Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/18830/2018 (P)**

THE IMMIGRATION ACTS

Decided under rule 34 (P)	**Decision & Reasons Promulgated**
On 9 September 2020	**On 15 September 2020**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MOHAMMED [S]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation (by way of written submissions)

For the appellant: Mr Karim Andani of Ashwells Solicitors

For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by an Upper Tribunal Judge on 20 April 2020 against the determination of First-tier Tribunal Judge Shergill, promulgated on 29 May 2019 following a hearing at Manchester on 10 May 2019. Time was extended as the application was made substantially out of time, the deadline being 25 July 2019.

2. The appellant is a Kenyan national born on 8 August 1981. He came to the UK with and his son S[1] on 23 October 2016 allegedly to attend the wedding of his sister's daughter. The UK sister, P, is a British national and her daughter, H, was from her first marriage. P also has a son, C, from a second marriage. Both her marriages ended in divorce. At some point the appellant's mother and another sister also arrived here. They all overstayed. The appellant maintains that his mother has since returned to Kenya but there is no evidence of that. According to the respondent, his sister made an application to remain. No details are provided. On 20 May 2017, after the expiry of his leave and after service of form RED.0001 on 16 May 2017 as an overstayer, the appellant married P whom he claimed was not a sister after all. He then made an application for leave to remain as her spouse.

3. The appellant and P were interviewed but the application was refused on 3 September 2018. The respondent was not satisfied that the marriage was genuine or subsisting or that there would be very significant obstacles to the appellant's reintegration on return to Kenya. It was noted that his son was not a qualifying child and that he had not adopted P's two children.

4. The appeal came before Judge Shergill initially on 1 March 2019. He expressed concern that S had been separated from his mother and minor sister in Kenya for much longer than had been agreed and directed that further evidence be provided to address this area of concern. Detailed directions were issued to both the appellant and the respondent at the time and further directions were issued on 28 March 2019. By the time of the second hearing in May 2019, the respondent had obtained the visa application forms for the appellant, his mother and S, and had raised the issue of the validity of the marriage to P given the contents of the VAF in which the appellant claimed to have been married and claimed that P was a sister. The respondent also

[1] I continue the use of anonymity by the First-tier Tribunal Judge.

queried the absence of any evidence of divorce from the appellant's first marriage.

5. Judge Shergill heard oral evidence from the appellant, P and H which he found to be unsatisfactory. He expressed concerns that the marriage may indeed be void and that the appellant and P may be within the prohibited degrees of relationships under the Marriage Act. He found that there was no genuine or subsisting marriage and that there was, therefore, no genuine parental relationship between the appellant and C or that S's best interests were to remain in the present situation. He found there were serious credibility issues and that no innocent explanation had been offered. Accordingly, he dismissed the appeal.

6. The appellant was refused permission to appeal on 28 June 2010 by First-tier Tribunal Judge O'Brien but was granted permission on renewal to the Upper Tribunal.

Covid-19 crisis: preliminary matters

7. The matter would ordinarily have then been listed for a hearing but due to the Covid-19 pandemic and need to take precautions against its spread, this did not occur and directions were sent to the parties on 12 May 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits. As no responses were received, further directions were sent on 19 June 2020.

8. The Tribunal has received written submissions from the respondent dated 26 June and from the appellant on 13 July 2020. I now consider whether it is appropriate to determine the matter on the papers.

9. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and

avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

10. I have had careful regard to the submissions made and to all the evidence before me before deciding how to proceed. I take the view that a full account of the facts are set out in those papers, that the arguments for and against the appellant have been clearly set out and that the issues to be decided are uncomplicated. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in their best interests. I am satisfied that neither party has raised any objection to the matter being determined on the papers although they have had ample opportunity to do so. I am satisfied that I am able to fairly and justly deal with this matter in that way and now proceed to do so.

Submissions

11. On 26 June 2020, Mr Melvin, on behalf of the respondent, replied to the directions and made the following submissions: (i) that the grounds had no merit and an extension of time should not have been granted; (ii) that the judge set out the immigration status of those involved and his findings on the evidence that he heard from the appellant and his witnesses; (iii) that the judge found the appellant to be a thoroughly incredible and evasive witness who had given a confusing, conflicting and untruthful account of events leading to his overstaying; (iv) that the judge did not accept any of the evidence given and had serious concerns over the validity of the claimed marriage in the UK given the lack of evidence of divorce from the previous spouse in Kenya; (v) that the evidence of H was also found to be unreliable and that she was found to be complicit in the deception which undermined the weight to be attached to her evidence; (vi) that the judge listed the number of lies that had been told and found that the marriage itself was likely to be void, leading to the conclusion of no family life between the parties and no genuine and subsisting parental relationship; (vii) that the judge found it was in the best interests of S to return to his life in Kenya attending the same school as his sister; (viii) that the judge had clearly taken S's circumstances into account as a primary consideration; (ix) that the judge was not satisfied that the purported family circumstances were as claimed given that the visa application showed the appellant to be a married man; (x) that given the judge's finding that family life in the UK did not exist, it was irrational for the Upper Tribunal to have granted permission on the basis that there had been an inadequate best interests assessment of S, particularly where the judge recorded serious

