



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

Appeal Number: HU/11739/2015
HU/11745/2015
HU/11748/2015

THE IMMIGRATION ACTS

**Heard in Liverpool
On 4 August 2017**

**Decision & Reasons Promulgated
On 5 September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

**Master KITM, Miss MBNM, Mr MIM
(ANONYMITY DIRECTION MADE)**

Appellant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. B. Adewusi, Crown & Law Solicitors
For the Respondent: Mr. McVeety, Home Office Presenting Officer

DECISION & REASONS

1. The appeals came before me for an error of law hearing on 28 April 2017. In a decision and reasons dated 22 May 2017, I concluded that the First tier

Tribunal Judge had erred materially in law and I adjourned the appeals for a hearing *de novo*. A copy of that decision is appended.

2. The resumed appeals came before me for hearing in Liverpool on 4 August 2017, when I heard evidence from the Sponsor and her husband, [NA] and submissions from both parties. I have recorded the evidence and submissions in full in my record of proceedings.

Hearing

3. The Sponsor confirmed the contents of her statement, signed at the date of the hearing. She stated that in respect of the available accommodation that there were 3 large bedrooms and 2 sitting rooms and that it was envisaged that the children would sleep in two rooms – one for the 2 boys and one for her daughter. When cross-examined she stated that she joined her husband in the UK in January 2014 and that at that time, her children were living with her sister, Juliet, who lives in Benin city. It was put to her that in her witness statement she said that the children were living with her sister but at the last hearing she said that the children were living with her cousin, Godwin since December 2016 and that they had had problems with her sister. It was also put to her that in her husband's witness statement dated 1 June 2016 he said that then they were living with her cousin. The Sponsor stated that their problems had started in June and that she thought they moved in July/August but still had some of their stuff there e.g. clothes until December.

4. The Sponsor stated that the children were now living on their own in Benin City on Eastman St. The eldest is 17 and they had been on their own since December 2016 when Godwin found a house for them. She said that the eldest had just finished his exams and the younger two are going to school. She said that she made the decision as to which schools they attend. The Sponsor said that she had been back to Nigeria in February 2017. From examination of the passports, there was an entry clearance stamp on 8.2.17 to Lagos and exit on 20.2.17 in the Sponsor's husband's passport. The Sponsor's passport shows re-entry to UK on 21.2.17. The Sponsor stated that the purpose of the visit was to stay with her children and that they lived with them for 2 weeks in Benin and had slept at their house for a couple of nights. The Sponsor stated that they had stayed with her uncle because she was worried about her husband being kidnapped. On the other nights the children came to her uncle's house to stay with her and her husband.

5. The Sponsor stated that she had started to work in the UK in November 2014 and had worked since that time although she had changed her job. She had lived with her husband since her arrival and prior to that she had lived at 30 Irogwe St. in Benin. She stated that she had not applied for her children to come with her at the same time because her husband could not meet the financial requirements of the Rules. In re-examination, Mr Adewusi asked

why she had concerns as to her husband's safety in Benin and she stated that the area of Benin where her children live is not safe and as a white man there are not many there and the area her uncle lived in is more posh. She did not want her husband to have problems as a foreigner. In respect of their living conditions, she stated that they had a mattress on the floor where they sleep. This is apparent from the photographs of her visit. She said that the children could not stay with her uncle because he is married with a wife and children.

6. The Sponsor's husband, [NA] then gave evidence and confirmed the contents of his statement. In cross-examination by Mr McVeety, he was asked to confirm whether the reason he amended his statement was because the children are living by themselves now, which he confirmed. When asked when the children left the Sponsor's sister he stated that he was not sure but he thought it was in 2015 if he remembered right. [NA] confirmed that they went to Nigeria in February 2017 and that they had stayed with a family member - one of the Appellant's uncles. He also confirmed that the children came to stay with them at that time. He said in response to the question as to how often they spoke to the children on the phone that there was not always power and it can go down for a couple of days. [NA] said he was still employed in the same job since 2007.

