The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: OA/17256/2013
OA/17255/2013
OA/17254/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On January 8, 2016	**On January 11, 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MS NADIA MENZEWA MATOKA
MISS FATOU IYABA
MASTER LOUISON IYAB
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

Appellant	Ms King, Counsel, instructed by Wilson Solicitors LLP
Respondent	Mr Bramble (Home Office Presenting Officer)

DECISION AND REASONS

1. The first-named appellant was born on 8 August 1980 and is a national of the Democratic Republic of Congo (DRC) and claims to be the wife of the Sponsor Mr Rockman Nzema Iyaba.

2. The second and third-named appellants are also nationals of the DRC born on June 30, 2003 and February 5, 1998 respectively and were respectively described in entry clearance applications as children of the first named Appellant and the Sponsor.

3. The respondent's DNA evidence demonstrated the second-named appellant is not the Sponsor's child.

4. The third-named appellant's application was originally made in the name of Christ Vie Iyaba date of birth January 4, 2000 who it was claimed was the child of the Appellant and Sponsor but it was claimed in the course of the appeal that Christ Vie Iyaba died and thereafter the application was pursued in the name of Louison Ayab.

5. The Appellants applied for settlement in the United Kingdom on March 5, 2012 as the spouse and children respectively of a Sponsor who has indefinite leave to remain having been recognised as a refugee.

6. The respondent refused their applications on May 11, 2012 and the Appellants appealed those decisions on June 8, 2012. The decisions were withdrawn by the Respondent prior to the scheduled appeal hearing to enable the DNA evidence to be further clarified.

7. The respondent reconsidered the applications but subsequently refused each application on August 12, 2013.

8. The appellants appealed those decisions on March 5, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

9. The appeals came before Judge of the First-tier Tribunal Tiffen on November 3, 2014 and in a decision promulgated on November 19, 2014 she allowed the first-named Appellant's appeal under the Immigration Rules and further allowed the appeals of all three Appellants on human rights grounds.

10. The respondent appealed those decisions on November 25, 2014 and her appeal came before Deputy Upper Tribunal Judge Birrell on March 18, 2015 and in a decision promulgated on April 14, 2015 she set aside the First-tier Tribunal's decisions finding:

    a. The Tribunal's assessment of the DNA evidence was flawed.

    b. The Tribunal failed to engage with the evidential requirements in relation to the standard of proof that the Respondent was required to meet in this case in requiring 'conclusive' DNA evidence and rejecting the evidence that stated the DNA results showed it was 100 times more likely that the Sponsor was related to the First Appellant as half sibling than if they are unrelated. This assessment of the DNA evidence underpinned her assessment of the claim that the first-named Appellant and the sponsor were husband and wife and therefore the error was material to the outcome of the decision.

c. The flawed approach to the DNA evidence and paragraph 320(7A) HC 395 inevitably infected the Article 8 assessment.

d. The Sponsor's claim that his son Christian Vie died in 2011 before the applications were made for entry clearance in 2012 were based, *ab initio*, on a false relationship claim. To conclude that the Sponsor was a credible witness given the scale of this deception was perverse. This credibility finding was clearly material to the Article 8 assessment in respect of all of the Appellants and therefore she was satisfied that the error of law was material to the outcome.

11. Deputy Upper Tribunal Judge Birrell found the Tribunal's decision could not stand and must be set aside in its entirety. She directed that all matters be decided afresh. The appeals were listed for a case management hearing on August 10, 2015 following which the case was adjourned for a full hearing.

12. Due to the unavailability of Deputy Upper Tribunal Judge Birrell Upper Tribunal Judge O'Connor transferred these appeals to be heard by any Judge on January 4, 2016 and the matter is now listed before myself for disposal on the date set out above.

13. The appellants' representatives served fresh DNA evidence, a further statement from the sponsor and some financial evidence.

14. Ms King sought to re-open the venue of the appeal and invited me to remit this matter to the First-tier Tribunal on the basis oral evidence was required and full findings had to be made.

