Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11203/2014

AA/11222/2014

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 25 February 2016	**On 8 April 2016**
Prepared on 1 March 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between
M. G.
S. N.
(ANONYMITY DIRECTION MADE)

Appellants

And
SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Selway, Brar & Co Solicitors
For the Respondent: Mr Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Uganda, who entered the UK as visitors, accompanied by two adults, Mr & Mrs S, who were represented to be their parents when applications had been made on the Appellants' behalf for entry clearance to the UK.
2. The Appellants became overstayers on 27 April 2011. Each claimed asylum on 25 November 2011 as a child giving a different name to that under which they had been granted entry clearance; the family name of S was simply dropped.

3. The Appellants' applications were refused by the Respondent on 4 February 2012, because the accounts upon which they were based were rejected as untrue, although they were then each granted periods of DLR until 21 October 2013 because the Respondent did accept that they were both children.
4. Each of the Appellants applied to vary their leave on 2 October 2013. Those applications were refused on 3 December 2014, and in consequence removal decisions were made in relation to both of them.
5. The Appellants both appealed against the immigration decisions made in relation to them. Their appeals were linked for hearing together, since they raised common issues of fact, and they were heard together on 29 January 2015, and allowed on Article 8 grounds by decision of Judge Manchester, promulgated on 27 February 2015, with all of the other grounds of appeal dismissed.
6. The Respondent's application to the First Tier Tribunal for permission to appeal the Article 8 decision raised three complaints, and that application was granted by Designated Judge McClure on 1 May 2015 on the basis there were inconsistencies in the conclusions that had been reached, and conflicts in the evidence that he had failed to resolve. As nationals of Uganda with relatives in Uganda it was arguable the Judge had failed to take the correct approach to the assessment of the proportionality of their removal.
7. The Appellants filed no Rule 24 Notice.
8. Thus the matter comes before me.

<u>The hearing</u>

9. When the appeal was called on for hearing Mr Mangion on behalf of the Respondent sought permission to amend the grounds of appeal so as to adopt the contents of the document he had served, and filed, by fax the previous day. Mr Selway for the Appellants opposed that amendment on the basis that it was far too late for the Respondent to do so. He accepted however that he had been given adequate time to consider the contents of the document in question, and he conceded that if the document had simply been entitled a skeleton argument that he could have had no objection to the Respondent relying upon its content. Specifically he accepted that fairness did not require the hearing of the appeals to be adjourned in the event that I were to grant permission to amend the grounds.
10. I am satisfied that Mr Selway was correct to take that approach, because as indicated at the hearing I am not satisfied that the document in question does raise new grounds of appeal. It is in reality no more than an expansion and explanation of those that were always advanced. I need

say no more about it, save to record that if I am wrong in that analysis of its content, I would have granted permission to amend. In any event both parties made oral submissions in relation to its content.

The case advanced by the Appellants

11. In 2011 the Appellants each made an application to the ECO in Nairobi for leave to enter the UK for the purposes of a holiday, in which it was asserted they would travel with their sibling and their parents, and visit the UK for one week. In their visa applications (which the Tribunal file records were placed in evidence at the hearing by the Respondent) it was declared that they were the children of Mr & Mrs S, and an address was given at which the family had lived for the preceding 16 years. Their visa applications were made in names which included the family name of S, and they were supported with legitimate Ugandan passports in those names. The visa applications made by Mr & Mrs S named the Appellants as but two of their own four dependent children, and they had gone on to give details of the businesses and investment assets from which they were said to derive a significant income.
12. The Judge noted that this was not the first visa that had been issued to A2 to enter the UK [73]. An earlier visa had also been issued to allow her to visit the UK in 2009 in the company of Mr & Mrs S, who were then also named as her parents. It had been issued in the same name as that under which A2 had made her 2011 application. The Respondent's record of the decision upon the 2009 application (which the Judge noted had been placed in evidence at the hearing by the Respondent) recorded that her birth certificate had been inspected by the ECO in the course of processing the 2009 application. The Judge also noted that at some stage the Appellants had produced a Ugandan identity card issued to A1 which recorded Mr & Mrs S as his parents.
13. The Judge concluded that passports in the full names given by the Appellants in their entry clearance applications (including the family name S), which recorded that Mr & Mrs S were their parents, were produced to the Respondent in support of their applications for entry clearance. He concluded that the appropriate background checks would have been carried out by the ECO before visas were issued to either of the Appellants [72].
14. In the course of the asylum applications they made in November 2011, and renewed in October 2013, the Appellants gave shortened names for themselves, in which the family name of S was omitted from the names in which they had applied for entry clearance, and in which passports had been issued to them. Each specifically denied that Mr &

