



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/06820/2017
HU/06821/2017

THE IMMIGRATION ACTS

**Heard at Glasgow
On 10 January 2019**

**Decision & Reasons
Promulgated
On 8 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

**AB
MB
(Anonymity direction made)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr A Devlin, Advocate, instructed by Neil Barnes,
Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. These appeals are brought against a decision by Judge of the First-tier Tribunal Hands dismissing appeals on human rights grounds against the refusal of entry clearance.

2. The appellants are a brother and sister and are nationals of Sierra Leone. The first appellant was born in 2002 and the second was born in 2005. They applied for entry clearance to join their father, who is settled in the UK and is the sponsor of the application.
3. Following the making of the application DNA tests showed that the sponsor is not the biological father of the appellants. The sponsor has always regarded the appellants as his children. His evidence is that the appellants' mother died several years ago after abandoning the children. It is also claimed that the children are ostracised in Sierra Leone because the sponsor is gay.
4. The Judge of the First-tier Tribunal expressed doubts or reservations about whether the appellants' mother was dead, about who was caring for the appellants, and about the extent of the sponsor's contact with and support for the appellants. The judge expressed the issue she had to decide as whether the appellants were now living in such compassionate and compelling circumstances that they should be allowed to join the sponsor in the UK in recognition of their right to live in a family with him. The judge was not satisfied that the sponsor was maintaining regular contact with the children as he claimed, or that the appellants were suffering abuse because of the sponsor's sexuality. The judge found that the best interests of the appellants were served by remaining in Sierra Leone where they were familiar with their surroundings, their school and their friends. The appellants had not established exceptional or compassionate circumstances to show the refusal decision was a disproportionate interference in the family and private life of the appellants and the sponsor.
5. Permission to appeal was granted because it was arguable, in particular, that the judge made factual errors in relation to the evidence and did not make clear findings on certain matters.

Submissions

6. For the appellants, Mr Devlin relied upon the grounds set out in the application for permission to appeal. In particular, paragraph 3 of the grounds set out certain matters on which careful findings of fact were required. The judge made a number of points about discrepancies in the evidence and the effect of these in undermining the weight to be given to the evidence but did not give conclusions or make findings of fact, looking in particular at paragraphs 11 to 17 of the decision. It was not appropriate to infer findings of fact where there were crucial issues on the best interests of the children.

7. Mr Devlin then referred to the second ground, at paragraph 4 of the application, in which it was contended that the judge made a number of errors of fact which affected her assessment of the evidence. As a result of this the judge's findings on family life were unsafe.
8. The third ground, according to Mr Devlin, was concerned with the public interest aspect of the proportionality assessment. According to the judge, at paragraph 13 of the decision, there was no provision in the Immigration Rules to consider a sponsor requesting family reunion for a child who was subject to a *de facto* adoption. Such an application therefore fell to be refused under the Rules. This statement about the Immigration Rules was incorrect. Paragraph 6 of the Immigration Rules included in the definition of "a parent" the adoptive parent of a child subject to a *de facto* adoption. This point was covered in AA (Somalia) [2014] 1WLR 43, where it was pointed out by Lord Carnwath, at paragraph 25, that the definition of a *de facto* adoption in paragraph 309A of the Immigration Rules would not cover the situation of a refugee who was an adoptive parent seeking family reunion. Among the requirements of paragraph 309A is one which requires the adoptive parent to have been living abroad with the child for 12 months immediately preceding the application for entry clearance. Further concern about this issue in relation to the application of Article 8 was expressed by Lord Glennie in *M & Anor* [2016] CSOH 51 at paragraph 34. On this matter Mr Devlin submitted that the Immigration Rules were not compliant with Article 8. It could not therefore be a negative factor in the balancing exercise that the appellants did not meet the Immigration Rules. A vigorous approach should be taken to the balancing exercise in these circumstances. The Judge of the First-tier Tribunal did not carry out the balancing exercise properly.
9. For the respondent, Mr Govan acknowledged that there were some issues with the decision. There was the point that adopted children could be taken into account under the Immigration Rules relating to family reunion. There were also some issues over factual errors. The question was whether these issues were material and whether they made the decision unsafe.
10. In relation to the first ground, the alleged failure to make key findings, Mr Govan submitted that paragraphs 16 and 17 of the decision should be read together. The judge did not accept that the appellants' mother was dead. The judge made findings at paragraphs 22-24 about the lack of evidence of who was caring for the children. There was enough here for the judge to find that the children's circumstances were not as it was alleged they were. At paragraph 25 the judge considered whether the children were being ostracised and found the evidence relating to this would not affect the outcome of the appeal in either direction.

