



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07067/2016
HU/07092/2016
HU/07097/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 5 July 2018

Decision Promulgated
On 12 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE PICKUP

Between

LT
ED
JD

[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellants: Mr B Chimpango, instructed by Crown & Law Solicitors
For the respondent: Ms R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellants' appeal against the decision of First-tier Tribunal Judge Grant promulgated 24.7.17, dismissing their linked appeals against the decision (RFR) of the Secretary of State, dated 2.3.16, to refuse their applications for LTR on private and family life human rights grounds. The first and second appellants are partners and the third appellant, born in the UK on 21.2.13, is their son. A further child, their daughter EJD, was born to them in the UK on 16.9.15.
2. First-tier Tribunal Judge Pedro granted permission to appeal on 5.1.18.

Error of Law

3. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.
4. The grounds (1) assert that the judge refused to consider factual matters already raised with the respondent prior to the RFR and which had or could have had a bearing on the human rights claim.
5. Additional grounds (2) claim that the judge failed to consider the best interests of the children of the family pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009, and (3), that the children are stateless, having been born in the UK.
6. Permission to appeal in respect of grounds (2) and (3) was refused. Mr Chimpango did not pursue those grounds before me and I do not consider them further.
7. However, in granting permission in relation to ground (1), Judge Pedro considered it arguable that as the issues raised but which the judge declined to address could have had a bearing on the human rights claim and were not new matters requiring the respondent's consent to the tribunal considering the same.

Chronology and appeal background

8. There is a considerable history to these linked cases. I spent some time at the hearing attempting to clarify the chronology and to determine what issues were raised when. It was not entirely clear and the two parties were not entirely in agreement. However, I proceed on the basis of the following:
 - (a) The first appellant, LT, claims to have entered the UK in 2005. However, the respondent has seen no evidence to confirm this assertion. In any event, she has never held any Leave to Remain;
 - (b) LT's first child, JD, a boy, was born in the UK on 21.2.13 and has never held any Leave to Remain;
 - (c) In December 2013 LT claimed asylum, on the basis of a fear on return of FGM and because of her Christian conversion. This was refused in February 2014 with no right of appeal;
 - (d) In August 2015 LT sought Leave to Remain outside the Rules. This was refused in January 2015;
 - (e) The second appellant, ED, entered the UK in January 2010 with clearance as a student but remained as an illegal overstayer after April 2010;
 - (f) In July 2013 ED claimed asylum, on the basis of a fear on return arising from a family feud over stolen money; a dispute over a girl he had a relationship with;

and his partner's fear of being subjected to FGM. The claim was rejected in September 2013;

- (g) LT's second child, EJD, a girl, was born in the UK on 16.9.15 and has never had any Leave to Remain;
 - (h) All appellants are citizens of Malawi.
9. It is common ground that none of the appellants can meet the requirements of the Immigration Rules under Appendix FM. However, it was submitted that there are insurmountable obstacles to integration in Malawi, relying on a number of allegations: the risk of FGM to the first appellant; risk to the first appellant arising from her Christian conversion; risk to the third appellant of circumcision; risk to their daughter of FGM. Mr Chimpango's case at the First-tier Tribunal and now is that these are all relevant to the human rights claim, including article 3.
 10. The Home Office Guidance, dated 9.10.17, relating to "Matters before the Tribunal" was put before me at the appeal hearing. Under s85(4) of the 2002 Act the First-tier Tribunal may consider evidence about any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision. However, the tribunal must not consider a new matter unless the Secretary of State has consented to the tribunal doing so. A matter is a new matter if it constitutes a ground of appeal of a kind listed in s84 and the Secretary of State has not previously considered the matter in the context of the decision being appealed or in response to a statement made by the appellant under s120.
 11. There is no evidence that the Secretary of State gave any such consent for the issues described above in relation to risk on return. At [3] of the decision of the First-tier Tribunal, the judge noted that the RFR made clear that the Secretary of State did not consent to protection issues being raised in the human rights appeal and indicated that if the appellants wanted to raise these issues they are required to make an asylum claim at the ASU. The Home Office Presenting Officer at the First-tier Tribunal appeal hearing confirmed that the Secretary of State did not consent. According to Ms Pettersen, the presenting officer's notes on file indicated that Mr Chimpango agreed at the appeal hearing that these matters could not be pursued. However, the judge's record of proceedings contained within the tribunal's case file do not support that assertion.
 12. In any event, the judge concluded at [5] that in the absence of consent, it was not appropriate for the tribunal to be the decision maker at first instance in respect of the refugee claim which had been previously refused and in respect of which no appeal had been pursued.
 13. After investigating the matter with the parties, I am satisfied that the risk of circumcision of the son and the risk of FGM to the daughter has never been the subject of any formal claim to or consideration or decision by the Secretary of State. Indeed, Mr Chimpango conceded that the FGM risk for the daughter was raised for the first

time in the appeal to the First-tier Tribunal. Only the claims of risk of FGM to the first appellant and her Christian conversion had been the subject of consideration and a decision rejecting the claim. I am satisfied that the other claims are factually different and distinct from the previous claims made by the first and second appellants and not merely further and better evidence of an existing 'matter.' These are new matters and cannot be considered by the tribunal without the consent of the Secretary of State, to do so would be to act outside its jurisdiction.

14. The issue remains whether the First-tier Tribunal should nevertheless have considered the previously made claims of risk on return of FGM and/or Christian conversion. However, even if the tribunal did so, those claims were previously rejected by the Secretary of State and the appellant did not seek to appeal against that decision or seek judicial review. Nevertheless, the appellants were entitled to rely on those claims, which have never been adjudicated upon by the tribunal, as being relevant to the issues of very significant obstacles or insurmountable obstacles, or even as compelling or exceptional circumstances.
15. In the circumstances, I find that there was an error of law in the refusal of the the First-tier Tribunal to countenance hearing evidence in relation to the FGM or Christian conversion claims. Even if that evidence would only have been the oral evidence of the appellant(s), it was still relevant to the human rights claim.

Remittal

16. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
17. In all the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal, on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Decision

18. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Consequential Directions

19. The appeal is remitted to the First-tier Tribunal sitting at Bradford;
20. The appeal is to be relisted at the first available date;
21. The appeal is to be decided afresh with no findings of fact preserved;
22. The ELH is 3 hours;
23. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Grant;
24. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances involve children allegedly at risk, I make an anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The outcome of the appeal remains to be decided.

A handwritten signature in black ink, appearing to read 'J. Pickup', written in a cursive style.

Signed

Deputy Upper Tribunal Judge Pickup