



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/12746/2013
OA/12753/2013
OA/12756/2013
OA/12760/2013
OA/12765/2013
OA/12766/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 4th August 2014**

**Determination
Promulgated
On 12th August 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**M B K (FIRST APPELLANT)
C K S (SECOND APPELLANT)
J N (THIRD APPELLANT)
D L M (FOURTH APPELLANT)
D D K (FIFTH APPELLANT)
D E L (SIXTH APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER, NAIROBI

Respondent

Representation:

For the Appellants: Mr J Doerfel, Counsel instructed on behalf of International Care Network

For the Respondent: Ms C Johnstone, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are nationals of Uganda. They appeal, with permission, against the decision of the First-tier Tribunal (Judge Britton) who, in a determination promulgated on 25th April 2014 dismissed their appeals against the decisions of the Respondent to refuse their applications for entry clearance to the United Kingdom under paragraphs 352A and 352D of the Immigration Rules, HC 395 (as amended).
2. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the claimant. Reference to the claimant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to a contempt of Court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate Court lifts or varies it.
3. The first Appellant, M B K, applied for entry clearance in order to join her spouse, who was also a citizen of Uganda. The Sponsor is a recognised refugee having left Uganda on 16th August 2006 and was subsequently granted refugee status at the end of 2006. He had indefinite leave to remain granted to him on 18th November 2011. The first Appellant married the Sponsor in March 1996. At the time the Sponsor left Uganda, he was in a customary marriage to two women; the first Appellant whom he had married on 24th March 1996 and F. The Sponsor, in his original asylum interview made reference to being married with two wives and having five children (see paragraph 4, SEF statement page 111 of the Respondent's bundle). Thus it was asserted that at the time he left Uganda his family consisted of his two wives and five children which included J N born on 12th January 1996 who was the first Appellant's child from a premarital relationship. At the time of the marriage she was 2 months old and it is said was brought up by the Sponsor as his child. Subsequently the Sponsor and the first Appellant had two children together, DDK born in 1997 and DEL born in 2004. Whilst the Sponsor is named as the father on his birth certificate, subsequent DNA testing for the purposes of applications demonstrated that the Sponsor was not his biological father however it was asserted that he had been brought up as a child of the Sponsor. The Sponsor also had two other children by F whom he had never been married to. They are CS born on 1st May 1991 before his marriage to the first Appellant and DLM, born in 2002, after his marriage to the first Appellant. It is said that the DNA tests confirm the relationship save for the paternity of DEL.
4. The Appellants made applications to enter the United Kingdom under the family refugee reunion provisions under paragraph 352A and paragraph 352D of the Immigration Rules. In 2007, the first Appellant had made an

application for entry clearance. It is not clear whether any of the children applied at the same time. For the purposes of that application she was interviewed at the British High Commission in Kampala and it is acknowledged by the first Appellant that the answers given in this interview were not correct. For reasons that will become clear in due course, the first Appellant did not provide correct answers to questions asked as a result of fear on her part and that of the Sponsor that any information given concerning his experiences in Uganda (including detention, torture and escape) would be communicated to the Ugandan authorities. The application was refused on the basis that the first Appellant had demonstrated a lack of knowledge of the Sponsor and it appears that the appeal that was made against the decision was withdrawn.

5. The current application was made in 2013 by the first Appellant and this time was accompanied by similar applications made by the children of the relationship. Those applications were subsequently refused by the Entry Clearance Officer under paragraphs 352A and 352D (in relation to the children). The first Appellant's application was refused on 13th May 2013. The substance of the refusal related to the interview that had taken place on the previous application in 2007. It was stated that when she had previously applied it was refused because of her lack of knowledge of the Sponsor on the basis that she had not been aware of significant incidents in the Sponsor's life and that there were serious discrepancies between the information the Sponsor provided to the UK authorities and the answers given at interview about him. It was recorded that the Entry Clearance Officer (in relation to that application) was not satisfied that the Appellant and the Sponsor had a subsisting marriage and they intended to live permanently with each other. The refusal went on to consider the solicitor's letter submitted with the current application providing an explanation as to why the Appellant gave those answers at interview. The Entry Clearance Officer, did not accept that locally employed High Commission staff would report any matters back to the government agencies but even if it did occur, it was considered that no attempt was made after the interview or before the decision to raise any concerns. Therefore he was not satisfied that she was part of the family unit at the time the Sponsor left Uganda under paragraph 325A(ii). Earlier in the refusal it referred to the Appellant's lack of knowledge and the Entry Clearance Officer's view that there was no subsisting marriage or that they intended to live permanently with each other.
6. In relation to the children, they were each the subject of individual immigration decisions. In respect of DDK, it was refused on the basis that as his mother's application had been refused as she was not part of the Sponsor's household at the time he left Uganda it followed that he also was not part of the Sponsor's family unit at the time of his departure from Uganda and it was refused under paragraph 352D(iv) on 13th May 2013.

7. In relation to DLM it was noted that he had applied to join his father in the UK but that there was no evidence in support of the claim that he lived with his stepmother thus it was not provided who he was living with at the time of the Sponsor's departure from Uganda nor was it clear the level of relationship with his mother or who was responsible for the important decisions with regard to his life. Thus the Entry Clearance Officer was not satisfied that he was part of the Sponsor's family unit at the time of his departure from the country of habitual residence and thus it was also refused under paragraph 352D(iv) on 30th April 2013.
8. In relation to JN, that application was refused on the same basis as DDK under paragraph 352D(iv) on 13th May 2013. In respect of CKS, it was noted that he had applied in a different category for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules. Thus the application was considered under paragraph EC-DR.1.1 of Appendix FM. The decision set out that he had not provided evidence that he could not care for himself; there was no evidence of any medical conditions nor was the Entry Clearance Officer satisfied that he required due to either age, illness or disability, long-term personal care to perform everyday tasks. Thus the application was refused under paragraph EC-DR1.1(d) of Appendix FM. It is further noted that his mother was not applying to travel to the UK and therefore he had family to turn to in Uganda if necessary. In relation to DEL it was refused on 13th May 2013 on the basis that it was noted that the Sponsor was not his biological father. It considered the submission that the Sponsor's name was on the birth certificate and that he had been brought up as his son but the Entry Clearance Officer considered there was no evidence to demonstrate that he had been adopted by the Sponsor; no adoption had taken place in Uganda and it had not been demonstrated that there was any "de facto adoption". Thus the Entry Clearance Officer was not satisfied that the Appellant was a child of a person settled and present in the United Kingdom or was being admitted for settlement at this time under paragraph 352D(i).
9. The Appellants exercised their right to appeal those decisions and as a result the appeal came before the First-tier Tribunal (Judge Britton) on 10th April 2014 at Newport. In a determination promulgated on 25th April 2014 he dismissed all the appeals. In that determination he considered the replies given by the first Appellant in her interview in 2007 which had been relied upon by the Entry Clearance Officer to refuse her application in 2013. At paragraph [22] of the decision he rejected the first Appellant and Sponsor's explanation for the answers that had been given and at [24] did not accept the Sponsor was in "a permanent relationship with M but that he was in a relationship with F and others". At [29] he did not accept the Sponsor and the first Appellant were in a permanent subsisting relationship and found that she lived in a "very big communal place where they all treat the children as if they are their own". At [30] the judge was unclear about the position of F as to whether she was the Sponsor's

brother's widow or not but found that both CS and DLM live with their mother and not with the Appellant and found that the Appellants were stating they lived with her for the purpose of making the application. In relation to D he was not satisfied that he was in a permanent and subsisting relationship with the Sponsor and found that it is in the best interest of all the Appellants to remain with their mothers in Uganda as they had lived in Uganda "all their life in a very close community".

