



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/11814/2015
HU/11818/2015

THE IMMIGRATION ACTS

Heard at Field House
On 8 November 2017

Decision & Reasons Promulgated
On 29 November 2017

Before

**THE RIGHT HONOURABLE LORD BOYD OF DUNCANSBY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE JORDAN**

Between

**MALISSA [A]
[K A]
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Lams, SBG Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appeal of Malissa [A] and she is joined by her daughter, [KA], who was born on [] 2012. These are the two appellants and they appeal against the determination of First-tier Tribunal Judge Margaret O'Keeffe promulgated on 15

February 2017 after a hearing at Hatton Cross on 27 January 2017. The two appellants are both citizens of Jamaica. The first, Malissa [A], was born on [] 1988. Both of them appealed against the decision made by the respondent on 6 November 2015 refusing their application for leave to remain in the United Kingdom on human rights grounds.

2. The case arises in this way. Both of them entered the United Kingdom as visitors on 28 October 2014. The principal appellant, as a visitor, did not meet the Immigration Rules for leave to remain as a partner because visitors are not able to switch the capacity in which they seek further leave to remain. The second appellant, who is not a British citizen, has not of course lived in the United Kingdom for seven years immediately preceding the application. However, it should be said in relation to her that her father is a British citizen now by naturalisation. He became a British citizen on 13 December 2016. That was a few weeks before the judge heard the appeal. As a result, it opens up the way for his daughter to seek British nationality as a result of the position of her father. Consequently, although [KA] is not at the moment a British citizen, she is capable on application of becoming one. At the moment no reason was advanced why she should not become one.
3. As far as the husband is concerned, we assume he was originally a Jamaican citizen. The couple met and married in Jamaica and the husband has been in the United Kingdom for some time. He is earning about £40,000 per annum but there was evidence before the judge that he earned some £50,000. It follows from this that he is in a position to meet the financial requirements of permitting his wife to join him as a spouse in the United Kingdom.
4. The couple also have another child. [KA] is presently at school and [A] is, as I understand it, a British citizen.
5. The determination of the judge was on the basis that the couple were in a genuine and subsisting relationship and they intend to remain living together. It is not disputed that [A], who was born on 1 February 2016, shortly before the naturalisation of his father, is a British citizen. Accordingly, the issue before the judge was whether it was reasonable for the couple to be separated whilst the principal appellant, the mother, went to Jamaica to make an application for entry clearance.
6. The effect of that would be that there is the option that she would take the two children with her while she made this application. That would be disruptive obviously as far as the children are concerned but it would not be insurmountable. She is not working at the moment. Accordingly it would not impose any particular burden upon them for this to happen. The father could continue to remain in the United Kingdom and would continue to work but the issue before the judge was whether it was reasonable for that to be required where the only substantial factor against it was that the policy of the Secretary of State is not to permit a visitor to change the capacity in which that visitor seeks further leave to remain. There must be a very good reason to depart from the policy but, at all stages, that good reason must be tempered by the duty to act proportionately in relation to the individual

circumstances of a case. In this case there are, it seems to us, a number of factors which are significant.

7. First of all, the mother has never been in the United Kingdom unlawfully. She entered as a visitor and she made an application to remain as a spouse and she did so during a period of extant leave. Accordingly there was continuation of leave as a visitor during the period of this appeal. She has never overstayed and her immigration status has not been tainted by any action on her part which has led to her being illegally in the United Kingdom.
8. The second thing that we think can properly be said is that the children, whilst both of them are not British citizens, both of them will be entitled to be British citizens. I daresay in due course that will happen.
9. The third matter which we can properly extract from the papers is that there does not seem to be any reason at all why the husband, who is earning a substantial amount of money, would not meet the requirements of the Immigration Rules as a spouse and thereby permit the wife to succeed in her application. Accordingly the reasonableness of her being required to leave the United Kingdom is on the assumption that all she would be required to do would be to establish those matters which have already been established. So, she would leave to go to Jamaica, spend some time in Jamaica, make an application (which on the face of it is bound to succeed) and then return. In issue therefore was whether it would be reasonable for her to do that.
10. The First-tier Tribunal Judge did not approach the case in this way. Although it was argued by Mr Tarlow that she appears to have used the yardstick of reasonableness in paragraphs 38, 39 and 40 of the determination, however in paragraph 41 she clearly identified the means by which she reached her decision. She concluded:

“On the evidence before me I find that there are no insurmountable obstacles to family life being enjoyed outside the UK. I find that temporary separation in order to enable the appellant to make an application for entry clearance is not disproportionate.”

It follows from this extract from the determination that the judge was certainly looking at insurmountable obstacles and disproportionality as being one and the same thing. In that the judge was plainly wrong. It was whether it was *reasonable* for this to occur. In those circumstances we are satisfied that the judge made a material error.

11. We can then go on to consider remaking the decision. In the circumstances of this case the public interest in requiring the appellant to go back to Jamaica and satisfy the requirements for entry clearance as a spouse is really very limited. There will obviously be an interference with the family's life during the period of separation. For example, if both children remain in this country or one child remains in this country, the husband will have to give up his work, at least temporarily. If both children go to Jamaica, that would require one of the children to start going to another nursery. It is an interference which is, in the circumstances of this case,

entirely unnecessary. There is no public interest in making the point that an appellant, who is unlawfully present, should be required to make good her illegality because the mother in this appeal is not here unlawfully. In those circumstances we find that it would be disproportionate to require her to make the application out of country. We allow the appellants' appeals on the remaking of the decision.

NOTICE OF DECISION

1. We find the First-tier Tribunal Judge erred in law.
2. We set aside the decision of the First-tier Tribunal Judge.
3. We substitute a decision allowing the appeal on human rights grounds.

Dated 29 November 2017

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL