Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22203/2018
HU/22205/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 December 2019	**On 13 December 2019**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

OTO
OAO
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Aslam, of Counsel, instructed by Atlantic Solicitors
For the Respondent: Ms I Vijiwala, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal by Upper Tribunal Judge Plimmer on 28 October 2019 in respect of the determination of First-tier Tribunal Judge S Taylor, promulgated on 2 July 2019 following a hearing at Hatton Cross on 3 June 2019.

© CROWN COPYRIGHT 2019

2. The appellants are sisters born in June 2000 and September 2004. They are Nigerian nationals. They seek entry clearance to join their paternal grandmother, the sponsor, who was granted indefinite leave to remain in July 2003 but who had been living here since May 1991. The sponsor was born in July 1948 and is in employment.

3. The First-tier Tribunal Judge heard oral evidence from the sponsor. He accepted that the father of the appellants had been missing since 2013 and that at the same time their mother had fallen critically ill with mental health problems and was unable to care for them. He found, however, that arrangements had been made for them to be cared for by a family friend, K, and that the arrangement had been working well. The first appellant had completed school and was studying fashion at college. The second was still at school. He did not accept the sponsor's delayed claim in evidence that K had emailed to say she was moving away and did not want to care for the appellants any longer because this was a matter the sponsor had "forgotten" to mention before, the email was not included in the appellants' bundle and the matter was not mentioned in any of the written statements or affidavit that post-dated it. The judge took account of the delay in the decision making. He concluded that there were no circumstances which made the exclusion of the appellants from the UK undesirable. Accordingly, the appeal was dismissed.

4. The grounds for permission to appeal argue that the judge was wrong to find that the appellants could continue to be cared for by K and that that was a temporary arrangement. It was argued that the email only came to light at the hearing and that it accords with the evidence of a temporary arrangement. It is maintained that the judge misdirected himself in law when he found that a family friend could provide care. Finally, it is argued that the best interests of the appellants were not considered.

The Hearing

5. Mr Aslam relied upon the grounds in his submissions at the hearing on 6 December 2019. He maintained the issue was a limited one and depended on whether the appellants met the requirements of paragraph 297(i)(f) – i.e., was the exclusion of the appellants from the United Kingdom undesirable? He submitted that the judge had found that the appellants were related as claimed to the sponsor (at 14), that their mother was unfit and unable to care for them (at 15) and that their father was missing (at 16). A friend of the sponsor stepped in to help but the evidence from the sponsor and her son was that the arrangement was a temporary one. It was anticipated that an entry clearance application would be made and the only reason the arrangement had continued so long was because there had been delays in the processing of the applications.

6. Mr Aslam submitted that the judge had read the email from the K on the sponsor's mobile phone. That had been spontaneous evidence and had not been advanced by the sponsor and so the judge had been wrong to make adverse findings as to its reliability.

7. Mr Aslam argued that children should be cared for by relatives and that this principle was confirmed in the Immigration Directorate Instructions (IDIs). The judge had misdirected himself in finding that a family friend could care for the appellants. He relied on Mundeba (s.55 and paragraph 297(i)(f) [2013] UKUT 88 (IAC) in which there had been reference to the IDIs. He submitted that there was an absence of relatives in Nigeria who could care for the appellants and that the provisions in paragraph 297(i)(f) allowed a child to join a relative in this country where that child could not be adequately cared for by parents or relatives in his/her own country. He conceded that neither the judgment nor the IDIs had been placed before the judge but he argued that the best interests of the children should still have been considered as the head note of Mundeba provided.

8. In response, Ms Vijiwala submitted that the grounds were a disagreement with the judge's decision. The judge took account of the evidence of the sponsor and her son and their claim that the arrangement was a temporary one. However, he also noted that there was no reference in K's affidavit (where she was described as the guardian) that this was the case. Further, the evidence of the sponsor's son was that there was an aunt (his sister) in Nigeria. In those circumstances the judge was entitled to find as he did. The appellants were studying. They were being cared for. There was no mention of any problems in the affidavit. The correct test had been applied. Mundeba was not authority for the contention that children must be cared for by a blood relative and the IDIs were not the rules. Whilst the judge had not specifically referred to the best interests of the appellants, it was implicit from his consideration of the evidence that he had taken this into account. Despite the delay in the entry clearance applications, K had continued to care for them, and they continued to progress with their education. There were no errors in the determination.

