



**Upper Tribunal
(Immigration and Asylum Chamber)
OA/08079/2014**

Appeal Numbers:

OA/08077/2014

OA/08090/2014

OA/08078/2014

THE IMMIGRATION ACTS

Heard at Manchester

On 15th March 2016

**Decision & Reasons
Promulgated**

On 26th April 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

R K

D N

J K

K C

(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Hodson of Counsel

For the Respondent: Ms C Johnstone, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Uganda born respectively on 15th July 1998, 23rd September 1999, 17th June 2000 and 4th December 2002. The Appellants had made application for entry clearance to join their sister for leave to remain in the United Kingdom pursuing a claim for humanitarian protection. Their applications were considered pursuant to paragraph 319X of the Immigration Rules. Notices of Refusal were issued by the Entry Clearance Officer on 16th June 2014.
2. The Appellants appealed and the appeals came before Judge of the First-tier Tribunal Kelly sitting at Hatton Cross on 27th February 2015. In a decision and reasons promulgated on 16th March 2015 the Appellants' appeals were dismissed. Anonymity directions were made in respect of each Appellant. No application is made to vary that order and I consequently extend the anonymity direction to this decision.
3. On 14th April 2015 Grounds of Appeal were lodged by the Appellants to the Upper Tribunal. Permission to appeal was refused on 3rd June 2015 by Judge of the First-tier Tribunal Pooler. On 16th June 2015 renewed Grounds of Appeal were lodged to the Upper Tribunal. Those grounds were considered by Upper Tribunal Judge Kopieczek and permission was granted on 31st July 2015. Judge Kopieczek set out detailed reasons. He noted that on one view the matters advanced in the grounds on close analysis amount only to a disagreement with the judge's assessment of the facts and if there is merit in the grounds it seemed to him that they were to be found in grounds 2 and 3, ground 4 not in itself revealing that the outcome of the appeal would have been any different if the judge's findings are "serious and compelling" and unsustainable.
4. However he did consider as to grounds 2 and 3 that there may be something in the point about the lack of any findings in relation to the Appellants' living conditions, although the argument would have to be good with reference to the evidence that was before the First-tier Tribunal. He noted that on an initial perusal there could be said to be scant hard evidence about the Appellants' living conditions and as far as he can see there are only two paragraphs said to show their accommodation in Uganda. The remainder of the evidence seems to him to be within the Sponsor's account only which does not particularly rely on their living conditions.
5. He has significant doubt about the arguability of ground 1 not least because the First-tier Judge had to deal with the case as put on behalf of the Appellants i.e. it is the Appellants' elderly aunt who is in effect the only person who they have to look after them. Nevertheless he does not limit the grounds that may be argued. He was satisfied that there was sufficient in the grounds to reveal that the First-tier Tribunal may have erred in law in its assessment of the "serious and compelling" issue.
6. On 19th August 2015 the Secretary of State responded to the Grounds of Appeal under Rule 24. The response submits that the grounds amount to

mere disagreement with the findings of the First-tier Tribunal Judge. They note that at paragraph 23 the First-tier Tribunal Judge found that the children's father had not abandoned them. At paragraph 26 the First-tier Tribunal Judge found that Ms Koburugi was another relative who was able to offer the Appellants support. The First-tier Tribunal Judge had also taken into account the authority of *Mundeba* at paragraph 32 and had taken into account all of the evidence in the round finding that there were no serious and compelling family or other considerations that made their exclusion from the UK undesirable and that these were findings open to the judge based on the evidence before him.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel Mr Hodson and by their Sponsor Ms DN (who is the Appellants' sister). Mr Hodson is familiar with this matter. He appeared before the First-tier Tribunal and he is the author of both the grounds and renewed Grounds of Appeal. The Secretary of State appears by her Home Office Presenting Officer Ms Johnstone.