15. Mr Bramble reminded me that this option had clearly been rejected by Deputy Upper Tribunal Judge Birrell both when she considered the error in law application and when the matter came back before her for a case management hearing on August 10, 2015. She set the matter down for three hours with provision for additional witness evidence to be called and this was a clear indication that the Upper Tribunal was the correct venue.

16. I have considered the Practice Direction on venue and having considered both Mr Bramble's and Ms King's submissions I decided that as the evidence and issues remained the same, the mere fact oral evidence was needed was not in itself a reason to remit the case back to the First-tier Tribunal. The Upper Tribunal was capable of both hearing evidence and submissions and those factors alone did not require the case to be remitted.

17. Ms King indicated that appellants' appeals under the Immigration Rules were not being proceeded with as the current DNA evidence meant the first-named appellant and sponsor could not succeed as they were siblings and any "marriage" would be a prohibited relationship and consequently the first-named appellant could not succeed under the Rules. The appeals of the second and third-named appellants had

previously been rejected under the Immigration Rules and Ms King did not pursue them either. She submitted the issue for me to decide was whether article 8 ECHR was engaged and if it was would refusing the appellants' entry be disproportionate.

18. Matters which fell to be considered by me at this hearing included:

    a. Was it more likely than not that the first-named appellant may not have realised that the second-named appellant was not the Sponsor's child?

    b. Was the third-named appellant's application based, *ab initio*, on a false relationship claim and should the refusals under paragraph 320(7A) HC 395 be upheld?

    c. Are the first-named appellant and sponsor husband and wife as claimed?

    d. Was the Sponsor a credible witness in light of the alleged deceptions?

    e. Could the appellants' appeals succeed under article 8 ECHR?

19. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I see no reason to make an order now.

SPONSOR'S EVIDENCE

20. The sponsor adopted his witness statements, given both in these proceedings and in two earlier asylum applications. He stated that the first-named appellant was the same person who had provided a witness statement to support his asylum application and she was the same person he had described in his screening interview as his wife. He denied knowing or having any knowledge that they were related and he maintained that before leaving the DRC in 2007 they had lived together as husband and wife. He and his wife spoke on the telephone at least twice a month.

21. Under cross-examination he stated:

    a. He had spoken to the first-named appellant after both DNA tests and had spoken to her mother and he maintained he was unaware of any sibling relationship between them.

    b. They had not obtained evidence of their original marriage certificate because of the cost and had simply obtained a replacement when it was required.

    c. He accepted what the DNA report said about his relationship to the second-named appellant but his wife maintained that he was the child's father despite the content of the report and he had brought her as his own.

    d. The third-named appellant had been living with his parents albeit in the same household as the sponsor's family had been living. The sponsor stated that the third-named appellant and his parents lived in his house after he left the DRC in 2007 and were therefore part of his household.

e. Both he and the first-named appellant knowingly passed the third-named appellant off as their son in the application.

f. He disputed the claim that he was not married to the first-named appellant because if that had been the case he would not have waited over seven years to find a wife. He had consistently maintained she was his wife. He was aware of family reunion requirements and he could have brought them all in as family members without the charade alleged by the respondent.

22. Having heard the sponsor's evidence, I invited the representatives to put forward their submissions.

SUBMISSIONS

23. Mr Bramble relied on the refusal letters and invited me to dismiss all appeals under paragraph 320(7A) of the Immigration Rules on the basis deception, in respect of the identity of the third-named appellant, had been used by both the sponsor and the first named appellant and such deception applied to all applicants in light of the fact paragraph 320(7A) applies whether or not a deception was with an applicant's knowledge.

24. In assessing credibility Mr Bramble invited me to have little regard to the information contained in the asylum papers or subsequent witness statements and he submitted that the sponsor's and first-named appellant's credibility should be considered in light of the admitted deception and the two DNA reports.

