Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02664/2013
OA/02673/2013
OA/02676/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination**
On 10th November 2014	**Promulgated**
	On 2nd December 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

(1) MISS SARA MARINO
(2) MISS KIRIA NSAMA
(3) KUMA MARINO
(ANONYMITY NOT DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Khan, Counsel instructed by Parker Rhodes Hickmotts Solicitors
For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Angola whose dates of birth are respectively (i) the 20th April 2000, (ii) the 19th January 1997, and (iii) the 14th September 1997. They appeal with permission against the decision of First-tier Tribunal Baker, promulgated on the 10th March 2014, to dismiss their appeals against the respondent's decision to refuse their applications for entry clearance,

with a view to settlement, as the putative children of Mr Bope Marino (hereafter, "the sponsor"). The sponsor has indefinite leave to remain in the United Kingdom as a refugee.

2. As anonymity was not directed in the First-tier Tribunal, little purpose would be served by ordering it now.

Background

3. The background to these appeals is complicated but may be summarised as follows.

4. The sponsor was born in Cabinda, which, though part of Angola, aspires to sovereignty. For reasons connected to the fact that the sponsor shares that aspiration, he fled with his parents to the Democratic Republic of Congo (DRC) in 1975. He returned to Cabinda in 1992. However, he was forced to flee again in August 2007. He subsequently claimed and was granted asylum in the United Kingdom due to his well-founded fear of being persecuted in Angola on account of his political opinion. The appellants and the other children (listed below) remained in Angola until, on the 22nd September 2009, they moved to Kinshasa in the DRC, where they have remained (illegally) ever since.

5. Prior to his departure from Cabinda, the sponsor lived in the same household as his five putative children. Albeit that in some case he was unaware of it at the time of their births, none of these young people are in fact his biological children.

6. It is perhaps convenient at this stage to list all five of the sponsor's putative children. I have placed an asterisk against the name of the appellants.

    (i) Piema Marino, born the 12th April 1994. He is the sponsor's brother.

    (ii) Kuma Marino*, born on the 14th September 1996. He is also the appellant's brother.

    (iii) Kiria Nsama*, born on the 19th January 1997. She is the niece of the sponsor's partner, Maria Buidi. She is unrelated to the sponsor.

    (iv) Bope Marino (junior), born on the 8th April 1997. He is the son of the sponsor's former partner, Anna. Although he is related to the sponsor, he is not his son. DNA testing has not revealed the exact degree of consanguinity. However, it is likely that he is the sponsor's nephew. It is the sponsor's case that he believed until relatively recently that his namesake was his son.

    (v) Sara Marino*, born on the 8th April 1997. She is also the daughter of the sponsor's former partner, Anna. Although she is related to the sponsor, she is not his daughter. DNA testing has

> not revealed the exact degree of consanguinity. However, it is likely that she is the sponsor's niece. It is the sponsor's case that he believed until relatively recently that she was his daughter.

For purposes of clarity and convenience, I shall collectively refer to these young people as "the children".

7. The four younger children first applied for entry clearance in 2011. Those applications were refused, on the 20th April 2011. This was because the appellants were found to have falsely claimed that the sponsor was their father, although it is of course possible that this was an entirely innocent misrepresentation. The appellants' further applications were refused on the 15th and 16th days November 2012, and it is these refusals that form the subject-matter of the current appeals. For reasons that are not entirely clear, the application of Bope Marino (which was made at the same time as his putative siblings) was rejected as invalid by the Entry Clearance Officer.

Grounds of appeal against the First-tier Tribunal's decision and response under Rule 24

8. There are two grounds of appeal, which may be summarised as follows:

   (i) The judge assessed the appeals by reference to the ages at the date of the hearing rather than at the date of the Immigration Decision.

   (ii) The judge failed to make any findings as what was in the best interests of the children and thereafter to treat those interests as a primary consideration.