10. The Appellants sought permission to appeal the decision of the First-tier Tribunal and permission was granted on 3rd June 2014 by First-tier Tribunal Judge Levin. The reasons given are as follows:-

"The grounds are extremely long but in essence they maintain that the judge's fact-finding was materially flawed, that the judge failed to assess the first Appellant's case with reference to paragraph 352A of the Immigration Rules, that he failed to assess the cases of the remaining Appellants with reference to paragraph 352D of the Rules, and that his assessment of the Appellants' cases under Article 8 was also materially flawed as he failed to carry out any detailed assessment thereof and that he failed to undertake any proportionality balancing exercise when considering the Appellants' case under Article 8.

Whilst the judge set out what he considered to be the relevant evidence in his determination and he also set out paragraphs 352A and 352D of the Immigration Rules, the judge failed to make any key findings of fact and he also failed to carry out any assessment or make any findings under either paragraph 352A or paragraph 352D in respect of any of the Appellants. The judge also failed to make any clear findings as to whether Article 8 was engaged in the case of each individual Appellant, and if so upon the proportionality of the Respondent's decisions in the individual cases of the Appellants. For those reasons both the grounds and the determination disclose arguable errors of law."

11. Thus the appeal came before the Upper Tribunal. Mr Doerfel, Counsel instructed on behalf of the International Care Network appeared on behalf of the Appellants and Ms Johnstone, Senior Presenting Officer on behalf of the Respondent. I heard oral submissions by Mr Doerfel who had also settled the Grounds of Appeal pages 1-13 of the core bundle and also provided a skeleton argument on the day of hearing. He relied upon those grounds and supplemented them by way of his oral submissions and by reference to the large volume of documentary evidence contained in the Respondent's bundle and also the Appellants' bundle.
12. The submissions, in essence related to the judge's consideration of what were the core issues in the appeal under the family reunion provisions. It was submitted that whilst there was some reference to the family refugee reunion Rules under 352A and D, they were not in fact considered during the body of the determination nor were there findings of fact made in relation to the salient issues under the Immigration Rules. In particular, he referred the Tribunal to the position of the first Appellant under paragraph

352A and submitted that no consideration was given to the provisions of that Rule and no findings of fact were made relevant to the refusal. This being a refusal under paragraph 352A(ii) although there was earlier reference to the subsistence of the marriage and therefore relevant to 352A(iv). He further submitted that there were factual inconsistencies in relation to the findings made as to the subsistence of the relationship when relying upon the interview that took place in 2007 and highlighted each of those. He further submitted that the judge did not consider the interview answers in the light of the Sponsor's experiences and no reference was made to that when reaching an assessment of the questions and answers that were given in that interview. This was material, he submits, because in effect the reasons for dismissing the appeals were based primarily on the answers given in that 2007 interview.

13. In relation to whether or not the relationship was subsisting, further material evidence was not considered by the judge although it had formed a great deal of the Respondent's bundle which numbered over 1,000 pages. The bundle consisted of documentation that had been produced on behalf of the Appellants but had been appended to the Respondent's bundle. Helpfully Mr Doerfel's solicitor had provided a schedule of contents of the Respondent's bundle and in that there were a number of documents relevant to the issue of the subsistence of the marriage including copies of money transfers, personal letters, school reports and other documentation which went to the issue of the subsistence of the marriage. None of that documentary evidence had been taken into account when reaching an assessment as a whole.
14. In relation to the children, their applications had all been refused under specific paragraphs of paragraph 352D and the judge did not consider each of the Appellants' cases separately. This was important because of the reasons given for refusal and thus it was necessary to engage with those issues. There was particular importance in reaching conclusions on findings of fact relating to the nature of the family unit prior to the Sponsor leaving Uganda as this was central to the issue. Mr Doerfel proceeded to go through the applications of each of the Appellants during his submissions. Thus he concluded in his submissions that in view of the grounds and the skeleton argument taken together and his oral submissions it demonstrated that the judge had made material errors of law and that the decision should be set aside.
15. Ms Johnstone relied upon the Rule 24 response that had been filed on behalf of the Respondent on 19th June 2014. In that Rule 24 response, it noted that whilst the judge may not have specifically addressed paragraph 352A of the Immigration Rules, the judge did not believe there to be a subsisting relationship between the Sponsor and the first Appellant and thus she could not satisfy the Immigration Rules. The response went on to state that the judge having concluded as such, found that the dependants on the appeal could not meet the specific requirements. He did not accept

