



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

Appeal Numbers: OA/00368/2014
OA/00369/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 14th January 2015**

**Decision & Reasons
Promulgated
On 11th February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MASTER S A O (FIRST APPELLANT)
MISS P E O (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr A. Jafar of Counsel

For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Nigeria and are brother and sister respectively. The First Appellant was born on 17th July 2001 and the Second Appellant on 19th August 1998. They appeal against a decision of Immigration Judge Prior sitting at Hatton Cross on 8th October 2014 who

dismissed their appeals against decisions of the Respondent dated 9th December 2013. Those decisions were to refuse the Appellants' applications for entry clearance to the United Kingdom in order to join and settle with their Sponsor, Ms J O O, a British citizen ("the Sponsor") pursuant to paragraph 297(i)(e) and (f) of the Immigration Rules. The Sponsor and the Appellants' father, Mr P A O, married in Nigeria in 1998 and subsequently re-married in the United Kingdom on 11th June 2011.

The Relevant Immigration Law

2. Paragraph 297 sets out the requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent present and settled in the United Kingdom. Those requirements insofar as they are relevant to this application are at sub-paragraph (e): that one parent is present and settled in the United Kingdom and has had sole responsibility for the child's upbringing or sub-paragraph (f) that one parent is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements had been made for the child's care. The burden of proof of establishing that the requirements of the paragraph are met rests upon the Appellants and the standard of proof is the usual civil standard of balance of probabilities. The Appellants also argue that their exclusion from the United Kingdom as a result of the refusal of their applications breaches this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention. The burden and standard of proof of establishing a breach equates with the burden and standard of proof under the Immigration Rules.

The Explanation for Refusal

3. The Respondent noted that the Appellants were residing with their maternal grandmother. The Appellants had provided no evidence that their mother, the Sponsor, had any day-to-day responsibility for them. The Appellants had last visited their parents in the United Kingdom in 2006 and the Sponsor had visited her children in Nigeria in 2012. There was no other evidence that the Appellants had seen their mother since her arrival in the United Kingdom in 2005. The Sponsor could thus not satisfy the sole responsibility test under sub-paragraph (e).
4. Letters written by the Sponsor in support of the Appellants' application and lodged with it indicated that the Appellants' maternal grandmother with whom they were living was suffering ill-health as a result of which the Appellants might be subjected to various forms of abuse. However the Sponsor had been aware of the grandmother's ill-health in 2006 when the Appellants returned from their visit to the United Kingdom and they had made no application to join their mother, the Sponsor, permanently since then. A visit visa application had been refused in 2008. The Respondent was not satisfied under sub-paragraph (f) that there were serious and

compelling family or other considerations which made the Appellants' exclusion undesirable.

5. The grounds of appeal against that decision argued that the grandmother's health had deteriorated to the point where she was no longer able to look after the Appellants in Nigeria. There was medical evidence in support of this which had been ignored by the Respondent. Although the Sponsor could have applied for the Appellants to join her in the United Kingdom she was happy for them to continue their education in Nigeria but the circumstances had now changed and it was in their best interests that they should join their mother in the United Kingdom. The Sponsor had had evidence to show that she sent her children monies for their daily upkeep including school fees and uniforms etc. She had produced evidence of regular contact with them. The Respondent had not considered the duty imposed by Section 55 of the Borders, Citizenship and Immigration Act 2009.

The Decision at First Instance

6. The Judge heard oral testimony from both the Sponsor and the children's father but had reservations about the evidence of them both. At paragraph 17 of his determination the Judge wrote:

"The evidence before me somewhat indicated a lack of commitment and care for the Appellants on the part of the Sponsor. The Sponsor did not endeavour to see the Appellants between 2006 and 2012 by visiting them in Nigeria. ... the Sponsor in her statement made reference to the visit that she did make in June 2012 as including the purpose of an attempt at achieving reconciliation between her family and the father's family in Nigeria, albeit in terms of initiating contact between the Appellants and their paternal grandparents in Nigeria. I took the view that it might have been expected that the Sponsor's primary concern in 2012 would have been to bring the Appellants away from Nigeria where due to the loss of her son and failing health the grandmother was struggling in her care of the Appellants. The Sponsor's visit in March 2014 was explained in terms of her attendance upon the grandmother's funeral".

