Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: **HU/04831/2019 (P)**
HU/04826/2019 (P)

THE IMMIGRATION ACTS

Decided Under Rule 34	**Decision & Reasons Promulgated**
On 4 September 2020	**On 9 September 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

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(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. This decision has been made on the papers, under Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008, further to directions issued by the Upper Tribunal on 12 June 2020.

2. The appellants, sister and brother, are nationals of Nigeria born on 14 June 2001 and 26 September 2003 respectively. They appealed, on human rights grounds, against the respondent's decision to refuse their applications for entry clearance to settle in the UK as the dependants of their aunt, HB, pursuant to paragraph 297 of the immigration rules.

3. The appellants' applications were refused on the basis that the respondent was not satisfied that the documents produced demonstrated that they were

related as claimed to the UK sponsor, that there was no evidence relating to their father or his whereabouts, that the documents provided did not confirm that their grandfather was unable to care for them and that the evidence did not demonstrate that the sponsor could adequately accommodate them in the UK.

4. The appellants appealed against that decision. Their appeal was heard on 14 October 2019 in the First-tier Tribunal by Judge Black. The relationship between the appellants and the sponsor and the accommodation available in the UK were no longer in dispute. Judge Black found that the evidence in the form of text exchanges between the sponsor and the appellants' elder sister T, referring to T's father and to T's dad, contradicted the claim that the appellants' father had abandoned them shortly after the death of their mother, leaving them in the sole care of their elderly grandfather. The judge therefore rejected the appellants' claim that they did not have adequate support in Nigeria and concluded that their father was available to provide them with support. She found that there were no serious and compelling family or other considerations which made the appellants' exclusion from the UK undesirable for the purposes of paragraph 297 and that the respondent's decision was proportionate and not in breach of Article 8.

5. Permission to appeal to the Upper Tribunal was sought by the appellants on the grounds that the judge had made an unreasonable inference that their father was alive because of the references in the messages to "dad", when both their grandfather and their carer were referred to as "dad", just as the sponsor was referred to "mum" and "ma", in accordance with Nigerian culture, and it was unfair for the matter not to have been put to the sponsor at the hearing so that she could provide an explanation. It was asserted that the reference to the appellants' "daddy" having a birthday on 25 November 2018 showed that the reference was not to their father, whose date of birth was 10 December 1965.

6. Permission to appeal was refused in the First-tier Tribunal, but was subsequently granted in the Upper Tribunal on 13 March 2020.

7. The case was then reviewed by the Upper Tribunal due to the circumstances relating to Covid 19. In a Note and Directions sent out on 12 June 2020, Upper Tribunal Judge Reeds indicated that she had reached the provisional view that the question of whether the First-tier Tribunal's decision involved the making of error of law and, if so, whether the decision should be set aside, could be made without a hearing. Submissions were invited from the parties.

8. Written submissions have been received from both parties, both of whom are content for the matter to be dealt with on the papers under rule 34. In the circumstances, and having had regard to the limited nature of the issues in this case, I find no reason not to proceed to determine the matter without an oral hearing and consider that no unfairness arises from doing so.

9. In the rule 24 response from the respondent, Ms Fijiwala submits that the judge did not err in law by failing to put the issue in relation to the messages to the appellants or the sponsor and that the burden of proof was on the appellants to establish their case and clarify the evidence. She noted, with regard to the issue of the appellants' father's birthday, that there was no evidence of the date of birth for their grandfather or the carer to show that the reference was in fact to one of them.

10. The appellants' solicitors, in their submissions, reassert that it was unfair for the judge to make inferences about the appellants' father without first putting the matter to the sponsor to explain, particularly when the sponsor was referred to "ma" and "mum" in the messages and there was evidence of the appellants' father's date of birth in the birth certificate at pages 179 of the bundle showing that the reference to "dad" could not be to him.

Discussion and Findings

11. Having considered the grounds of appeal and the submissions made by both parties, I cannot find merit in the assertion that the judge acted unfairly by drawing an adverse conclusion from the apparent references to the appellants' father in the text messages adduced in the appeal bundle without inviting an explanation from the sponsor. That was the evidence before the judge and she was entitled to draw the conclusions that she did from a matter which plainly and obviously cast doubt on the appellants' claim to have been abandoned by their father. As Ms Fijiwala submitted, the burden of proof lies upon the appellants and it was for them to clarify the entirely reasonable inference from that evidence that their sister and their sponsor were in contact with their father. The appellants had the benefit of legal representation at the hearing and therefore had ample opportunity fully and properly to present the evidence and to clarify any matters before the judge, particularly given that they were fully aware from the refusal decision that the issue of their father's whereabouts was a matter of dispute, as the judge noted at [22].

12. Permission was granted by Upper Tribunal Judge Macleman on the basis that the appellants, had they been given an opportunity to explain, could have shown that the reference to "daddy's birthday" in the text messages related to the date of birth of their grandfather. However, it is relevant to note that the medical report at page 181 of the appeal bundle, and paragraph 9 of the sponsor's statement at page 3, both refer to the appellants' grandfather's date of birth as 9 April 1926. As such, the birthday referred to in the text message at page 160 of the bundle, 25 November 2018, does not support the claim that the references to "dad" and "father" were to the appellants' grandfather. I also note that the appellants' grandfather is referred to as "grand dad" in the message of 21 November 2017 at page 146, and as "grandpa" on 7 October 2018, at page 159, which is then followed by a reference to "Dad", again undermining any claim that the reference to "dad" was in fact a reference to the appellants' grandfather.

13. The appellants' grounds also state that the appellants referred to the carer as "dad" or "father", suggesting that the references in the text messages could

have been to him. However, whilst the judge referred at [30] to evidence of full-time domestic help, there was no suggestion in the evidence that there was anything verging on a sufficiently close relationship such that the domestic help would be referred to as "father" or "dad". The sponsor's statement, at paragraphs 2 and 9, when referring to the appellants' grandfather's age and his inability to care for them, does not even refer to there being a carer and neither is there any mention of such in the statements from the appellants.

14. In the circumstances, there was no reason for the judge, on the evidence before her, to consider that the references in the text messages to "dad" and "father" could have related to any other person than the appellants' father, irrespective of the birth certificate at page 179. She was accordingly perfectly entitled to draw the adverse conclusions that she did. She was not required to ask the appellants to explain their evidence, but was entitled to rely on that which had been presented before her. The appellants were not deprived of an opportunity to clarify their evidence and there was no unfairness in the judge drawing the conclusions that she did from the evidence.

15. For all these reasons it seems to me that the judge was perfectly entitled to conclude that the appellants' father was available in Nigeria to provide them with parental care and to take parental responsibility, that the requirements of paragraph 297 were therefore not met and that the respondent's decision to refuse entry clearance to join their aunt in the UK was not in breach of their Article 8 rights. The grounds do not disclose any errors of law in the judge's decision.

DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 4 September 2020