11. Mr Govan continued that at paragraph 22 the judge found there was no evidence of contact between the sponsor and the appellants. At paragraph 23 the judge found that a letter from IKK about the children's circumstances was based on information provided by the sponsor. At paragraph 25 the judge considered the best interests of the children. The decision gave appropriate consideration to the source of evidence and looked at the circumstances in which the children were living.
12. Mr Govan continued by referring to the contention that the judge had disregarded evidence of contact between the sponsor and the appellants. Mr Govan submitted that it was open to the judge to put little weight on letters produced as evidence of contact. The point was that the circumstances in which the children were living were not established. The findings made by the judge were open to her. While there might be errors in the decision it did not follow that the decision overall was unsafe.
13. Mr Govan acknowledged that paragraph 6 of the Immigration Rules allowed for a *de facto* adoption. The appellants, however, could not meet the requirements of paragraph 309A. Notwithstanding the comments of Lord Carnwath on paragraph 309A, the relevant provisions of the Rules still stood. The question was whether paragraph 309A led to a disproportionate approach. The present appeal, however, turned on its facts. The judge considered the relationship between the sponsor and the appellants and the best interests of the appellants. This was a relatively simple exercise and there was no error of law.
14. Mr Devlin responded for the appellants. On the question of whether their mother was dead, he asked me to compare paragraphs 16 and 17 of the judge's decision. At paragraph 16 the judge postulated the mother was dead but at paragraph 17 the judge doubted the veracity of the claim the mother was dead. There was at least a tension here.
15. Mr Devlin further submitted that the judge failed to make clear findings on whether the appellants were being ostracised because of the sponsor's sexuality. Mr Govan said this did not affect the outcome either way but it did affect the judge's findings at paragraph 25 on the best interests of the appellants. The judge further erred at paragraph 22 when considering the evidence of contact between the appellants and the sponsor. The judge stated that all the evidence of this was from the sponsor and there was no independent evidence. However, letters such as the letter from IKK were independent evidence. This was a material error which might have led to a different outcome. Mr Devlin asked for the appeal to be remitted to the First-tier Tribunal.

16. I reserved my decision on the issue of whether the Judge of the First-tier Tribunal erred in law and her decision should be set aside.

Discussion

17. In my consideration of this appeal I will begin by looking at whether the Judge of the First-tier Tribunal made adequate findings of fact and whether these were affected by any mistakes in apprehending the evidence. I will then consider the proportionality assessment carried out by the judge under Article 8.
18. It is contended that the judge failed to make proper findings on four issues. These were whether the appellants' mother was dead; who was currently caring for the children; whether that person could reasonably be expected to continue to provide care for the children; and whether the children were being ostracised from their local community because of the sponsor's sexuality.
19. Mr Devlin submitted that at paragraph 16 the judge postulated that the appellants' mother was dead and at paragraph 17 questioned the veracity of the evidence of her death. On my reading, at paragraph 16 the judge was considering the evidence about who was caring for the appellants in the period from 2010 to 2016. The judge identified a number of inconsistencies in this evidence. She found, however, that it was more likely than not that the appellant's mother cared for them "until her death", which occurred in April 2011, according to a death certificate before the judge. Essentially this finding was about who was caring for the children up until April 2011, when the evidence indicated they were placed in an orphanage for a short period. It was not a finding about whether or not the appellants' mother was alive at the date of the hearing. This is apparent from paragraph 17, where the judge identifies significant discrepancies in the evidence about the year in which the appellants' mother supposedly died. The judge concludes that she doubts the veracity of the information she has been given about the death of the appellants' mother and the circumstances in which the appellants were said to be living. In these appeals it was for the appellants to show that their mother is no longer alive and this they signally failed to do.
20. Indeed, the judge could not be expected to make findings on matters on which she had not been provided with credible and reliable evidence. It was for the appellants, and for the sponsor as a witness on their behalf, to show the circumstances in which they were living and who was caring for them. Where the judge for good reason rejected the sponsor's evidence, then it was not possible for the judge to make findings on the children's circumstances. It is not appropriate to criticise the judge for this -

the fault lies with those who sought to mislead her in their evidence.