uncertainty over the child's family circumstances in Kenya; (xi) that it was not accepted that the judge had adopted a contemptible tone or that the findings did not make sense; and (xii) that the only rational conclusion to be reached was that it was proportionate for the appellant and the child to return to Kenya.

12. In his response to the reply from the Secretary of State, the appellant complains that the judge did not consider the best interests of the children in making his decision. Reliance is placed on section 117B(6) and it is submitted that the conduct of the parties has no bearing on the best interests of the children. It is submitted on this basis alone the decision should be set aside. It is submitted that the Secretary of State made a fundamental error of fact because S is not four years old but 14. There was no consideration of his best interests or the relationship between "*the stepbrothers*". Reference is made to Mr Melvin's submissions and it is pointed out again that the child in question is not four years old but 14. It is submitted that the judge was very angry and that no meaningful analysis was undertaken regarding the best interests of the children. There was no assessment as to the schooling needs of S and the judge did not consider whether the child would be able to enrol in a local school on return. It is submitted that although the judge found that there was a possibility of a prohibited relationship between the appellant and P, no evidence of this had been advanced. The respondent had granted permission for the parties to be married. It is submitted that the extension of time was properly granted in the interests of justice because there was a reasonable prospect of success. It is submitted that the judge erred by not referring to the interview after which consent to marriage was given. It is submitted that if the respondent now believes the marriage was not legitimate then it is for her to produce the evidence to support her position. Reference is made to the statement from S's mother which expressed a view that he would have forgotten Swahili during his absence and would be unable to return to school. Further reference is made to facts which it is conceded were not before the court. It is submitted that if lies were told, the judge did not undertake an analysis of the materiality of the lie or turn his mind to the fact that people lie in court for a multitude of reasons. It is submitted that there is manifestly a subsisting relationship between the appellant and his biological child and that the child had become settled in the UK through no fault of his own. It is submitted that the judge failed to undertake an assessment of the adverse implications of the child's repatriation to Kenya; for example, the impact on his education at such a critical time in his life. It is submitted that the judge made an "*off the hoof*" judgement.

Discussion and conclusions

13. I have considered all the evidence, the grounds for permission and the submissions made by both parties.

14. I have regard to the fact that my colleagues granted permission to appeal in strong terms. He considered that it was arguable that the judge's assessment of S's best interests was flawed because the assessment came at the end of the determination as "*an afterthought*". He also considered that the judge's adverse findings were arguably made in a contemptible tone which infected the best interests assessment and that the reasoning at paragraph 17 made no sense. He considered that the judge had also arguably erred in failing to have regard to evidence advanced to support the relationship between the children.

15. Having had the benefit of more time than my colleague would have had in deciding a permission application, I find that certain facts were misapprehended and findings of facts overlooked when permission was granted. For example, S is not four but fourteen years old. This error plainly did not come from the First-tier Tribunal's determination as there is no mention therein of a four year old child. I note that the appellant's written submissions refer to this error but as it was made in the permission decision and not by the First-tier Tribunal, it has no material relevance to the outcome of the appeal or the assessment of the claim. Mr Melvin's reference to a four year old child was either drawn from the grant of permission or was a typographical error where the 1 was omitted from 14. Again, this has no bearing on the judge's consideration. He did not make this error.

16. Further, the judge demonstrated his concern for S's best interests not at the end of the determination as is alleged but in fact very early on in his determination (at paragraph 3) and indeed, adjourned the initial hearing in order to seek further evidence on that very issue because he was so concerned. It was said in the grant of permission that the reasoning in paragraph 17 made no sense and the following sentence pertaining to S is cited: "*he has after all been yanked away from his birth mother and sister in circumstances where that was, so it is claimed, not ever envisaged*". I am unclear what was found in this phrase to make no sense. What the judge was referring to was the decision to separate S indefinitely from his mother and sister in Kenya when only a one month visit to attend a wedding had been planned. Without further clarification, I cannot find that this reasoning was in any way unclear. Nor am I able to detect any contemptuous tone. Indeed, the grounds made no such allegation. Although it is now remarked on in the recent submissions, that was plainly the result of what was said by my colleague and I shall turn to those submissions later.

