Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/19686/2018**

HU/20672/2018

THE IMMIGRATION ACTS

Heard at Field House
On 6 March 2020

Decision & Reasons Promulgated
On 17 March 2020

Before

UPPER TRIBUNAL JUDGE FINCH

Between

AKISSI [N]

[P K]

(ANONYMITY ORDER NOT MADE)

Appellants

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Aminu, Aminu Aminu Solicitors

For the Respondent: Mr S. Walker, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellants are nationals of Cote d'Ivoire and the 2nd Appellant is the 1st Appellant's eight year old daughter.

2. The 1st Appellant entered the United Kingdom, as a student, in March 2000 and her leave was extended in this capacity until 31 December 2004. She applied for further leave to remain on 29 December 2004 but her application was subsequently found to be invalid. On 18 May 2005 she applied for leave to remain outside the Immigration Rules. This application was not refused until 15 December 2014.

3. The 1st Appellant made a human rights claim on 16 July 2015. This was refused on 29 July 2015 and she appealed. Her appeal was dismissed on 30 January 2018 and she had exhausted her appeal rights by 27 July 2018. Meanwhile the Appellants had applied for leave to remain on 3 April 2018 on the basis that the 2nd Appellant had been resident in the United Kingdom for more than seven years. This application was refused on 7 September 2018.

4. The Appellants appealed and First-tier Tribunal Judge Widdup dismissed their appeal in a decision promulgated on 24 September 2019. They appealed and Upper Tribunal Judge Martin, sitting as a Judge of the First Tribunal granted them permission to appeal on 14 January 2020.

ERROR OF LAW HEARING

5. The Appellant's representative submitted that First-tier Tribunal Judge Widdup had erred in law by relying on the reasons given by First-tier Tribunal Judge Clark for dismissing the Appellants' previous appeal when the circumstances before him were now significantly different. The Home Office Presenting Officer accepted that the Appellants' grounds of appeal had force and that First-tier Tribunal Judge Widdup had not properly factored into his decision the fact that the 2nd Appellant was now eight years old. It was also noted that the 1st Appellant would have been in the United Kingdom for 20 years on 13 March 2020 and would be making an application for leave on this basis.

ERROR OF LAW DECISION

6. In the decision under challenge, First-tier Tribunal Judge Widdup referred to the five stage test established in *R v Secretary of State for the Home*

Department ex parte Razgar [2004] UKHL 27 and found that the Appellant's family and private life rights were engaged for the purposes of Article 8(1) of the European Convention on Human Rights and that their proposed removal from the United Kingdom would have consequences of sufficient gravity. He also found that their removal was lawful and in pursuit of a legitimate aim.

7. He then reminded himself that the issue between the parties was whether their removal would be a proportionate response.

8. He referred to the earlier decision by First-tier Tribunal Judge Clark, who had found that the 1st Appellant did not qualify for leave as a parent under Appendix FM to the Immigration Rules and that there were no very significant obstacles to her re-establishing herself in Cote d'Ivoire for the purposes of paragraph 276ADE(1)(vi) of the Immigration Rules.

9. He did not explicitly make any findings of fact in relation to the 2nd Appellant in the context of paragraph 276ADE(1)(iv) of the Immigration Rules, which states:

> "(1) The requirements to be met by an applicant for leave to remain on the grounds of private life are that at the date of the application the applicant:
>
> …
>
> (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK".

10. He also failed to give sufficient consideration to the 2nd Appellant's best interests as someone who had lived in the United Kingdom for eight years; having been born here.

11. Instead, he relied on the provision relating to the 1st Appellant, namely section 117B (6) of the Nationality, Immigration and Asylum Act 2002, which states:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom".

12. When considering the question of reasonableness First-tier Tribunal Judge Widdup did take into account the fact that the 2nd Appellant was not at a critical stage of her education, that she spoke some French and that First-tier Tribunal Judge Clark had not accepted that the 1st Appellant had lost touch with her mother and brother in Cote d'Ivoire and that she would be able to obtain education there. He also accepted the finding of First-tier Tribunal Judge Clark that the 2nd Appellant would not be at risk of FGM in Cote d'Ivoire.

13. However, in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 Carnwath LJ found:

> "17. As has been seen, section 117B (6) incorporated the substance of the rule [paragraph 276ADE(1)(iv)] without material change, but this time in the context of the right of the parent to remain. I would infer that it was intended to have the same effect. The question again is what is "reasonable" for the child. As Elias LJ said in *MA (Pakistan) Upper Tribunal (Immigration and Asylum Chamber)* [2016] EWCA Civ 705, [2016] 1 WLR 5093, para 36, there is nothing in the subsection to import a reference to the conduct of the parent. Section 117B sets out a number of factors relating to those seeking leave to enter or remain, but criminality is not one of them. Subsection 117B (6) is on its face free-standing, the only qualification being that the person relying on it is not liable to deportation. The list of relevant factors set out in the IDI guidance (para 10 above) seems to me wholly appropriate and sound in law, in the context of section 117B(6) as of paragraph 276ADE(1)(iv).
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> 18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents,

> apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245:
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> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"

14. In paragraph 40 First-tier Tribunal Judge Widdup reminded himself that "there can be no question of penalising the daughter for the fact that her mother is an overstayer". But he then went on to find that he was "entitled to take into account as part of the factual background that the mother did overstay and that her evidence before the Tribunal in 2017 was found in some ways to be lacking in credibility". This appears to me to be contradictory and to fall into the error of penalising the 2nd Appellant on account of her mother's immigration history when the actual question should have been was whether the 1st Appellant had leave to remain.

15. In paragraph 43 First-tier Tribunal Judge Widdup also took into account the fact that the 1st Appellant was reliant on public funds. The evidence confirms that the Applicants are being accommodated and supported by the London Borough of Lambeth under section 17 of the Children Act 1989. This is not a factor which was relevant to the question of whether it was reasonable to expect the 2nd Appellant to leave the United Kingdom, as she could not be made responsible for her mother being in receipt of public funds and in any event she was entitled to such support as a child in need under this Act.

16. I also find that the decision did not properly focus on the 2nd Appellant's best interests but conflated those with a proportionality assessment relating to the 1st Appellant.

17. As a consequence, I find that there were material errors of law in First-tier Tribunal Judge Widdup's decision.

DECISION

(1) The Appellant's appeal is allowed.

(2) First-tier Tribunal Judge Widdup's decision is set aside.

(3) The appeal is remitted to the First-tier Tribunal to be heard by a First-tier Tribunal Judge other than First-tier Tribunal Judge Widdup, Martin or Clark.

(4) The First-tier Tribunal is asked to delay listing the appeal until the first open date after 5 June 2020 to give the Respondent the time to consider any application for leave made by the 1st Appellant under paragraph 276ADE(1)(iii) of the Immigration Rules.

Nadine Finch

Signed Date 6 March 2020

Upper Tribunal Judge Finch