



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

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

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 22<sup>nd</sup> April 2015**

**Determination Promulgated  
On 7<sup>th</sup> September 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**DEL (1)**

**JN (2)**

**CKS (3)**

**DLM (4)**

**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER NAIROBI**

Respondent

**Representation:**

For the Appellant: Mr J Doerfel of counsel

For the Respondent: Ms A Brocklesby-Weller, a Home Office Presenting Officer

**DECISION AND REASONS**

**The parties**

1. DMK was born on 18th December 1967 in Uganda. He first arrived in the UK and claimed asylum in 2006 and was given ILR on 18th November 2011.
2. MBK was born on 10th October 1977. She claims to have gone through a ceremony of customary marriage with DMK on 24th March 1996, prior to his departure for the UK on 16th August 2006.
3. The first appellant, DEL and the second-fourth appellants, JN, CKS and DLM (and DDK) were all their children or, it was claimed, were treated as children of the family (JN having been born of a previous relationship between MBK and an unknown father before she married DMK).

### **The Immigration applications**

4. On 24 April 2013 MBK sought entry clearance to the UK as the spouse of a refugee under paragraph 352 A of the Immigration Rules ("paragraph 352A").
5. The other appellants sought entry clearance to the UK on the same day on the basis that they are the children of DMK, who they are entitled to join, following his grant of refugee status in the UK, under paragraph 352D of the Immigration Rules ("paragraph 352D"). However, their situations were not identical. CKS was in full time education but he did not qualify under paragraph 352D as he was not a child at the time of the application, but, according to his application, he claimed that the need to maintain close family ties justified and required the grant of leave. The respondent refused all the applications on 13th May 2013.

### **The appeal proceedings**

6. The first appeal against the respondent's refusal of leave to enter was considered by the Entry Clearance Manager on 23rd January 2014, who decided the ECO's decision to refuse entry clearance had been correct. That appeal against the respondent's refusal of entry clearance came before IJ Britton whose decision was promulgated on 25th April 2014. However, on 12th August 2014 Upper Tribunal Judge Reeds found that it contained arguable errors in that some of the fact-findings of the FTT were flawed. There was a second appeal before Judge Woolley ("the Immigration Judge") who, following a hearing on 22nd December 2014, again dismissed the appeal but made an anonymity direction.
7. The present appeal follows the lodging of grounds of appeal on 5th January 2015 against the Immigration Judge's decision. Judge Pooler found the grounds to be at least arguable, noting that in the case of JN there was evidence her father was dead which the judge failed to take account of. There was also case law in relation to section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55") and there may have been a failure to properly consider paragraph 297 (i) (f) of the

Immigration Rules. That paragraph provides that a person seeking leave to enter the UK on the grounds of being the child of a parent or relative settled here has to show that there are serious and compelling reasons why it is undesirable to exclude that child or that there were other considerations which make the exclusion of that child undesirable. Additionally there must be adequate arrangements for that child's care. In the case of DLM it was thought that the judge had erred in his assessment of whether or not he formed part of the family unit and in DEL's case there was also thought to be a faulty application of rule 297 (i) (f) of the Rules.

8. On 20th January 2015 the respondent filed a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 stating that the latest appeal was opposed on the basis that the determination was a comprehensive one based on the evidence and the judge made findings he was entitled to make.
9. At the hearing I heard oral submissions by both representatives. There was no application to adduce fresh evidence. Mr Doerfel submitted that MBK qualified for entry clearance because she was the spouse of a person with ILR, their marriage was subsisting and she was rightly successful in her appeal to the FTT. This resulted in her being granted entry clearance. There had also been a successful appeal by DDK and there was no challenge to that outcome by the respondent. In order to preserve the family unit it was appropriate to grant the children entry clearance to join them, it was submitted. That would be either under the Immigration Rules or on the basis that there would be a breach of Article 8 of the European Convention on Human Rights (ECHR) if they were to be excluded. A large number of telephone cards and other materials were provided to corroborate the intense contact between the parties.
10. With regard to the children:
  - a. DEL was aged 10 at the date of the hearing and he was part of a family unit with DMK who had travelled here to claim asylum.
  - b. DDK also qualified under the same rule (297).
  - c. DLM was also under 18 and qualified under that rule.
  - d. CKS remained financially and emotionally dependent on his father and accordingly should also be allowed to stay, presumably, on the grounds that Article 8 would be offended if he were not.
  - e. JN ought to be treated as a member of the family of DMK by reason of the definition of "parent" in the Immigration Rules.
11. It was submitted for the respondent that even if errors were found in relation to some of the appellants' cases this did not mean I had to allow

all the appeals. However, there was no cross-appeal against the decision to allow MBK's appeal against the refusal of entry clearance.