Submissions/Discussions

8. Mr Hodson relies on the renewed Grounds of Appeal. He submits that there are four Grounds of Appeal. He starts with the fourth ground namely that the First-tier Tribunal Judge fell into error as regards the accommodation of the Sponsor. He points out that the issue was to be considered as it appertained at the time of decision and therefore he submits that there is a material error of law. He submits that the judge's finding at paragraph 33 that the property continued to be available to Miss K or that the Appellants would be permitted to reside there was wrong and that the Entry Clearance Officer in refusing the applications had not challenged whether the Sponsor actually occupied the property at the time of decision nor was any adverse point made by the Presenting Officer or taken by the First-tier Tribunal Judge to this effect. He submits that the First-tier Tribunal Judge had committed a material error of law by in effect considering the circumstances as regards the Sponsor's accommodation as appertaining at the time of the hearing rather than that at the date of the immigration decision.
9. Mr Hodson states that the other three grounds should be considered together and these revolve around paragraph 319X of the Immigration Rules. He notes that the relevant paragraph is set out at paragraph 4 of the First-tier Tribunal Judge's decision. He points out that there is no reference within the Rule to "sole responsibility" and that notwithstanding that the judge commences her assessment of the appeal by considering the Sponsor's claim that her father had abdicated all responsibility for the Appellant and that the elderly aunt has had sole responsibility for their care since their departure from their family home. He submits that the findings at paragraphs 22 and 24 of the First-tier Judge's decision implies

that the judge considered that there is applicability for the concept of 'sole responsibility' when clearly there is not.

10. Secondly he submits that there has been an acknowledgement that the Appellants' aunt has played a significant role in the upbringing of the children and at paragraph 25 that the judge has accepted that her health is likely to be in decline and that she will be significantly less able to help and care for the Appellants than she once was. He submits that these findings amount to serious and compelling family and other considerations implying that the care of the children by their aunt who has been their main carer cannot be sustained as before and that the judge has given wholly inadequate and unsound reasons and nonetheless finding these considerations do not mean that the exclusion of the children is undesirable.
11. Further he emphasises that the suggestion he gleans in paragraph 29 of the First-tier Tribunal Judge's decision that the poor record of attendance and achievement at school implies that there will be difficulties in the children adjusting to the far better educational provisions of this country hardly constitutes a proper reason that it is in the best interests of the Appellants to remain as they are.
12. He contends the judge has failed to take into account the letter from RK to her Sponsor and that this letter is borne out by the school report referred to at paragraph 29 of the decision. He notes the consent form to DNA testing is signed by a person named AM who is said to be no more than a neighbour who accompanied the children. He submits that the judge relied on the most flimsy of evidence to come to the finding that he did and that there is evidence in the substantive bundle before the First-tier Tribunal at pages 224 to 225 as to how ill the Appellants' aunt it.
13. Thirdly he turns to the living conditions of the Appellants. He points out these have been described by the Sponsor in her evidence before the First-tier Tribunal and at that stage she set out how she had regained contact with the children and given an explanation of the conditions they are living in. She points out that bare maintenance is provided and photographs have been shown that they are dwelling in a hut. He submits that this is evidence to show that this is where they are living with their aunt and that these conditions are basic in the extreme e.g. they have to walk to fetch water. He submits the judge has not referred to this. He further submits at paragraphs 29 and 30 of the judge's decision are not properly reasoned.
14. In reply Ms Johnstone relies on the Notice of Refusal pointing out that the judge correctly identified the circumstances of relatives and who was responsible for the children's care. She admits that the judge's analysis at paragraph 27 invokes the correct test and that reasons have been given. She reminds me that the matters have been considered based on the application form and on the witness statement of the Sponsor.

