



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25938/2016
HU/25940/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 August 2018

Decision & Reasons Promulgated
On 31 August 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MJ1

MJ2

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the appellants: Mr W Rees, Counsel, instructed on a direct access basis
For the respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a remade appeal decision following the identification of material legal errors in the decision of Judge of the First-tier Tribunal E B Grant (the judge), promulgated on 16 November 2017, in which she dismissed the appellants' appeals against the respondent's decisions dated 26 October 2016 refusing their applications for entry clearance under paragraph 297 of the immigration rules, which were considered as human rights applications. The 'error of law' decision was promulgated on 1 May 2018. The judge's decision was set aside in its entirety and the re-making of the appeals was adjourned to enable further evidence to be adduced.

Factual Background

2. The appellants are nationals of Gambia. The 1st appellant (MJ1) maintains that he was born on 22 August 2001, and the 2nd appellant (MJ2) maintains that he was born on 10 April 1999. The appellants' mother is MN, a Gambian national born on 25 April 1976. She entered the UK in September 2013 pursuant to a grant of entry clearance as a spouse of PN, a British citizen settled in the UK. MN has Indefinite Leave to Remain (ILR). MN and PN married in Gambia in October 2012.
3. On 11 October 2016 the appellants applied for entry clearance to join MN on the basis that she was solely responsible for them. They were being looked after by BT, MN's younger sister, and were living in Gambia. They had previously been living in Senegal with FD, their paternal aunt. The respondent was satisfied, based on DNA evidence, that the appellants were the children of MN. In refusing the applications the respondent was not satisfied that the appellants' father was dead as there was no death certificate. Nor was the respondent satisfied that MN had sole responsibility for the appellants. The respondent noted that they had been separated from MN since she entered the UK in 2013 and that there was no satisfactory evidence that she had returned to Gambia. Phone records, presumably provided with the application, did not identify to whom they related and was not considered to be adequate evidence of communication. The respondent was not satisfied that MN was actively involved in their upbringing. There was said to be no evidence that MN took the important decisions in regards their upbringing, including where they lived, the choice of school and their religious practice. There was no evidence that MN paid for the appellants' education. Although money transfer documentation had been provided to the respondent (none of which appears in the documents before the Tribunal) the respondent was not satisfied that this showed MN was financially responsible for the appellants. The respondent was not satisfied there were serious and compelling family or other considerations making the appellants' exclusion undesirable as they were being looked after by their aunt and were being visited by their mother. The respondent considered whether the decisions breached article 8 of the ECHR but was satisfied that the refusals of entry clearance were proportionate.

Documentary evidence before the Upper Tribunal

4. The respondent's bundle contained a number of documents including the completed application forms, the Reasons For Refusal Letters, an Entry Clearance Manager's review, an untranslated copy of a death certificate purportedly relating to the appellants' father, an affidavit from BT dated 6 September 2016, visa stamps in the passports relating to MN and PN and travel invoices, email correspondence including correspondence from Ruth Evans, an Associate Professor at the University of Reading with a particular interest in care and bereavement in Senegal. In her affidavit BT confirmed the appellants' ages, that MN had been solely responsible for the appellants and that their father died on

30 December 2015. BT affirmed that, due to financial constraints, the appellants had previously lived in Senegal with FD while their mother worked across the porous border in Gambia, but they spent time with MN at the weekends and during school holidays. BT stated that MN also took care of her siblings because their parents died at an early age. BT agreed to look after the appellants for a short time and to be their guardian until the appellants could join their mother in the UK. In 2015 MN and PN purchased a truck and shipped it to Gambia. The financial yields from the commercial use of the truck would be used to cover the appellants' expenses. MN telephoned the appellants on a weekly basis.