that the Sponsor's children were living with her as claimed nor that he had been told the truth regarding their domestic circumstances and that it was in the children's best interests to remain living with their respective mothers in Uganda. Thus it was submitted the judge having found there was no subsisting relationship between mother and father, the Sponsor's children with the Appellant could not succeed under the Rules thus it was not a material error for failing to address their applications.

16. In her oral submissions she submitted in relation to the first Appellant her evidence was considered exhaustively by the judge and in the context of the interview in 2007. As to her claim he rejected that she had been instructed to give those answers and it was open to him at paragraph 22 to reach that conclusion on the evidence before him. He considered everything in the round and he had the benefit of hearing the evidence. At paragraph 29, the judge set out that he was asked to consider the Appellants as a whole. Whilst he did not refer to the Immigration Rules the findings make it clear that the judge found that they were not living in the circumstances as claimed and therefore they could not meet the Rules. The judge needed evidence that they were part of the family unit that he found that they were living as a commune. Furthermore, he reached the conclusion that she had had a child with somebody else namely DEL in 2004 and therefore she was in a relationship with someone else before the Sponsor left Uganda. In this respect she also made reference to the birth certificate that he was only registered as the Appellant's father in 2008 and thus the finding at [24] was right that she had had a child with another man. There was no evidence before the First-tier Tribunal to deal with the issue as to why his name was on the birth certificate when he was not the father. In any event none of the Appellants can meet the Immigration Rules and it would not be an unjustifiably harsh result for them not to be granted entry clearance. Thus the decision of the First-tier Tribunal was not wrong in law.
17. At the conclusion of the submissions I reserved my determination which I now give.
18. I have had the opportunity of hearing detailed submissions from each of the advocates before me. I have also had the opportunity of reading a large amount of documentary evidence that had been provided on behalf of the Appellants in furtherance of their applications before the Entry Clearance Officer and the skeleton argument produced. Having done so, I have reached the conclusion that the decision of the First-tier Tribunal should be set aside as I find that it has erred in law in its consideration of material issues in these conjoined appeals. I shall set out the reasons why I have reached that view.
19. The relevant provisions that the judge was required to apply were firstly, those under the Immigration Rules namely paragraph 352A (in relation to the principle Appellant) and paragraph 352D (in relation to the remaining

Appellants save for CK who was over 18 at the time of the application and therefore he was considered as an adult dependant relative under the provisions of Appendix FM. In the alternative the application is to be considered under Article 8 outside of the Rules which was dependent upon the findings of fact made in relation to the Immigration Rules. It is common ground between the parties that the judge, although he made reference to those provisions in the introductory part of the determination, did not seek to apply them in his findings or conclusions which start at paragraph [22] of the determination. It is argued by Ms Johnstone on behalf of the Respondent that whilst that might be an error, it is not material when considering the first Appellant's appeal because the issue the judge was required to determine under paragraph 352A(iv) was whether each of the parties intended to live with the other as his spouse or civil partner and that the marriage was subsisting which was the question the judge considered under Article 8 albeit not under the Rule itself. Further Ms Johnstone submits he considered relevant questions even if not in the context of the Rules.