7. Although the grandmother had been admitted to hospital on three occasions the Sponsor had made no application for the Appellants to come to the United Kingdom until 23rd October 2013. The Appellants' father, Mr O had not known where the Appellants had lived between the grandmother's death and the commencement of their (present) residence with their maternal uncle in March 2014. Financial support of the Appellants by the Sponsor did not constitute the exercise of sole responsibility by her. Mr O had no status in the United Kingdom and there was no evidence why the Sponsor should not join the Appellants in Nigeria with him. The Judge concluded at paragraph 21:

“I was not satisfied that sub-paragraph 297(i)(f) or Article 8 was engaged given that the Appellants are well integrated in Nigeria and have a large extended family in that country”.

The Onward Appeal

8. In grounds of appeal which at seven pages were one page longer than the determination appealed against, it was argued that the Judge’s finding that the Appellants were well integrated into a large extended family was not borne out by the evidence. The Appellants still had to look after themselves. Apart from the Sponsor’s brother no other family member was willing to take them in. The evidence about the grandmother was that prior to the application being made she was no longer able to bathe or take care of herself.
9. Article 8 was engaged in this case and the grounds cited a number of Strasbourg cases to indicate that only in exceptional circumstances could family life between a parent and the parents’ biological child be broken. The Judge had not made findings on whether the Sponsor demonstrated sole responsibility. Nor had he made any findings on who actually did exercise sole responsibility (if the Sponsor did not). The financial support given by the Sponsor was an important part of sole responsibility. The Respondent had failed to follow the Immigration Directorate Instructions August 2003, Chapter 8, Section 3, Children – Annex M, which said that the objective of the provision [in paragraph 297] was to allow a child to join a parent where that child could not be adequately cared for by his parents or relatives in his own country. The child should first and foremost be cared for by his natural parents and only if they could not care for the child in the child’s own country should consideration be given to joining relatives in another country. The Judge had not considered the right of a child to live with his biological parent (or vice versa) or the positive obligation under Article 8 to facilitate this.
10. The application for permission to appeal came on the papers before First-tier Tribunal Judge Cox on 27th November 2014. In granting permission he wrote:

“The grounds in essence contend for extensive reasons given that the Judge’s ultimate findings that there was no feature which engaged paragraph 297(i)(f) or Article 8 family life were perverse, incorrect in law and based on a false factual premise. On reflection I find the grounds are arguable and merit consideration.”
11. The Respondent replied to this grant on 12th December 2014 stating that the Judge had properly considered the evidence before him and made reasonable sustainable findings that the Appellants had failed to discharge

the burden of proof to the requisite standard to show that the Sponsor was exercising sole responsibility over them. Although various comments were made relating to the Sponsor and her husband's attitude towards their responsibilities as parents this did not in any way compromise the sound sustainable findings by the Judge which were properly open to him on the evidence. The Sponsor had failed to demonstrate that she exercised sole parental responsibility over the two Appellants who were now in the care of their uncle as the grandmother had passed away. The grounds were a mere disagreement with the negative outcome of the appeal.

The Hearing Before Me

12. In oral submissions Counsel for the Appellant stated that there was a letter from the children's uncle to the effect that he could no longer look after them. It was difficult to see how the Judge's conclusion that the children were well integrated was relevant to paragraph 297. It was a low threshold to establish the existence of family life. The relationship of parent and child would amount to family life unless there were exceptional circumstances. The requirement in sub-paragraph (f) to show compelling reasons was entwined with the duty under Section 55 to consider what was in the children's best interests. The Judge had given no consideration to who had been taking parental responsibility after the grandmother had died in December 2013.
13. In referring to a lack of effort by the Sponsor to reunite herself with her children the Judge had glossed over the fact that the Sponsor had sought to bring the children to the United Kingdom [on a visit visa] but that was refused in 2008. Although the Judge had dealt at paragraph 16 with the children's education there was no finding on whether the Sponsor had chosen the schools, nor on the Sponsor's evidence that the grandmother could not communicate with the school which was an English-speaking one. It would not have been possible for the Sponsor to have provided documentary evidence in support to establish that she, the Sponsor, had chosen the schools as the school would not have a record of that. The visit in 2012 made by the Sponsor was both to effect a reconciliation between the two families and to visit the children. The children's father had not contributed a penny towards the Appellant's upkeep in Nigeria. He had been living in this country illegally since 2011. A letter in the Appellant's bundle from the Appellant's uncle dated 5th September 2014 (in which he had begged the Sponsor to come back to Nigeria and collect the Appellants) was uncontradicted.
14. The Judge had misunderstood the affidavit from the grandmother dated 7th October 2013 which he had characterised as making no reference to the Sponsor having sole responsibility for the Appellants. The Judge had commented on references in the Appellants' letters to the advice of the Sponsor and the children's father rather than decisions made in relation to the Appellants. Part of the affidavit was to give permission for the Appellants to travel to the United Kingdom as the grandmother was the Appellants' guardian at that time. It was difficult to understand how the

