



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/10087/2013**

Appeal Number:

**OA/10088/2013
OA/10089/2013
OA/10090/2013
OA/10091/2013**

THE IMMIGRATION ACTS

**Heard at Field House
On November 11, 2014**

**Determination
Promulgated
On November 17, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

**MISS URSULE MABIALA KEMBI
MISS KERENE ZAWADI MPUKUTA
MR JUNIOR MPANZU MPUKUTA
MR HUGUES MASSAMBA MPUKUTA
MR AIME LUVUEZO MPUKUTA
(NO ANONYMITY DIRECTION MADE)**

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Ritchie (Legal Representative)

For the Respondent: Mrs Holmes (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellants, at the date of their applications on February 11, 2013 were aged 24, 15, 17, 19, and 13 respectively, and are citizens of the Democratic Republic of Congo. They each applied for entry clearance to join their parents who reside in the United Kingdom with the appellants' seven-year-old sibling. The respondent refused all of their applications in separate refusal letters dated March 20, 2013.
2. The first and fourth-named appellants' applications, as adults, were considered under Appendix FM of the Immigration Rules but were refused as the respondent was not satisfied they satisfied the requirements of paragraph E-ECDR of Appendix FM.
3. The remaining appellants' applications were considered under paragraph 297 HC 395 but were refused as the respondent was not satisfied they satisfied the requirements of paragraph 297 HC 395. Additionally, the applications of the second and third-named appellants were refused under paragraph 320(3) HC 395.
4. The appellants appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on April 25, 2013 and on July 4, 2014 Judge of the First Tier Tribunal Ferguson (hereinafter referred to as the "FtTJ") heard their appeals and in determination promulgated on August 27, 2014 he refused their claims under the Immigration Rules and article 8 ECHR.
5. The appellants lodged grounds of appeal on September 26, 2014 and on October 7, 2014 Judge of the First-tier Tribunal Omotosho gave permission to appeal on the basis the FtTJ's approach to article 8 was possibly flawed.
6. The appellants' parents (Mr Mukongo and Mrs Kamalandua) were present at the hearing and were represented by Mr Ritchie.

SUBMISSIONS ON ERROR OF LAW

7. Mr Ritchie relied on the grounds of appeal and submitted:
 - a. The FtTJ placed too much weight on the fact the appellants and their parents had been separated and without contact with each other for substantial parts of their lives. In doing so the FtTJ erred by not having regard to the decision of Sen v Netherlands (2003)

EHRR 81 in which the Court affirmed the principle that a biological parent-child relationship will always give rise to family life and there is a presumption in favour of the children and parents living together. The FtTJ failed to have regard to the fact that the family had been separated because the parents had fled and the parents had only recently located the children in 2011. Since finding each other finances have prevented direct contact as well as the appellants' mother's ill-health.

- b. The FtTJ failed to take into account the prospect of the future family life as set out in Ahmadi & Anor, R (on the application of) v SSHD [2005] EWCA Civ 172.
 - c. The FtTJ wrongly ignored the medical opinion that the appellants' mother's health would improve if her children were with her.
 - d. The FtTJ wrongly relied on the fact the pastor was able to continue providing support when considering the appellants' circumstances in the DRC.
 - e. The FtTJ failed to take into account material in the public domain about conditions in the DRC including the respondent's own operational guidance note that there are no adequate reception facilities or support for minors with no family in the DRC.
 - f. The FtTJ should have applied the spirit of Section 55 of the Borders, Citizenship and Immigration Act 2009 even though the children were not living in the United Kingdom.
 - g. The FtTJ wrongly concluded the children's best interests were to be in the DRC.
8. Mrs Holmes relied on the Rule 24 response dated October 15, 2014 and submitted:
- a. The grounds are a mere disagreement with the FtTJ's decision. He considered all of the evidence put to him by the appellants' representatives and made findings that were open to him. The burden was on the appellants to show their best interests lay with them living together in the United Kingdom and Mr Ritchie was now attempting to bolster the appellants' case by submitting fresh material that was not before the FtTJ.

