IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001104

First-tier Tribunal No:
PA/50160/2022
IA/00525/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

13th December 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAA
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Arif, Senior Home Office Presenting Officer
For the Respondent: Mr R McTernaghan, instructed by Phoenix Law

Heard at Royal Courts of Justice (Belfast) on 20 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant, his wife and their children are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent and/or his wife or their children). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Rea promulgated on 14 February 2024 in which he allowed JA's appeal against a decision of the Secretary of State made on 5 January 2022, refusing his protection claim and on which his wife and three children were dependent.

2. The respondent's case was that he and his family would be at risk on return owing to his and his wife's inability to protect their daughters A, B and C from being forced to undergo female genital mutilation ("FGM"); or, in the alternative, that their return would infringe their rights to family and private life pursuant to Article 8 of the Human Rights Convention.

3. The Secretary of State did not accept that the respondent or his daughters would be at risk as claimed, nor was she satisfied that their removal would be a breach of their rights pursuant to Article 8 of the Human Rights Convention given that their removal was proportionate to the need to maintain immigration control. The judge found that A had undergone FGM in Nigeria as claimed given the medical evidence to that effect, finding that however, the youngest daughters were born in Brazil and had Brazilian nationality [14] and that there was no risk of serious harm if the respondent and family were to return there [15], nor was he satisfied that there would be a risk in Nigeria [16].

4. The judge noted [19] the children's date of birth and set out matters he considered relevant to their best interests concluding [20] that their best interests lie in remaining in the care of their parents and in continuing to live in the United Kingdom but noting that their immigration status had been precarious.

5. Having accepted that they did not have a right to remain within the Immigration Rules and that this was an important factor to which substantial weight was to be given [22] he found factors in respect of family and private life which weighed in the respondent's favour and that these outweighed the public interest [23]. He concluded as follows:-

> 23. I find that the factors raised by the appellant outweigh the public interest because to all intents and purposes the children have grown up in the UK and have developed their own private lives in this country. Although this has occurred while their immigration status has been precarious, I nevertheless attach some weight to it. The children are of an age that if their parents are required to leave the UK the children will leave with them. I find that in all the circumstances this would be unjustifiably harsh and a disproportionate interference with the children's right to private life under Article 8 of the ECHR.

6. The Secretary of State sought permission to appeal on a number of grounds, submitting that the judge had erred:-

(i) in failing to have any proper regard to the statutory public interest factors set out in Section 117B of the 2002 Act, in particular the issue of financial independence as set out in Section 117B(3);

(ii) in failing to attach minimal weight to the fact that family and private life had been established at all times when their presence here was precarious;

(iii) in treating the appellant's children's best interests as a paramount consideration rather than a primary consideration contrary to AR (Pakistan) v SSHD [2010] EWCA Civ 816 and in effect would be treating the children's departure from the United Kingdom as if they were qualifying children and improperly attaching weight to the fact they are in education here.

7. On 11 March 2024 First-tier Tribunal Judge T Lawrence granted permission to appeal.

The Hearing

8. I had before me a bundle prepared by the Secretary of State in compliance with the standard directions. I also had before me a skeleton argument served by Mr McTernaghan.

9. Ms Arif relied on the grounds of appeal submitting that the judge had erred, in particular in failing to have any regard to the financial aspect. He had also incorrectly attached weight to the children being in education contrary to **EV (Philippines)**, in particular at paragraph 60 and that the decision should be set aside.

10. Mr McTernaghan relied on his skeleton argument submitting that the judge had properly complied with the requirements of the law having properly directed himself at paragraph 9 and he clearly applied the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 (" the 2002 Act") in substance if not necessarily stating so which is not a requirement. He had dealt with the fact that their immigration status was precarious and the decision was sustainable.

11. I reserved my decision.

Discussion

12. In considering the decision of Judge Rea I bear in mind that I am considering the decision of a specialist Tribunal and bear in mind the very cogent observations of the Court of Appeal in Ullah [2024] EWCA Civ 201and in Volpi v Volpi [2022] EWCA Civ 464. I remind myself that I should be reluctant to interfere in the findings of fact of the First-tier Tribunal. I bear in mind also that I should take care to ensure that any points that are now being sought on appeal were in fact properly raised before the judge, or at least in issue before him.

13. It is important to bear in mind that the judge can be assumed to know what the law is and to have applied it. The provisions of Section 117B of the 2002 Act are very well-known and it is evident from the phrasing of the judge's decision that he was fully aware of the factors set out in that, given the reference to integration and to the fact that the family speak English. The judge directed himself properly as to the law at paragraph 9.

14. The judge has not, however, made any mention of the financial circumstances over and above saying that they are trying to do their best. And thus, there is potentially a failure properly to apply Section 117B (3) of the 2002 Act.

15. With regard to Section 117B(4) and 117B(5) of that Act, it is evident the judge appreciated the immigration status had been precarious. I accept that that does require an evaluation of all the overall circumstances but I am not satisfied that the judge had properly engaged with the issue as to whether little weight should be given to a private life established by a person where that person's immigration status is precarious and it is the private life aspect of the children's situation, that is their best interests, which is in issue. That is because the family life they have is with each other and with their parents and that would not be affected by removal, whereas the private life aspect of their family and private life is engaged by the fact that they are at school here and there would be disruption to that.

16. Contrary to Mr McTernaghan's submissions, I am not satisfied that the judge has in fact properly addressed this matter because he had referred on several occasions to their status being precarious. While I accept the judge is understood to know the law, equally he fails to explain why more than little weight has been attached to this issue in any sufficient way. He had stated that he attaches some weight to it but this overall does not explain why the very great weight attached to the fact that they did not meet the requirements of the Immigration Rules was overcome.

17. I do, however, find little merit in the Secretary of State's submission at ground (e). The grounds appear to conflate the issue of assessing best interests and the weight to be attached thereto. It was manifestly open to the judge to conclude their continuity in education which the children were benefiting, was in their best interests. The fact that something is in a child's best interest does not mean that it is capable of being outweighed, nor is it indicative that the judge was not aware that their best interest is a primary consideration not the paramount consideration.

18. Similarly, there is no merit in the submission that the judge had incorrectly considered the proportionality of the children being removed as if they are qualifying children; that is simply an argument that he attached too much weight to their best interests. The judge was clearly aware that they were not qualifying children.

19. Accordingly, for these reasons, and despite Mr McTernaghan's best efforts, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

20. I am, however, satisfied that it would in the circumstances of this case be appropriate to remit the decision to the First-tier Tribunal. That is because, looking at the practical circumstances of this case as suggested in SSHD v CAO [2024] UKSC 32 at [106], the reality is that by the time this matter is heard the children will be qualified children and thus different considerations will apply and fresh findings of fact and whether this amounts to a new matter will need to be considered. It is appropriate for that to be dealt with in the First-tier Tribunal.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remit the decision to the First-tier Tribunal to be heard afresh by a judge other than Judge Rea.

Signed Date: 6 December 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal