



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07157/2017

THE IMMIGRATION ACTS

Heard at Birmingham
On 7th February 2019

Decision & Reasons Promulgated
On 14th March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MS POULA [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M J Azmi (Counsel)
For the Respondent: Miss H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This was an appeal against the determination of First-tier Tribunal Judge Mathews, promulgated on 17th January 2018, following a hearing at Stoke-on-Trent on 20th December 2017. In the determination, the judge allowed the appeal of the

Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Zimbabwe, and was born on 20th March 1981. She is a female. She has two children, both of them girls, and they are aged 7 years and 4 years currently. Both children were born in the UK. There is also a third child, who is the stepdaughter of the Appellant, and she has reached the age of 18 already, having been born on 4th June 1999.

The Appellant's Claim

3. The Appellant made an asylum claim on 14th January 2016. However, she then did not attend appointments for substantive interviews. These were offered on two separate days. No explanation was given. The Respondent proceeded to refuse the application on 7th July 2016. The background of the Appellant is that she made a visa application to visit the UK in March 2004 from Zimbabwe, contending that she wanted to make a short visit whilst in transit within Europe. She returned to Zimbabwe. The Appellant then left Zimbabwe on her own passport to enter the UK in July 2010. She was granted an EEA residence card on the basis of her husband's claimed Irish nationality. The card was valid until 9th June 2016. The present asylum claim was then made on 14th January 2016.

The Judge's Determination

4. The judge heard the Appellant's evidence. She claimed that she had worked as a journalist for a number of years in Zimbabwe. The judge found there to be no evidence of this. She claimed to have been raped by her boss in 2009. The judge was not satisfied that this was the case. In the end, the judge was clear that the Appellant had not been a journalist, not been raped, not been employed in Zimbabwe as claimed, and did not have a viable protection claim upon arrival as she stated (see paragraph 28). A further feature of this appeal was that the Appellant's husband was presently serving a ten year sentence for facilitating illegal immigration. Her two daughters, who are the natural daughters of the husband, made monthly visits in prison to see their father. The Appellant's own evidence was that she was not sure whether her own relationship was still viable with her husband. This is something that she will only know once he had been released from prison in 2020.
5. In the end, the judge fell back on a consideration of the best interests of the children. He observed that the younger two children were born in the UK. They had lived their entire lives here. They were at primary school here. They were doing well. They are settled in a family unit with their mother. They have no experience of Zimbabwe. They made regular visits to see their father in prison. The judge observed that "it is clearly in their best interests that they remain in the care of their mother". He found that their best interests "would lie in them being able to continue

in their settled education and residence in the United Kingdom, any move to Zimbabwe would be a considerable upheaval ..." (paragraph 36).

6. The judge also gave consideration to the older child. This was the stepchild. The judge observed that she was now 18 years old. She had been in the UK for over seven years. The conclusion of the judge was that she was "at a critical point, seeking to go on to university to continue her studies" (paragraph 37). She had lived in the UK all of her life except the first ten years of her eighteen years (paragraph 37).
7. However, the two younger children had not accumulated seven years' residence (paragraph 49). In the end, the judge's decision was that

"To sever completely the contact between father and children, as would be the case if the Appellant were to be removed, is a disproportionate decision in the unusual circumstances of the present case. It is the position of the children, and their best interests that I find tips the balance in this case, and I note of course that their best interests are not a so called 'trump cards'" (paragraph 60).
8. The appeal was allowed.

Grounds of Application

9. The grounds of application state that the judge failed to give weight to the public interest on the facts of this case when allowing the appeal on the basis of Article 8. Whilst it was necessary to have regard to the best interests of the children as a primary consideration, it was also important to bear in mind the public interest factors, which point away from granting a right to remain, in the face of the fact that the children's father was facing a long term in prison of ten years, after which she would be subject to deportation.
10. On 21st February 2018, permission to appeal was granted.

Submissions

11. At the hearing before me on 7th February 2019. Miss Aboni submitted that the judge was wrong to have allowed the appeal. The children were only visiting their father in prison. The Appellant was their primary carer. If the Appellant were to be removed so would the children also be removed with her, and in time the father would be deported at the end of his sentence in 2020 as well. The visits in themselves were only twice a month. The eldest child, the qualifying child, who had reached 18 years of age, was his stepdaughter. Second, however, there had been a further development of recent.
12. This was that the Appellant herself had now been sentenced to imprisonment on account of having committed fraud. On 21st May 2018 she was convicted and sentenced to three years. There has not as yet been a deportation order. However, it is plain that she would be subject to removal in due course as well. Given the recent change in circumstance, the appropriate course of action was to make a finding of an

error of law on the basis of Judge Mathews' decision, and then to remit this matter back to the First-tier Tribunal, so that all the facts could be considered again.

13. For his part, Mr Azmi submitted that this was a case where the judge had himself recognised that there were "unusual circumstances" to the present case (paragraph 60). The children had their natural father in this country. It was true he was in prison. However, the children visited him there. They were entitled to retain this aspect of family life with him. They had been born in this country. They did not know Zimbabwe. They could not be expected to go there themselves. The judge had considered the case law very properly (at paragraphs 52 to 56). Moreover, the children's particular circumstances have been noted in terms of their "settled family unit with their mother and siblings" (paragraph 36). Any move to Zimbabwe would be a considerable upheaval for them. The position of the older child, who had reached 18, was such that she was at a "critical point" (paragraph 37) and the judge had been mindful of this consideration as well. Another judge may well have come to a different conclusion. However, this judge had come to a conclusion that was properly made out on the basis of the reasons given and there could be no error of law. In fact, the judge was clear (at paragraph 60) that the presence of children was not a "trump card".

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
15. First, this is a case where the Appellant herself is subject to removal. There are children. They are aged 7 years and 5 years. However, it is the Appellant who is the primary carer of the children. The children's natural father is in prison. He is being visited by them twice a month. However, the father himself is subject to removal as well. In the end the entire family faces a removal to Zimbabwe on the basis of the position "in the real world" as the latest jurisprudence now emphasises. The children are expected to be where the parents will be. Although their position must be considered specifically as children, in an indirect manner, the impact of the parents' situation will be felt by them in the eventual decision to be reached. The judge's conclusion, on the basis of the "unusual circumstances" where the visit by the two girls is to their father in prison is not sustainable bearing in mind the public interest in immigration control and the Section 117B considerations.
16. Second, the fact that the Appellant herself has now been convicted of fraud, and sentenced to three years' imprisonment, and likely to herself face removal, means that the position of these very young children cannot be determinative in terms of the overall bounds of considerations. The ultimate decision cannot be made without all the evidence being considered again and for this reason, although I make a finding of an error of law in relation to the first reason that I give above, the existence of the second reason by way of the development of recent events, means that the

appropriate course of action is for this decision to be remitted back to the First-tier Tribunal and to be heard again, by a judge other than Judge Mathews.

Notice of Decision

17. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the First-tier Tribunal. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be heard by a judge other than Judge Mathews, pursuant to practice statement 7.2(b).
18. No anonymity direction is made.
19. The appeal of the Secretary of State is allowed.

Signed

Dated

Deputy Upper Tribunal Judge Juss

11th March 2019