- b. Neither parent had been granted refugee status and the fact the appellants' father had now been granted indefinite leave to remain did not mean he was unable to visit or go to live in the DRC.
 - c. Two of the children were refused because they were adults and the test for them is different than the test for the minors. The FtTJ had considered the situation and found it was proportionate to refuse them entry.
 - d. In assessing the evidence at paragraph [26] of the determination he made findings that were open to him in paragraph [27].
 - e. The FtTJ had regard to the best interests of the children and section 55 of the 2009 Act. In paragraphs [28] and [29] of his determination the FtTJ addressed the best interests of the child and the findings were open to him.
 - f. Their appeals should be dismissed.
9. Having heard their submissions I reserved my decision. I agreed with the representatives that in the event I found an error in law I would remake the decision without further submissions.

ASSESSMENT OF ERROR OF LAW

10. Permission to appeal was given because Judge of the First-tier Tribunal Omotosho felt it was arguable that the FtTJ had not made specific findings in respect of each appellant or followed the approach set out in Guslhan (Article 8-new rules-correct approach) Pakistan [2013] UKUT 640 and Razgar [2004] UKHL 00027.
11. I have had regard to both the written and oral submissions of the representatives and I have read carefully the determination and papers that were submitted to the FtTJ.
12. At paragraph [5] of his determination the FtTJ noted that the grounds of refusal based on relationship was no longer relied on and the FtTJ noted-
 - a. The respondent maintained the reasons for refusal for the first and fourth appellants was based on paragraph E-ECDR 2.4 (long-term care requirement), 3.1 (show sponsor can provide adequate maintenance without recourse to public funds) and 3.2 (sponsor to provide undertaking that will be responsible for maintenance,

accommodation and care for five years without recourse to public funds).

- b. The respondent maintained the reasons for refusal for the remaining appellants on the grounds they did not meet the requirements of paragraph 297(iv) (maintenance) and (v) (accommodation) HC 395.
13. The FtTJ further noted the respondent no longer relied on paragraph 320(3) HC 395 as a plausible explanation had been provided.
 14. Counsel for the appellants agreed that the appellants could not meet the remaining reasons for refusal as set out above and that their appeals would be argued on article 8 ECHR grounds only.
 15. The grant of permission suggested the FtTJ had not followed the approach in Guslhan but I am satisfied the FtTJ considered the appeals outside of the Immigration Rules under article 8 ECHR. Whilst he did not quote Razgar that does not amount to a mistake because it can be seen he did follow the recommended steps including a proportionality assessment. It is the proportionality assessment that forms the main thrust of Mr Ritchies' s submissions.
 16. The FtTJ had regard to the following issues when considering these appeals and in rejecting their claims he found:
 - a. The medical evidence for Mrs Kamalandua including the submission that if her medical condition was so poor how would she be able to cope with two extra adults and three minor children. The FtTJ had regard to the medical reports including Dr Cvejic's report dated May 7, 2014 and the fact the doctors supported her being reunited with her family because this would provide her with a great source of support but if the appeal failed it was likely to have a deleterious impact on her mental state. The FtTj considered a number of other reports and found that the mother's mental health problems were longstanding and dated back to the time she lived with her children in the DRC and her medical symptoms varied from good to bad depending on how she was feeling as evidenced by the fact her condition worsened when she learnt about the abuse her youngest child had suffered in the United Kingdom to May 2014 when the doctor commented that she had improved and her PTSD was under control.

- b. The evidence of Mr Mukongo and the fact he stated it was important for him and his wife that the appellants were admitted into the United Kingdom as this would enable them to be a family and would lead to his wife's health improving.
- c. Neither of the parents had refugee status. The father had arrived in 1999 and both his and his wife's subsequent asylum applications were refused. In 2009 the father had been given indefinite leave to remain outside of the Rules and his wife had been given leave as his dependant. Neither parent had established a real fear of returning to the DRC either for the purpose of a visit or to live.
- d. The lack of adequate accommodation in the United Kingdom (the parents and child lived in a one-bedroom property) was a factor to be considered. The fact larger accommodation was required would mean recourse to further public funds. The Local Authority could not guarantee such a property would even be available.
- e. The importance of families living together as set out in LD [2010] UKUT 278, Muse [2012] EWCA Civ 10 and AAO [2011] EWCA Civ 840.
- f. The fact adult appellants should be considered differently to minor appellants. The first and fourth-named appellants were able to care for themselves on a daily basis and could not satisfy the maintenance or accommodation requirements. There was nothing specific about the adult appellants that outweighed the public interest of maintaining immigration control.
- g. The best interests of the minor appellants, including the British child, have to be considered as of first importance including the fact families should live together, where possible.
- h. The father had not seen his children since 1999 and had not even met the youngest appellant. The mother had not seen any of her children since April 2005. This lack of contact did not establish more than the usual emotional ties between the adult appellants and their parents.
- i. There was a lack of evidence that any of the appellants were living in "the most dire