Mrs S were their parents. Each claimed to have been orphaned in 2004. Although they accepted that they had been cared for subsequently by Mr & Mrs S, they denied that they were related to Mr & Mrs S in any way. They claimed to have been brought to the UK by Mr & Mrs S in order to be left in the care of Ms N, who they claimed as their aunt, although they denied that they had ever met Ms N before their arrival in the UK in 2011.

15. The Appellants accepted that they had attended a private boarding school in Uganda at the expense of Mr and Mrs S. Nevertheless they maintained a claim to have been subject to physical abuse by Mr & Mrs S, and that there was no-one in Uganda who could care for them appropriately upon return. Thus they claimed that they would be destitute upon return, and at real risk of serious harm as young adults in the course of trying to support themselves in the event of return. Moreover, specifically, A1 claimed to fear conscription in Uganda, and A2 claimed to fear a forced marriage in Uganda.

The decision

16. The Judge dismissed the claims that removal to Uganda would give rise to a real risk of persecution for a Convention reason, or to a real risk of a breach of their Article 3 rights, and the claim that they were entitled to a grant of humanitarian protection. The Appellants have lodged no cross appeal against those decisions.

17. In reaching those decisions the Judge noted the inconsistency between the claim to have been subject to abuse and ill treatment by Mr & Mrs S and to face destitution upon return to Uganda on the one hand, and the acceptance that Mr & Mrs S had paid for their education at boarding school, and had paid for them to be brought to the UK, on the other hand. He rejected the claim that they had been subject to ill treatment by Mr and Mrs S as untrue. He also rejected as untrue the claim that A1 faced forced conscription into the Ugandan Army, and that A2 faced a forced marriage, at the instigation of Mr and Mrs S in the event of their removal to Uganda [75-7].

18. The Judge also rejected as untrue the explanation of how Mr & Mrs S had located Ms N in the UK [78-9]. He noted that although there had been ample opportunity to arrange for its production, no DNA evidence had been produced to establish any biological link to any degree between the Appellants and Ms N. Whilst he noted that North Tyneside Council had been prepared to place the Appellants with Ms N as a foster carer, and that the Appellants had been willing for that to occur, he noted with concern that on the face of the evidence before him the social workers concerned had

simply accepted at face value all that they had been told by the Appellants and Ms N.

19. The Judge made no positive finding that the Appellants and Ms N were related in any way, and he was clearly not persuaded on the balance of probabilities that they were.

20. Against that somewhat unpromising background the Judge allowed the Article 8 appeals on the basis that their removal was not proportionate to the legitimate public interest in the maintenance of effective immigration controls, and it is his decision to do so which is the subject of challenge by the Respondent before me.

Error of law?

21. The grounds raised three complaints;
First, the Judge made inconsistent findings of fact, so that his finding that the Appellants were orphaned in 2004 was not open to him, and/or was flawed for lack of any reliable evidence to support it.
Second, it was not open to the Judge to find that the Appellants had established "family life" for the purposes of Article 8 with Ms N, when he had found that she was not related to them, and that Mr and Mrs S who were either their parents, or who had acted as such in Uganda, were alive and well and living in Uganda.
Third, it was not open to the Judge to find in the light of his previous findings, that the best interests of the Appellants were served by anything other than a return to Uganda to their parents, where they could return in safety, and where they would enjoy adequate shelter and support. Moreover they had no right to continue their education in the UK.

22. Despite Mr Selway's best efforts to do so I am not persuaded that these complaints are merely a disagreement with the decision. At the heart of both the Article 3 and Article 8 appeals lay the same disputed issues of fact; whether the Appellants had told the truth about their parentage, and their circumstances in Uganda in the course of the applications they made in November 2011, and in October 2013.

