of the children, deciding whether the respondent's decision to refuse the appellant leave to remain would breach her Article 8 rights and those of her family. In the circumstances the parties agreed that there has been an error of law in the making of the decision.
21. The parties agreed that in the circumstances it is appropriate for the appeal to be remitted to the First-tier Tribunal for hearing.
22. I am satisfied that the effect of the error has been to deprive the appellant of the opportunity for her case to be put and considered by the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

The case is remitted to the First-tier Tribunal (Taylor House) for a fresh determination to be made by another Judge.

Anonymity direction continued.

Signed

Date 10 June 2018

Deputy Upper Tribunal Judge C R Mailer