



Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: IA/39834/2013

IA/40028/2013

THE IMMIGRATION ACTS

**Heard at Stoke
on 22nd December 2014**

**Determination Promulgated
On 23rd December 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**YOLLY OJEDA DIAZ
ADRIAN DARIO HERMEMDEZ OJEDA
(Anonymity order not made)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Lotay of Derby Immigration Aid Consultants
For the Respondent: Miss Johnstone - Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Bell promulgated on 23 July 2014 following a hearing at Stoke. The appellants are a mother and her adult son born on 27 August 1969 and 24 October 1990 respectively. They are

both citizens of Venezuela who entered the United Kingdom as visitors, lawfully, on 5 March 2012. On 3 September 2012 they made an application for leave to remain which will was refused on 28 August 2013.

2. Judge Bell considered the evidence made available and the merits of the appeal both under the Immigration Rules and Article 8 outside the Rules. The finding under the Rules is set out at paragraph 30 of the determination, that neither appellant can meet the requirements of the Rules for further leave to remain. Although this is an issue challenged on the grounds of appeal Mr Lotay conceded before the tribunal today that he was no longer able to sustain such an argument.
3. The Judge then moved on to consider Article 8 at paragraphs 31 to 37 of the determination making the following substantive finding in paragraph 36:

36. I am not satisfied that arguably good grounds been put forward as to why leave should be granted outside the immigration rules. The rules defined partner and the first appellant did not meet that definition when she applied to vary her leave. Even if she had passed that hurdle the rules do not provide for switching from visitors status to partner status. The sponsor and 1st appellant state they wish to get married but have not yet been able to do so. They can do this and then apply for entry clearance to return as a spouse. The sponsor will not have any difficulty meeting the maintenance requirements of the rules for entry clearance. The 2nd appellant does not need to return alone. The evidence shows that the 2nd appellant is at present totally reliant on his mother and he would therefore be able to make an appropriate application for entry clearance as a dependent relative under the immigration rules.

Discussion

4. The grounds on which permission to appeal is sought are commendably brief and focused. The challenge to the decision under the Immigration Rules is no longer being pursued and has no arguable merit. In relation to Article 8 it is submitted in Ground 4 that the Judge has not considered Article 8 at all. I find this ground has no arguable merit. A reading of the determination shows the Judge considered the evidence made available with the required degree of anxious scrutiny. Adequately reasoned findings have been made. The Judge sets out the relevant law between paragraphs 10 to 14 of the determination including reminding herself of recent Court of

Appeal case-law setting out the approach to be taken if Article 8 is to be considered in relation to a case involving the Rules.

5. This is not a case in which the Judge dismissed the appeal under the Rules and then did nothing further. Not only does the Judge specifically consider Article 8 as a freestanding aspect of the case, she finds that she was not satisfied that there were arguably good grounds put forward for why leave should be granted outside the Rules. This is a proportionality finding. Had the Judge found good reasons why such leave should be granted outside the Rules the decision would have been found to be disproportionate. As it is, the evidence did not support such a finding.
6. The Judge analysed the position of both the first and second appellant and noted that the second appellant is reliant upon his mother for his care because of his disabilities, albeit that he is over 18 years of age. He received treatment for his condition in Venezuela. The assertion in the submissions that the Judge failed to consider the evidence made available has no arguable merit and has not been substantiated as a reading of the evidence and the determination clearly demonstrates.
7. A properly reasoned proportionality decision is only susceptible to challenge on Public Law grounds. It was asserted the findings are irrational but it has not been established that the finding is out with the range of permissible decisions a reasonable person could make if appraised of the facts and law. The assertion the Judge failed to consider the position of the first appellant's partner, Mr Stocks, has no arguable merit as he is clearly referred to on a number of occasions in the determination and even if he cannot return to Venezuela with the appellants to live for employment reasons, it has not been established that he cannot visit long enough to marry or that the consequences of the appellants returning where they can make a valid lawful application to re-enter will be such that the decision should be found to be disproportionate.
8. There are no economic concerns in this case as Mr Stocks is clearly able to support the family.
9. It is an established principle that Article 8 does not allow an individual to choose where they wish to live. The Higher Contracting States also have a margin of appreciation under Article 8. Under such provision the Secretary of State has set out the way in which she considers Article 8 should be assessed which is within the body of the Immigration Rules. The appellants failed under the Rules and the reason why, namely the inability to switch as well as the inability to prove

the appellant could satisfy the partner criteria with Mr Stocks, is relevant. Both appellants entered the United Kingdom as visitors with no legitimate expectation they will be entitled or permitted to remain. Domestic law prevents visitors from switching and any relationship that has been formed or further developed has been so at a time when all parties knew their immigration situation was precarious.

10. In this case it has not been established there is any procedural irregularity in the approach adopted by the Judge to the consideration of the appeal or that the conclusions arrived at by the Judge can be said to be perverse, irrational, or contrary to the evidence or the law.

Decision

11. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

12. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 22nd December 2014