12. It was pointed out on behalf of the respondent that different appellants had different mothers and fathers. As far as JN was concerned, it was accepted that DMK was treated as her father if she could show that her father was dead. However, as the judge had pointed out in paragraph 35 of his decision, there was no evidence that JN's father was dead. Accordingly he found that this had not been established to the required standard and concluded that her application could not succeed under paragraph 352D (i) of the Immigration Rules. This, it was said, was clearly a conclusion the Judge was entitled to come to on the evidence placed before him.
13. The Immigration Judge considered JN's application under paragraph 297 of the Immigration Rules but concluded at paragraph 36 that because JN was a young woman in good health, who was supported by her sponsor, no serious or compelling reasons made exclusion of that child undesirable. Having summarised a number of decisions of the Court of Appeal the Immigration Judge had concluded that the requirements of the rule were not met.
14. DLM's mother was one FN, who was not a member of the family unit. He had no biological relationship with MBK and the judge had analysed the nature of that relationship at paragraphs 37-40 of his decision. The judge had referred to the case of **BM (BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055)** and pointed out that the President had there distinguished between cases where a child remained part of the family unit and cases where he did not. DLM was not part of the family unit of DMK either for the purposes of paragraph 352D (iv) of the Immigration Rules.
15. CKS was over the age of 18 at the date of the decision. He had formed a family life in the UK by virtue of the de facto roll assumed by DMK. It appeared to be accepted that he could not meet the requirements of the Immigration Rules. Any consideration of the application on the basis that CKS's human rights would be unlawfully interfered with should be through the "prism of the rules" it was submitted by Ms Brocklesby-Weller. CKS was an adult who could make his own way. It was noted that he had embarked on tertiary education. I was urged to consider the public interest considerations in section 117. The Immigration Judge appears to have applied the correct paragraphs of the Immigration Rules but to have concluded that he could not meet those requirements. In terms of his right to form a family or private life in the UK was concerned, the Immigration Judge had given proper consideration to the additional factors in section 117 at paragraph 50. When a proportionality assessment was carried out it led the judge to the correct conclusion under the ECHR.

16. In reply Mr Doerfel said that JN was a child at the time of the appeal. MBK, her mother, was a part of the family unit. CKS did not have to show emotional ties to his siblings. All the siblings had a family life together and the Immigration Judge erred in his assessment of the various factors. If maintenance and accommodation were in issue there is no reason why it should not have been raised. Although I found Mr Doerfel's submissions difficult to follow he appeared to say that 352D of the rules (requirements to be met by a child seeking to join a refugee parent) or Article 8 gave adequate grounds for allowing CKS's appeal. Further, it was contended that DMK took ultimate responsibility for all the children. CKS would be heartbroken by being divided from his siblings.
17. It was submitted that JN fell within paragraph 352D (i) (child of a parent who has been granted refugee status). Alternatively paragraph 297 (i) (d) of the Rules applied to her case in that one parent was living in the UK (MBK) and the other (unknown) may well be dead. Alternatively there were "serious and compelling reasons" why the exclusion of that child would be "undesirable" for the purposes of paragraph 297 (i) (f).
18. At the end of the hearing I reserved my decision as to whether an error of law had been established by the appellants and, if there were such an error, what directions should be made and steps taken to rectify it.

## **Conclusions**

19. The appellants rely on the following provisions in support of their appeals:
- a. In relation to the child appellants-
    - i. They claim to be the children of at least one parent who is settled in the UK (DMK) and that there are serious and compelling family and other considerations which make exclusion of those children undesirable and that there are suitable arrangements for their care.
    - ii. Alternatively, they are the children of a refugee (DMK) and formed part of his family until he left the country of his habitual residence (Uganda) to claim asylum in the UK;
  - b. In relation to all appellants it was submitted that the respondent has an obligation to consider their applications in the light of Article 8 and her obligation to respect their right to a private or family life in the UK required her to admit all the appellants to the UK.
20. I turn to consider the Immigration Judge's findings by reference to each child.