grandmother could have used the term “sole responsibility”. The letters had not dealt with who was exercising actual control. It was not an answer to the proportionality exercise to say that the children’s parents could go back to Nigeria. There had been no findings on the issue of sole responsibility.

15. In reply the Presenting Officer argued that as this was an out of country appeal the case fell to be decided on the situation at the date of decision. The Respondent’s decision was made on 9th December 2013, the grandmother died twelve days later on 21st December. Although the decision had been reviewed by the Entry Clearance Manager in March 2014, that was not the date of decision for these purposes. The Judge therefore had to consider the case on the basis that the grandmother was still alive. If the Judge had not made findings about who had sole responsibility it was because that was not what his task was. What was before the Judge was a claim that the Sponsor had sole responsibility. It would be speculation for the Judge to go on to say who did have sole responsibility if it was not the Sponsor. The Judge set out the evidence regarding the contact between the parents and the school (at paragraph 16 of the determination) to show that the Sponsor was not exercising sole responsibility. If the Sponsor wished to give more evidence about contact with the school that should have been set out in the witness statement.
16. The Appellants’ argument that the Judge had said there was no family life in this case was wrong. The Judge’s decision that Article 8 was not engaged was not because there was no family life but rather because the parties could live in Nigeria and family life could be continued elsewhere. It was difficult to see how on the basis of the Judge’s findings that compelling circumstances could be made out. Even though the grandmother was extremely unwell in 2012 and had been for the previous five years the application was not made until late 2013.
17. In closing Counsel for the Appellant argued that even if the parties could go back to Nigeria the **Razgar [2004] UKHL 27** step by step approach applied and the best interests of the children still had to be considered. Failure to do so would be an error of law. The Appellants did not know what the Judge found to be in their best interests. It could be said that someone was always exercising parental responsibility. The grandmother was unable to look after herself at the date of decision. The Sponsor had come to the United Kingdom at the age of 18 and had remained in touch whilst studying and working in this country. The error of law was that there were no sustainable findings and the proper course of action would be to remit the matter back to the First-tier to be decided again.

Findings

18. This matter came before me to decide in the first place whether there was an error of law in the determination such that if there was it fell to be set aside and the decision re-made. If I were to find there was no such error then the decision of the First-tier Tribunal would stand. The issues before

the Judge were firstly whether the Appellants could bring themselves within either limb of paragraph 297(i) of the Immigration Rules and secondly, if they could not whether their appeals should nevertheless be allowed outside the Immigration Rules under Article 8.