20. The question remains as to whether the judge properly applied the issues to the evidence that was before him. In this respect I have concluded that he did not. The first identifiable error flows from the finding made concerning the reliance on the interview notes of 2007 which form the basis of the later refusal which is the subject of this appeal. The Appellant was never re-interviewed and therefore the only interview with the first Appellant took place in 2007, one year after her husband had left Uganda to seek asylum in the United Kingdom which was granted. The thrust of the refusal is based on the interview in 2007 and it stated:-

“Your application was refused because of lack of knowledge of the Sponsor; you were not aware of significant incidents in your Sponsor's life and there were serious discrepancies between the information the Sponsor provided to the UK authorities and the answers you gave at interview about him.”

21. I pause here. The refusal did not specify which questions demonstrated a lack of knowledge nor did it identify the “serious discrepancies” relating to the Sponsor's life. The rest of the refusal letter went on to consider the explanation given by the first Appellant in which it was asserted that she had not given information concerning her husband's life in Uganda because she was concerned about the safety for herself and that of the family members. The reason being that the Sponsor, who was a recognised refugee and having experienced torture, detention and having escaped did not trust the Ugandan authorities and feared that the local staff would lead sensitive information (divulged in the interview) to the Ugandan authorities. The refusal letter did not accept that that would take place but even if there was such a fear, that the first Appellant would have said something prior to the interview and not give incorrect information when she did say something. Again, the refusal letter does not particularise what the incorrect information was.

22. The judge dealt with these issues at paragraph 22 of the determination. He, of course, had the advantage of hearing the Sponsor give oral evidence and considered that in the light of the documentary evidence and I do not lose sight of that and the importance of it. He reached the conclusion that he did not accept the explanation given by the Appellant and the Sponsor for those answers and found that she had told the truth in the interview. He did not give reasons as such but posed a number of questions at paragraph 22. It is those questions that have been the subject of challenge on behalf of the Appellants. I am satisfied the judge did not properly consider the replies given in interview in the context that they were given and against the background of the Sponsor's circumstances and at places they are factually incorrect. By way of example, the judge stated at paragraph 22 "There was no need for M (the first Appellant) in her interview to say anything about the Sponsor's escape from detention or leaving Uganda." However that is factually incorrect. During the interview she was expressly asked questions about her husband and whether he had ever been arrested and if so when (see question 20), whether he had been detained (question 21), whether he had been detained during the elections (question 24). In the interview it can be seen that the Entry Clearance Officer did ask a number of questions relating to her husband's experiences in Uganda including arrest and detention. Other questions asked in the interview related to the Sponsor and how he had left Uganda (see question 28). Another factual error made at paragraph 22 is where the judge posed the question "If M was concerned not to mention names, why was F mentioned?" However as the interview demonstrates the Appellant did not mention F, it was a question posed directly to her from the interviewer at question 30.
23. When considering the interview and the Appellant's explanation for giving those answers, it was also important to consider the context and the background. The interview relied on in 2013 took place in 2007; only one year after her husband had left Uganda. It was accepted by the UK authorities that the Sponsor had been recognised as a refugee on account of his experiences in Uganda. He had been detained on two occasions (including 2001 for eight months and 2006 from 10th March to 30th June 2006 when he escaped from detention and fled Uganda on 16th August 2006). It was further accepted that he had been a victim of torture as set out in the Medical Foundation Report. Thus the Appellant was being asked to divulge information concerning her husband's experiences in Uganda one year after he left. There is no consideration of the context in which the interview answers were given by the Appellant.
24. The factual errors and the lack of context are material issues because the judge reached the conclusion that the marriage was not subsisting based primarily on the answers given in the interview in 2007 (see paragraphs 22 of the determination and 29 where the judge refers to the Appellant who "gave answers to simple questions. The answers were inconsistent with

those given by the Sponsor.”) Thus substantial weight was given to that interview.