21. The Immigration Judge seems to have found DMK and MBK to be credible witnesses. For the most part he fully considered the evidence and arguments presented to him and reached conclusions he was entitled to come to. However, in relation to JN, I agree with Mr Doerfel that he was wrong to say at paragraph 35 of his decision that there was “no evidence” that her natural father was dead and that it was against the weight of the evidence to conclude that DMK was not her “parent” for the purposes of the Immigration Rules since MBK dealt with this in her witness statement. On the face of it, although that was a bare assertion, that JN’s father was dead, it does not seem to have been disputed. As the “child” of a refugee she did therefore qualify under paragraph 352 D of the Rules and ought to have been given entry clearance. In the circumstances it is unnecessary to deal with her claim also to having qualified under paragraph 297 (i) (f) of the rules, other than to say that for the reasons given below in relation to the other child appellants, I do not accept the criticisms of the Immigration Judge’s decision.
22. In relation to the other child appellants, and in so far as it is relevant in the light of the above conclusion in relation to JN, it is alleged that the Immigration Judge was not entitled to conclude that there were no “serious and compelling family and other reasons” why exclusion of the family would be undesirable. I bear in mind that the respondent was required to safeguard and promote the interests of the child appellants and this was a primary consideration, but in my view the Immigration Judge had these requirements very much in mind in his decision and carefully weighed up the balancing considerations of the children’s welfare with the wider public interest of properly and proportionately applying the requirements of the Immigration Rules. It is noteworthy that in relation to JN he was not addressed on the paragraph 297 point and concluded that she was a “young woman in good health “ who was about to go to college in Uganda. This completely contradicted the notion of requiring the respondent to grant her entry clearance for “serious and compelling” reasons.
23. In relation to the other children, the alleged failure to carry out an adequate welfare assessment is no more than a criticism of the conclusions of the Immigration Judge. I am satisfied that he did consider their welfare (see, for example, paragraph 50 on page 34 in relation to DEL. It is not part of this Tribunal’s remit to interfere with decisions of the FTT merely because the Upper Tribunal disagrees with the conclusions. The judge had regard to all the case law relied on by the appellant in this appeal but concluded it did not alter the outcome. In relation to DEL it was not alleged that his father was dead (see paragraph 42 of the decision). It was not submitted that DMK fell within the definition of his father. It was submitted that MBK, his natural mother, was being admitted to the UK and therefore that DEL ought to be admitted at the same time but it seems that MBK had never had sole care of him for the purposes of paragraph 297 (i) (e) and the

requirements of paragraph 352 D were not met because DMK was not DEL's father.

24. As far as DLM is concerned, FN is his mother and she, as far as can be established, remains in Uganda. He was integrated with two family units and was not part of DMK's family unit at the relevant date. It seems on this basis that the Immigration Judge was entitled to reject his appeal also.
25. CKS's claim was not advanced under any Immigration Rule but solely under Article 8 of the ECHR. The Immigration Judge considered this claim, and all the children's claims, under Article 8 of the ECHR but concluded that there would be no unlawful interference with their human rights if they were not all re-united in the UK. I have considered, particularly in relation to the child appellants and the fact that DDK and, as a result of my findings, JN, are potentially to be divided from their siblings, whether this conclusion is still sustainable. However, I have concluded that since adequate provision for their care is available in Uganda and since there are clear requirements which must be met before they may be admitted under the rules, the Immigration Judge had reached the correct conclusion under Article 8. As Mrs Brocklesby-Weller submitted the Article 8 assessment had to be carried out looking through the prism of the rules. The Immigration Judge's consideration of this issue appears well-reasoned. His conclusions in relation to Article 8 took account of the wider public interest considerations which Parliament has deemed necessary under section 117 of the Nationality, Immigration and Asylum Act 2002, before any conclusion is reached under this article.
26. DLM has not in my view raised any credible argument against the conclusions of the Immigration judge in relation to Article 8 and the Immigration Judge was entitled to make an objective assessment of the likely burden to tax payers consequent on the admission of foreign national in to the UK in circumstances where he did not qualify under the rules.

### **Notice of Decision**

27. I find a material error of law in the decision of the FTT in relation to JN. The appeal by JN against the refusal of entry clearance is allowed under paragraph 352D of the Immigration Rules.
28. In relation to all the other appellants their appeals are dismissed. The decision of the First-tier Tribunal and the decision of the ECO to refuse entry clearance in their cases stand.
29. The anonymity direction by the FTT is maintained.
30. No fee award was made by the FTT and I make no fee award.

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Signed W. E. HANBURY  
**Deputy Upper Tribunal Judge**

Date 6<sup>th</sup> September 2015