

**Upper Tribunal
(Immigration and Asylum
Chamber)**

Appeal Number:
OA/17983/2013

OA/17985/2013



THE IMMIGRATION ACTS

Heard at Field House, London

On 5th August 2014

Determination

Promulgated

On 20th August 2014

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

**MR REAGAN BIZIMUNGU (FIRST APPELLANT)
MISS MBAZAZI PHIONAH (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr G Khan

For the Respondent: Mr G Jack, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are citizens of Uganda. They claim to have been born on 23rd September 1996 and 30th June 1999 respectively. They applied for entry clearance to join their mother Nyamata Nyakake “the Sponsor”. It is claimed that their Sponsor exercised sole responsibility for both Appellants. She entered the UK as far back as 2000. She claimed at that time to be a refugee from Rwanda. This claim was refused but in 2007 she

was granted indefinite leave to remain because a younger child of hers, had by 2007 spent his formative years in the UK. The Sponsor left the two Appellants in Uganda in 2000 and visited them for the first time only in 2012.

History of the Appeals

2. The Appellants' first applications to join their Sponsor, were refused on 16th March 2012. Their subsequent appeals to the First-tier Tribunal were dismissed. The Judge on that occasion made findings that he could not be satisfied that the birth certificates provided by the Appellants were genuine, nor could he be satisfied that their passports could be relied upon as evidence of identity. The Judge further commented that he had doubts over the DNA test results.
3. Both Appellants made a further application for entry on 31st May 2013. Those applications were also refused and their subsequent appeals came before First-tier Tribunal Judge Pedro. Judge Pedro also dismissed their appeals.
4. The Appellants sought permission to appeal Judge Pedro's determination on the grounds that they had been deprived of a fair hearing. The grounds amplified this by saying that the Judge failed to have regard to evidence which was put before him. The Appellants' sponsor had attended the hearing on their behalf and submitted a witness statement. In that statement she gave an explanation for submitting false birth certificates on behalf of the Appellants and said that she had obtained new birth certificates from the proper issuing authorities.
5. The Judge declined to hear her oral evidence and referred to the **Devaseelan** principle. He took the previous Judge's decision as his starting point and informed the Appellants' representative why he concluded that the position remained the same.
6. Permission to appeal was granted by First-tier Tribunal Judge Nicholson. The relevant parts of the grant of permission are contained in paragraph [4], [5] and [6] and are reproduced here.

"At paragraph 3 Judge Pedro stated that at the commencement of the hearing he had a preliminary discussion with the representatives regarding the issues and, at the conclusion of that discussion, he informed the representatives that he intended to dismiss the appeal of both appellants. The judge referred to **Devaseelan 2002 UKIAT 00702**, took the previous decision as a starting point and explained why he concluded that the position remained the same.

Grounds 3 and 4 contend that the appellants did not get a fair hearing because the judge declined to hear the evidence of the sponsor, who the appellants claim is their mother.

Whilst the judge might well have reached the same conclusion, even if the sponsor had given oral evidence, it was arguably incumbent upon the judge

as a matter of of (sic) procedural fairness to allow the appellant's (sic) representative to call as a witness the person who the appellants claimed was their mother (See comments generally on the calling of witnesses in **A (Somalia) 2004 UKIAT 00065**). If that was not done then it is arguable the judge erred. In those circumstances permission is granted to argue grounds 3 and 4. I do not refuse permission on the remaining grounds”.

7. Thus the matter comes before me to determine whether the Judge has erred materially, such that his decision needs to be set aside and remade.
8. I heard brief submissions from both representatives; Mr Khan on behalf of the Appellants and Mr Jack on behalf of the Respondent. At the end of those submissions I announced my decision that I was satisfied that the First-tier Tribunal had materially erred and that its decision must be set aside. I now give my reasons for reaching that conclusion.
9. It is a matter of procedural fairness that if there is evidence available which may be relevant to the decision being litigated, then that evidence should be heard.
10. **Devaseelan** should be the starting point only for a Judge, not a re-litigation of the facts found by the previous Judge. The approach by Judge Pedro has led to a failure to properly consider and evaluate the fresh evidence which was available to him. As First-tier Tribunal Judge Nicholson stated in the grant of permission, it is possible that having heard the evidence of the Sponsor the Judge may well have reached the same conclusions but that would only have been after a full and fair hearing of the evidence available. Instead he has deprived himself of the opportunity of evaluating the available evidence and more importantly has deprived the Appellants of the opportunity of putting their best case forward. That is procedurally unfair and amounts to a legal error.
11. For those reasons I see no alternative but to remit this matter to the First-tier Tribunal (not Judge Pedro) since it is clear there is a lack of judicial fact finding. I give a direction that the Sponsor attend the new hearing before that Tribunal and be given the opportunity to present her evidence on behalf of the Appellants.

Decision

12. The decision of the First-tier Tribunal contains an error of law and it is set aside. The matter is remitted to the First-tier Tribunal.

No anonymity direction is made

Signature

Judge of the Upper Tribunal

Dated

