



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/24786/2016  
HU/00743/2017  
HU/00749/2017  
HU/00752/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 2<sup>nd</sup> November 2018

Decision & Reasons Promulgated  
On 15<sup>th</sup> November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ZUCKER

Between

AB (FIRST APPELLANT)  
CD (SECOND APPELLANT)  
EF (THIRD APPELLANT)  
GH (FOURTH APPELLANT)  
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER (ECO)

Respondent

**Representation:**

For the Appellants: Ms U Dirie, Counsel, instructed by J McCarthy Solicitors  
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are each citizens of the Gambia whose dates of birth respectively are recorded as 20<sup>th</sup> June 1980, 30<sup>th</sup> August 2003, 11<sup>th</sup> October 1998 and 15<sup>th</sup> August 1998. The First Appellant is the mother of the Second and Third Appellants who submitted in the First-tier Tribunal that she was also the adoptive parent of the Fourth Appellant.

**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.**

2. Application was made for the family to join the First Appellant's husband, a British citizen, in the United Kingdom. On 2nd February 2017 decisions were made to refuse the application. The principal reason for refusal in respect of the First, Second and Third Appellants was that it was said that the requisite evidence pursuant to Appendix FM-SE had not been submitted in order to demonstrate the required income of £27,200 or more. It was the First, Second and Third Appellants' case that the evidence had been submitted with the application.
3. As to the Fourth Appellant it was said that there was no sufficient evidence of the adoption contended for. The basis upon which it was said that there was an adoption was a "de facto" adoption as set out in the final sentence of paragraph 5 of the Decision and Reasons of Judge of the First-tier Head-Rapson who heard the appeal of this matter on 15<sup>th</sup> September 2017 when sitting at North Shields. She dismissed the appeal on all grounds.
4. Not content with that decision, by Notice dated 9th November 2017, application for permission to appeal to the First-tier Tribunal was made, accompanied by grounds drafted by Counsel who appears before me today. Those grounds assert that it was in the best interests of the Second, Third and Fourth Appellants that the family was to be reunited but the grounds did not engage with the issue of de facto adoption and the negative finding made by the judge on that issue.
5. On 14<sup>th</sup> May 2018 Judge of the First-tier Tribunal Boyes refused permission.
6. By Notice dated 12th June 2018 a renewed application was made to the Upper Tribunal. Again, the renewed grounds were drafted by Counsel who appears before me. Those grounds were again silent on the issue of de facto adoption. However, on 20<sup>th</sup> September 2018, Upper Tribunal Judge Plimmer granted permission on the grounds which related to the financial requirements not being met. All other grounds were said to be arguable so permission was granted on them but that did not include, because it was not submitted, any ground to do with the de facto adoption.

7. The matter came before me and Ms Dirie, as a preliminary matter sought permission to amend the grounds and have me grant permission for the issue of the de facto adoption to be heard in this appeal. I considered that application by reference to the case of **R (on the application of Onowu) -v- First-tier Tribunal (IAC) (extension of time for appealing: principles) IJR [2016] UKUT 00185 (IAC)**. That was a decision of the Vice President, Judge Ockelton, sitting with the now Principal Resident Judge, Judge O'Connor, in what was a judicial review case.
8. The guidance taken from the case of **Mitchell -v- News Group Newspapers Limited [2013] EWCA Civ 1537; Denton and White [2014] EWCA Civ 906 and the Crown (Hysaj) -v- Secretary of State for the Home Department [2014] EWCA Civ 1663** was in short that there were three stages that a judge should address in an application for relief in circumstances such as these. They are
  - (i) to identify and assess the seriousness or significance of the failure to comply with the Rules. The focus should be on whether the breach has been serious or significant. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages, but if the judge decides that the breach is serious or significant then the second and third stage is assumed greater importance;
  - (ii) to consider why the failure occurred. That is to say whether there is good reason for it. It was stated in **Mitchell** at paragraph 41 that if there is a good reason for the default, the court will be likely to decide that relief should be granted. The important point made in **Denton** was that if there is a serious or significant breach and no good reason for the breach this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage;
  - (iii) to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application.
9. The two factors specifically mentioned in Civil Procedure Rule 3.9 were said to be of particular importance and were to be given particular weight. That is
  - (a) the need for litigation to be conducted efficiently and at proportion of cost; and
  - (b) the need to enforce compliance with Rules, Practice Directions and the court orders.
10. In this case the application is made just over a year out of time. On any view the delay is significant. Ms Dirie quite properly did not seek to persuade me otherwise.
11. The second question then is to consider why the failure occurred and Ms Dirie "held her hands up". She overlooked the issue. She felt that in drawing attention to the failure of the judge to have regard sufficiently to the best interests of the children she had captured the point, but she acknowledges, quite properly, that she had not done so.