9. Before turning to consider those grounds, it is first appropriate to mention a concern that is expressed in the respondent's 'Rule 24' Notice. This states that the judge failed "to grapple with the claimed and actual relationships of two of the appellants" and the fact that they had been refused entry clearance on the basis of false documents "in addition to other aspects" [paragraph 6]. The respondent's concerns are summarised at paragraph 7 –

> There is no clear finding as to whether all the parties were in total ignorance of their actual parentage or whether there has been a deliberate and sustained attempt to evade immigration control.

10. First of all, it is pertinent to note that none of the applications were refused under the mandatory requirement to refuse entry clearance where there has been proven deception or submission of false documents, whether by reference to paragraph 320 of the Immigration Rules or otherwise.

11. Nevertheless, it is fair to observe that there was an obvious discrepancy between the sponsor's claimed paternity of the appellants, as was apparently supported by their supposed birth certificates, and their actual relationship as confirmed by DNA testing, Moreover, the respondent's

suspicions were understandably heightened by the children's apparent "lack of contact" with the sponsor over the years. There were thus reasonable grounds to suspect (at the very least) that he sponsor may have had an ulterior motive in sponsoring the current applications.

12. Mrs Petersen confirmed that the concern which lay behind the issues raised in the Rule 24 Notice was that the children are or were intended to become victims of human trafficking. However, that possibility was in my view dealt with by the judge at paragraph 14 of his determination –

> Accordingly, I find I accept that an ongoing genuine relationship exists which might be characterised as a quasi family life, despite a near 7 year physical dislocation of same (discounting the short 2010 visit). Almost daily phone contact is ongoing as well as the fiscal provision supplied to "the children".

The judge thereafter went on to decide the appeal on the basis that genuine family life existed between the appellants and their sponsor. That finding was in my view sufficient to dispose of the possibility that the sponsor had an ulterior motive in sponsoring the current applications. The judge did therefore 'grapple' with the issue of prior deception, albeit that he did so in a similarly indirect manner to that in which the respondent had raised the issue in the first place. I would merely add that, as Ms Khan pointed out, the children's birth certificates were issued by the Cabindan 'government'. This is an authority that is not recognised by the Angolan government. It is thus entirely feasible that they were issued upon nothing more than information that had been supplied, in good faith, by the sponsor.

Error of law

13. Following on from the passage that I quoted in the previous paragraph, Judge Baker said this –

> I so must examine the Article 8 application, no per Appendix FM, but rather using the Razgar criteria as urged by Ms Khan. Accordingly, are the Respondent's decisions an interference with such from of family life as exists and has done for some time in its present form? It seems to me by the same token, that there would be no change, save for a lack of reunification. The two oldest "children" are now already adults, the Third Appellant is very nearly aged 18 in a few months and only the Second Appellant is really very young at aged almost 14 years.

14. It is clear from this passage that the judge was considering the ages of the children at the date of the hearing of the appeal. However, at the date of the decision (the 15 and 16th days of November 2012), only Piema was aged 18 years; Kuma had recently turned 16 years, Kiria and Bope were both 15 years, and Sara was only 12 years. In the case of an appeal against refusal of entry clearance, Section 85A(2) of the Nationality, Immigration and Asylum Act 2002 requires the Tribunal to "consider only the circumstances appertaining at the time of the decision". It was thus an error of law for the judge to undertake his Article-8 assessment on the basis of the ages of the child at the date of the hearing. Moreover, it is clear from his

observation that "only the Second Appellant is really very young at aged almost 14 years", that the judge considered that the relative maturity and ages of the children were a material factor in his overall assessment of their appeals. It is thus appropriate to set aside his decision on this ground alone. The extent to which I do so is considered below.