25. Although positive findings on credibility had been made in the sponsor's earlier asylum proceedings Mr Bramble submitted that firstly, the Judge in those proceedings had been considering an asylum claim and not an article 8 claim and secondly, the standard of proof was lower in asylum appeals.

26. The DNA evidence contradicted the sponsor's and first-named appellant's evidence. The results demonstrated firstly, that the sponsor and first-named were half-siblings, despite their repeated claims to be oblivious of this fact and secondly, the second-named appellant could not be the sponsor's daughter despite the first-named appellant's claim that she had only ever had a relationship with the sponsor. When the DNA evidence was considered alongside the deliberate deception carried out by both the first-named appellant and sponsor in respect of the third-named appellant Mr Bramble submitted that no weight should be attached to a recently obtained marriage certificate or the sponsor's (and first-named appellant's) claim that they were married despite the fact he had given this account when he attended a screening interview in 2007. The fact the sponsor claimed he would not have waited for his "wife" to join him if he had not been married had to be considered in light of the above evidence.

27. The first-named appellant's credibility was undermined by the DNA evidence and by her failure to provide an updated response to the recent DNA report provided by

her legal representatives. The sponsor claimed to have tried to speak to her mother about the situation but the first-named appellant's silence on the issue affected her credibility. Ms King had accepted the appellants could not succeed under the Rules and this failure and in particular a refusal under paragraph 320(7A) was something to be taken into account if section 117 of the 2002 Act was engaged.

28. Mr Bramble submitted that if the Tribunal rejected the sponsor's evidence concerning the family circumstances and in particular his claim that he lived with his "wife" and daughter before he came to the United Kingdom in 2007 then article 8 ECHR would not be engaged for the purposes of family life.

29. However, if the Tribunal accepted that the sponsor, first and second-named appellant, however related, had lived as family unit then regard must be had to section 117 of the 2002 Act and in particular Section 117B(1) which stresses the importance of immigration control. The family had been living in the DRC and were not related as claimed and it would not be disproportionate to refuse them entry.

30. The fact the sponsor supported them financially did not mean they were related as he claimed but merely that he sent some funds to the DRC for them. Neither the appellants nor sponsor should benefit from a clear course of deception.

31. Finally, the sponsor came to the United Kingdom in 2007 and whilst it was claimed the third-named appellant was living in the first-named appellant's house it is clear that when he moved there he was cared for by his own parents and only later, according to the sponsor's claim, did he come to be cared for by the first-named appellant. He invited me to dismiss all claims under article 8 ECHR.

32. Ms King relied on her skeleton argument. She submitted that this was both a difficult and unusual case. She submitted that the fact the DNA reports contradicted the sponsor and first-named appellant's claims did not undermine her main submission that the sponsor and appellants were a family and it would be disproportionate to prevent the appellants from joining the sponsor in the United Kingdom.

33. Whilst the DNA report stated the first-named appellant and sponsor were more likely to be half-siblings Ms King submitted that the evidence as a whole demonstrated that the first-named appellant and sponsor were married as claimed in light of the marriage certificate and the fact the sponsor had referred to the first-named appellant as his wife in asylum documents and witness statements.

34. It lacked credibility, as was being suggested by Mr Bramble, that this was one big conspiracy because why would the sponsor give the same account about his relationship to the first-named appellant when he applied for asylum and then maintain that account even though he had initially been refused asylum. On a family reunion application, the sponsor would have been able to bring his whole family over so there would have been no benefit to continue the charade.

35. A statement from the first-named appellant had been obtained in 2008 and 2014 through a solicitor in Kinshasha and evidence of identity had been produced to confirm who she was. The sponsor had also been interviewed by a doctor representing the Helen Bamber Foundation who referred to the trauma and shock suffered by the sponsor. Ms King submitted that it was more likely than not the appellant's claim he was married was credible and the sponsor's history did not support the kind of deceit being alleged.

36. Ms King submitted that the evidence was that they lived as a family unit and that the third-named appellant was a de facto child of their family. The second-named appellant had been brought up by the sponsor and even now he was coming to terms with the DNA report that indicated the second-named appellant was not his child.

