Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07084/2016

THE IMMIGRATION ACTS

Heard at Stoke	**Decision promulgated**
On 15 November 2017	**On 9 March 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SKH
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jarro instructed by Bhogal Partners Solicitors.
For the Respondent: Mr Bates Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a hearing at Field House on 31 July 2017 the Upper Tribunal found a judge of the First-tier Tribunal had made a material error of law and set aside that decision. The matter has been listed for a Resumed hearing after which this tribunal shall substitute a decision to allow or dismiss the appeal.

Background

2. SKH is a citizen of Namibia born on [ ] 1980 who claimed asylum in the United Kingdom on the basis she feared persecution if returned to her country of origin as she has no social networks in Namibia and would find it difficult to find work.
3. The appellant entered the United Kingdom lawfully as a Working Holidaymaker in 2003 but only claimed asylum in January 2016. That claim was refused on 24 January 2016.
4. There is no challenge to the rejection of the appellant's protection claim to the Upper Tribunal, meaning that aspect of the initial decision is preserved together with the findings relating thereto.
5. The appellant gave birth in the United Kingdom to a son M on [ ] 2008 and to a daughter F on [ ] 2016. Even though the children have separate fathers it is claimed they remain involved with children in relation to both contact and financial issues.
6. The children have remained in the United Kingdom; which for M is a period of nine years and in relation to F a period of two years. The child M is therefore a qualifying child in relation to which the issue is whether it is reasonable to expect the child to leave the United Kingdom.
7. It is not made out either of the children are British citizens.
8. It was submitted on the appellant's behalf that the children have developed relationships and ties within the community, especially the appellant's son who is nearly 9 years of age. Although it is claimed the children do not speak the indigenous language of Namibia it was pointed out at the hearing that the official main language of Namibia is English.
9. It is not disputed the children have formed their own friendships and that the eldest son has been able to pursue his education in the United Kingdom. It is stated they have cousins and friends in the United Kingdom and have put down roots here.
10. On behalf of the appellant, Mr Jarro submitted there are a number of factors in the appellant's favour including:

    i. The age of M, at that time being 8 nearly 9.
    ii. The best interests of the children.
    iii. The length of time the children have been in the United Kingdom; all their lives.
    iv. The fact M has been in education in the United Kingdom for three years.
    v. The fact M has undertaken primary level education.
    vi. The fact the children have never been to Namibia.
    vii. Linguistic issues and that the children only speak English and do not speak any other language.
    viii. There was no evidence that relatives could speak to them in English.

ix. The children have never been to Namibia so would not be sure how they would adapt to life in that country.
x. They have family life with cousins, friends and private life and their own network of friends and family.
xi. Although the parents may be culpable, it is not appropriate to visit the sins of the parents upon M who was born here and not here of his own making.
xii. Whilst the appellant may have a flawed immigration history this is not the fault of the child.

11. It is also argued that under paragraph 276 the mother and younger sister are also brought into consideration. The children are totally dependent upon their mother. The appellant had claimed she is distant from her family Namibia. She was brought up by her aunt from an early age and her aunt's husband abused her over a long period of time. These people are still alive. The appellant claims her father is angry with her but that she had lost contact with her elder brother and sister and other family in Namibia. It was argued that if the appellant was sent back she will be without family support and that although she indicated she has a sister, her sister claims she cannot support the appellant in Namibia as she has children of her own in the United Kingdom.
12. The appellant's concern is that if she works she would have to leave the children, including her younger daughter, which could expose the child to sexual exploitation and violence. It was indicated at the hearing there was no country evidence of a real risk arising from the same which appears to be based upon a subjective fear and desire of the appellant to avoid her daughter having the same experience she did, although such fear is not objectively made out.
13. It was argued that the fathers of the children are in the United Kingdom and that the children will be deprived of contact with their fathers and the role of fathers have to play in the children's lives. Witness statements have been provided in relation to this aspect. It was argued that even if some financial support could be provided by the father's it would not be regular and that no face-to-face contact could occur.
14. Although there was no evidence of communication problems between the United Kingdom and Namibia it was argued that the four-year-old child would not understand communication with her father on a screen and that indirect contact was not a substitute for direct contact.
15. It was argued the appellant did not know what she would do in Namibia as she is concerned about leaving the children to find work although it was accepted that it is speculation regarding what may happen.
16. It was argued the best interests of children are to remain with their mother in the United Kingdom. It was argued there was no evidence of the willingness of the family in Namibia to allow the appellant and the children to return to live with them or to provide for her. It is argued that the article 8 ground has been made out and that any interference with a protected right to family or private life will be disproportionate.