7. In re-examination by Mr Adewusi he said that he did not apply for the children to come at the same time as the Sponsor because his wages were not sufficient in terms of the immigration laws, but they hoped the Sponsor could start work straight away and could then apply when they had enough money. He said it took about a year for her to find work and in the meantime he was the only provider and they had to save up. He confirmed that the children are living on their own. [NA] said that his stepson passed out on the street last week as he was not eating as the person supposed to be giving them food was not doing that. He added that one of their aunts belted them: she is from Lagos and they were staying in her family's house. [NA] said that he had had stern words with her when he found his stepdaughter crying; that he had heard argument and slaps and then when she came in crying he had asked her. He said that apparently it happened to the youngest son as well but he went outside so he did not get the chance to see him. When asked who made the decision about the schooling of the children he said that he was him and the Sponsor. [NA] said that everything that is needed they arrange and that they tell the children if it does not happen to tell them but the children are scared to tell them as they are scared of being belted.

8. In response to my questions, [NA] confirmed that he and his wife are paying for the children's accommodation and that they transfer money via a man rather than Western Union because it is cheaper ie. he charges £10 - and they send £200-£300 every month depending on the exchange rate. [NA] said that he sends the money to his wife's cousin, Godwin and his wife do the shopping for the children and take it to them. He said that they left rice for

the children but Godwin and his wife took it. He said that he and his wife had met on the internet and then in Manchester. He was asked again about when the children moved to live from Juliet to Godwin and whether this was in 2015 or 2016 and he said that he has a very bad memory, that he suffers from depression and has had a breakdown.

9. Further to my questions, Mr McVeety asked what Godwin's wife is called, to which he replied that she is called Patricia. He was then asked why the Western Union transfers are all in the name of Patricia not Godwin and he said that this was because it will be her who picks the money up and that she takes the ID and everything. Mr McVeety said that on those documents there is a question Patricia needs to ask and that is: what is her sister's name? The answer is Mabel but Mabel is not her sister's name because Mabel is the Sponsor and she is the cousin of her husband. [NA] stated that Nigerians all call each other brother and sister even if they are only friends. When asked why they did not send money directly to the elder boy, [NA] said that they are trying to get a bank account set up for him but it just does not happen straightaway because he is under 18 and needs a signatory. Mr McVeety put it to the witness that his wife has other family in Nigeria so why not send to another uncle or someone who is trustworthy? [NA] said that he is in Lagos and he did not know if he could transfer money on to Benin because they have never done it this way. He said that the person who hit one of the children is called Nata and she is his wife's uncle's wife's sister and that this had taken place in the house they were staying in, in Benin. He said that she lives in Lagos but came when they were there. When asked why the children are living on their own rather than where he and his wife stayed in Benin he said that the house in which they are staying is being built and belongs to another member of the family and they would put the children there if they could. He said that that owner lives in Saudi Arabia and they were granted the privilege of staying there as a courtesy because there was nowhere else they could stay in Benin. He said he did not have a contract to show that they were paying rent for the children's accommodation available for inspection at the Tribunal and that they send money to Patricia to pay the landlord.

10. There were no further questions or re-examination.

11. In his submissions, Mr McVeety asserted that, from the evidence in the witness statements and the oral evidence there are serious issues regarding a lack of consistency. The Sponsor gave many different answers as to when matters occurred: June, then December, then between the two. He pointed out that there were no up to date witness statements and no up to date evidence and if the children were living on their own, as was asserted in oral evidence, there is no documentary evidence. The whole story does not make sense. If the children are living on their own and vulnerable then why are the Sponsor and her husband continuing to send money to someone who is stealing it. He submitted that the Upper Tribunal has not been given a credible or consistent

account as to who is looking after the children, where they are and where they are living and that there are massive inconsistencies as to how and when they moved. Consequently, the Sponsor cannot show sole responsibility and on the balance of probabilities the test is not met

