



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/20204/2016  
HU/20206/2016  
HU/20209/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 31 October 2018

Decision & Reasons Promulgated  
On 8 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

RJM (FIRST APPELLANT)  
CJM (SECOND APPELLANT)  
HFN (THIRD APPELLANT)  
(ANONYMITY DIRECTIONS MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - PRETORIA

Respondent

**Representation:**

For the Appellants: Mr T Bahja, of Counsel instructed by Messrs Lords Solicitors  
For the Respondent: Mr P Duffy, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal, with permission against a decision of Judge of the First-tier Tribunal Nightingale who, in a determination promulgated on 25 August 2017, dismissed their appeals against the decisions of the respondent dated 22 July 2016

refusing them entry to Britain as dependent children with discretionary leave to remain.

2. The first two appellants are the daughters of the sponsor, [MM], who came to Britain in 2006 as a student and thereafter overstayed. She at present has limited leave to remain on the basis of her marriage to [HU], a British citizen. They have two daughters born in 2009 and 2010.
3. The first two appellants were born on 16 July 2001 and 8 March 2004. The third appellant is the nephew of the sponsor who was born on 5 November 2014. The children were therefore 15, 12 and 2 at the date of the decision, they having applied sometime before that date. Interviews appear to have taken place in April 2016. They were refused under the Rules because the financial requirements of the Rules could not be met and because it was not accepted that the sponsor's partner earned the required income of £27,200. The refusal notice also stated that the Entry Clearance Officer, while accepting that the first two appellants were related to their mother, was not satisfied that the evidence provided showed that she had sole responsibility for them or that she was in regular contact with them and their guardian in Tanzania. No details had been provided as to the whereabouts of their father or what part he played in their life and it was stated that it was considered that they had an established family life in Tanzania and there was no reason why that could not continue.
4. The judge considered evidence from the sponsor and her husband and in paragraph 12 noted that it was the sponsor's evidence that although she arrived in Britain in 2006 she had visited Tanzania later that year and had visited again in January 2010 for nine months and in November 2014. She had first made attempts to get visas for the three appellants in 2014 and then asked a friend, [G], to be the guardian for the three children - the third appellant was the son of a "cousin sister" who had looked after the sponsor's own two children when she had come to Britain in 2006. The sponsor's two daughters were in a boarding school but would holiday with [G].
5. The judge set out the relevant law and at paragraphs 26 onwards set out her findings of fact and her reasons. She correctly stated that she "had an eye" to their best interests and welfare as a primary consideration. She stated that they could not meet the requirements of the Immigration Rules for entry. The specified documents had not been produced to show that the financial requirements could be met. The judge pointed out that the sponsor was not settled and that her husband did not meet the definition of parent as set out in paragraph 6 of the Immigration Rules as there was no indication that the children's father was dead. The sponsor had merely stated that she is unaware of the whereabouts or circumstances of the first and second appellant's father. The judge pointed the third appellant's father was alive and had written an affidavit in support of the appeal. The judge stated that the third appellant must fail under the Rules as the sponsor was not his parent and that the family relationship was not evidenced on the documents, although the judge said that she was prepared to accept that the third appellant's mother was the niece of the sponsor. There was no evidence moreover of any adoption, legal or de facto, of the third appellant by the sponsor.