circumstances” and little evidence of their actual circumstances was presented. Whilst photographs were provided there was nothing in them, which identified their accommodation or living conditions or where the younger appellants went to school or if they did not why they did not go. The adult appellants did not work because there were no jobs in Kinshasa but all of them appeared cared for and accommodated with access to medical conditions.

- j. The appellants had spent all their lives living in the DRC and are all Congolese nationals. None had any direct contact with their mother since 2005 and their father since 1999. In fact, the fifth-named appellant had never met her father.
 - k. The question of proportionality between proper immigration control and proper respect for family life comes down on the side of immigration control.
17. Mr Ritchie has sought to persuade me that insufficient weight was attached to the concept of family life and too much weight was attached to the importance of immigration control.
 18. The FtTJ clearly had regard to all of the factors in this appeal. He considered the positions of both the adult appellants and minor appellants and in the case of the adult children he found nothing that went beyond normal emotional ties.
 19. On the subject of the appellants’ living conditions he found there was a dearth of evidence put forward on their behalf. Photographs are a powerful tool but all the FtTJ was presented with were photographs of children but there was no evidence of their surroundings or any evidence that they were living in dire conditions and on the face of it they were all healthy and well cared for.
 20. The FtTJ acknowledged when the parents last saw their children and the fact they all wanted to be together. He accepted there was family life already and this could continue. He concluded the public interest of immigration control outweighed their desire to live as a family together in the United Kingdom. He also found the parents could have visited their children as there was nothing preventing them travelling to the DRC.
 21. The FtTJ acknowledged the importance of families being together but as he noted none of the family members were British citizens save of course the youngest child was now entitled to British nationality because his father had indefinite

leave to remain in the United Kingdom. He also took into account neither the parents nor the appellants spoke English. The parents were unable, at the date of decision, to satisfy the Rules on maintenance and accommodation.

22. The FtTJ did carry out a proportionality assessment acknowledging the family wanted to be together and that children should, where possible, be with their parents but he balanced that against the public interest in maintaining immigration control and he found the latter outweighed the appellants' desire to come and live in the United Kingdom.
23. Mr Ritchie criticised the FtTJ for not considering certain materials about conditions in the DRC but when challenged he admitted these articles were not before the FtTJ.
24. Judges are in a no win situation because they are appealed when they do look up their own sources and appealed when they do nothing. Where appellants are unrepresented a judge may well feel it necessary to check public documents if none are placed before him but these appellants were represented throughout by solicitors and counsel appeared for them before the FtTJ. A bundle of documents that was relied on was submitted on their behalf and I am satisfied there is no obligation placed on the FtTJ to investigate the matter further.
25. The FtTJ had full regard to the medical evidence and the doctor's opinion that her health would be stable if they were allowed to enter. He balanced that against the public interest in maintaining immigration control and made a finding that was open to him.
26. The FtTJ had regard to the position of all of the appellants albeit I accept he did not deal with each appellant in isolation. I am satisfied that these were applications for them all to come and live here as a family. He did assess the adult appellant's application separately to the minor appellants' applications because the criteria under the Rules was different and his article 8 assessment had regard to the fact they had failed to demonstrate anything other than the usual emotional ties.
27. The FtTJ quite properly had regard to the public interest in maintaining immigration control when considering their article 8 claims. The fact the family want to be together was a factor the FtTJ was fully aware of and took into account. The FtTJ also considered the medical evidence but found that in light of the mother's medical circumstances it was not in their best interests to be cared for by her.

28. This is a detailed determination in which he considered all of the available evidence.
29. In the circumstances I find no merit in any of the arguments presented today and I find no error in law.

DECISION

30. There was no material error of law. I uphold the original decision and dismiss all the appeals before me.
31. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order was made in the First-tier Tribunal and I see no reason to amend that Order now.

Signed:

Dated: **November 17, 2014**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

The appeal was dismissed and no fee award can be made.

Signed:

Dated: **November 17, 2014**

Deputy Upper Tribunal Judge Alis