



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/02245/2013
OA/02246/2013
OA/02247/2013
OA/02248/2013

THE IMMIGRATION ACTS

**Heard at Manchester
On 8 October 2014**

**Determination Promulgated
On 14 November 2014**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

**DENISE GIKWISI NSENGA
SABINE INGABIRE
NELLY UMOTONI
LAURETTE DUSHIME**

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Mr M Karnik instructed by Binas Solicitors
For the Respondent: Mr G Harrison, Senior Presenting Officer

DECISION AND REASONS

1. The appellants, who are mother and daughters, have been granted permission to appeal the decision of First-tier Tribunal Judge Lever, who for reasons given in his determination dated 1 October 2013 dismissed their appeals against the Entry Clearance Officer's decisions dated 26 November 2012 refusing their applications to settle in the United Kingdom with the first appellant's husband Tony Murinzi (the sponsor) and three of their five children, the second, third and fourth appellants. The appellants are nationals of Rwanda where they live.
2. The sponsor and first appellant have two sons living in the United Kingdom. As with their father, they were born in Rwanda and joined him here in December 2002. The eldest was born in March 1996 and the younger in October 1998. The sponsor had fled the country in April 2001. He was granted exceptional leave to remain that year. He and his sons were granted indefinite leave to remain in October 2008 and were naturalised as British citizens in October 2011.
3. The first, second and third appellants were previously in the United Kingdom between 2003 and 2005 when they were administratively removed to Rwanda. The sisters were born in November 1994 and October 1998. Their mother was born in August 1971. The fourth appellant was born in the UK in January 2004. The sponsor visited his family in Rwanda in March 2012 for just over two weeks.
4. The first appellant's application was refused under paragraph 320(11) of the Rules on the basis of deception practised previously when she applied for leave to remain in December 2003. The validity of the marriage was not accepted based on concerns about the marriage certificate and furthermore it was not accepted that the relationship was genuine and subsisting or that the parties intended to live together permanently in the United Kingdom.
5. The application was additionally refused with reference to the financial requirements in Appendix FM based on a failure to submit the required documentation to demonstrate the threshold of £24,800. The Entry Clearance Officer was also concerned that there would not be adequate accommodation without recourse to public funds.
6. The third and fourth appellant's applications were rejected because the Entry Clearance Officer was not satisfied as to the relationship and it was not accepted that the financial requirements had been met.
7. Although it is not a matter which appears to have been raised before the First-tier Tribunal or indeed before me, the second appellant's application was refused with reference to paragraph 297 rather than the requirements in Appendix FM introduced on 9 July 2012. The Entry Clearance Officer had found no trace of the applications by the first, third and fourth appellants. He also noted the timing of the second appellant's application, three days before her 18th birthday. He therefore refused it on the basis that there was no evidence that her mother was being admitted to the United Kingdom for settlement and accordingly did not accept that the provisions of paragraph 297 in respect of sole responsibility had been met nor that there was

evidence of compassionate circumstances. The adequacy of accommodation and financial provision was also rejected with reference to the relevant subparagraphs of 297 and in addition Article 8.

8. Paragraph 297 is under part 8 of the Immigration Rules. Paragraph A280(b) provides that *inter alia* paragraphs 297 to 230 continue to apply to all applications made on or after 9 July 2012. These paragraphs apply in their current form unless an additional requirement by reference to Appendix FM is specified. There is no additional requirement in relation to paragraph 297.
9. The error by the Entry Clearance Officer in applying paragraph 297 was that the second appellant was not seeking leave to enter in any of the circumstances in paragraph 297(i). Specifically in respect of paragraph 297(i)(e), the sponsor has not had sole responsibility for the second appellant's upbringing or that there are serious and compelling family or other considerations which make exclusion of the second appellant undesirable.
10. The grounds of appeal relating to the second appellant make no reference to the nature of the decision but I do not consider this aspect has any material bearing on the case.
11. A consequence of this aspect however is that the appeals proceeded before the First-tier Tribunal Judge based on a misapprehension as to the funding requirements under Appendix FM. The first appellant correctly indicated in her application she needed to demonstrate with reference to the three accompanying children an income before tax by the sponsor of at least £27,200 a year and not the lesser sum referred to in the decisions by the ECO relating to the other appellants. Here again I do not consider anything material turns on this aspect; it is accepted that the appellants are unable to meet the requirements of the rules even based on the lower sum. It is odd that the point was not picked up but it has no bearing on my enquiry into whether the First-tier Tribunal erred in law.
12. In dismissing the appeals Judge Lever reached these conclusions:
 - (i) The case was not appropriate for refusal under paragraph 320(11).
 - (ii) The decision of the Administrative Court in *MM* [2013] EWHC 1900 does not provide a basis for the Immigration Rules to be disregarded. This was the extent of the judge's findings under the Rules.
 - (iii) As to Article 8 -
 - (a) family life existed between the first appellant and sponsor and between him and the appellant children and the two siblings living in the United Kingdom;