15. I do not however accept that the judge failed to make any findings as to what was in the best interests of the children, or that he failed thereafter to treat those interests as a primary consideration. At paragraph 14, he said this –

> I recognise that their respective status in the DRC is probably illegal with all therein implied, but since they have lived and been brought up together, it could be thought of as almost curel to split them up and treat them each differently, even if one was minded to do so and even if the very sketchy description of their apparent vulnerability and relative deprivation might seem to justify different treatment. The course is told that hospital treatment has been accessed for blood pressure and hernia treatment when needed and it seems to me that despite the passage of 7 years, the group of them have not undergone extreme hardship or experienced the most compassionate circumstances which might trigger the relief sought.

16. It is clear from the above passage that the judge considered that, whilst there were some contra-indicators, it was in the overall best interests of the children (including those who are not appellants in the current proceedings) to remain together, and that the only way of achieving this was to refuse the applications of those who were seeking to enter the United Kingdom. At paragraph 16(v) of her grounds of appeal, Ms Khan argued that the judge had failed to, "start with the premise that the Appellants best interests are actually served by being cared for by Mr Marino Sr and Ms Vuidi given the findings he makes". However, neither the law nor the logic of the judge's findings are (or were) such as to require him to start with this premise. In my judgement, the judge's assessment of the appellants' best interests was one that was reasonably open to him; in other words, it cannot be described as either irrational or perverse.

17. I shall therefore re-assess the appellant's Article 8 rights by substituting the ages of the children at the date of the decision, as referred to at paragraph 14 above. However, I shall preserve the remainder of Judge Baker's findings.

Article 8 assessment

18. Other than to remove the qualification that is implied by the word "quasi", I adopt Judge Baker's finding concerning the existence of family life [see paragraph 14 of his determination, as quoted at paragraph 11 above]. I also accept, as did Judge Baker, that the consequences of the decision are such as to engage the potential operation of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.

19. All parties agree that the decisions were 'in accordance with law'; that is to say, they were made in accordance with immigration rules. Moreover, they serve the legitimate end in a democratic society of maintaining the economic well being of the country. It is at least doubtful that the sponsor would be able to maintain and accommodate the appellants without recourse to public funds. Whilst it is said that the appellants' best interests require them to enter the United Kingdom in order to enjoy the benefits of an education [see paragraph 37 of the sponsor's witness statement dated the 4th February 2014] the appellants are not British citizens and are not therefore entitled to a UK education. The fact that the appellants would be educated at the UK taxpayers' expense is thus a factor that increases rather than reduces the public interest in their continued exclusion from the UK.

20. The suggestion by the sponsor that the female appellants "could be raped" if they remain in the DRC, and that their male 'siblings' "would also be in danger" if they tried to defend them, is nothing more than speculation.

21. The welfare of children is in general best served by preserving continuity of care within an emotionally secure environment and in surroundings that are familiar to them. I therefore agree with Judge Baker that, despite the existence of some contra-indicators, the overall best interests of the appellants were served by them continuing to live with their 'siblings'. At the date of the decision, the appellants had not lived with the sponsor for a period of some 5 years. I am not therefore satisfied that it would at that stage have been in their best interests to separate them from their siblings with a view to placing them with putative 'parents' with whom (albeit by force of circumstance) they have had limited contact in recent years, and into a social and cultural environment that would be alien to them. In reaching that conclusion, I am well aware, as was Judge Baker, that it may be the case the appellants' residence in the DRC was and is unlawful. Nevertheless, as Judge Baker also observed, there is no evidence that this fact (if it be a fact) has had a significantly adverse impact upon the daily lives of the appellants. Their lack of attendance at school may or may not be a consequence of illegal residence. However, just as the National Health Service is unable to be a hospital to the world, so too is the publicly-funded UK education system unable to provide a school for the world.

22. I am therefore satisfied that the appellants' exclusion from the United Kingdom is justified and proportionate in seeking to maintain the economic well being of the country through the consistent application of immigration controls.

Notice of Decision

23. Having set aside the decisions of the First-tier Tribunal, and have remade them in accordance with the circumstances appertaining at the date of the immigration decisions, I have decided to dismiss these appeals.

Signed Date

Deputy Upper Tribunal Judge Kelly