5. In addition to the principle respondent's bundle, the respondent provided a supplementary bundle of documents. This included, *inter alia*, copies of the appellants' Gambian passports giving their dates of birth as 22 August 2001 and 10 April 1999 (both passports were issued on 29 December 2015), the application form in respect of MN's visit visa application (in her maiden name) made on 3 July 2012 in which she claimed to have no dependent children, the application form in respect of MN's visit visa application (in her maiden name) made on 24 August 2012 in which she again claimed to have no dependent children, and her application to enter the UK as a spouse, made on 12 June 2013, in which she claimed to have 2 children, MJ1, whose date of birth was given as 22 August 1998, and JM2, whose date of birth was given as 10 October 1996. The June 2013 application maintained that both children were born in Gambia, although the Gambian passports state that they were both born in Senegal.
6. The appellants relied on the bundle of documents prepared for the First-tier Tribunal hearing which included, *inter alia*, statements from MN and PN dated 4 October 2017, evidence of Western Union money transfers in respect of PN's account, and an extract from a Research Report authored by Ruth Evans, dated February 2016, entitled 'Responses to Death, Care and Family Relations in Urban Senegal'. The bundle additionally included a floor plan of PN's home indicating 4 bedrooms. In her statement MN claimed the appellants had no relationship with their father who left her when she was 6 months pregnant with MJ1. She briefly spoke with him when applying for the appellants' passports. BT had her own children and wanted to start a business and could not care for the appellants indefinitely. The appellants missed MN and she missed them. MN and PN arranged for the appellants to continue their studies in Gambia and organised a college for them. MN and PN ensured that an adult family member went with the appellants to a doctor if they were sick. On previous visits MN and PN took the appellants to a dentist. They sent clothing and essentials from the UK to the appellants or provided BT with money to purchase items locally. MN and PN spoke with the appellants on a regular basis and asked BT to help them if necessary. Financial support generated by the small business in Gambia was supplemented with Western Union transfers. In his statement PN confirmed that he was a qualified Chartered Accountant and was employed full-time as a Financial Controller for a consultancy company in the oil and gas sector. His current salary was just over £76,000. He confirmed that he and MN lived in a detached property with 4 bedrooms. He and MN spoke regularly to the appellants using a mobile phone of WhatsApp about 4 or 5 times a week.

7. A supplementary bundle of documents prepared for the remade hearing contained, *inter alia*, further witness statements by MN and PN dated 13 June 2018, a translated affidavit from FD dated 10 June 2018, a translated statement from RG, MN's older sister, dated 10 June 2018, a further translated affidavit from BT dated 10 June 2018, a translated affidavit from AT, MN's brother, dated 7 June 2018, further evidence of Western Union money transfers, documents relating to the purchase of a truck by PM and the transfer of the truck from Belgium to BT in Banjul.
8. In her statement dated 13 June 2018 MN claimed the appellants lived in Gambia under her direction and control while being under the guardianship of BT. BT had her own life and only wanted to care for the appellants on a temporary basis. Whenever they spoke BT asked MN for her direction, guidance and advice concerning the appellants and BT acted upon this direction. Some examples were given of BT acting on MN's instructions, including the registration at a school and a medical examination. MN desperately missed her children. She spoke a few times each week with the appellants using mobile phones or WhatsApp. She gave details of her children to a visa agency in Gambia in respect of her two visitor applications in 2012. As MN could neither read nor write she had no way of knowing that the agency did not include her children's details. MN remained on good terms with FD, the sister of DD, the children's father. It was through her that MN later discovered that DD had gone to Spain. MJ2 only had a very vague memory of DD and MJ1 had never met him. In order to obtain the appellants' passports some action was required from DD for verification purposes. MN managed to contact DD through FD and he happened to be in Senegal for a holiday. DD spoke to the passport authorities and the passport applications proceeded. About a week after speaking to DD he was overtaken by a rapid medical problem and died.
9. In his statement dated 13 June 2018 PN described his relationship with the appellants and the stress caused by the separation. This led to an extended holiday in Gambia in January and February 2018. In her affidavit FD confirmed the general history outlined by MN and PN and confirmed that DD had been residing in Spain and that, to the best of her knowledge, he had no contact with either appellant and took no responsibility for his sons. FD described how she offered to care for the appellants after recognising the difficulties MN had in locating work while having to look after young children. FD confirmed that MN came to stay with them most weekends and that the appellants would stay with MN during the school holidays. While the appellants lived with FD MN provided financial support, clothing, and would sometimes meet their teachers. FD confirmed the death of DD in December 2015. In her statement RG confirmed the general history presented by MN including the circumstances in which FD looked after the appellants and MN's contact with them during this period.
10. In his affidavit AT confirmed that the appellants' original birth certificates were destroyed in a house fire in 2008 and that he maintained his own informal record of the dates of birth of the children in the family. He confirmed that an uncle helped replace much of the paperwork destroyed but that the wrong dates and