25. Furthermore, the judge did not consider the other documentary evidence available to reach a conclusion on the genuineness and subsistence of the marriage or the makeup of the family unit at the time the Sponsor left Uganda which was a material issue. The documentary evidence consisted of the evidence given by the Sponsor on arrival in the UK (including his asylum interview of 11th October 2006) where he gave some of the names of his wives including the first Appellant and F and also his SEF statement where he gave details of being married with two wives and five children. There were a number of money transfers between the parties, personal letters and cards, a large number of phone cards, and letters from the children. The judge was required to make an assessment of this evidence in reaching a conclusion not only on the subsistence of the relationship but also on the makeup of the family unit and what it consisted of at the time the Sponsor left Uganda as this was a material issue as it formed the basis of the refusal under paragraph 352A and D in relation to all the Appellants. It would have been open to the judge to reject the evidence if reasons were given for so doing, however there is no reference in the determination to the other evidence provided in support of the circumstances of the first Appellant and those of the children and there was no engagement with that evidence.
26. There were other material findings that were not made including the makeup of the family unit (relevant to Paragraph 352D in relation to the children and also flows from the findings in relation to the first Appellant). The judge was required to consider the nature of the family unit when the Sponsor left Uganda in 2006 and was required to consider that in his findings. It is insufficient to say as he did that they lived communally and it was incumbent on the judge on the unusual facts of this case to consider how the family unit was made up, at what time, the relationships between the parties and the children at the time the Sponsor left Uganda and in relation to the first Appellant whether the relationship continued to subsist in the light not only of the interview in 2007 but also the other evidence that had been produced and appended to the Respondent's bundle.
27. There is no reference to paragraph 352D in the determination nor was there any analysis of the individual position of each of the Appellants two to six to determine their appeals and in the event of not satisfying the Rules to consider their applications in the context of the findings made under Article 8 (if so applicable).
28. A point made by Ms Johnstone was that the evidence that the relationship was not subsisting related to the circumstances of the birth of the child D and that whilst he was born in 2004, prior to when the Sponsor left Uganda that he was not the father of this child (relying on subsequent DNA evidence) and thus she had had a child with another man and therefore

the relationship could not have been subsisting and the judge was right to make that finding. However that submission failed to take into account that the evidence was that the Sponsor was in a polygamous relationship and it was acknowledged that the marriage was not faithfully monogamous for each party but that was not evidence of its failure or cessation. Furthermore, it was the Sponsor's case that he had considered himself to be D's legal father (having been named on the birth certificate) and was always treated as his son and the evidence that he was not the biological father was not ascertained until the DNA evidence was available years later. This, I think, illustrates the necessity for careful findings of fact to be made as to the nature of the family unit, what it comprised of, when making an assessment of all the evidence and then applying the Immigration Rules and if necessary and if relied upon Article 8 outside of the Rules.

29. For those reasons, I have reached the conclusion that the determination cannot stand and that the appropriate order is for the decision to be set aside. None of the findings of fact can be preserved and thus fresh findings of fact dealing with all of those issues will be required to be made. In those circumstances I have also reached the conclusion that the correct disposal of the appeal is for it to be remitted to the First-tier Tribunal for a fresh oral hearing to that Tribunal. Due to the nature of the error of law, the First-tier Tribunal will be required to consider the oral evidence of the Sponsor and the documentation to make fresh findings of fact relevant to the issues relevant to the appeal. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, I consider that there are good reasons why I have reached this conclusion given that fresh findings of fact will be required to be made on the evidence as a whole and also having given particular regard to the overriding objective of the efficient disposal of the appeal. Thus the decision of the First-tier Tribunal is set aside and the case is to be remitted to the First-tier Tribunal at Newport for a hearing in accordance with Section 12(2) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Decision

30. The First-tier Tribunal made an error of law. The decision is set aside. The appeal is to be remitted to the First-tier Tribunal for a hearing on a date to be fixed with a directions hearing.

Direction regarding anonymity - rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction

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applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of Court proceedings.

Signed

Date 11/8/2014

Upper Tribunal Judge Reeds