9. Mr Aslam replied. He submitted that there was no contradiction between the affidavit, the email and the oral evidence; the affidavit simply failed to mention the arrangement was temporary. There had been a failure to consider s.55. The judge had not given reasons for why it was in the best interests of the appellants to be cared for by the sponsor's friend rather than a relative. The determination was flawed as a result. There were, however, positive findings made; those could be maintained, and a fresh decision could be made by the Upper Tribunal on the available evidence, despite the dispute as to K's position.

10. That completed submissions. At the conclusion of the hearing, I reserved my determination which I now give with reasons.

Discussion and Conclusions

11. I have considered all the evidence before me and have had regard to the submissions made.

12. Paragraph 297 of the Rules provides:

> *The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:*
>
> *(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:*
>
> *(a) both parents are present and settled in the United Kingdom; or*
>
> *(b) both parents are being admitted on the same occasion for settlement; or*
>
> *(c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or*
>
> *(d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or*
>
> *(e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or*
>
> *(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and*
>
> *(ii) is under the age of 18; and*
>
> *(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and*
>
> *(iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and*
>
> *(v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and*
>
> *(vi) holds a valid United Kingdom entry clearance for entry in this capacity.*

13. The provisions the appellants need to meet are at 297(i)(f), (ii)-(vi) although Mr Aslam only addressed sub paragraph (i)(f) in his submissions.

14. I now turn to the arguments made. Essentially, the case for the appellants is that the judge was wrong to find that the care provided by a family friend could take the place of care by a relative and that there had been no consideration of s.55.

15. I turn first to the judge's decision in respect of the first point. Heavy reliance was placed upon the IDIs and the judgment in Mundeba. The IDIs, as cited in the judgment, say the following about 'serious or other family considerations':

> *S.55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.*
>
> *Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to s.55. The UK Border Agency instruction "arrangements to safeguard and promote children's welfare in the United Kingdom Border Agency" sets out the key principles to take into account in all agency activities.*
>
> *Our statutory duty to children includes the need to demonstrate:*
>
> • *fair treatment which meets the same standard as a British child would receive;*
>
> • *the child's interests being made a primary, although not the only consideration;*
>
> • *no discrimination of any kind;*
>
> • *asylum applications are dealt with in a timely fashion;*
>
> • *identification of those that might be at risk from harm.*
>
> *This paragraph relates to the considerations referred to in paragraphs 297(i)(f) … of the Immigration Rules.*
>
> *The objective of this provision is to allow a child to join a parent or relative in this country* ***only*** *where that child could not be adequately cared for by his parents or relatives in his own country. It has never been the intention of the Rules that a child should be admitted here due to the wish of or for the benefit of other relatives in this country.*
>
> *This approach is entirely consistent with the internationally accepted principle that a child should first and foremost be cared for by his natural parent(s), or, if this is not possible, by his natural relatives in the country in which he lives. Only if the parent(s) or relative(s) in his own country* ***cannot*** *care for him should consideration be given to him joining relatives in another country. It is also consistent with the provisions of the European Convention on Human Rights, and the resolution of the harmonisation of family unification agreed by EU members in June 1993* (dated July 2011, chapter 8 section 5 Annex M, at paragraph 1).

16. Mr Aslam relied primarily on the penultimate paragraph.

17. Reference was also made by the Presenting Officer in Mundeba to the following part of the IDIs:

> *1.2 Where the sponsor is not a parent*
>
> *If the sponsor is not a parent but another relative, e.g. an aunt or grandparent, the factors which are to be considered relate only **to the child** and the circumstances in which he lives or lived prior to travelling here. These circumstances should be exceptional in comparison with the ordinary circumstances of other children in his home country. It would not, for instance, be sufficient to show that he would be better off here by being able to attend a state school. The circumstances relating to the sponsors here (e.g. the fact that they are elderly or infirm and need caring for) are **not** to be taken into account."*

18. In having regard to the arguments put in respect of the rules and the IDIs, the court held decided that when considering the meaning behind the rules, "*the words need to be given their natural and ordinary meaning*" (at 29). It further found that: "*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*" (at 34). Reference was also made by the court to what was said in Odelola [2009] 1WLR 126 on the matter of using the IDIs to interpret the Immigration Rules : "*The question is what the Secretary of State intended. The Rules are her Rules*" (at 33) and on the clarification provided in AM (Somalia) [2009] UKSC 16 (at 10): "*...that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules*" (both cited in Mundeba at 25). Indeed, Lord Brown noted that there were instances of the IDIs providing guidance contrary to the Immigration Rules and he observed that he found reliance upon them "*singularly unhelpful on the issue of construction*" (AM at 11).