17. What appears to have been overlooked in the grant of permission is the very important finding made by the First-tier Tribunal Judge that there was no genuine and subsisting marriage which in turn led to the finding that there was no family life between the parties including the children.

18. The finding regarding the marriage is the crux of the entire case as if that finding was properly made then the grounds on family life cannot be sustained.

19. In so far as the grounds seek to challenge that finding, the following argument is made: "*The Home Office refused to believe that we were in a subsisting relationship. Since the decision we have lived together and we continue to live together... We continue to be married and have been for a considerable period of time*". The grounds fail entirely to engage with the judge's reasons for finding that the marriage was not genuine or subsisting and the grant of permission also fails to flag up any argument about that finding. The judge was rightly concerned about many aspects of the account he had been given and of the utter failure of the appellant to resolve/explain the anomalies he identified. In the appellant's grounds and in the submissions received, it is maintained that people lie in court for a multitude of reasons but there is no attempt to identify what lies were told or why. Such a claim only serves to further undermine the appellant's integrity yet the submissions bizarrely attack the judge for failing to consider the materiality of the lies but without specifying what they were.

20. The judge identified the following serious problems in the evidence: (i) that the appellant said he was married and living with his wife in Kenya when he made his application for entry clearance in September 2016 but that he subsequently maintained in his application for leave to remain in June 2017 that they had divorced in February 2014: (ii) that no evidence of the claimed divorce had been adduced; (iii) that the wife in Kenya has not referred to a divorce in her letter, only to a separation; (iv) that the appellant had claimed on his VAF to be coming to visit P, described as his sister, but that he subsequently claimed she was not a relative at all and that he married her; (v) that there were discrepancies over when H's wedding was meant to take place and when it was called off which suggested that the appellant had applied for a visa after the wedding had been cancelled; (vi) that there were discrepancies over where the appellant lived prior to his visit to the UK because although he claimed he lived with his wife in Kenya, she said that they had lived apart since 2014 and P said that he lived with his mother.

21. The appellant was questioned about why he had passed himself off as married on his VAF if it was the case that he had been divorced some two and a half years earlier. It is plain from the judge's Record of Proceedings and the evidence recorded in the determination (at 8-9) that no coherent reply was forthcoming and indeed this matter remains unresolved. The appellant maintained that he had to write the truth that he was married which makes no sense at all if his subsequent evidence was that he was in fact divorced at the time. He claimed that he only continued to live with his wife (or ex-wife) because he had no other accommodation but that is contradicted by her evidence. Although he claimed that he was supposed to move in with his mother, he could not do so because of her "issues" but P had said in her evidence that the appellant and his mother had been residing together prior to the visit and that the appellant would take his son to visit his (S's) mother and their other child who lived with her (at 10). The judge also noted that the appellant's first wife has spoken of separation in 2014 in her letter; there was no mention of a divorce and no mention of any continued co-habitation (at 10). The judge was fully entitled to find that the appellant had either lied on his VAF when he said he was married or that he was lying to the court when he said he was divorced and had been free to marry P (at 11 and 13). This matter remains unexplained and seriously undermines the appellant's credibility.

22. The judge noted that the appellant was described as single on his marriage certificate whereas by his own evidence he claimed to be a divorced man. The judge had regard to the appellant's evidence that he had informed the registrar that he was divorced but rejected that claim as he was not satisfied that the registrar would have accepted the appellant's oral statements without requiring documentary evidence. He was also concerned that the wife in Kenya made no reference in any of her letters to a divorce which called into question the ability of the appellant to marry again. That was a conclusion he was entitled to reach (at 12).

23. The written submissions from the appellant maintain no evidence was advanced to support the judge's conclusion that the appellant and P may be prohibited from marrying. I would say in reply that the evidence was there in the appellant's VAF. It was he who described his present wife as his sister.

24. It is also submitted for the appellant that the respondent had given the appellant and P permission to marry and that the judge did not refer to the pre marriage interview. That did not form part of the evidence before the judge so he cannot be criticized for failing to have regard to evidence that was not adduced. The interview record is not before me either and, as

consent was given for the marriage, I can only assume that the appellant did not tell the Home Office that he was a married man at the time. The issue of whether he remained married to his wife in Kenya at the time he married P only became known to the Secretary of State when his VAF was obtained. I also note that the letter giving permission maintains that it "*does not constitute a determination as to the genuineness of the relationship on which it is based*" so its relevance to the issues raised by the judge is of very limited weight. The submissions further maintain that if the respondent now maintains that the marriage is not legitimate, evidence of this should be adduced. As stated in the preceding paragraph, the evidence is in the form of the VAF and the absence of any evidence of divorce.