19. The Judge's concern in the case was the lack of contact between the children and the Sponsor and indeed the lack of knowledge of what was happening to the Appellants by both the Sponsor and her husband, Mr O, the children's father. The Judge accepted that the Sponsor was making payments to her relatives in Nigeria who had the day-to-day care of the Appellants but did not consider that that by itself was sufficient to establish the test of sole responsibility under sub-paragraph (e).
20. What the Appellants needed to show was evidence that the Sponsor was exercising parental responsibility for her children. This would involve evidence that the Sponsor was making decisions in relation to them but upon enquiry the Judge could not find evidence to support that. The Sponsor testified in vague and generalised terms as to the Appellant's educational achievements. If the Sponsor was taking decisions in relation to the children's education it was reasonable to have expected her to be rather more knowledgeable about that than she was. She had no knowledge of the grades achieved by the Appellants. Someone the Sponsor said was a teacher at the children's school did not figure on the school reports. The Appellants' letters referred to the advice of the Sponsor and their father rather than decisions. The Sponsor put forward a letter from Reverend Gyasi which said that the Sponsor had sole responsibility but the Sponsor was unable to say how the Reverend was in a position to know what was happening in Nigeria with the Appellants.
21. The importance of that was not just that the Sponsor had put forward evidence which had failed to come up to proof but more importantly she was unable to produce evidence from a disinterested third party to confirm her case that she had sole responsibility for the children. Corroboration of itself is not a requirement but in circumstances where it would be reasonable to expect supporting evidence to be produced and none is, it is open to a trial Judge to take an adverse view.
22. This was very much a case where the impression made by the Sponsor on the Tribunal was going to be important. The Judge evidently felt there were difficulties with the general credibility of the Sponsor for example at paragraph 15 of the determination. The Sponsor had said in oral testimony that she had re-started her relationship with the children's father, Mr O in 2009 when her own statement had said that it was only in early 2011 that he had approached her for a reconciliation.
23. It is correct, as the Presenting Officer submitted, that it was not the task of the Judge, once he had rejected the Sponsor's claim to have sole responsibility for the Appellants, to make a finding as to who did have sole responsibility. That would be to engage in speculation in circumstances where the Judge had found that he did not have a satisfactory description

of what was going on in Nigeria. Someone was evidently looking after the children but that someone was not the Sponsor. The Judge was also concerned about the lack of contact between the Sponsor and the children noting that there were a number of opportunities where steps could have been taken to improve the level of contact but they had not been and no good reason had been provided for that. The failure to take steps was not the action of someone exercising sole responsibility over her children and it was open to the Judge to make that assessment. It is inaccurate to say that the Judge made no findings on the issue of sole responsibility. His finding was that the Sponsor was not exercising sole responsibility. He did not have to go on to say who was. The Appellants failed to prove their case under sub-paragraph (e).

24. The alternative argument was that even if the Sponsor was not exercising sole responsibility the circumstances of the Appellants in Nigeria were such that their exclusion was undesirable. The Judge reminded himself of the authority of **Mundeba [2013] UKUT 00088** which mirrors the content of the Immigration Directorate Instructions cited in Counsel's grounds of onward appeal. The Judge was fully aware that the best interests of a child were usually best served by being with both or at least one of their parents. It was in that context that the Judge considered whether the parents could return to Nigeria to look after the children. In the case of the children's father he had no status in this country as was readily acknowledged by Counsel and there would appear to be no reason at all why he should not return to Nigeria to assist in the care of the children. This is particularly so as he had told the Sponsor that he felt heartbroken that he had neglected and abandoned them. The Sponsor is now a British citizen but the Judge was aware of her ties to Nigeria and her travel there and evidently could see no reason why she too could not return to Nigeria to look after her children.
25. In those circumstances it was open to the Judge to conclude that there were no compelling or compassionate circumstances under either paragraph 297 or when conducting the proportionality exercise under Article 8, to allow the appeal either under the Rules or outside them. The Judge's comment that the Appellants had a large extended family in Nigeria derived from the Sponsor's own evidence that she had made a visit to Nigeria in June 2012 as the Judge put it "to achieve reconciliation between her family and the father's family". By definition that meant that there were members of the extended families. This was not a conclusion that the Judge arrived at without any reference to the evidence he assessed in his determination.
26. The Judge had to consider matters at the date of decision when the grandmother was alive, albeit the evidence appeared to suggest that her health was already very poor by then. At some point the uncle took over care of the Appellants. The Judge was not impressed by the father's lack of knowledge of who had looked after the children between the death of the grandmother (and by implication her progressively worsening illness)

and the commencement of the children's residence with their uncle, Nosa, in March 2014.

27. Notwithstanding the repeated reference to it in both the grounds of onward appeal and Counsel's submissions, the Judge did not say that there was no family life between a mother and her children rather that Article 8 was not engaged because family life could be continued elsewhere. He gave his reasons for that conclusion which were open to him on the evidence before him. The arguments to the contrary are a mere disagreement with those findings. I do not find that the Appellants can demonstrate any errors of law in the Judge's determination and I dismiss their appeals.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the Judge's decision to dismiss the Appellant's appeal against the Respondent's decision.

Appeals dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed this 10th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT **FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed this 10th day of February 2015

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Deputy Upper Tribunal Judge Woodcraft