19. In Mundeba, the Upper Tribunal found that although s.55 only applied to children within the UK, there was a broader duty on the administrative authorities to have due regard to the UN Convention on the Rights of the Child which is why the IDIs invited ECOs to consider the statutory guidance issued under s.55 (at 36). It held that:

> "*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 is sufficiently serious and compelling to require admission*" (at 37).

20. It was accepted that "a*s a starting point the best interests of a child are usually best served by being with both or at least one of their parents*" but that there were other important considerations such as "*continuity of residence*" because "*change in the place of residence where a child has grown up for a number of years when socially aware is important*" (at 38).

21. The appellant in that case was a young teen who had been separated from his family during the conflict in the DRC. His mother had since died and his father's whereabouts were not known so he was being cared for as an orphan by The Girl Guides when his sister, the sponsor, found him and made contact. Her evidence was that he was very lonely, unhappy and receiving no education (at 7). She also maintained that she was not in a position to visit him due to her own circumstances and the ongoing civil war (at 8 and 16). She was found to be a credible witness. It was also argued on the appellant's behalf that he had no one to protect him and was at risk of recruitment as a child soldier (at 10). Nevertheless, the Upper Tribunal concluded that the First-tier Tribunal judge had been entitled to find that his circumstances (having no family, no education, being unhappy and living in a civil war environment) were not serious and compelling (at 45). It also found that the sponsor would be able to visit him when the situation settled down.

22. The Tribunal observed: "*It is not the case that any 15 year old orphan who has a sister in the United Kingdom must be admitted, irrespective of his actual circumstances*" (at 44). That certainly undermines Mr Aslam's submission that the intention of the rules was that all children should be cared for by a blood relative. Nor is the determination authority for the contention that the IDIs must be followed by the courts to the extent that they intend for children, in

the absence of relatives in their home country, to join relatives in the UK. Had it been so, then the Tribunal would not have observed as it did (above).

23. The Tribunal concluded:

> "*Taking the circumstances of the appellant at its highest, he is being looked after by the Girl Guides Association who are meeting his basic needs including, significantly, medical care which we suspect may not be available to many orphans displaced by the civil war in the DRC. Although the appellant is not receiving an education, we do not consider, having regard to his age at the date of application and his age now, that this of itself is sufficient to create a serious and compelling consideration. The lack of opportunities that might exist for a teenager in the United Kingdom are unlikely to be of any relevance unless the cumulative effect is to undermine a child's welfare needs. In addition he has a mobile phone supplied by his sister, and receives regular remittances from her. Doubtless there are emotional exchanges between them given their family history and their re-discovery of each other but that is not sufficient to amount to serious and compelling circumstances that make his exclusion undesirable. In so far as a comparison is made with other children in his country of origin, it is a factor (albeit not a conclusive one) that his circumstances would appear to be reasonably catered for despite the loss of his parents*" (at 45).

24. Turning then to the circumstances of the appellants in the present case, now aged 19 and 15, although obviously younger whether the entry clearance applications were made in December 2016, I note that the judge found that they were being well cared for, that they were progressing in their education and that the eldest appellant had completed school and was now studying fashion at college. He found that they were provided for financially and that contrary to what the sponsor had said in evidence, she did have a daughter in Nigeria (indeed, she is the one who is cited in the police report as having reported the appellants' father, her brother, missing). Additionally, there were relatives of the appellants' mother although the sponsor had not asked the appellants about them (at 9 and 17).

25. Whilst the sponsor gave evidence as to the nature of the arrangement of care, the judge was not satisfied that he had been given a true picture, noting that K (described as the legal guardian of the appellants in a sworn affidavit) had made no mention of the temporal nature of the arrangement in any evidence before him. He, therefore, found that he could not rely on the claim that it was temporary, and he had reservations about the reliability of the February 2019 email from K which stated that she was moving shortly and that the sponsor

should make other arrangements for the children. Whilst Mr Aslam argued that the evidence was in accordance with the oral testimony, spontaneous and thus uncontrived, the judge was entitled to note that it was not referred to at all in the more recent affidavit from the same person. His finding is reinforced by the fact that the appellants continue to live with K some ten months later.

26. No submissions were made on how the circumstances of the appellants compare to those of other youngsters in Nigeria but the fact that they are in receipt of an education already puts them ahead of many others in their country. There is no suggestion that they have been neglected or abused, that they have basic unmet needs nor that there are any issues financially. Were there any such issues, one would have expected the sponsor to say so given her recent regular visits to Nigeria where presumably she had contact with the appellants (although strangely her statement is silent on this). Indeed, the sponsor's funds are bound to stretch much further in Nigeria than in the UK.