places of birth had been recorded. AT accompanied MN and PN to the Office of the Chief Justice in Bajul where he swore under oath that the dates of birth on the Gambian birth certificates were incorrect. The Court issued a statement allowing the Registry of Births and Deaths to re-issue the birth certificates. In her affidavit BT confirmed that she spoke to MN and PN once a week giving updates on the appellants' welfare and gave some examples of the support provided by MN and PN.

11. An additional short bundle of documents included a statement from MJ1, a joint statement from PN and MN, a further statement from MN and a statement from HM, the appellants' neighbour, all dated 13 August 2018. MJ1 explained that he and his brother grew up with their paternal aunt in Senegal where they attended school, but that they would be with their mother every weekend and every school holiday. The appellants' relationship with their maternal aunt, BT, became strained in 2018 because she wanted to start a new life as a married woman. MJ1 felt good when his mother and stepfather visited and felt lonely and sad when they returned to the UK. MJ1 did not sleep or eat well and found it hard to concentrate as he was always thinking about his parents and how much he wanted to be with them.
12. In their joint statement dated 13 August 2013 MN and PN stated that BT looked after the appellants since the summer of 2015 under their direction and close guidance. BT's attitude however changed and she sometimes commented that she had had enough looking after the appellants. In the months following MN return to the UK in February 2018 after a visit the appellants informed MN and PN that BT's behaviour was becoming erratic. She would often not cook for them, or even for her own children, and would often not speak to the appellants. she even locked the main house so that the appellants were restricted to their bedroom in a small outbuilding. In July 2018 BT informed MN that she planned to marry her fiancé and that she no longer wanted to be guardian to the appellants. The relationship between BT and MN deteriorated and they have not really spoken since the middle of July 2018. MN and PN have grave concerns for the appellants' welfare and safety as they are effectively caring for themselves. MN and PN continue to send the appellants money and speak to them 3 or 4 times a week. MN and PN stated that they were particularly concerned about MJ1 as he was "emotionally bordering on depression", although there was no medical evidence in support.
13. In her statement dated 13 August 2018 MN stated that it was very common when she was growing up for girls to be uneducated and described how, when she was 15/16 years old, she ran away from her family and went to Senegal to avoid marrying an elderly man from a nearby village. MN could neither read nor write and obtained work as a house maid. The appellants were born from her relationship with DD. DD offered to look after the appellants while MN returned to the Gambia to find work to support her children. MN felt that the failure to mention the appellant in her visit visa applications in 2012 was attributable to her inability to read or write. She had faith in the agency she used to complete the application forms and was unable to read the final applications before they were

submitted. The incorrect dates of birth detailed in her spousal entry clearance application were also attributed to MN's inability to read or write. She could not check the details of the birth certificates obtained by her uncle and had to trust that they were done correctly. When the errors in the birth certificates was noticed MN sought to remedy this through legal and administrative channels.

14. Also contained in the most recent bundle is a statement from HM, who claimed to be a neighbour of BT. She knew the appellants and BT since they moved into their house in March 2017 and she knew MN and PN through their visits to Gambia. She noted that BT's mood changed over recent months and often heard her shouting at the appellants for no reason and now often ignored them.
15. At the hearing the appellant's legal representative, somewhat belatedly, produced a number of further documents. There was a letter dated 5 October 2017 from Dr Ruth Evans concerning death certificates in Gambia. This letter had apparently been provided to the First-tier Tribunal but there was no such record on the Tribunal file. There were two affidavits sworn by each of the appellants and dated 28 December 2015 in support of the rectification of the date and place of birth of their Gambian birth certificates. There were two letters issued by the Deputy Registrar of the Gambian Directorate of Planning & Information, Ministry of Health and Social Welfare, dated 29 December 2015. Each letter referred to the tendering of an extract copy of each appellant's Senegalese birth certificate. The Gambian Registrar nullified the previous registrations and revoked the earlier Gambian birth certificates. Also provided were an original and a copy of the 'extrait du register des actes de naissance' relating to the appellants. These indicated that MJ1's date of birth was 22 August 2001 and MJ2's date of birth was 10 April 1999.