6. The judge stated that she was satisfied that since at least 2014 when the third appellant's mother had died, the sponsor had had sole responsibility for the first and second appellants' upbringing and that the sponsor and her husband made the major decisions for the appellants. She noted the communication with the children's schools since 2015 but stated that it appeared that [G] - the friend with whom the children were living - had taken on day-to-day care for the appellants and also that the first and second appellants had been at boarding school and consequently their care had been largely in the hands of teachers and educational professionals rather than in the hands of the sponsor.
7. The judge accepted that the sponsor had taken on responsibility for the third appellant and that insofar as a child of 2 needed any assistance she would provide it. She stated that there is a presumption of family life enjoyed between parents and minor children and she was satisfied that that family life existed and, to a lesser extent, that the sponsor took on a caring role for the third appellant. She stated that family life had been enjoyed since 2010 by means of visits and communication through modern methods but the interference with family life was not caused by the decision appealed, but by the sponsor's decision to leave the children in 2006 and settle in the United Kingdom and start a new family here. She accepted that the sponsor returned to Tanzania to visit her children periodically and had stayed with them for extended periods. However, he found that there had been a very considerable delay in making any application for the appellants to join her. There had been no explanation for her decision to leave the first and second appellants for most of their lives in the care of her niece rather than returning to Tanzania to care for them herself, or applying for them to visit her in the United Kingdom. She stated that the Entry Clearance Officer's decision did no more than maintain the status quo.
8. The judge stated that although she accepted that ideally the sponsor and her husband would wish the appellants to join them in the United Kingdom, she would regard the decision as proportionate. She said:-

"31. ... There is nothing in the circumstances of these children which suggests that their welfare is adversely affected by their mother's residence in the United Kingdom. They are cared for and are in education, the first and second appellants, and the third appellant is cared for by a family friend. The first and second appellants have lived in Tanzania for all their lives and are familiar with the country, culture and customs and the education system in which they are enrolled. None of these appellants appear to have any health problems beyond the normal childhood illnesses to be expected. I accept that they are likely to be English speakers, since English is one of the national languages of Tanzania, but the maintenance requirements of the Immigration Rules cannot be met. It cannot therefore be said that these children are self-sufficient.

32. I find nothing unreasonable in the suggestion that these children continue to enjoy their family life with the sponsor as they have for the past eleven years which is by way of ongoing contact, family visits and financial support. It is, of course, open to these appellants to make a fresh application once the maintenance requirements are met. In the meantime, I can find nothing on the circumstances before me which compels the grant

of leave to remain outside of the Immigration Rules so as to give effect to the respondent's Article 8 obligations. So far as any interference has been caused with family life here, I find it to be proportionate to the lawful aim pursued; namely the maintenance of a fair and effective immigration control so as to safeguard the economic wellbeing of the United Kingdom."

The judge therefore dismissed the appeal.

9. The grounds of appeal argue that the case should have been considered outside the Rules as although it was accepted that paragraph 297 of the Rules and the Immigration Directorate Instructions set out that where the sponsor mother was not yet settled with permanent status in Britain, this was a case which cried out for consideration outside the Immigration Rules and for the exercise of discretion. It was argued further that the judge had found that the sponsor had sole responsibility for the children and the grounds therefore appeared to argue that the judge had not taken into account the fact that the sponsor's family friend [G] had stated that she was unable to assist further as she needed to devote more time to her own children. Emphasis was placed on the ages of the children and it appears that it was argued that there were compelling and compassionate reasons which would mean that the children should be granted entry clearance although the phrase from Macdonald's Immigration Law & Practice which was quoted in the grounds refers to the refugee family reunion policy (page 24 of the bundle). It was argued that there were the compelling family circumstances required by the Rules and reference was made to Section 55 of the Borders, Citizenship and Immigration Act 2009. It was argued that the judge had erred in her approach to the issue of Article 8 outside the Rules and had not, as required, taken into account the impact on the whole family unit.
10. Mr Bahja referred to the findings of the judge that the sponsor had sole responsibility for all the children and that family life existed and stated that the judge had erred in dismissing the appeal on Article 8 grounds. He referred to the reasoning of Upper Tribunal Judge McWilliam who had granted permission to appeal. Upper Tribunal Judge McWilliam had stated:-

"The children were healthy. They had not lived with the sponsor since 2006 when she came here to the UK. The third appellant's father was alive, and the judge did not accept that the first and second appellant's father was deceased. However, it is arguable that in the light of the finding that the sponsor had sole responsibility for the children this was a factor that was not properly put into the proportionality assessment. It is arguable that there was evidence that [G] was no longer able to look after the children which the judge did not arguably engage with".
11. Mr Bahja argued that the judge had not properly placed into the balancing exercise the finding that the sponsor had sole responsibility and stated that the judge had erred when stating that modern means of communication would mean that family life could be continued. He referred to the judgment in **AP (India) v SSHD [2015] EWCA Civ 89** where it stated that young students usually continue to form an important part of the family in which they have grown up and so gravitated to their homes during the holidays, and upon graduation, while they seek to "make their

own way". There should therefore be careful consideration where that type of issue existed.