25. There were also problems about the wedding the appellant claimed he was coming to attend. His visa application was made for a one month visit with an expected arrival date of 23 October 2017 and a duration of one month's stay. P's evidence was that in fact the wedding was planned for December 2016 and was called off in November (at 14). That would mean that the appellant had intended to leave the UK even before the wedding had taken place had it gone ahead as planned. However, the evidence of H, the alleged bride, was entirely at odds with that. Her evidence was that the wedding was meant to be in July/August 2016 and that it had been called off in May or June. She was unsure of the dates which the judge found very strange indeed given that it was her wedding and was planned as an extravagant and very expensive affair according to her oral evidence (as recorded in the Record of Proceedings). If her evidence was reliable, then the appellant had lied further about the purpose of his trip and had obtained entry clearance on false pretences.

26. Additionally, the evidence raises the following difficulties: (i) that both the appellant and S's mother were named as his legal guardians on his VAF but that the appellant subsequently claimed that he had custody of the child; (ii) the appellant's mother on her VAF gave details of a sister she had in New Malden whereas this person was not mentioned on the appellant's VAF in the section requesting information of relatives in the UK; (iii) that she gave her marital status as married and said she was living with her husband but that the appellant claimed at the hearing she had not been and that they had problems; and (iv) that despite the judge's directions no evidence of the appellant's mother's return to Kenya has been adduced.

27. Given all these serious problems and conflicts with the evidence, which remain unexplained, it is hardly surprising that the judge reached the conclusion the evidence was a "*web of lies*" and that

it was not possible for him to make any firm findings on whether P was actually a sister or not but he was certain that "*there was a constructed purposeful attempt to bring the appellant over to the UK by circumventing immigration control*" (at 16).

28. It was in that context that the judge concluded that there was no extant family life between the appellant and P as a married couple. Based on that finding there can be no question at all of any family life between S and P or the appellant and C or between S and C. At best the two boys are friends, they are not "*step-siblings*" as the written submissions claim and at its highest S's removal would mean the loss of a friendship formed over a relatively short period. The judge properly found that S's best interests would be to return to Kenya where he had a mother and sister and to return to the life he had there. I note that the submissions make a big issue about the failure of the judge to consider the difficulties the child would have in being repatriated but in fact no oral submissions were made on the issues now relied on in the written submissions and there is no reason why S would be unable to resume his education in Kenya given that he was able to adapt to life and school in the UK. The judge did not hold the conduct of the appellant and P against the children. He properly found that there was no family life because there was no genuine marriage.

29. It is asserted that the judge did not have regard to the statement from S's mother in which she maintained that S would have forgotten Swahili during the four years he has been here and so would have difficulties at school. First, this statement post dates the hearing before the First-tier Tribunal and so can have no bearing on the judge's decision. Second, even if it had been before the judge, it could have no material impact as I note that the languages spoken by the appellant do not even include Swahili so plainly it is possible to live, study and work in Kenya without Swahili if indeed it is the case that he has forgotten it. Third, the claim that he has forgotten the language is mere supposition as it was not part of the appellant's evidence. Fourth, it is not credible that in a matter of just four years the child would have forgotten a language he had spoken for some 11 years. Fifth, it is not suggested that the child does not speak any of the languages spoken by his father which enabled him to live and work in Kenya.

30. The judge was also entitled to find that no reliance could be placed on s.117B(6) as there was no genuine and subsisting parental relationship. The grounds suggest that there was between the appellant and S; that is accepted but S is not a qualifying child and would be returning to Kenya with the appellant.

31. There has been no suggestion that the requirements of paragraph 276ADE(1)(v) can be met.

32. The written submissions from the appellant refer at various points to the statements from S's mother. There is, however, no evidence of how these statements have been prepared, no evidence of how they have come to be in the UK, no evidence of them having been witnessed, no evidence to show that they have been prepared freely by the alleged signatory and nothing to independently verify her signature. The statement attached to the written submissions post dates the hearing and cannot be relied on to criticize the judge's findings.

Decision

33. The decision of the First-tier Tribunal does not contain errors of law and it is upheld.

Anonymity

34. No request for an anonymity order has been made at any stage.

Signed

R. Kekić

Upper Tribunal Judge

Date: 9 September 2020