15. So far as living conditions are concerned she submits that Mr Hodson has exaggerated the position pointing out that there is no reference to the lack of running water in the Sponsor's written testimony nor has there been a housing report, showing the conditions that it is purported the children are living in, provided. She reminds me that contact is made by mobile phone and through facebook and that modern technology appears to be available to the Appellants. Further she points out there is no reason provided as to why the children have been missing school and the conclusions reached at paragraph 29 by the judge are ones that were open to her.
16. He further submits that the findings at paragraph 25 were open to the judge based on the Sponsor's own evidence. She reminds me that the parties have been separated for over ten years and that no visit had taken place. She submits that there is no evidence to support the grounds and no evidence of serious or compelling circumstances. She asked me to dismiss the appeal.

The Law

17. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
18. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

19. This is an appeal under the Immigration Rules. The burden of proof when the matter was heard before the First-tier Tribunal Judge was on the balance of probabilities. I remind myself that this is an appeal and that the issue before me is whether or not there is a material error of law in the

decision of the First-tier Tribunal Judge. I am not rehearing the appeal nor considering the appeal as being properly decided and reasoned, by imposing my own view against that of the judge. The judge at first instance heard the evidence. It is difficult not to be sympathetic with the position in which the Appellants find themselves. They are all minors living in Uganda. I totally accept that their living conditions cannot match those that would be found in the UK. However this of itself does not provide compelling reasons for allowing an appeal. The issues have to be addressed as matters of law and not as matters of sympathy.

20. Sympathetic therefore as I am to the Appellants' circumstances I do not, having given due consideration to all the issues raised, find that there are material errors of law in the decision of the First-tier Tribunal Judge. The judge has considered the relevant law. This is paragraph 319X of the Immigration Rules. She has recited the relevant paragraph at paragraph 4 of her decision. She has applied it. The Appellant's Sponsor has limited leave to remain in the United Kingdom as the beneficiary of humanitarian protection. It is consequently necessary for the Appellants to show that there are serious and compelling family or other considerations which makes their exclusion undesirable and that suitable arrangements have been made for the children's care. Those were the issues extant before the First-tier Tribunal Judge. The judge has given these issues detailed consideration. She has heard the evidence and oral testimony of the Sponsor. She has made findings at paragraph 23 as she was entitled to that the Appellants had not established that their father was absent from their lives. The judge acknowledges that their father is someone who is likely to do as little as possible to administer to his children's practical and emotional needs and she has then gone on to consider the role of the Appellant's aunt and the role that she has played since the death of their mother in 2003.
21. Clearly the aunt is ageing and that her health is declining but the judge has given due consideration to these factors at paragraphs 24 and 25 and whilst she may well have made an error in the ages of the children by twelve months I am not persuaded that this error is material.
22. Further I acknowledge that reference is made to the letter from RK and I further accept that it is not specifically referred to within the decision. However I find that its content reflects issues that have been considered by the judge in that the decision reflects the aunt's health and the burden that is placed upon the eldest Appellant. Whilst the letter is sad the overall picture presented in this matter has been given due, full and proper consideration by the judge.
23. In addition the judge has gone on to analyse the school reports and whilst a conclusion that the children are unlikely to make a smooth transition to the secondary education in the United Kingdom and that such a conclusion is speculative it does not in itself I am satisfied reach the threshold that would engage paragraph 319X(ii). The fact remains the judge has

identified the responsible relative who looks after the children and has given detailed reasons particularly at paragraphs 27 and 30. I agree with the submission made by Ms Johnstone that the judge has applied the correct test and made findings that she was entitled to. Further the judge has noted that the children have been separated for over ten years from their elder sister, that there has never been any visits and that they have modern technology contacts i.e. mobile phones and facebook. Further as Ms Johnstone points out, the evidence relating to their home conditions is very limited and their home position was given due consideration by the First-tier Judge in general consideration throughout her decisions and reasons.

24. Finally whilst I note the submission made with regard to accommodation the judge was I find entitled to reach the conclusion that she did having given due consideration to the evidence that was produced to her and that when looked at in the round the judge was entitled to come to the finding that the provisions of paragraph 319X of the Immigration Rules were not met. In such circumstances the decision discloses no material error of law and the Appellants' appeals are 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

Date

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application is made for a fee award and none is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris