Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08600/2018**
HU/08595/2018
HU/08602/2018
HU/08603/2018

THE IMMIGRATION ACTS

Heard at Field House
On 5 April 2019

Decision & Reasons Promulgated
On 9 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

FATOUMATA [K]
[N N]
[R N]
[P N]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - Sheffield

Respondent

Representation:
For the Appellant: Mr S Vokes (counsel) instructed by Cartwright King solicitors
For the Respondent: Mr S Walker, 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

the Appellants. 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 James promulgated on 28 November 2018, which dismissed the Appellants' appeals.

Background

3. The first Appellant was born on 30 December 1985. The second appellant was born on 4 December 2005. The third appellant was born on 5 August 2007. The fourth appellant was born on 11 August 2017. All four appellants are nationals of Senegal. The first appellant is the mother of the remaining appellants. On 15 December 2017 the Appellants applied for entry clearance to join the first appellant's partner (the father of the second, third and fourth appellants), who has been granted limited leave to remain in the UK. On 9 March 2018 the respondent refused the Appellants' applications.

The Judge's Decision

4. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge James ("the Judge") dismissed the appeals against the Respondent's decision.

5. Grounds of appeal were lodged and on 7 January 2019 Judge Bird granted permission to appeal stating *inter alia*

> "2. The appellants seek permission to appeal against this decision. It is alleged that the Judge has made conflicting findings - reference to paragraph 22 where the judge found that the first appellant did not have a subsisting relationship with the sponsor and in paragraph 23 where he said she did.
>
> 3. It is arguable that the judge's findings on this issue appears to be conflicting. Either the relationship was subsisting or it was not. The findings are unclear. It is arguable that the judge has made an arguable error of law in that conflicting findings have been made on a core issue. All the other grounds raised are arguable."

The Hearing

6. (a) For the appellants, Mr Vokes moved the grounds of appeal and adopted the terms of his written submissions. He told me that there are two challenges of the Judge's decision; the first is a reasons challenge and the second is a challenge to the rationality of the Judge's findings.

(b) Mr Vokes took me to [22] and [23] of the decision and told me that there is a glaring contradiction when the first sentence of 23 is compared with what is said in [22]. He told me that the Judge finds at [23] that the marriage between the first appellant and the sponsor is subsisting. In the same sentence, the Judge then finds that the sponsor and first appellant do not intend to live permanently together in the UK. Mr Vokes told me that the first sentence of

[23] contains an unreconciled contradiction which fundamentally undermines the decision. He told me that a subsisting marriage implies a genuine relationship. That genuine relationship should be viewed against the fact that the second, third and fourth appellants are indisputably the children of the first appellant and the sponsor. He told me that the subsistence of the marriage is sufficient to enable the first appellant to succeed.

(c) Mr Vokes told me that the Judge's decision is tainted by an inadequacy of reasoning which amounts to a material error of law. He took me to [18] of the decision and told me that the Judge fails to take account of the sponsor's visits to Gambia to maintain contact with the appellants. He told me that the Judge does not make adequate findings about enduring contact by text messages, nor does he make meaningful findings about money remittances through a third party. He told me that the Judge's ignores the fact that the fourth appellant was born after the sponsor visited the first appellant in Gambia.

(d) Mr Vokes returned to [23] of the decision and told me that the Judge's final two sentences (of that paragraph of the decision) are demonstrative of flaws in the Judge's reasoning. He urged me to set the decision aside and remit this case to the First-tier Tribunal so that the fact-finding exercise can be carried out of new.

7. For the respondent Mr Walker told me that there is merit in the submissions made for the appellants. He told me that the appeal is no longer resisted and asked me to set the decision aside because the Judge has ignored evidence of contact between the sponsor the appellant post flight; because there are conflicting findings on whether or not the relationship continues between the sponsor and the first appellant; and because there is inadequate consideration of the best interests of the second, third and fourth appellants, who are all children.

Analysis

8. In the first sentence of [23] the Judge finds that the marriage between the first appellant and the sponsor is "*subsisting*". The Judge focuses on the two part test in paragraph 352(A)(v) of the rules, which says

> '(v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting'

It is at least implicit that the first appellant meets the remaining requirements of paragraph 352A of the rules.

9. Although the Judge makes a clear finding that the marriage is subsisting, his finding that there is no intention to live together permanently is inadequately reasoned. Three of the appellants are young children. It may well be that the Judge's reasoning is unduly influenced by consideration of the reason the sponsor was granted refugee status, but the focus in this case should not be on the sponsor, it should be on the appellants. The three children

of the sponsor do not care why the sponsor was granted refugee status. What is important is the quality of relationship. Neither 352A of the rules nor 352D of the rules require consideration of the reasons the sponsor is granted refugee status. The starting position is that he has been granted refugee status. There is no need to go behind the grant of refugee status.

10. [16] to [27] of the decision are preceded by the heading

'Findings and conclusions'

[18], [19] and [20] of the decision are neither findings nor conclusions. They are a summary of evidence. The evidence that is summarised there is relevant, but no findings of fact are drawn from that evidence.

11. The third last sentence of [21] is inadequately reasoned. The Judge finds that the first appellant and the sponsor are married. He finds that the fourth appellant was born after the sponsor was granted refugee status and because the first appellant and the sponsor were briefly reunited in Gambia. Despite finding that the fourth appellant was born because the first appellant and sponsor are husband-and-wife who have access to each other, the Judge finds that the birth of the fourth appellant does not confirm an ongoing relationship. The use of the words "*definitively confirm*" indicates that the Judge applies the wrong standard of proof.

12. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

13. Because the fact-finding exercise is incomplete & because the decision contains no meaningful analysis of relevant evidence lead for the appellant, the decision is tainted by material errors of law. I set it aside.

14. I consider whether or not I can substitute my own decision. there was an inadequacy of fact finding in the First-tier Tribunal. I find that none of the First-tier Judge's findings of fact can be preserved. One of the central issues in this case is the intentions of the sponsor and the first appellant. The determinative question is whether or not they intend to live together permanently in the UK. That is a question which cannot be answered without further evidence and clear fact-finding. I am asked by both parties' agents to remit this case the First-tier Tribunal. The material error of law in the decision relates to an inadequacy of fact finding. I cannot substitute my own decision. A further fact-finding exercise is necessary.

Remittal to First-Tier Tribunal

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

16. In this case I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary.

17. I remit the matter to the First-tier Tribunal sitting at Birmingham to be heard before any First-tier Judge other than Judge James.

Decision

18. The decision of the First-tier Tribunal is tainted by material errors of law.

19. I set aside the Judge's decision promulgated on 28 November 2018. [illegible]e First-tier Tribunal to be determi

Signed Date 8 April 2019

Deputy Upper Tribunal Judge Doyle