21. On the issue of whether the appellants are ostracised, again the judge did not have reliable evidence on which to make a finding. The best she is able to do, when considering the best interests of the appellants at paragraph 25, is to say that the sponsor's evidence was that they found it difficult to make friends but not that they did not make friends or had no friends. The judge did not err in expressing a limited finding in this way.
22. It is contended that the judge misapprehended parts of the evidence. As a result she concluded there was no independent evidence of contact between the appellants and the sponsor, when in fact there was; that information contained in correspondence from third parties, including information about the ill-treatment of the children by the local community, was derived from the sponsor when it was not; and that one of these third parties, IKK, failed to corroborate the evidence that the appellants' current carer was MB, when in fact he did.
23. It appears that where the Judge of the First-tier Tribunal addressed this correspondence from third parties, at paragraph 23 of her decision, she did so very briefly. The correspondence in question seems to be a letter dated 26th October 2016 from IKK, a letter dated 22nd October 2016 from TG, and an email dated 21st May 2011 from MT. At this point in her decision when the judge reached this correspondence she had already found significant inconsistencies in the evidence of the sponsor, who was the only witness to give evidence orally at the hearing.
24. The judge also had before her an affidavit dated 10th November 2016 from MB, supposedly the current carer of the appellants, and a letter from FB, on which the judge stated at paragraph 16 that she placed very little weight. The affidavit from MB stated that she was the guardian of the appellants but had asked the sponsor to find an alternative guardian as she intended to leave Sierra Leone. The affidavit also stated that the appellants' mother was dead. Because of inconsistencies in other evidence relating to the alleged death of the appellants' mother, the judge was not satisfied this was true.
25. The letter of 26th October 2016 from IKK named the appellants' carer as MB but the judge mistakenly stated that the letter did not name their carer. This mistake was not made in the specific context of identifying who was caring for the children but more widely in relation to attempting to ascertain information about their welfare and the circumstances in which they were living. The point the judge was making was that the letter in question was silent on these important matters. The judge was considering how well the

appellants were being cared for, rather than by whom. I therefore agree with Mr Govan that the judge's mistake on this point is not material to the outcome of the appeal.

26. The broader point being made by the judge in relation to the three pieces of correspondence under consideration at paragraph 23 was that they were written by friends of the sponsor to support the sponsor's evidence. The sponsor's oral and written evidence was found by the judge to lack credibility because of a number of inconsistencies and omissions which she clearly identified. The sponsor's evidence could not be saved by the three pieces of correspondence even had none of them been partially misconstrued at paragraph 23. By this point in the decision the sponsor's own evidence had already been rejected as lacking in credibility.
27. There may have been at least an implicit suggestion on behalf of the appellants that if the judge had had proper regard to this correspondence she might not have rejected the sponsor's evidence in the way that she did. I agree with Mr Govan, however, that the findings made by the judge in relation to the sponsor's evidence would not have been materially affected by anything in this correspondence which the judge might have failed to properly apprehend. The sponsor's evidence was found by the judge, with good reason, to be so inadequate that there is nothing in these letters which would have outweighed its deficiencies. I should add, in addition, that in this context the judge was entitled to place little, if any, weight on the email from MT about the treatment of the appellants by the local community.
28. The final issue for me to consider is the judge's proportionality assessment. The judge was incorrect, of course, to assume that an adoptive parent in a *de facto* adoption could not be a parent under the Immigration Rules. The judge was correct, albeit for the wrong reasons, to conclude that the appellants could not succeed under the Immigration Rules on the basis they were joining an adoptive parent. The judge does not appear to have been referred to the judicial decisions relating to this to which I was referred by Mr Devlin. Mr Devlin argued that the judge wrongly assumed that the appellants' failure to meet the requirements of the Immigration Rules was a negative factor in the balancing exercise under Article 8. That this should be treated as a negative factor seems to have been implicit in the submission on behalf of the respondent, recorded at paragraph 7 of the decision, but it does not form an explicit element in the judge's reasoning.
29. Instead the judge states at paragraph 20 that under Article 8 she will consider whether the appellants "are now living in such compassionate and compelling circumstances that they should be allowed to join the sponsor in the United Kingdom **in recognition**

of their right to live in a family with him” [my emphasis]. It is difficult to find fault with this formulation. The reason the appellants did not succeed under Article 8 was not because the judge did not carry out the balancing exercise properly but because the evidence of the appellants’ circumstances was so inadequate. The judge did not err in law in her approach to the assessment of proportionality under Article 8.

30. Furthermore, the judge stated that any contact between the appellants and the sponsor could continue, as could the relationship they may have shared in the same manner as it had in the twelve years since the sponsor left Sierra Leone.

Conclusions

31. The making of the decision of the Judge of the First-tier Tribunal did not make an error on a point of law.
32. The decision of the First-tier Tribunal dismissing the appeals shall stand.

Anonymity

The First-tier Tribunal made a direction for anonymity. In view of the ages of the appellants I continue this direction in the following terms. Unless a court or tribunal directs otherwise no report of these proceedings shall identify either directly or indirectly the appellants or any member of their family. This direction applies both to the appellants and the respondent. Failure to comply with this direction may lead to contempt of court proceedings.

M E Deans
Deputy Upper Tribunal Judge

30th January 2019