23. As the Judge identified there was a wealth of evidence that indicated firmly that they had not done so. That evidence was not limited to the declarations made in the course of the 2009 and 2011 entry clearance applications, or to the contents of the birth certificates and passports issued to them by the Ugandan authorities, or even to the names used in the entry clearance applications of 2009 and 2011. Their claim to have suffered ill treatment at the hands of Mr & Mrs S, and to face a real risk of harm from them in the event of return, was entirely inconsistent with their acceptance that

they had been educated in Uganda at the expense of Mr and Mrs S at private boarding schools.

24. The Judge rejected the Appellants' claim to face any risk of harm in Uganda as not credible, and he thus rejected the asylum and Article 3 appeals. He was plainly right to do so, and indeed the Appellants have not sought to challenge his decision to do so.

25. In my judgement when the decision is read as a whole there is a clear inconsistency between the rejection as untrue of the Appellants' account of their past experiences in Uganda and their claims to face a risk of harm in Uganda upon return on the one hand, and the finding in paragraph 85 that the Appellants were orphaned in 2004 as they had claimed to be when making their asylum claims in November 2011 on the other. Although the Judge refers to "consistencies" in the Appellants' account when making that finding, his decision entirely fails to identify any consistencies in the evidence they relied upon that were relevant to that finding, although he does identify a number of material inconsistencies. Mere repetition of the bald assertion that they were orphans would carry no material evidential weight in these circumstances. There was no other material "consistency" to be found in the decision. Thus in my judgement the finding that the Appellants were orphaned in 2004 was inconsistent with the Judge's earlier findings of fact which rejected their evidence concerning their experiences in Uganda and fear of future harm in Uganda, and it must therefore be set aside as unsafe.

26. In any event, and even if the finding that the Appellants are orphans should stand, the grounds do establish that the Judge fell into error in his assessment of the proportionality of the removal of the Appellants.

27. Even if they were orphans it did not follow that the Appellants had no family in Uganda, and no prospect of shelter and support from Mr and Mrs S upon return to Uganda. There was no reliable evidence that would have permitted such a finding to be made on the balance of probabilities. As noted in AA (Iran) [2013] EWCA Civ 1523, "*absent the persecutory background, continuing contact is inherently likely*".

28. Moreover the approach taken to the best interests of the Appellants was flawed because it assumed, wrongly, that they could only pursue a relationship with Ms N, and could only pursue their further education if they were permitted to live in the UK.

29. It is also quite clear that the Judge was persuaded by the advocate who then represented the Appellants that the Respondent had failed to discharge her duty to make enquiries to trace the Appellants' family members in Uganda

[83-4]. There was no error in that conclusion, because Mr Mangion accepts that no attempt was ever made by the Respondent to do so. In my judgement the Judge's approach to the failure to discharge that duty did however lead him into further error [83-4 & 94-95]. His reference to the decision in Rashid v SSHD [2005] EWCA Civ 744 in the terms in which it was made, in my judgement discloses that the Judge felt obliged in some way to somehow award some advantage to the Appellants as a result of the Respondent's breach of duty, in the course of his assessment of the proportionality of the removal decisions. As the Supreme Court have explained in MA and AA (Afghanistan) [2015] UKSC 40, Rashid was wrongly decided and should not be followed. As it happens, it is plain on these facts that the breach of the duty to trace and make enquiries of Mr and Mrs S had no consequence at all for the Appellants' ability to present their appeals, and it is not suggested by Mr Selway that it did.

30. Thus I am satisfied that the Judge's decision does disclose an error of law in the approach taken to the assessment of the proportionality of the removals, which requires the decision to allow the Article 8 appeals to be set aside and remade.

Conclusion

31. What then is the proper approach to the assessment of proportionality?

32. The starting point must be the unchallenged rejection of the Appellants' claims that they could not return in safety to Uganda.

33. The Judge was not satisfied that the Appellants had told him the truth about their childhood in Uganda in several key respects, although even they accepted that they had been privately educated at the expense of Mr and Mrs S, and had been brought to the UK by Mr and Mrs S. This would have involved Mr and Mrs S in significant expense as the Judge recognised.