The Upper Tribunal hearing

16. The following is a summary of the evidence given by MN and PN at the hearing on 20 August 2018. Both witnesses adopted their various statements and were tendered for cross-examination.
17. MN confirmed that the appellants were supported by the income generated by the purchase of the truck in 2015 and that there were definitely money remittance documents before the respondent, even though these were not included in the Tribunal bundles. More money was sent in 2017 and 2018 because the truck developed a problem. It was previously used for transporting sand and stones. MN did not buy the truck herself because she did not have a UK passport. She spoke to the appellants about 3 times a week. If the school needed to contact anyone they would contact BT. MN however would talk to the manager of the school if there were any problems, and to the children. Although there was no evidence from a doctor MN explained that, if either of the appellants was very unwell, a doctor would talk to BT first and she would then contact her. MN described how her brother AT maintained a record of the dates of births within the family. MN claimed that her family did not believe girls needed to be educated. When referred to BT's affidavit from 2016 MN initially claimed that she supported her siblings when she was in Gambia and when she was in the UK

and that she cared for her siblings since she was 16. She then changed her evidence and claimed she ran away to Senegal when she was 16 and did not support her family from that age. She claimed she was confused. She said AT was now in Saudi Arabia and that she did not yet have any contact details for him, and that his wife could not look for any contact details because it was not customary for women in Africa to go through a man's property.

18. Although she signed her spousal entry clearance application MN did not read it and used a lawyer to complete it. She accepted that it was her responsibility to ensure the information was correct. In respect of the visit visa applications MN trusted the agent she used to complete the forms and, as she could not read the forms, she did not know that they omitted any reference to her children. She said there was no reason for her to claim to have no children. There was no difficulty in travelling from Senegal to Gambia and vice versa. One of DD's relatives obtained the death certificate, although normally if a person died at home in Senegal a death certificate was not produced. MN knew little about the statement from HM, BT's neighbour, and confirmed that no identification evidence had been provided relating to HM. MN confirmed that BT was not talking to her and that there were no other family members who could take care of the appellants. Although MJ2 was now over the age of 18 it was too dangerous for him and his brother to live alone as they were still too young and it was customary for the family to remain living together until marriage. It was also difficult to rent property as a teenager as landlords may think the teenager is trying to do bad things. In response to questions from me MN gave a general description of how the change in the Gambian birth certificates was obtained, and she confirmed that the original Senegalese birth certificates destroyed in the fire contained the correct information.
19. PN confirmed in oral evidence that MN had contact with the appellants 3 or 4 times a week, and that he and MN often spoke to them together. The income generated by the truck business had not been so good for the past 5 or 6 months because of the truck itself, which was 15 years old, and problems in Gambia with the collection of sand from quarries. PN confirmed that he sent money to maintain the appellants up to 2016 and beyond. PN described the recent issues with BT and that MN had two sisters in Senegal and was in contact with two brothers, although she was estranged from some of her family in her village. PN did not know where AT was living but believed it was in Gambia. He believed MN had contact with AT but he could not say how often. PN did not believe he had seen any Senegalese birth certificates, and could not remember the process by which the amended Gambian birth certificates were obtained but believed new Senegalese birth certificates were obtained and provided to the Gambian authorities. He was then given the opportunity of looking through the various documents he brought to the Tribunal and found MJ2's original Senegalese 'Extract from the Register of Birth Certificates', and a copy of a similar document relating to MJ1.
20. PN confirmed that a Gambian lawyer was instructed to complete MN's spousal entry clearance application. The letter from HM was drafted by PN after speaking

to HM on the phone with the help of the appellants and it was scanned and email for her to verify and sign. He confirmed that he and MN found a place for the appellants to study English when they moved to Gambia. MN had spoken with the school. BT was the initial contact for the school if something happened but she would immediately contact him and MN. MN and PN paid the school fees. When I informed PN that MN said her brother was now in Saudi Arabia PN said this was possibly true and that he had not spoken to him since Christmas.