17. On behalf of the respondent Mr Bates submitted that although a letter had been provided, purportedly from M, on the morning of the hearing, concerns regarding identity of signatures and questions regarding whether the statements that had been introduced were from the individuals concerned, arose.
18. It was submitted by Mr Bates that although there had been reference to the fathers of the children there have been no findings the fathers have a genuine subsisting relationship with the children and no evidence the fathers have ongoing contact with their children.
19. It was submitted there was inadequate background information relating to Namibia provided by the appellant to support her claim; particularly the assertion that the use of the English language would not get the children by in Namibia. English is the official language of that country.
20. It was submitted the protection findings are preserved and that the First-tier Tribunal found there are no problems in the appellant returning as a lone parent.
21. In relation to family support; it was found at [44] of the First-tier Tribunal decision, when considering risk from family members:

> 44. I am satisfied that the appellant is not at risk from her immediate or extended family because there have been no threats made against her, according to her evidence since she was aged 9 ½ years old. She did not leave Namibia until May 2003 when she was 23 years old and her evidence is that there were no threats of the preceding fourteen years. I am satisfied that the appellant does have family to whom she can turn to for support in Namibia in the form of the sister with whom she had contact until 2014. She said that that sister accepted that what she had said about the abuse was true and was sorry for not believing her. She said that they did not part on bad terms.

22. The First-tier Tribunal Judge also found:

> 45. I am satisfied that the appellant was being truthful in her asylum interview when she said that she did not fear anyone or a group of people upon her return to Namibia. She just did not want to go back because she would have no accommodation and would not be able to get a job. I note that the grounds of appeal also reiterate this reason as well as the fact that her son has been here for over seven years. There was no mention of her fear of her family and no mention that the refusal letter was wrong to say that her aunt and uncle were dead. I am satisfied that this fear of her family and her denial of the deaths of her aunt and uncle is a fabrication to bolster a week asylum claim.
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> 46. I am satisfied that even if the appellant did have a well-founded fear of her family, the objective evidence supplied by her representatives at page 21 makes it clear that there are specialist Gender-based Violence Protection Units staffed by police officers, social workers, legal advisers and medical personnel who are trained to assist those in the position of the appellant. There are special courtrooms in the courts and shelters for those who need accommodation, albeit on an as needed basis. The objective evidence goes on to confirm that child abuse is a serious problem and crimes against children are prosecuted and there are social workers throughout the country to address these cases. There is nothing in the objective evidence supplied by the representatives to demonstrate that the appellant would not be able to seek the protection of the authorities if she was threatened by her family.

> Nor is there anything to say that she will not be able to obtain employment without qualifications. There is no evidence before me to say that the appellant will be at risk as a lone woman or as an unmarried mother of two children.

