



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

Appeal Number: OA/13626/2012

THE IMMIGRATION ACTS

**Heard at Glasgow
on 30 January 2014**

**Determination
promulgated
on 31 January 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

DJODJO MUYIGA

Appellant

and

ENTRY CLEARANCE OFFICER, DEMOCRATIC REPUBLIC OF CONGO (DRC)
Respondent

For the Appellant: Mr R Gibb of Quinn, Martin & Langan, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

No anonymity order requested or made.

DETERMINATION AND REASONS

- 1) The appellant appeals against a determination by First-tier Tribunal Judge Agnew, promulgated on 11 June 2013, dismissing her appeal under paragraph 297 of the Immigration Rules and under Article 8 of the ECHR.
- 2) The appellant argued that there was error in 4 respects - (1) the appellant being a child at the date of decision, failure to treat her best interests as a primary consideration; (2) failure to take relevant factors into account, in particular the totality of money transfers from the appellant to the sponsor, and the reasons why the appellant and her siblings moved to Kinshasa; (3) error in taking the date of birth of the appellant's sibling Basile as 14 September 1992 and so considering him an adult, his date of birth being 14 September 1997; and (4) holding as adverse to the appellant's case an

alleged discrepancy about whether she had been in the care of her grandfather, a matter of which she ought to have been put on notice.

- 3) I advised parties at the outset that I had traced the origin of the error regarding the age of the appellant's sibling. The date was wrongly stated by the administration of the First-tier Tribunal on the outside of the Tribunal file. It appears that unfortunately the judge took the date from there, and having no reason to think that this person's age was an issue, did not cross-refer to the other materials.
- 4) Mr Gibb submitted thus. He acknowledged that the best interests of the child had not been stated as a specific ground of appeal to the First-tier Tribunal, and that *Mundeba* [2013] UKUT 00088, referred to in the grounds of appeal to the Upper Tribunal, was not cited to the First-tier Tribunal. He also acknowledged that the case as put to the First-tier Tribunal (the other siblings having withdrawn their appeals) posed a choice between taking the appellant, a near adult, away from siblings with whom she has lived so far in order to live with the sponsor, with whom she has not lived since 2004. He argued however that the sponsor had been the child's effective parent and principal or sole carer, so that the bond between them was a very strong one, which the judge overlooked. There had been evidence of money transfers over and above those listed by the judge at paragraph 20. He accepted that the judge was not provided with any schedule of dates and amounts and he could not say how much further the overlooked evidence took the case, other than that there were "quite a few" other transfers. He said that the error at paragraph 19 of the determination regarding the age of Basile was a matter which the judge thought went to the core. The judge overlooked the sponsor's explanation of why the children were transferred from the remote rural area where they lived with their grandparents to Kinshasa. The judge's point regarding the grandfather caring for the appellant, although obvious on reading the court judgment, was overlooked by the Entry Clearance Officer, the Entry Clearance Manager and the Presenting Officer as well as by the appellant's representative. That suggested it was a matter on which the appellant should have been invited to comment. If so, it was not just an empty procedural matter, because the appellant now puts forward a possible answer. A letter from the sponsor's lawyer in DRC dated 26 August 2013 says that this "can be considered as a material error which falls outwith the wording of the judgment." Finally, Mr Gibb submitted that the determination as a whole was fatally undermined by a combination of errors, and an entirely fresh hearing in the First-tier Tribunal was required.
- 5) The Presenting Officer fairly mentioned that the question of the best interests of the child, while not put as clearly as it might have been in the First-tier Tribunal, was recorded by her colleague as part of the submissions for the appellant. There was error about the age of Basile. While the point about the court order and the grandfather's involvement might be thought obvious once seen, no-one had noticed it apart from the judge. Again very fairly, Mrs O'Brien pointed out that although the passage quoted by the

judge (9/10 of the appellant's First-tier Tribunal bundle) goes against the appellant, there is another passage from the same proceedings (9/8) which is in her favour, narrating that since the death of their parents the children have been financially supported by the sponsor. Mrs O'Brien suggested that if a fresh decision were required the real crux of the case might be in paragraph 297(f) of the Immigration Rules rather than in separate consideration of the best interests of the child and Article 8. She reserved the respondent's position regarding the lawyer's letter of 26 August 2013.

- 6) The judge does not seem to have considered the age of the appellant's sibling by itself decisive, but she did give it importance. I think the error must have contributed to her conclusion that she was not being given a true picture of the appellant's circumstances.
- 7) The omission to put the terms of the court judgment to parties for further comment did not appear to me to constitute legal error, until it was pointed out that the wording of the court materials may be inconsistent. Further analysis is required in any fresh decision.
- 8) Any error about amount and dates of money transfer receipts arose from the appellant's failure to present her case clearly, and even if there was an oversight, it was not shown to be significant. Nor does there appear to have been an explanation about the children moving to Kinshasa which helped their case very much.
- 9) The judge's approach to the best interests of the child appears to have reflected the case as put to her, and it might be thought that all relevant considerations were implicit in the determination.
- 10) However, I conclude that the errors over the age of a sibling and over the effect of the court judgment together undermine the judge's conclusion that the evidence as a whole was unreliable. On the basis of such a finding, parties were in agreement on the further course to be followed.
- 11) The determination of the First-tier Tribunal is **set aside**. None of its findings are to stand. Under section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The member(s) of the First-tier Tribunal chosen to reconsider the case are not to include Judge Agnew.
- 12) It is not anticipated that the First-tier Tribunal may need to hold a CMR hearing. Parties are directed to comply for purposes of the next hearing in the First-tier Tribunal, insofar as not already complied with, and particularly in respect of any new materials, with the requirements set out in the Practice Directions (PD 7.5 and 8.2).

A handwritten signature in black ink, appearing to read "Hugh Maclemon". The signature is written in a cursive style with a large, stylized initial 'H'.

30 January 2014
Judge of the Upper Tribunal