21. Ms Isherwood adopted the Reasons for Refusal Letters and invited me to find MN an unreliable witness. There were inconsistencies as to where AT lived and in respect of her support for her siblings. It was her responsibility to ensure the application forms were completely correct and her evidence as to the process by which the Gambian birth certificates were amended was vague. I was invited to place no weight on the letter from HM in the absence of any independent evidence of her identity. The respondent did not accept that the appellants' father was deceased and there was insufficient evidence to establish sole responsibility and no up-to-date evidence of contact. Mr Rees adopted his what discursive skeleton argument and supplement it by general and at times vague reference to the evidence before me. He invited me to find that MN was a reliable witness although she was nervous and confused at the hearing. He invited me to find that the relationship between the appellants and their mother engaged Art 8 and that the refusals of entry clearance was disproportionate.

The Law

22. These appeals are against refusals of human rights claims. The applications for entry under paragraph 297 of the immigration rules constitute human rights claims. The appellants appeal on the basis that the refusals of entry clearance are unlawful under section 6 of the Human Rights Act 1998.
23. The relevant Immigration Rule is paragraph 297 of the Immigration Rules, HC 395. The appellants maintain that their biological father, DD, is deceased, or that their mother, MN, has sole responsibility. I must therefore be satisfied that each appellant:
 - (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
 - ...
 - (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
 - (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
 - (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which

make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and

(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and

(vi) holds a valid United Kingdom entry clearance for entry in this capacity; and

(vii) does not fall for refusal under the general grounds for refusal.

The Burden and Standard of Proof

24. It is for the appellants to discharge the burden of proof and the standard of proof to be applied is a balance of probabilities. As these are appeals against the refusal of human rights claims I can consider any matter which I think is relevant to the substance of the decisions, including matters arising after the date of the decisions (s.85 of the Nationality, Immigration and Asylum Act 2002).

Findings of fact and reasons

25. I have concerns with some aspects of MN's evidence. In her most recent witness statement she claimed to have fled her family to avoid marriage to an elderly man from another village and that, as a single parent of two children, she was regarded as 'unclean' by her family and that, when she had her children, her family in Gambia had 'completely cut' her off. This sits uncomfortably with the affidavit from BT contained in the respondent's bundle dated 6 September 2016 which claims that MN took care of her siblings because her parents died at a very young age. It is also inconsistent with the evidence MN began to give in her oral testimony to the effect that she supported her family since the age of 16, although she subsequently said this was not the case. It is also inconsistent with her 2017 statement in which she claimed she had a 'good close family'. Although MN may have been estranged from some of her family in her village, I find she has embellished her most recent account of being 'completely cut off' from her family. MN was vague in her description of the process by which the Gambian birth certificates came to be amended, although I accept that she appeared very nervous during the hearing and may have been confused. It is not credible that, if MN's brother recently went to Saudi Arabia, he would not have left contact details for his wife. I reject this aspect of her claim. Nor was there any supporting ID evidence in respect of the statement from HM, BT's purported neighbour. As a consequence, I can attach little weight to this statement.