37. The article 8 claim was based on the fact they were a family unit and if the Tribunal accepted that evidence then Ms King submitted that both children and the first-named appellant should be granted entry as to refuse any of them would be disproportionate. The fact the sponsor had lied about the third-named appellant may well have been due to the circumstances that occurred around the time his own son had died.

38. The second and third-named appellants are minors and should not be blamed for actions taken by adults. The children are related to each other and it would be disproportionate to leave the third-named appellant behind (if the other appeals were allowed) because the sponsor was his closest relative.

39. The sponsor cannot return to the DRC to look after the family or even the third-named appellant because h was granted refugee status. Despite the difficulties highlighted Ms King submitted all three appeals should be allowed under article 8 ECHR.

40. Having heard both representative's submissions I reserved my decision. A full record of proceedings is contained on the court file.

DISCUSSION AND FINDINGS

41. I am concerned with applications from three appellants. The first-named appellant is said to be the sponsor's wife, the second-named appellant is the first-named appellant's daughter and the third-named appellant is said to be the sponsor's nephew.

42. All three appellants applied under the Immigration Rules and article 8 ECHR but at the today's hearing Ms King confirmed that I need only consider their applications under article 8 ECHR as none of the appellants could satisfy the Rules.

43. Ms King in her submissions invited me, when considering credibility, to place greater weight on the evidence given during the asylum process whereas Mr

Bramble invited me to place little weight on that evidence in light of the sponsor's and first-named appellant's deception.

44. The appellants had applied for re-union under paragraphs 352A and 352D HC 395. The first-named appellant had argued that she should be admitted under paragraph 352A HC 395 but to do so she and the sponsor, as a prerequisite, had to be married. The respondent had obtained a DNA report but as the sponsor and first-named appellant disputed the claim a further report was commissioned by the first-named appellant's representatives. A report from Kings College London found the most likely relationship is one of half siblings and the parties were 260,000 times more likely to share that relationship as against being unrelated.

45. The sponsor provided a witness statement dated January 7, 2016 but no further statement was provided by the first-named appellant. The sponsor expressed surprise at the DNA test result as he claimed he had no idea they were related and from paragraph [4] of this statement he provided an explanation of how they may be related and the steps he had taken to resolve the matter. The sponsor stated he called the first-named appellant's mother and raised the issue of whether she had had a relationship with his father but she refused to discuss the issue. The first-named appellant also refused to discuss the matter with the sponsor. The sponsor also refers to the fact that he had consistently identified the first-named appellant as his wife from the moment he arrived in the United Kingdom and Ms King submits that it was simply not credible that he would have created such a story and continued that story ever since.

46. Ms King's submission on this point is something that cannot be dismissed but the correct approach must be to consider this issue alongside other evidence because credibility is a key factor in this appeal.

47. Ms King accepts that the second-named appellant is not the sponsor's child. The recent Kings College London report makes it clear that the sponsor could not be the second-named appellant's father and that she is the daughter of the first-named appellant. The sponsor was challenged about this in his oral evidence and he now accepts the test but stated the first-named appellant maintained the first-named appellant's claim that she had only ever had children with him.

48. The DNA report could not be clearer in this case and accordingly either both the sponsor and first-named appellant have deliberately attempted to deceive the respondent or the first-named appellant is lying and has not admitted the same to the sponsor.

49. Both the sponsor and first-named appellant admit that when the original application for entry clearance was submitted the third-named appellant's name was not included albeit his photograph was attached to the application form which had been submitted in the name of Christ Vie Iyaba. They both accept they acted dishonestly but blame the deception on the fact they were grieving at the time. Ms King asked me to take into account the Helen Bamber report in this regard.

50. In considering whether the sponsor is telling the truth I have to consider the account he gave on arrival (and subsequently maintained in respect of the first-named appellant) against other deceptions. He asks me to find that the only deception related to the third-named appellant whereas Mr Bramble invited me to find that his deception commenced on his arrival.

51. Having considered the evidence submitted I find as follows:

    a. The first-named appellant's evidence cannot be relied on. She has clearly lied twice on at least two significant matters. Firstly, the DNA report confirms that her account of only having a sexual relationship with the sponsor cannot be true. The report discounts this claim and her evidence is severely undermined by this deception. Secondly, she has admitted submitting an application attempting to pass the third-named appellant off as her son whereas the evidence now demonstrates that this is not the case. These were deliberate deceptions. The claim of grieving does not explain both deceptions and I find this explanation has been put forward to try and explain away her deception.

    b. I am satisfied the First-named appellant has not told the truth about either the second or third-named appellants.

    c. The sponsor has admitted he lied in relation to the third-named appellant and this was a conscious decision he and the first-named appellant took. They deliberately substituted the third-named appellant's picture with that of "their son" and tried to pass him off as "their son".

    d. The "marriage certificate" is a document that says the marriage was registered in 2011 which was twelve years after they claimed to have married and it must be considered in the round having regard to the principles of Tanveer Ahmed [2002] UKIAT 00439.

    e. The above deceptions severely undermine their overall credibility.

    f. Both the sponsor and first-named appellant have demonstrated an ability to lie when it suits them.

52. The burden of proof in demonstrating they were married is on the sponsor and first-named appellant and they must show on the balance of probabilities they were married as claimed. They rely on the earlier evidence as demonstrating they were married Ms King referred me to the statement from the Congolese lawyer but this does not prove the sponsor's relationship to the first-named appellant but merely that she took a statement from someone who said she was the first-named appellant and produced evidence to confirm her details.

53. I have considered this evidence but in light of the deceptions highlighted above I reject their claim to be married and I find it more likely that the first-named appellant is only the sponsor's sibling and I reject their claim to be married.

54. Ms King invited me to find that the second-named appellant has been treated as a child of the family by the sponsor but I reject this submission. Whilst I am prepared

to accept that they may have all lived together in a family home this does not mean the sponsor treated her as his daughter. The sponsor told me it was the African way that families lived together and so the fact the sponsor may have lived with his sibling and her child does not mean he treated her as his daughter.

55. Turning to the third-named appellant's circumstances the DNA report demonstrated that the first-named appellant was not related to him and that the sponsor was related as an uncle, grandfather or other distant relative. According to the sponsor's evidence he had already left the DRC before he came to live at his home and in any event he came with his parents and lived with them in the compound. This does not make him a child of the sponsor's family.

56. The second and third-named appellants sought to be admitted under paragraph 352D HC 395. The first-named appellant summarised their living arrangements in paragraph [3] of her witness statement dated October 26, 2014. She indicated they all lived in a compound and that the third-named appellant lived with his parents in the same compound. Ms King does not pursue any claim under the Rules and I find that neither the second nor the third-named appellants were part of the sponsor's family unit. They may have all lived in the same compound but in the case of the second-named appellant I find that she was part of the first-named appellant's family unit and in the case of the third-named appellant he was part of his own parent's family unit.

57. Returning therefore to the questions I posed at paragraph [18] above I find:

    a. The first-named appellant knew the second-named appellant was not the sponsor's child despite her claims to the contrary. I also find the sponsor was aware of the actual relationship as well.

    b. The third-named appellant's application was based, *ab initio*, on a false relationship claim. Paragraph 320(7A) HC 395 applies where false representations have been whether or not to the applicant's knowledge.

    c. Legally the sponsor and first-named appellant cannot be man and wife due to the DNA report-a fact accepted by Ms King. Based on my findings above I reject their claim, in any sense, to be husband and wife.

    d. I do not find either the sponsor or the first-named appellant to be credible witnesses.

58. Primarily these were applications under paragraphs 352A and 352D HC 395. The first-named appellant could not meet the requirements of 352A HC 395 and the second and third-named appellants could not meet the requirements of 352D HC 395.