12. That judgment had also gone on to state:-

"The idea that this family's family life (as it existed before) should be maintained by telephone, other forms of communication and occasional visits, as the FTT considered possible in paragraph 31 of its judgment, is to my mind wholly unrealistic (McCombe LJ)".

13. The grounds also referred to the letter from the sponsor's friend [G] in the bundle.

14. In reply Mr Duffy pointed out it was accepted that the Rules were not met and that therefore the relevant test would be that of exceptional circumstances, these being defined in GEN IDI 3.2(2) in Appendix FM of the Rules which referred to "justifiably harsh consequences". He pointed out the children could live with [G] although two were in boarding school, and that the younger was only aged 2. He stated there was nothing to show there were justifiably harsh consequences. He referred to the decision in the judgment of McCombe LJ in **AP** but stated that that related to entirely different circumstances as not only were the children in that case older and the family had all been living together in India and it was not a case of a mother leaving her children to come to Britain and thereafter overstaying and therefore not seeing them for many years. He referred to the sponsor's immigration history and pointed out that she could have returned to be with the children at any time but had not done so.

15. He said that the judge had been slightly unclear with the finding regarding family life as she did refer in paragraph 31 to the fact that she did not accept that interference with family life was caused by the refusal of entry clearance. He pointed out that [G] had not said that she would abandon the children. It was therefore not a material error of the judge not to have dealt with that. He said that in any event there was the prospect of a further application being made. The children, in any event would not be entitled to anything other than limited leave as the sponsor only had limited leave.

16. In reply, Mr Bahja emphasised the decision in **AP (India)**, emphasised the importance of a balancing exercise rather than the issue of the interruption or threat to family life.

### **Discussion**

17. I consider that the judge did properly consider all relevant factors in this case. It is of note and she was entitled to place weight on the fact that the sponsor, having come to Britain, overstayed and that that meant that she had been unable to make regular visits to the children. There is reference to the sponsor having visited Tanzania in 2010 and 2014, however it does appear that she was doing that at a time when she did not have leave to remain in Britain, but in any event she was not in a position to make applications for the appellants to come here. The maintenance requirements of the Rules were not met and there seems to be no attempt to indicate to the judge that they could be met. Moreover, there was nothing to indicate whether or not the

accommodation requirements of the Rules could be met for three further children. Although reference was made to the judgment in **AP** the reality is that that case referred to a completely different set of circumstances where the family had lived together in India and had then been divided. Those left in India would clearly have had a different quality of family life when they were with their parents from the family life which these appellants have in this case where the sponsor had decided to leave Tanzania leaving her children there. It is important to take into account the best interests of the children but it is not clear that those would necessarily be served by them joining their mother and stepfather here given that they have lived all their life in Tanzania and been educated there. The fact that the judge found that the sponsor has sole responsibility for the children is not a determinative factor in an Article 8 assessment outside the rules. I would add that the third appellant does not appear to qualify under the Rules for leave to enter - he is not the child of the sponsor, his father is alive and indeed is still in contact.

18. In all, I consider that the judge did properly weigh up all relevant factors and reached conclusions which were fully open to her thereon. I therefore dismiss these appeals.
19. I would add that a bundle of documents has now been submitted which indicate that the sponsor's husband (incorrectly referred to in the skeleton argument as the children's father when he is their stepfather) is now earning well over the necessary amount to entitle the children to come here although there does not appear to be any evidence regarding the accommodation available.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

**Decision**

This appeal is dismissed. The decision of the Judge in the First-tier shall stand.



Signed:  
Deputy Upper Tribunal Judge McGeachy

Date: 6 November 2018