26. Other aspects of MN's evidence are however plausible. She maintained that she was uneducated and that, when the various entry clearance applications were made, she could neither read nor write. This is not an inherently implausible assertion in respect of a woman born in 1976 in Gambia. She exhibited difficulty in reading documents before her at the hearing and had to have them read to her. Her lack of education was corroborated by her husband. Nor is it implausible that she may have innocently used unscrupulous immigration agents in Gambia in respect of her visitor applications in 2012. Unscrupulous immigration advisors who prey on unsophisticated or uneducated individuals are all too familiar to the Tribunal. There appears to be no reason why she would not have disclosed her children in the visitor applications as they would have acted as an incentive for her return, even if they were living across the porous border in Senegal. MN's claim that she did not actually read the applications, trusting that they had been correctly completed based on the information she provided, is, on its face, a credible assertion. She has been consistent in much of her evidence, including her claimed exercise of direction and control over her children and that they were financially support by the purchase of a truck and Western Union money remittals, and much of this evidence was also consistent with PN's evidence and the documentary evidence.
27. I found PN to be an impressive witness. His evidence was measured and was given in a direct manner and without hesitation. There was no perceptible attempt to embellish his evidence and he readily acknowledged instances where he relied on accounts given by others. His oral evidence was generally consistent with the documentary evidence, including the evidence relating to the truck, the various visits to Gambia and the money remittals, and was internally consistent. Whilst consistency can never be determinative of credibility, it can be considered a factor indicative of credibility. PN provided detailed and reasonable explanations for the purchase of a truck to provide an income to maintain the appellants, and for the various funds remitted to the appellants via Western Union. I find I can attach significant weight to PN's evidence.
28. With these initial findings in mind, I consider first the dispute relating to the ages of the appellants. The respondent contends that, as MN's spousal entry clearance application identified MJ1's date of birth as 22 August 1998, and JM2's date of birth as 10 October 1996, they were both over the age of 18 when the decisions were made. The appellants maintain that, following a fire in 2008 that destroyed their original birth certificates, a maternal uncle mistakenly gave inaccurate details when applying for Gambian birth certificates for the appellants and that the lawyer who completed MN's spousal application form relied on the inaccurate birth certificates and MN, who was illiterate, did not appreciate the mistake when she signed the application form.
29. Although I have found some aspects of MN's evidence to be unreliable, this does not mean that all her evidence must be rejected. It is quite possible that an uncle may have inadvertently provided inaccurate information relating to the appellants' dates and places of birth believing them to be otherwise. I have accepted that MN was uneducated and had considerable difficulty reading

English when the spousal entry clearance application was made. Whilst it discloses a lack of care in the preparation of an important document, this explanation is not inherently unlikely. It is the documentary evidence however that ultimately persuades me that the appellants have the dates of birth claimed. The two most significant documents are the original and the copy of the 'extrait du register des actes de naissance' relating to the appellants. I indicated to the parties that I would take judicial notice of the fact that 'extrait du register des actes de naissance' translates as 'extract from register of birth certificates'. If genuine, the documents reflect information contained in the Senegalese register of births. There is nothing on the face of the documents to suggest that they are unreliable, or that they have been tampered with. Ms Isherwood did not identify any particular aspect of these documents as unreliable or lacking authenticity. The birth registry extracts were also referred to and relied upon by the Deputy Registrar of the Gambian Registry of Births and Deaths in his letters dated 29 December 2015. The Gambian authorities were satisfied as to the authenticity of the Senegalese birth registry extracts because they nullified the previous registration and revoked the previous birth certificates. Although PN may not have initially appreciated the nature of the Senegalese documents, he did explain that, to ensure all the relevant documents were provided to the Gambian authorities, evidence was sought from the Senegalese authorities relating to the appellants' birth dates. I find, having regard to the evidence before me 'in the round', that the Senegalese documents are genuine. The birth registry extracts, issued by the Senegalese government on 18 December 2015, strongly suggest that MJ1's date of birth was 22 August 2001 and MJ2's date of birth was 10 April 1999. This is now reflected in the amended birth certificates issued by the Gambian authorities, and in the appellants' Gambian passports. For these reasons the appellants have persuaded me, to the balance of probabilities standard, that MJ1 was born on 22 August 2001 and was 16 years old at the date of the hearing and turned 17 years old at the date of my decision, and that JM was born on 10 April 1999 and was 19 years old at the date of my decision, although he was 17 years old at the date of the respondent's decision.

30. I have carefully considered the evidence relating to the death of DD. This is supported by an original document entitled 'extrait de deces' giving details of the deceased and a supporting translation. There is nothing on the face of the document itself causing me to doubt its authenticity. The letter from Dr Ruth Evans confirmed that the 'extrait de deces' can be considered the equivalent of an official death certificate. DD's untimely death has been consistently maintained by MN and PN, and is further supported by the affidavits from FD and BT. In these circumstances I find that DD did die on 30 December 2015. As one of the appellants' parents is dead, and contrary to the assertion in the Reasons for Refusal Letters, there is no need to demonstrate that MN has sole responsibility for the appellants.
31. I am nevertheless satisfied, for the following reasons, that MN does indeed have sole responsibility for the appellants.