59. I find that paragraph 320(7A) applies to each appellant based on the fact the sponsor and first-named appellant deliberately lied on the application forms in relation to the third-named appellant and also because the first-named appellant lied on the application form in relation to the second-named appellant as she claimed, and

continues to do so, the sponsor was the child's father. As stated earlier a decision under paragraph 320(7A) applies even where false representations have been whether or not to the applicant's knowledge.

60. Ms King argues that their claims should be allowed under article 8 ECHR submitting that they were a family unit and refusing them admission to the United Kingdom would be disproportionate in light of the fact the sponsor cannot return to the DRC.

61. In order to establish a family life claim, the appellants have to demonstrate the existence of family life in the context of article 8. The House of Lords in Razgar [2004] UKHL 00027 laid down five tests that had to be met. Since July 2012 family life is dealt with under the Immigration Rules and if the Rules are not met then only in compelling circumstances should the Tribunal go on to consider a claim under article 8.

62. At paragraph [44] in the Secretary of State for the Home Department v SS and Ors (Congo) [2015] EWCA Civ 387 the Court of Appeal found-

> "If there is a reasonably arguable case under Article 8 which has not already been sufficiently dealt with by consideration of the application under the substantive provisions of the Rules (cf *Nagre,* para. [30]), then in considering that case the individual interests of the applicant and others whose Article 8 rights are in issue should be balanced against the public interest, including as expressed in the Rules, in order to make an assessment whether refusal to grant LTR or LTE, as the case may be, is disproportionate and hence unlawful by virtue of section 6(1) of the HRA read with Article 8."

63. I accept there is evidence of some financial support being sent to the first-named appellant but as I have found that she is his sister I have to consider their relationship in light of Kugathas v SSHD [2003] INLR 170. The Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In JB (India) and Others v ECO [2009] EWCA Civ 234 the Court of Appeal said that financial dependence "to some extent" on a parent did not demonstrate the existence of strong family ties between adult children and the parent nor did weekly telephone calls evidence anything more than the normal ties of affection between a parent and her adult children. In AAO v Entry Clearance Officer [2011] EWCA Civ 840 the Court of Appeal held that family life would not normally exist between parents and adult children within the meaning of Article 8 in the absence of further elements of dependency, which went beyond normal emotional ties. However, in Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) the Tribunal said that a review of the jurisprudence discloses that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

64. Neither of the minor appellants are his children and they have been living at a compound with the first-named appellant and others. I am not satisfied that there is family life, within article 8, in respect of any of the appellants.

65. However, even if there was family life for article 8 purposes, applying the Razgar tests, I find that preventing the appellants coming to live with the sponsor would be an interference but such interference would be in accordance with the law and for the pursuit of a legitimate aim namely immigration control.

66. When considering proportionality, I must have regard to section 117 of the 2002 Act and in particular section 117B. Section 117B(1) of the 2002 Act confirms the maintenance of effective immigration control is in the public interest. There is no evidence the appellants are able to speak English and consequently their inability to integrate easily/work (in the case of the first-named appellant) with society would be more of a burden on the British taxpayer. I have no evidence to show the sponsor would meet any financial requirements for meeting the Immigration Rules and of course the appellants do not meet the Immigration Rules.

67. I have balanced the fact the sponsor is related as an uncle to the two minor appellants and a sibling to the remaining appellant. I have taken into account the fact they may have, prior to 2007, lived together in the same village and I note their claim to be a family unit. I have already indicated that I do not find they are a family unit in the sense advance by Ms King and having regard to section 117B factors, the multiple deceptions committed by the sponsor and first-named appellant and the other findings made I am satisfied this it would not be disproportionate to refuse these three appeals.

DECISION

68. There was a material error. Deputy Upper Tribunal Judge Birrell set aside the earlier decisions.

69. I have remade the decisions and I dismiss the appeals under the Immigration Rules and Article 8 ECHR.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

FEE AWARD

I make no fee award as I have dismissed the appeal.

Signed: Dated:

Deputy Upper Tribunal Judge Alis