



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07947/2015

THE IMMIGRATION ACTS

Heard at Manchester
On 20 June 2017

Decision and Reasons Promulgated
On 22 June 2017

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

JK

ANONYMITY DIRECTION MADE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Pledger, Latitude Law solicitors
For the respondent: Mr Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

1. I have anonymised the appellant's name because she is a minor. She was born in 2003 and is now 14.

2. The appellant is a citizen of Uganda. She has appealed against a decision dated 4 March 2015 refusing her application for entry clearance to join her aunt in the United Kingdom ('UK'). The SSHD did not accept that there are serious and compelling family or other considerations which would make the appellant's exclusion from the UK undesirable as required under para 297(i)(f) of the Immigration Rules. The SSHD also did not accept that the sponsor would be able to maintain the appellant without recourse to public funds under para 297(v).
3. The appellant was 12 (but nearly 13) at the date of decision. The appellant's aunt ('the sponsor') is the appellant's late mother's half-sister.

Procedural history

4. After hearing from the sponsor at a hearing, the First-tier Tribunal dismissed the appellant's appeal in a decision dated 12 August 2016. The First-tier Tribunal considered the appellant's case in detail but concluded that the requirements of 297(i)(f) are not met and the decision does not breach Article 8.
5. In a decision dated 20 February 2017 Upper Tribunal Judge Bruce granted permission to appeal. The matter now comes before me to determine whether the First-tier Tribunal decision contains an error of law

Error of law hearing

6. Mr Harrison conceded that the First-tier Tribunal erred in law in failing to take into account a material significant factor – as an orphan the appellant lived in Uganda without any parental influence and that on the evidence the only person capable of being her de facto parent and meeting her emotional needs in a parental sense, is the sponsor.
7. Mr Harrison was entirely correct to make the concession he did. The First-tier Tribunal undoubtedly set out the appellant's case in some detail at [11-30]. The findings of fact from [40] onwards similarly cover much detail. Specific findings have been made regarding the death certificates provided [45-45] and the presence of other family members in Uganda [51]. The First-tier Tribunal then accepts that the sponsor is the appellant's aunt [52] and is an orphan [53]. The First-tier Tribunal then summarises the evidence regarding Ms Namanda's support to the appellant from July 2014 to July 2015 and Ms Namugerwa's support for the appellant from July 2015 to the date of hearing, August 2016 at [54 and 55]. The First-tier Tribunal then turns to evidence relating to the appellant's schooling at [57-61] before considering the contact between the appellant and the sponsor at [62-64]. The First-tier Tribunal then appears to address some of the factors set out in Mundeba (s.55 and para

297(i)(f) [2013] UKUT 00088 (IAC) at [65 to 74] before concluding at [75] that the relevant test is not met.

8. This summary of the First-tier Tribunal decision demonstrates that at no point does the First-tier Tribunal make a clear finding regarding the credibility of the evidence provided by the appellant in the papers or the sponsor at the hearing. This evidence is discussed and analysed but it is unclear whether parts have been accepted or not. This evidence is pivotal to the appeal because it sets out the claim that the sponsor is the only person who has provided emotional support in a parental way to the appellant since the death of her grandfather in 2014. I acknowledge that the First-tier Tribunal reminded itself of the importance of the appellant's emotional needs at [74] but there is a failure to acknowledge what these are and how or if they are met at the date of decision. That failure is a material error of law – the First-tier Tribunal has failed to take into account a significant consideration when determining whether there are serious and compelling family or other considerations making the appellant's exclusion undesirable.
9. That failure is compounded by a further error of law: the failure on the part of the First-tier Tribunal to consider the best interests and welfare of the appellant when assessing her emotional needs or at all – see Mundeba at [36] and [37].
10. Both representatives agreed that these errors of law vitiate the conclusion of the First-tier Tribunal such that its decision should be set aside and remade by the Upper Tribunal. The factual position is uncomplicated and I therefore concluded that I should remake the decision myself.

Remaking the decision

Hearing

11. The representatives were able to agree the following which helpfully narrows the issues for me to determine.
 - (i) Given the date of the decision, the appellant is entitled to bring an appeal under the Immigration Rules and Article 8.
 - (ii) The only issue in dispute under the Immigration Rules relates to 297(i)(f). It is accepted that the appellant is an orphan and that the sponsor is her only living relative who has ever cared for her or indicated a willingness to care for her. Mr Harrison accepted that as at date of decision and continuing the sponsor has sufficient income to cover the costs of the appellant in the UK without recourse to public

funds, and that the appellant would be adequately accommodated in the sponsor's three-bedroom home.

- (iii) The assessment of 297(i)(f) must assess the position as at the date of decision in March 2015. The appropriate test is that set out in Mundeba (supra).
 - (iv) Given the lack of clarity in the First-tier Tribunal's credibility findings, I should hear from the sponsor and make my own credibility findings.
 - (v) Only if I find that 297(i)(f) is not met, will it be necessary to turn to Article 8.
12. The sponsor confirmed her witness statements and gave oral evidence before me. She clarified several issues in examination-in-chief. She made it clear that she could support the appellant in the UK. She continued to work at Trafford Council (and was now in receipt of an annual income of £24900). She continues to live in a three-bedroom house she shares with son. He works at Tesco and attends college with ambitions to go to University. She described the appellant as being very lonely for a long period of time and missing her grandfather.
 13. Mr Harrison briefly cross-examined the sponsor. After the completion of cross-examination, Mr Harrison indicated that he did not dispute any of her evidence and invited me to determine the appeal on all the evidence available. He placed no reliance upon the SSHD's decision letter. As Mr Harrison put it, the appellant has been through very traumatic events at a young age and her circumstances are exceptional.
 14. I indicated to Ms Pledger that I did not need to hear from her because I was going to allow the appeal, for reasons I now give in writing.