27. The sponsor's written evidence was that the appellants also receive health care and attend church. There is also evidence that there are relatives in Nigeria and that the situation is not as the sponsor originally tried to make out of there being no other relatives. No details were given as to whether attempts have been made to seek their assistance; the sponsor's evidence was that she had not even asked the appellants about their mother's relatives. The sponsor's son spoke of having met some on one of his two visits to Nigeria and it transpired that he had a sister there, so the sponsor had not been truthful when she told the judge that all her children except for the appellants' missing father were in this country.

28. There was no evidence of contact between the sponsor and the appellants before the judge; no evidence of phone calls, text messages, cards or other correspondence. The decision maintains the status quo and the continuity of residence in a country and culture the appellants have always lived in and are familiar with. "*The material advantages of life in the United Kingdom is not the test; the loss of his cultural roots in the society in which he has grown up to date is a relevant factor. There is no evidence that he is at risk of harm where he is*" (Mundeba at 50). On this evidence, I cannot find that the judge erred in his conclusion that the evidence did not point to there being serious or other family considerations that make the exclusion of the appellants from the UK undesirable.

29. It is important to note that in this case, as in Mundeba, the appellants are not being denied re-union with a previous carer. This is not a case where they were previously cared for by their grandmother and that she could not care for them anywhere but the UK. They have never lived together, and the sponsor has been living in the UK since before they were born. Her passport copies show that she visits Nigeria most

years (since 2003) and no reason was given as to why she could not continue to do so.

30. I would also note that although Mr Aslam asked that I allow the appeal because paragraph 297(i)(f) had been made out, he omitted to consider the remaining sub paragraphs which have not been addressed at all by the evidence. Indeed, the evidence of the sponsor's finances shows that she is regularly overdrawn, sometimes even beyond her overdraft limit, and there was no evidence given to the judge as to how she would be able to afford to support two teenagers. No evidence of available accommodation has been adduced. The notice to leaseholders gives no information as to the size of the property, or the number of occupants or whether the appellants would be permitted to reside there. There is also an anomaly in that her pay slips give a Coventry address as opposed to the London address in other evidence.

31. I turn next to the complaint that there was no consideration of s.55. I accept that the judge did not cite s.55 in his determination; however, as Ms Vijiwala submitted, it is implicit in his consideration of the facts and the evidence that he did have regard to their welfare and best interests. He noted they were cared for, that they had stability, that they were progressing in education and training and that there was no reliable evidence that the situation could not continue. He also noted that the older appellant was now over 18. It is not apparent that there were any factors omitted in the judge's consideration of the appellants' circumstances, nor was I referred to any. Mr Aslam did not point to any overlooked matters in his submissions, save for the formal consideration of s.55, and the grounds fail to mention any.

32. Three of the head notes of Mundeba were relied on by Mr Aslam. They state:

> (i) *The exercise of the duty by the Entry Clearance Officer to assess an 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.*
>
> *(ii) 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".*
>
> *(iii) 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.

33. As set out in the first paragraph of the head note, it may be safely assumed that any consideration by the respondent, and hence also by a judge, of whether there are family or other considerations which would make a child's exclusion undesirable inevitably involves an assessment of what that child's welfare and best interests require. In Mundeba, the judge did not conduct a s.55 assessment, noting that *"...section 55 of the BCIA 2009 does not apply to entry clearance cases but that not dissimilar considerations should be taken into account under Article 8."*

34. That is entirely consistent with what the judge did in the present case. As I have already said, there is no reliance on any factors that were said to have been overlooked by the judge nor any which would fall to be considered under s. 55 but not under paragraph 297(i)(f). So essentially, the judge's consideration of whether there were family or other considerations which would make the appellants' exclusion from the UK undesirable was a consideration of their best interests. It is also important to note that according to the judge's record of proceedings, no submissions on s.55 were made to the judge at the hearing by Mr Aslam who represented the appellants at that time, as he does now.

35. In conclusion, therefore, I am satisfied that the decision by the First-tier Tribunal judge did not contain an error of law. The joint appeals of the appellants in the Upper Tribunal are accordingly dismissed.

Decision

36. The appeals are dismissed.

Anonymity

37. I make an order for anonymity.

Signed

Upper Tribunal Judge

Date: 9 December 2019