12. There were however opportunities for her to deal with the point on a number of occasions. The first was in the drafting of the grounds for permission to appeal to the First-tier Tribunal. That opportunity was overlooked. There was a second opportunity. After refusal by the First-tier Tribunal, renewed grounds were drafted again by Ms Dirie when she would have had an opportunity to look again at the file and the grounds which were being submitted. Even then, in advance of the hearing in preparation for today's appeal, there would have been an opportunity to raise the matter. Only today at the hearing, before me, was the matter raised.
13. It may be some comfort to Ms Dirie and the litigants today that having been shown the quality of the evidence that was being relied upon in support of the de facto adoption, which speaks of the First Appellant being a recognised guardian of the Fourth Appellant and the like, in my judgment such was not sufficient evidence in any event. I say that because although the case was being advanced on the basis of the de facto adoption, there was little evidence on the point. There was the evidence in the various documents at Annex 11 onwards, but my principal concern was, as I have indicated, the evidence was not sufficient, particularly against the necessity to protect young people from being trafficked.
14. In **SK ("Adoption" not recognised in UK) India [2006] UKAIT 00068** the Tribunal said that the restrictions on the notion of adoption (paragraphs 6 and 310(vi)(a) and de facto adoption (paragraphs 309A and 310(vi)(b)) are not shown to be contrary to Article 8, disproportionate or irrational. The point I would make is that in any event there did not appear to be sufficient evidence to show that the finding made by the Judge in the first-tier was not one that was open to her.
15. Further although I cannot say this with any degree of certainty what I would have done had an error of law been identified, it is most unlikely that had I dealt with the case I would have come to a different view on the basis of the evidence that I have seen. Of course, I have not heard submissions on the matter because I refused permission for the matter to be dealt with at this late stage but as I have said, I hope it is some comfort to everyone to know that had I granted permission it is unlikely to have made no difference.
16. I turn then to the substance of the appeal. Some inquiries were made to see whether certain documents, which appeared to be missing from the bundle, which appears to have been before the judge, were in fact available to be produced to me. So far as it was necessary to grant permission for additional documentation to be produced I grant it.
17. If those various documents (a number of bank statements) could not have been produced, then I would have come to the view that the relevant documentation was not produced to the Secretary of State at the time of the application. That necessarily follows because if that evidence could not be produced to me they could not have produced it at an earlier stage.

18. On the other hand given the large bundle of documents that was before the judge with which she does not appear properly to have engaged, I come to the view that there would have been no reason not to have submitted that documentation with the application. Mr Avery does not seek to persuade me otherwise.
19. As it was the documentation was produced. In the circumstances the decisions in respect of the First, Second and Third Appellants are set aside because there was an error of law by reason of the failure of the judge to engage with the issue of whether the documentation was submitted.
20. I find the evidence that was available and submitted with the application. I am able to remake the decision in respect of the First, Second and Third Appellants on that basis such that their appeals are allowed.
21. As to the Fourth Appellant given that permission to appeal has not been granted and given that I have not granted permission for the grounds to be amended, for the reasons which I have given, the decision with respect to the Fourth Appellant remains. Whether in due course the Fourth Appellant seeks to make application to the Secretary of State on the basis of better evidence will be a matter for the Fourth Appellant and those giving advice. What the Secretary of State does with that is entirely a matter for the Secretary of State. It should not be inferred from my observations that I am suggesting that the Secretary of State should grant relief one way or the other. I am not doing that. I am simply saying that the door is not necessarily firmly shut.

### **Notice of Decision**

The appeals of the First, Second and Third Appellants to the Upper Tribunal are allowed. Their decisions are set aside and remade such that their appeals in the First-tier Tribunal are allowed.

The Fourth Appellant's appeal is dismissed.

### **TO THE RESPONDENT** **FEE AWARD**

As I have allowed the appeals and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £80 in each of the three appeals which have been allowed. I make no fee award in respect of the Fourth Appellant as the Appeal was dismissed.

Signed

Date: 9 November 2018



Deputy Upper Tribunal Judge Zucker