34. The clear inference is that Mr and Mrs S are either the parents of the Appellants, or close relatives of theirs. Even if they are not the Appellants' parents, it still remains the fact that on their own case, Mr and Mrs S had accepted an obligation towards the Appellants to act as their parents from 2004 to 2011 during their formative years in Uganda, and that they had expended significant sums upon both their care and education in Uganda, and then in bringing them to the UK.

35. In the light of the Judge's unchallenged rejection of the claims that Mr and Mrs S had ill treated them in the past, or would do so in the future, the only sensible inference that any Tribunal properly directing itself could draw would be

that Mr and Mrs S would in all probability resume the provision of shelter and support to the Appellants in the event of their return to Uganda, and, that upon return the Appellants would simply resume the relationships they had previously enjoyed with Mr and Mrs S and their other two children.

36. Educational and employment opportunities would be open to the Appellants in Uganda, no doubt enhanced with the benefit of the education they have received in the UK since 2011. If either wished to pursue a tertiary education in the UK, then they could apply for entry clearance to do so, and study at their own expense, rather than public expense, in the usual way.

37. In consequence of the rejection of the claim that Ms N is related to the Appellants to any degree, a finding that "family life" had been created between them would appear to be flawed, although I accept that the Judge's alternative finding that this was a "private life" appeal "at the top of any scale" was well open to him. As the Court of Appeal noted in Singh [2015] EWCA Civ 630 @25, to focus upon whether a given set of facts constituted a "family life" rather than a "private life" is likely to arid and academic, although it is an exercise that Parliament has demanded be undertaken by the Tribunal through the differentiation between the two in s117A-D 2002 Act.

38. The consideration of the issue of proportionality must be undertaken in the light of the terms of ss117A-117D of the 2002 Act, and, the guidance to be found thereupon in AM (s117B) Malawi [2015] UKUT 260.

39. The decision of the Supreme Court in Patel [2013] UKSC 72 sheds light upon the proper approach to be taken;

> "It is important to remember that article 8 is not a general dispensing power. It is to be distinguished from the Secretary of State's discretion to allow leave to remain outside the rules, which may be unrelated to any protected human right. The merits of a decision not to depart from the rules are not reviewable on appeal: section 86(6). One may sympathise with Sedley LJ's call in *Pankina* for "common sense" in the application of the rules to graduates who have been studying in the UK for some years (see para 47 above). However, such considerations do not by themselves provide grounds of appeal under article 8, which is concerned with private or family life, not education as such. The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8." [57]

40. Viewed in this light the Respondent's breach of her tracing duty carried no evidential relevance to the assessment of proportionality, because the available evidence did establish that support and shelter were available to the Appellants upon return to Uganda. Moreover, given the lack of truth in the claims made about Mr and Mrs S, and about a parental relationship with Ms N, it was highly unlikely that the Appellants had lost contact with Mr and Mrs S. Any attempt

by the Respondent to contact Mr and Mrs S and secure the co-operation in providing a truthful account of the Appellants' past circumstances, or, in facilitating the Appellants' return to Uganda was also highly unlikely to succeed. Even as wealthy Ugandans, they would have been involved in significant expense in bringing the Appellants to the UK compared to the wealth of the average Ugandan, and having managed to do so, they would be unlikely to want to co-operate in either telling the truth, or in facilitating the return of the Appellants. Indeed they would have a very strong incentive not to do so, and any information they provided would be of doubtful value. MA paragraphs 52-55, 64

41. As to their life in the UK, the Judge had rejected the claim that the Appellants were related to Ms N, and again that finding is unchallenged. Although he undoubtedly correctly accepted their claim to have established a close relationship with Ms N since their arrival in 2011, the finding he made, which Mr Mangion does not seek to challenge, was "*there has developed a loving and close bond between them and the Appellants are very happy with her. In those circumstances I find that they have established what amounts to family life with her, and, taking into account the age of the First Appellant, that, given his circumstances the bond has a dependency element that takes it beyond the existence of normal emotional ties. Even if I am wrong in that conclusion I find that they have an established private life in the UK based on their friendships education and career opportunities and that if their relationship with their alleged aunt were to be regarded as an element of private life it would result in their right to private life being properly considered to be at the top of any scale.*" [92]