12. In the alternative, Mr McVeety submitted that the adequacy of financial support was in issue. In respect of [NA]'s finances, employment by itself at the date of consideration would not be enough; there was no employer's letter in accordance with Appendix FM-SE and it is necessary to meet every single requirement in accordance with paragraph 2(c) *viz* length of employment, gross annual salary and employment start date. The Sponsor had not worked for more than 6 months at the date of decision and thus fails under Appendix FM-SE, which provides that she needs to show she has worked for over 12 months, as identified in the refusal decision. He accepted that the financial requirement is met otherwise based on the couple's monthly salaries it exceeds £27,000, but the evidential requirements of the Rules were not met at the date of decision. Mr McVeety submitted that it would be necessary to make a new application in order to succeed under the Immigration Rules and Appendix FM-SE.

13. In respect of Article 8 outside the Rules, Mr McVeety submitted that this only comes into play if I were to find the Sponsor has sole responsibility for her children but that the financial requirements cannot be met and that Article 8 is not a general dispensing right. He submitted that it would be proportionate for the Appellants to make a new application for entry clearance and that an application made under the Rules would be more beneficial than one made or decided outside the Rules.

14. In his submissions, Mr Adewusi submitted that it is clear from the evidence of the couple that they do have sole responsibility, no matter who is there in Nigeria and that [NA] has visited twice despite the fact that the FCO do not advise this and he would have no reason to travel to Nigeria otherwise. Mr Adewusi accepted that only one of the visits [18.8.12-26.8.12] pre-dated the date of decision. The Sponsor left Nigeria on 3 January 2014 to join her husband in the UK. He submitted that the absence of evidence eg rent receipts; a bank account; a child of 17 getting money and spending it was a cultural issue and why money is being sent to an adult. He submitted that full information as to how the money is being spent is also hard to come by as the children are scared of saying they are only getting driblets and drabs.

15. Mr Adewusi clarified that there was no new evidence before the Upper Tribunal in addition to that submitted to the First tier Tribunal and that he was seeking to rely on the evidence in the bundle previously submitted to the ECO, which includes money transfer receipts. In respect of the issue of financial support, Mr Adewusi submitted that, despite the fact that they are unable to meet the requirements of Appendix FM - SE there has been a recent

amendment to the Immigration Rules which means that if the financial requirement cannot be met third party support is permitted and this should be taken into account.

16. In respect of Article 8 outside the Rules, Mr Adewusi submitted that, based on the oral and documentary evidence the family life of [NA] needs to be considered under Article 8 of ECHR, given that the refusal impacts on his family life. His wife has been expecting the children to come and stay with her so they can all live together as a family. The children have accepted their step-father and he has sent money and taken responsibility along with his wife. As the carer of these children they intend to have the children with them in the UK and lead their private and family life fully. He submitted that the judgment in *Beoku Betts* should be considered along with the impact on the children who are not able to join their parents in the UK. Mr Adewusi sought to rely on the fact that the couple have now travelled to Nigeria twice which is costing a lot of money. Mr Adewusi submitted that the family's Article 8 rights had been unlawfully interfered with and the decision of the ECO was disproportionate with regard to maintaining immigration control to the UK.

Decision and reasons

17. The issues I am required to determine are whether the Sponsor has sole responsibility for her three children and/or whether there are serious and compelling family or other considerations which makes exclusion of the children undesirable and suitable arrangements have been made for their care and whether the financial requirements of the Rules were met: EC-C 1.6.(b) and (c) and E-ECC 2.1. The date of decision is 19 October 2015.