32. In TD (Paragraph 297(i)(e): 'sole responsibility') Yemen [2006] UKAIT 00049 the Tribunal indicated that questions of "sole responsibility" under the immigration rules should be approached as follows:
- i. Who has "responsibility" for a child's upbringing and whether that responsibility is "sole" is a factual matter to be decided upon all the evidence.
 - ii. The term "responsibility" in the immigration rules should not to be understood as a theoretical or legal obligation but rather as a practical one which, in each case, looks to who in fact is exercising responsibility for the child. That responsibility may have been for a short duration in that the present arrangements may have begun quite recently.
 - iii. "Responsibility" for a child's upbringing may be undertaken by individuals other than a child's parents and may be shared between different individuals: which may particularly arise where the child remains in its own country whilst the only parent involved in its life travels to and lives in the UK.
 - iv. Wherever the parents are, if both parents are involved in the upbringing of the child, it will be exceptional that one of them will have sole responsibility.
 - v. If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child.
 - vi. However, the issue of sole responsibility is not just a matter between the parents. So even if there is only one parent involved in the child's upbringing, that parent may not have sole responsibility.
 - vii. In the circumstances likely to arise, day-to-day responsibility (or decision-making) for the child's welfare may necessarily be shared with others (such as relatives or friends) because of the geographical separation between the parent and child.
 - viii. That, however, does not prevent the parent having sole responsibility within the meaning of the Rules.
 - ix. The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole".
33. I approach the issue of 'sole responsibility' bearing in mind the aforementioned points. I must be satisfied that the MN has been the person exercising primary responsibility for the appellants as understood in (ix) above.
34. The immigration stamps contained in the passports issued to MN and PN disclose a significant number of visits to Gambia. MN visited Gambia on 4 separate occasions between September 2015 and October 2016, and PN accompanied her on three of those occasions. There were further visits in 2017

including a visit at Christmas 2017 extending to January and February 2018. I have no doubt, based on those aspects of MN's evidence that I have accepted as credible and the evidence from PN, that the frequency of visits can be attributed to MN's desire to care for and support the appellants. This is a relevant factor in determining whether she is solely responsible for the appellants. Both PN and MN consistently stated that they communicate with the appellants 3 to 4 times a week via WhatsApp and mobile phone.

35. I am satisfied that a truck was purchased by PN in 2015 and shipped to Gambia to be used in a small transport business and provide financial support for the appellants. A receipt issued by 'Degroote trucks & Trailers nv', dated 19 May 2015, confirming the purchase of a Euro Trakker truck and its shipment to Banjul was issued to PN. The appellants' bundle contains details of the truck and its shipment to BT. MN and PD were generally consistent in their evidence relating to the truck. The Western Union account details disclose regular remittals to the appellants as well as remittals to BT and to MN at a time she was visiting Gambia. Although the money remittals provided to the respondent at the date of the applications are not contained in the various bundles, it is apparent from the Reasons for Refusal Letters that such evidence was provided. This was corroborated by PN, who confirmed that the appellants received financial support prior to and after the purchase of the truck, although the remittals were provided at a reduced level while the commercial exploitation of the truck generated financial support. This financial support is another factor relevant in determining whether MN exercised sole responsibility. I additionally note that PN and MN sent clothing and other essentials directly to the appellant from the UK, or provided money to BT to purchase such items locally. This is a further indication of direction and control over the appellants interests.
36. Both PN and MN were consistent in their claim to have arranged the appellants' studies in Gambia. This was further supported by BT's affidavit in which she described registering the appellants at a particular school on instruction from MN when they first lived in Gambia, and their subsequent registration at the Grace Baptist School in Brufut. It was consistently maintained that MN and PN paid the school fees. MN's evidence that the school would contact BT if there were any problems does not undermine MN's claim to exercise sole responsibility, having particular regard to (vii) and (viii) of the guidance in TD. It is entirely sensible for the person with whom the appellants are living to be the first point of contact, especially given that MN lives on another continent. In her oral evidence MN explained that if there were any problems at school she would be the one to speak to the manager of the school, and this was supported by PN who explained that BT would immediately contact MN if any problems arose.
37. MN's evidence concerning the instruction, direction and guidance she exercised over the appellants was inherently plausible and consistent with PN's personal knowledge. I therefore accept MN's evidence that she guided BT in respect of the purchase of clothing for the appellants, their diet, and their general wellbeing. I also accept as credible MN's evidence that, on one occasion when MJ2 had a skin problem, she spoke to a doctor and directed BT to take MJ2 to that doctor for a