42. Thus the Tribunal must place the relationships formed with Ms N into their proper context, which include the findings made about the truth of the relationships enjoyed with Mr and Mrs S, and their ability to return to Uganda in safety. The Appellants have taken full advantage of the educational opportunities available to them whilst they held DLR, and their success is undoubtedly a credit to both them, and the teachers who have sought to assist them achieve. They would return to Uganda with that benefit. The Judge was plainly concerned as to the need for the Appellants to continue their education [99], but there was no evidence before him that would have allowed him to conclude that tertiary education was unavailable to them in Uganda, or, that the Appellants did not have access to the financial resources that would allow them to pursue it. Put simply they had no right to continue their education in the UK at public expense, and no right to take employment in the UK.

43. If the Appellants did return voluntarily they would also have the financial assistance of any current relocation package available from time to time to those who choose to do so. The guidance of the Tribunal in AN & SS (Tamils – Colombo – risk) Sri Lanka CG [2008] UKAIT 00063 was that it was appropriate to take into account the availability of financial support from the Respondent to a returnee, through what was then the Voluntary Returns Programme run by the IOM;

> 117. Much has been made of the undue harshness which AN will face as a single mother without accommodation or employment and without friends or family to turn to in Colombo, but this is to leave out of account what even Dr Smith acknowledges to be the very generous support package offered by the IOM to voluntary returnees. After "*smoothing the re-entry process*" the IOM provides "*a comprehensive package of support for five years after arrival*", which includes "*five years shelter guaranteed*." We do not think it is open to the appellant to say that, if she loses her appeal, she will not take advantage of this package, and to argue from that refusal that she will face destitution in Colombo which, accordingly, is not a place to which she can reasonably be expected to relocate.

44. In the light of that guidance it was not open to the Appellants to argue that in the event of their return to Uganda they would not take advantage of whatever package of assistance was then available to voluntary returnees, or argue that even if they could not access financial support from Mr and Mrs S that they would face destitution upon return.

45. Moreover it is also relevant to the assessment of the proportionality of the removals to recognise that although the Appellants were children at the time, who were under the control of the adults involved in their life, they had nonetheless entered the UK illegally, and they had then actively pursued as young adults an attempt to deceive both the Respondent, and in due course the Tribunal, as to their true circumstances in Uganda.

46. Neither of the Appellants was ever a “qualifying child” for the purposes of s117A-D of the 2002 Act, and their status in the UK had only ever been either unlawful, or precarious, within the meaning of s117B. Thus the Tribunal was required, at best, to give little weight to any “private life” that they had established in the UK.

47. Even giving full weight to the strength of the relationships formed with Ms N in the course of her care of them since 2011, the Tribunal would be obliged to note that it would be perfectly possible for Ms N to visit the Appellants in Uganda in safety whenever she chose to do so. She had never been recognised as a refugee from Uganda. If she had in fact retained her Ugandan citizenship then she could visit as often as she wished, or indeed settle there, without any visa requirements.

48. Thus, looking at the matter in the round, I am not persuaded that the Tribunal if properly directed, could properly have reached the conclusion that the removal of either of the Appellants was disproportionate to the legitimate public interest in maintaining effective immigration controls. Accordingly, for the reasons set out above I remake the Article 8 decisions so as to dismiss them.

DECISION

The Decision of the First Tier Tribunal which was promulgated on 27 February 2015 contains an error of law in the decision to allow the appeals of the Appellants on Article 8 grounds which require that decision to be set aside and remade. There is no error of law in the decision to dismiss the appeals of the Appellants on asylum, Article 3, or humanitarian protection grounds and the decision to do so is confirmed.

I remake the decision so as to dismiss the Article 8 appeals of the Appellants.

Deputy Upper Tribunal Judge JM Holmes
Dated 1 March 2016

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Deputy Judge of the Upper Tribunal JM Holmes
Dated 1 March 2016