- (b) the Entry Clearance Officer's decision did not interfere with the current or previous family life of the parties living in separate countries for the previous twelve years;
- (c) the decision interfered with the future and "more integrated" family life if the only reasonable place to enjoy that life was in the United Kingdom;
- (d) such interference was lawful and by implication for a legitimate aim;
- (e) in the context of the proportionality exercise, there was no evidence as to specific difficulties or adversity in any aspects of the children's lives either in Rwanda or the United Kingdom;
- (f) of the children in the United Kingdom, one was 17 and soon therefore to pass into adulthood;
- (g) there were no "obvious fetters or bars" to the sponsor and the boys in the UK moving to Rwanda. The bar to the appellants moving to the United Kingdom was their failure to meet the Immigration Rules;
- (h) no evidence had been provided to demonstrate that in acquiring British citizenship the parties had been forced to relinquish their Rwandan nationalities;
- (i) the sponsor had recently been in Rwanda and had not expressed any concerns or worries regarding the situation for himself or family there;
- (j) the natural inference was that the best interests of the children were to live with both parents, nothing indicating on balance that those best interests were served by their being together in the United Kingdom rather than in Rwanda;
- (k) there was nothing inherently unreasonable in the sponsor and his sons if they were moving to Rwanda to unite the family.

Thus with the above matters taken into account the judge decided that the interference was proportionate.

13. The renewed grounds of application rely on the grounds raised before the First-tier Tribunal. The first was that it was necessary for the First-tier Tribunal to decide as a separate step whether EX.1 of the Immigration Rules applied and whether it was reasonable to expect the children to leave the United Kingdom. The failure to do so was an error.
14. The second ground argues that the Tribunal erred in its approach to the evaluation of proportionality as to what could reasonably be expected of British children under Article 8. Reference is made to *Campbell* (exclusion; Zambrano) Jamaica [2013] UKUT 147 (IAC) and *MA and SM* (Zambrano: EU children outside EU) Iran [2013] UKUT

380. The latter cases cited were a specific reference to the concession on behalf of the Secretary of State by Mr Deller. It is also argued that in assessing Article 8 the Tribunal had failed to recognise the “European dimension” despite the submissions before it. The further ground advanced is that the Tribunal had failed to consider the relevance of *R (MM) v SSHD* [2013] EWHC 1990 (Admin) with reference to the sponsor’s employment earning £15,000 per year and savings in an account of some £17,500.

15. The renewed grounds raise again the application of the Administrative Court’s decision in *MM*. It is also argued that the treatment of the UK children’s British citizenship by the Tribunal had been an error with reference to the judge’s expectation that they should leave the United Kingdom and the European Union in order to live together as a family. The concept of voluntary return can have no part to play where children are concerned.
16. I am grateful to the parties for their submissions. They were focused on the relevance of the British citizenship of the two sons living in the United Kingdom to the judge’s findings that it would be reasonable for them to relocate with reference to the Secretary of State’s concession on this aspect.
17. I heard no submissions on the first ground regarding the application of EX.1. This is misconceived. In order to succeed under s.E-ECPT of FM the first appellant would need to demonstrate that she had sole responsibility or that the parent with whom the child lives must not be the partner of the applicant. EX.1 is of no application in such circumstances.
18. It was the decision in *MM* coupled with the fact of the split family that led UTJ Goldstein to grant permission to appeal. The Court of Appeal has overturned that decision and clarified in *MM & Ors, R (On the Application Of) v SSHD* that the new minimum income requirement provisions were capable of being compatible with Article 8 rights of the UK partners and others if relevant. This disposes of the second ground.
19. I turn to the third ground which is the challenge to the proportionality exercise. In my view the grounds conflate the *Zambrano* principles with the Article 8 considerations. As was made clear in *MA and SM*, such principles involve distinct different enquiries. There is no question in this case that the two sons in the United Kingdom were compelled by the Entry Clearance Officer’s decision to leave the United Kingdom with their primary carer who was himself compelled to leave. They are all British citizens and under no such compulsion.
20. The proportionality enquiry is a separate one. Having regard to the facts of this case, I am persuaded that the judge erred when he sought to resolve the tension between the family life of the parties and the public interest in maintaining immigration control by finding it reasonable for the two sons in the United Kingdom to relocate to Rwanda. Although their recently acquired British citizenship has limited relevance, the fact of their physical presence in the United Kingdom since 2002 makes it difficult

to see how it is reasonable for them to return to a country which they have only visited once since they came to the United Kingdom at a young age.

21. The question I need to ask is whether the error is material. It is evident from my reading of the determination that the judge did not find the proportionality exercise an easy one. In my view the approach to proportionality must be through the reality of the situation; this family has lived apart except for a brief period since 2002. The only bar to reunification is an inability to meet the requirements of the Immigration Rules. There is nothing in the circumstances of the parties, taking account of the length of time they have been separated, to demonstrate that there is a compelling feature that could render the interference occasioned by the decisions under appeal disproportionate. The sons have flourished in the UK. There is no evidence that the children in Rwanda have needs that cannot be met by a continuation of the arrangements that have prevailed for some years. There is no indication that their mother is unable to care for them.
22. The best interests of the children which are a primary consideration. They should be together as a family unit as found by the judge. Such interests are of less force however in the light of the lengthy separation. The natural desire of this family to be reunited is understandable but best interests do not always dictate the proportionality outcome. The appellants in this case have not shown a compelling case for reunification notwithstanding an inability to meet the requirements of the rules. As the financial circumstances of the sponsor improve it will be open to the appellants to re-apply for entry clearance.
23. Although I am persuaded that the judge erred in the proportionality exercise I consider that on the evidence, there is no realistic basis on which the appeal could succeed. The decision dismissing the appeals does not require to be set aside and therefore stands.
24. These appeals are dismissed.

Signed

Date 12 November 2014



Upper Tribunal Judge Dawson