Discussion

23. Although the children do not appear to have relevant cultural ties to Namibia, save through their mother, SKH grew up in that country and will have a clear level of understanding of the cultural norms of Namibia. To the extent the children have been exposed to their mother exercising such norms, but within the United Kingdom, or others living in the UK with connections to Namibia, it is possible the children have some level of understanding and awareness of the same although not to the degree of a child who has grown up in that country living in that environment on a day-to-day basis.
24. The fact the appellant wishes to remain in the United Kingdom was demonstrated by her argument in support of the language issue. Although there are regional dialects in parts of Namibian the official language is English which all members of this family unit speak, read, and write. It is not made out the children do not possess the necessary language skills to enable them to properly function within the education system or society of Namibia.
25. Neither of the children have attended education in Namibia. The elder child has only been educated in the United Kingdom where he has commenced his primary education. The other child is too young to enter compulsory education.
26. Neither party referred to country specific information that can be said to be determinative. Namibia is a sparsely populated but stable country.
27. The appellant has not adduced evidence to show that removal would give rise to a significant risk to the children's health. There is no evidence that the children are undergoing a course of treatment for a life threatening or serious illness and treatment will not be available in the country of return.
28. The appellant relies on the differences in the quality of education, health and wider public services and in economic or social opportunities between the UK and Namibia in addition to the alleged family circumstances. Whilst it is accepted there are material differences it was not made out that the effect of the children having to adapt and live in such an environment would have any long term detrimental consequences. It was also not made out that there is no available family support in Namibia who could assist the appellant with care to enable her to work without putting the children at any danger. Whilst the appellant's subjective fear is recorded this has not been shown to give rise to real risk to the children.
29. It is accepted that during the time the child M has lived in the United Kingdom he will have put down roots and integrated into life in the UK as this is his birth country. Significant weight must be given to such a period of continuous residence. It is not disputed that the longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more

30. The respondent's guidance states that such strong reasons may arise where, for example, 'the child will be returning with the family unit to the family's country of nationality, and the parents have deliberately sought to circumvent immigration control or abuse the immigration process – for example, by entering or remaining in the UK illegally or by using deception in an application for leave to enter or remain. The consideration of the child's best interests must not be affected by the conduct or immigration history of the parent(s) or primary carer, but these will be relevant to the assessment of the public interest, including in maintaining effective immigration control; whether this outweighs the child's best interests; and whether, in the round, it is reasonable to expect the child to leave the UK. In other circumstances, the child's best interests may outweigh the public interest in maintaining effective immigration control, even where the parents have been guilty of deliberately seeking to circumvent the latter or abuse the immigration process. For example, such a situation may occur when the child has been resident here for seven years or more, and is suffering from a serious medical condition that is being successfully managed in the UK, but could not be so managed in the country of proposed return'.
31. In this case the appellant and two children will be returned to Namibia as a family unit. There is evidence of family in Namibia to assist. The appellant entered the UK lawfully but overstayed. The eldest child M wishes to remain in the UK. The children's fathers are in the UK and it is said maintain contact with them and provide some financial support.
32. Having considered all the evidence in the round including the guidance from the Court of Appeal it is found that notwithstanding the appellant's own poor immigration history the elder child has been in the United Kingdom for nine years. It is not made out that the countervailing factors relied upon by Mr Bates are of sufficient strength to counter the position that after such a length of time with the extent of the personal integration, including between each of the children and their father's, it is not reasonable in all the circumstances to expect the elder child to leave the United Kingdom. I find that to do so will be a breach of a protected right pursuant to article 8 ECHR on the basis it would not be reasonable or in the child's best interests for him to leave the United Kingdom to re-establish a life in Namibia.
33. I find that the eldest child's primary carer is the appellant, SKH. I find that the family life that exists between the appellant and her oldest son will be lost if the child remains in the United Kingdom whilst his mother is removed. I find any such interference, in light of the loss of the child's primary carer and absence of evidence of suitable alternative care, to be disproportionate. The appellant's daughter, sibling of the appellant's son (albeit from a different father) is also reliant upon her mother for her care and with whom she has family life recognised by article 8 in addition to that with her brother. I find that separating the child from her brother will be a disproportionate interference with such family life.
34. It is also relevant to consider the appellants past. Even if those who sexually abused her as a child are now dead, and the risk to her children of experiencing similar abuse may not be objectively made out, the fact of the matter is the

appellant has a strong subjective fear which she portrays as being real. It is not made out that it is in the children's best interest for them to be in environment where their mothers subjective reaction may have a detrimental impact upon their general wellbeing.

35. Having looked at matters afresh I substitute a decision to allow the appeal.

Decision

36. **I remake the decision as follows. This appeal is allowed**

Anonymity.

37. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Signed…….
Upper Tribunal Judge Hanson

Dated the 8 March 2018