Upper Tribunal
(Immigration and Asylum Chamber

Appeal Number:
OA/06906/2015
OA/06908/2015
OA/06909/2015

THE IMMIGRATION ACTS

Heard at Field House

On 26 April 2018

Decision & Reasons Promulgated
On 10 May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

ABIODUN [O]
OLUWATOBI [O]
[E O]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, LAGOS

Respondent

Representation:
For the Appellant: The sponsor
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This an appeal by the appellants against a decision of the First-tier Tribunal issued on 22 August 2016 dismissing their appeals against the

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respondent's decisions of 13 and 17 February 2015 refusing them entry clearance as the dependent children of their father, the sponsor.

2. The first and second appellants are brothers born on 20 December 1996 and 25 September 1999 respectively and the third appellant is their sister, born on 30 March 2002. They are all citizens of Nigeria and are the children of their father, a British and Nigerian citizen, living in the UK. Their mother is a Nigerian citizen living in Nigeria.

3. In December 2014 the appellants applied for entry clearance to join the sponsor in the UK under para 297 of the Rules. Their applications were refused as the respondent was not satisfied that the sponsor had had sole responsibility for them or that their natural mother had decided to relinquish custody to the sponsor. In the light of the lack of detail regarding their current living circumstances in Nigeria, the respondent was not satisfied that there were serious and compelling family or other considerations making their exclusion undesirable. He also took into account a previous application which had been refused, a subsequent appeal being dismissed in 2012, the judge not being satisfied that the sponsor had sole responsibility for them or that their mother had disappeared from their lives or abdicated all responsibility and interest in their care and welfare.

The hearing before the First-tier Tribunal

4. At the hearing before the First-tier Tribunal, the sponsor and his second wife gave oral evidence. His evidence is summarised at [35]-[50] of the decision and the evidence of his wife at [52]-[55]. The judge was referred to the previous decision and to the finding that the sponsor did not have sole responsibility for the appellants. He commented that at the time of that appeal the sponsor's mother had died and the arrangements for the children were virtually the same as they were now, attending boarding school and living with the headmaster during the school holidays [76].

5. The judge said at [77] that he did not accept the sponsor's evidence that the appellants' mother had abandoned all interest in the children and had not played any part in their upbringing since 2007, when she and the sponsor separated. He said at [78] that he approached the evidence of the sponsor and his second wife with considerable caution as the sponsor in giving oral evidence was not convincing and his very specific evidence that his second wife had no close family in Nigeria was not true, given that she had a disabled sister living in Lagos. He had said that she spent 6 to 8 weeks with her sister each year and that the appellants came to stay with them. He also noted that when the appellant submitted their applications the sponsor was interviewed, and the respondent formed the distinct impression that he did not know without reading off a piece of paper the identity of the schools that the children were attending [79].

6. The appellants relied on a complaint made to the Office of Youth and Social Development in Lagos dated 3 September 2014 that the appellants had not seen their mother for a considerable time. However, the judge was not satisfied that this was an objective assessment of the position and found that it was contradicted by letters written by the appellants referred to at [82] – [84].

7. Whilst the judge accepted that the sponsor paid some money for the support of the appellants and paid for school fees, he was not satisfied that he had had sole responsibility for their upbringing after he separated from his wife in 2007. He went on to consider whether the appellants were entitled to leave to enter under para 297(1)(f) and found that, although the appellants may be dissatisfied with their current living conditions and the sponsor's second wife had expressed some concerns about their safety in Lagos, no evidence had been produced to show that there were serious and compelling reasons for the appellants to be admitted to the UK.

8. Having found that the appellants did not meet the provisions of the Rules, the judge went on to consider article 8. He accepted that the decision interfered with the resumption of family life between the appellants and the sponsor but it did not interfere with the family life currently existing between them. He found that any interference was proportionate to the legitimate end of preserving immigration control and the economic well-being of the country. For these reasons, the appeal was dismissed.

The Grounds and Submissions

9. Permission to appeal was refused by the First-tier Tribunal firstly, on the basis that the application had been submitted out of time and there was no adequate explanation for this and secondly, because the grounds did not disclose any properly arguable points of law.

10. The application was renewed to the Upper Tribunal, adopting the grounds submitted to the First-tier Tribunal but adding an explanation for the delay in submitting the first application, namely that it was submitted in time by email on 14 September 2016 but following enquiries from the appellants' solicitors in May 2017, the First-tier Tribunal had no record of having received it and the application was re-submitted. In the grounds it is argued that the judge's findings, and in particular his comment at [62] that the claim by the sponsor that he had sole responsibility for the children did not sit comfortably with one visit a year to Nigeria sometimes of only two weeks duration, were grossly misconceived as the sponsor could not be expected to abandon his work in the UK, he spoke to the appellants virtually every day and sent money regularly for their upkeep.

11. It is further argued that the judge failed to consider the children's welfare and best interests which were not made a primary consideration; that it was very clear from the documentary evidence that the appellant's

mother had indeed abandoned them; a complaint this effect made to the Office of Youth and Social Development was not properly taken into account; the judge had failed to take proper account of the letters written by the appellants showing that there was no contact between them and their mother and generally that his findings were against the weight of the evidence, misconceived and arbitrary.

12. Permission was granted by the Upper Tribunal the basis that it was arguable that the judge had failed to give primary and detailed consideration to the best interests of the appellants and there was no evidence that the appellants were living with their mother or that she shared responsibility for them with their sponsor.

13. At the hearing before me the appellants were not legally represented but the sponsor did attend the hearing. An application had been made for an adjournment by their solicitors by letter dated 17 April 2018 on the basis that the sponsor would be unable to attend the hearing as result of his ill health. This was supported by evidence that he was being treated for acute coronary syndrome following a heart attack and was awaiting an urgent investigation. The application was refused the basis that the hearing could proceed as the issue of whether there was an error of law could be properly considered and no explanation was provided as to how his presence at the hearing could assist on that issue. Following notification of the refusal, a further letter was received from the appellants' solicitors dated 24 April 2018 indicating that they had their client's instructions that the hearing could be dealt with on paper only and that the appellants would not be represented.

14. I asked the sponsor whether he wanted the hearing to go ahead or whether he wished to apply for an adjournment so that the appellants could be legally represented. After some consideration, he said that he was happy for the appeal to go ahead as he was there to represent his children and he wanted the matter to be resolved. He explained that he had been solely responsible for his children. When he left Nigeria, he had put them into a boarding school. Initially, they had stayed with his mother but after she died, they had stayed with the headmaster of the school. He had continued to send money to them. He had had anxieties about how they were being cared for at school and they had complained that they did not receive any of the money he sent. The appellant's mother did not have any contact with them and had abandoned them. This has caused him a lot of stress. He explained that he had to do three jobs to support his family. He had not abandoned his children and when things had gone wrong, he had made this application.

15. Mr Tufan raised the issue of whether the Upper Tribunal judge granting permission had dealt properly with the fact that the application had been refused by the First-tier Tribunal because it was out of time. Any question of a further extension of time had not been addressed. In the alternative, he submitted that the grounds did not raise any issues of law. In

substance, they sought to re-argue issues of fact where the judge had reached findings properly open to him and had given clear reasons for his conclusions.

Assessment of the issues

16. The position in relation to whether the Upper Tribunal Judge should have dealt with the issue of the delay in filing the grounds of appeal to the First-tier Tribunal is not without its difficulties. Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008 sets out a procedure to be followed by an applicant applying to the Upper Tribunal when his application for permission to appeal to the First-tier Tribunal was not admitted because it was made out of time. However, the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 appear to make provision for applications not to be admitted only in circumstances where a written statement of reasons has been refused because that application was received out of time. In the present application the appellants gave an explanation for the delay and there is no reason to think that the judge did not see it. I will proceed on the basis that, particularly as this was a case involving children, the judge must have been satisfied that the effect of the delay, if any, was not such as to justify a refusal of permission in the light of the issues identified as arguable.

17. In order to succeed in their application, the appellants had to meet the provisions of para 297 of the Rules and this included showing either that one parent was present and settled in the United Kingdom and had had sole responsibility for their upbringing (para297(i)(e)) or that there were serious and compelling family or other considerations making their exclusion undesirable and suitable arrangements had been made for their care (para297(i)(f)).

18. The judge, however, was not satisfied on the evidence before him that the sponsor had had sole responsibility. This was an issue of fact for him to resolve on the available evidence. He made a clear finding of fact at [86] that he was not satisfied that the sponsor had had sole responsibility for the appellants since separating from his wife in 2007. When reaching this decision, he took into account the findings in the previous appeal. He also took into account the complaint made to the Office of Youth and Social Development but was entitled to comment that the contents of the complaint showed that it was instigated by the sponsor and there was no indication that the appellants' mother was even aware that it was being made.

19. He also found that the complaint was contradicted by the letters written by the appellants, in one of which the writer says that he is “sick and tired of this woman you called our mother”. The judge inferred from this letter that, whilst the writer was dissatisfied with his current situation, he was

not estranged from his mother and received little in the way of emotional support from the sponsor. This was an inference of fact that the judge was entitled to draw. He also referred to the fact that the sponsor had produced call logs which he claimed showed that he regularly contacted the appellants in Nigeria. The judge acknowledged that they post-dated the previous decision but there was no information or evidence what the purpose of the telephone calls were or in what way the sponsor exercised responsibility over the appellants. I am satisfied that the judge's findings on the issue of sole responsibility were properly open to him for reasons he gave. Similarly, for the reasons the judge gave in [89], he was entitled to find that the appellants had failed to show that there were serious and compelling reasons for them to be admitted to the UK.

20. When granting permission to appeal in the Upper Tribunal, the first issue identified as arguable was that the First-tier Tribunal judge failed to give primary and detailed consideration to the best interests of the appellants. I am not satisfied that there is any substance in this ground. The judge prefaced his consideration of the evidence at [72] with a reminder himself that he must have regard to the best interests of the appellants as children and that this was a primary consideration. Further, in [103] the judge dealt more specifically with the best interests of the children in the context of considering article 8. There is no reason to believe that the judge did not give proper consideration to the best interests of the appellants.

21. The second issue raised when permission to appeal was granted was that it was arguable that there was no evidence that the appellants had been living with their mother or that she shared responsibility for them with the sponsor. However, this refers to factual issues where the onus was on the appellants to produce the evidence to show that the sponsor had sole responsibility for them. For the reasons the judge gave, he did not accept that evidence and therefore the appellants failed to discharge the onus upon them of showing that they were able to meet the requirements of the Rules. This was not a case where an inference could properly be drawn from a lack of evidence following the rejection of the evidence on these issues adduced on behalf of the appellants.

22. In the grounds of appeal, the appellants sought to challenge a number of the judge's findings of fact and the inferences he drew from the evidence. However, these were all issues of fact for the judge to assess and it was for him to decide what inferences should be drawn not only from the oral evidence but also from the documentary evidence such as the complaint with the Office of Youth and Social Development and the letters from the children. In substance, the grounds are seeking to rehearse and reargue issues of fact where the judge reached findings properly open to him for the reasons he gave. The grounds do not satisfy me that the First-tier Tribunal erred in law.

Decision

23. The First-tier Tribunal did not in law and its decision stands.

Signed: H J E Latter Dated: 8 May 2018

Deputy Upper Tribunal Judge Latter