medical examination, and that the doctor's fees were subsequently paid by PN. I additionally take into account the evidence, consistently given, that BT was only ever to provide temporary support to the appellants.

38. Having holistically considered the aforementioned evidence, and for the reasons given above, I am satisfied that MN does exercise primary responsibility for the appellants and that she is solely responsible for them.
39. There was no suggestion in relation to either appellant that they were leading independent lives or had formed their own independent family units. Both appellants remain living in BT's family compound. Nor has it been suggested that the appellants would not be adequately maintained and accommodated. Given that PN earns around £76,000 and lives in a four-bedroom detached property, neither of which was challenged at the hearing, it is apparent that there will be adequate maintenance and accommodation. Nor has it been suggested that the appellants fall to be refused under the general grounds of refusal.
40. MJ1 is still a minor. He meets all the requirements of the immigration rules for entry under paragraph 297. This is a significant factor in the Art 8 proportionality assessment. I consequently find that the refusal to grant him entry clearance constitutes a disproportionate interference with Art 8 and allow his appeal.
41. MJ2 is now 19 years old. He was however 17 years old when the respondent's decision was made. I have considered the public interest factors identified in s.117B of the Nationality, Immigration and Asylum Act 2002. I note that the maintenance of effective immigration controls is in the public interest. It is relevant that MJ2 met the requirements of the immigration rules both when his application was made and when it was decided. But for the respondent's wrongful decision MJ2 would have entered the UK in compliance with the immigration rules. In these circumstances it is difficult to see how his entry to UK would now undermine the maintenance of effective immigration controls. I note that MJ2 has been attending English language classes since moving to Gambia, where English is the main language for education and official purposes, and PN's evidence that the appellants were proficient in English was not challenged. MJ2 would be capable of being financially independent as he is in good health and capable of working, although his parents are also able to financially support him. These are however only neutral factors. The factors in s.117B(4), (5) and (6) do not apply to MJ2 as he is seeking entry to the UK.
42. In assessing the issue of proportionality, I attach significant, although not determinative weight to the fact that MJ2 was wrongly denied entry clearance when he met all the requirements of the immigration rules. It is clear that the conduct of the respondent may, in appropriate circumstances, be taken into account in undertaking a proportionality assessment and detract from the public interest in either removing or refusing entry clearance (see, by way of example, delays by the respondent in reaching decisions - EB Kosovo (FC) (Appellant) v Secretary of State for the Home Department (Respondent) [2008] UKHL 41).
43. In TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 the Court of Appeal held, in the context of

applications for leave to remain by persons already in the UK, that, where a person satisfies the immigration rules, whether or not by reference to an Art 8 informed requirement, this will be positively determinative of that person's Art 8 appeal, provided their case engages Art 8(1), for the very reason that it would be disproportionate for that person to be removed. MJ2 did not meet the requirements of the immigration rules at the date of the hearing because, by then, he was over the age of 18. He should not however have been refused entry clearance by the respondent in the decision dated 26 October 2016. MJ2 has been placed at a very significant disadvantage because of a wrong decision by the respondent. Had the respondent not wrongly refused the entry clearance application, MJ2 would have gained lawful entry into the UK. Having regard to the respondent's conduct, and there being no challenge to the family life relationship between MN and MJ2, I find that the respondent's conduct does detract from the public interest considerations to a sufficient degree to render the refusal to grant him entry clearance disproportionate under Art 8. I consequently allow his appeal.

Notice of Decision

The appeals are allowed on human rights grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellants in this appeal 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.



Signed
Upper Tribunal Judge Blum

Date 22 August 2018