18. I have carefully considered the evidence of the Sponsor and her husband, which was inconsistent as to when the children ceased to live with the Sponsor's sister, Juliet. The Sponsor stated that it was in June 2016; then stated it was in December 2016 and then that it was in July/ August and finally in December 2016 they moved to live with her cousin, Godwin. [NA] stated that they moved in 2015 and then later stated that he has a bad memory and could not say whether it was in 2015 or 2016. The difficulties are compounded by the fact that the statements submitted on behalf of the Sponsor and her husband were signed and dated 4 August 2017 but it is clear that they date from an earlier time, when they were living with the Sponsor's sister and in fact are in identical terms to the earlier statements of 12 January 2016. Whilst the oral evidence of both witnesses is that the children left the home of the Sponsor's sister to move to live with the Sponsor's cousin and his wife and are now living on their own, I accept Mr McVeety's submission that there is no evidence other than the oral evidence to support this contention, which is, in any event, post decision.

19. However, the issue is not so much who the children are living with but whether, at the date of decision, the Sponsor retained sole responsibility for their care and upbringing “*whether the parent has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life*” cf. TD (Yemen) [2006] UKAIT 00049. Whilst there is some evidence of money transfer receipts and also telephone records, although these have not been particularised, there is insufficient evidence before me to find that at the date of decision the Sponsor had sole responsibility for her children. There is no letter from either her sister, Juliet nor her cousin, Godwin as to the role they play or have played in caring for the children and the Sponsor's ongoing role since she came to the United Kingdom to join her husband. For the avoidance of doubt I accept that the Sponsor is the mother of the three children but on the balance of probabilities it has not been proved that she has sole responsibility for them.

20. I further accept the submission of Mr McVeety that, at the date of decision, the Sponsor was unable to meet the financial requirements of the Rules with reference to Appendix FM-SE because she had been working for less than 12 months. Although in her oral evidence the Sponsor stated that she had started work in the United Kingdom in November 2014, the evidence before the ECO dated from December 2014 up to July 2015, when the applications for entry clearance were submitted. Mr McVeety accepted that the financial requirements of the Rules were now met, taking account of the income of both the Sponsor and her husband, however, this was not the position at the date of application or decision.

21. It follows from my findings above that the appeals under the Immigration Rules fall to be dismissed.

22. I have gone on to consider whether there are compelling circumstances that justify consideration of the appeals with regard to Article 8 of ECHR, outside the Immigration Rules cf. *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387. The evidence of the Sponsor and her husband is that the children are now living on their own, however, they were inconsistent with each other's evidence as to when the children left the home of their aunt, Juliet to live with the Sponsor's cousin, Godwin and it is entirely unclear when the children left Godwin's home to live on their own. [NA] made serious allegations in his oral evidence that one of the children had been beaten by a female relative whilst they were visiting Nigeria, but there is no supporting evidence e.g. by the Sponsor in her evidence, or in the form of a letter or statement from the child concerned. In his witness statement, [NA] made the even more serious allegation that his stepdaughter had been attacked “*by her nephew sexually and had to run to my wife's cousins for safety*” but he did not make any reference to this incident in his oral evidence and again, it was unsupported by any other evidence e.g. from his wife or from the child concerned.

23. Consequently, whilst I accept that there is a genuine and subsisting relationship between the Sponsor and her children so as to amount to family life and that the Sponsor's husband is fully supportive of the applications for entry clearance and I understand that the ongoing separation from the children is causing both the Sponsor and her husband distress, I cannot accept the veracity of their evidence absent support from reliable sources, due to the inconsistencies set out above and the lack of clarity as to the children's current circumstances, caused at least in part by the failure of their representatives to put forward up to date witness statements and evidence.

24. I have concluded, in light of the above, that there are no compelling circumstances to justify consideration of the appeals outside the Immigration Rules. It remains open to the Appellants to make new applications for entry clearance, which may well succeed if properly and reliably evidenced.

25. However, for the reasons set out above, the appeals cannot succeed with reference to the Immigration Rules as at the date of decision.

26. The appeals are dismissed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

4 September 2017