Legal framework

15. The only issue that arises under the provisions in paragraph 297 of the Immigration Rules in this case is whether there are serious and compelling reasons family or other considerations, which make exclusion of the appellant from the UK undesirable.
16. The starting point is that there is a high hurdle to overcome in order to establish that there are serious and compelling family or other considerations. In Mundeba it was held that:

"34. In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family

or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be.

...

36. The exercise of the duty by the Entry Clearance Officer to assess the application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by...administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration". Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55.

37. Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come into play where there are other aspects of a child's life that are serious and compelling - for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve inquiry as to whether: -

- (i) there is evidence of neglect or abuse;
- (ii) there are unmet needs that should be catered for;
- (iii) there are stable arrangements for the child's physical care.

The assessment involves consideration as to whether the combination of circumstances sufficiently serious and compelling to require admission."

Findings of fact

17. I entirely accept the credibility of the evidence provided by the sponsor, which is no longer disputed. She gave her evidence in a straightforward and candid manner. Her evidence has been consistent in all material respects. She has endeavoured to obtain as much documentary evidence as possible in difficult circumstances including 'after the event' death certificates, letters from school and from Ms Namanda and Ms Namugerwa. Having considered all the evidence from the sponsor and the appellant in the round, together with the documentary evidence I make the following findings.

- (i) The appellant was aged 12 at the date of the decision and is the niece of the sponsor. The appellant lived with her mother, grandfather, the

sponsor and other relatives as part of the same household from the time she was a 6-month-old baby. Her father died when she was a baby and her mother died when she was 2 from AIDS. The sponsor came to live in the UK when the appellant was 4 to join her partner. The appellant continued living in this household with her grandfather, albeit she went to boarding school when she was 8 and returned during the holidays. The appellant's grandfather was her de facto parent until his death in June 2014.

- (ii) Upon the grandfather becoming ill and prior to his death, the sponsor began to pay for the appellant's school fees, and this arrangement has continued since then. Upon his death, the sponsor was the only living relative who took any active interest in the appellant. This has continued since that time. It was the sponsor who told the appellant about the grandfather's death and it was the sponsor who comforted her at the funeral. It was a very difficult time for the appellant who looked upon her grandfather as a parent. The appellant continues to find it difficult to cope without any family members supportive of her in Uganda.
- (iii) The sponsor made arrangements for a friend of hers, Ms Namanda, to lodge the appellant during the school holidays. This arrangement continued from July 2014 to July 2015. After this time and to date the appellant has stayed with Ms Namanda's neighbour, Ms Namugerwa, during the school holidays. She is paid to provide board and lodging during the school holidays by the sponsor.
- (iv) Notwithstanding the living arrangements during the holidays, since the grandfather's death and as at the date of decision and continuing, the sponsor has played an active role in attempting to parent the appellant on a long-distance basis. The sponsor has overseen the appellant's education, accommodation and emotional needs. She has met her teachers and visited Uganda, during which time the appellant stayed with her. The appellant and the sponsor view their relationship as a very close one and akin to parent and child.
- (v) As at the date of decision and continuing, no other family member or individual has been able or willing to play a quasi-parental role. As at the date of decision Ms Namanda was due to leave Uganda, which she did in July 2015, when Ms Namugerwa accommodated the appellant. They were paid for these services.
- (vi) As at the date of decision the appellant was progressing reasonably well in her education and this continues.

- (vii) As at the date of decision the appellant lived at boarding school during term time, and during the holidays lived at Ms Namanda's home. She was due to leave Uganda at the date of decision and did so in July 2015. Since this time, during the holidays the appellant has lodged with Ms Namugerwa in a one bedroom home on a mattress on the floor.
- (viii) It is firmly in the appellant's best interests to be reunited with the only living relative who has taken any interest in caring for her. Her age, family history and circumstances are such that her emotional needs unquestionably require a parental authority in her day-to-day life. The absence of this since 2014 when her grandfather died has had an adverse impact upon the appellant.

Application of findings of fact to law

18. I am entirely satisfied that the appellant meets the high hurdle necessary to establish that there are serious and compelling family or other considerations, making her exclusion undesirable. This is not a case merely involving a simple desire on the part of the parties to be together. The appellant has no other living relative able to offer her the emotional support in a parental capacity that she needs. There are persuasive and powerful factors rendering the circumstances compelling: it is strongly in the appellant's best interests to be reunited with her aunt. She has been through the trauma of having lost both parents as well as her grandfather. She has not had anyone in a de facto parent role in Uganda since the death of her grandfather. This has understandably upset her.
19. I acknowledge that this is not a case involving neglect or abuse. The appellant's basic needs are being met. She has access to adequate education, board and accommodation. Her circumstances in Uganda as at the date of decision were not however stable as Ms Namanda was due to leave Uganda. Her residence during the holiday period was therefore due to change in any event. The concern in this case is not however directed at the appellant's physical care. Her emotional need to live with and be cared for in a family home by a person prepared to take on a parental role can only be met in the UK by her aunt. Her aunt cannot be expected to return to Uganda. She has strong links to the UK through her employment and her son, who lives with her.
20. The combination of circumstances in this case are sufficiently serious and compelling to require the appellant's admission, and I therefore find that the requirements of para 297(i)(f) are met.
21. It follows that there is no need for me to consider Article 8.

Decision

22. The decision of the First-tier Tribunal contains an error of law and is set aside.
23. I remake the decision by allowing the appellant's appeal pursuant to the Immigration Rules.

Signed: Ms Melanie Plimmer
Judge of the Upper Tribunal

Dated: 21 June 2017