Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/23511/2012
OA/23514/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 March 2014	**On 25 March 2014**

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

Z J
RG

Appellants

and

ENTRY CLEARANCE OFFICER, KINGSTON

Respondent

Representation:

For the Appellants: Mr M Goldborough, Solicitor, of Cleveland & Co Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Jamaica, born respectively on 15 July 1998 and 1 September 1995. They are half siblings and the biological children of the sponsor, Lisa Williams, a person present and settled in the United Kingdom. In August 2012

they applied for entry clearance to the United Kingdom as dependants of the sponsor. On 24 October 2012 the respondent refused their applications.

2. The appellants appealed against that decision and on 27 August 2013 their appeal was heard at Taylor House by First-tier Tribunal Judge Elliman. In a determination promulgated on 3 September 2013, she allowed their appeals on human rights grounds (Article 8), having found that the appellants could not meet the requirements of the Immigration Rules; namely, that, if admitted, the appellants could be satisfactorily maintained, without recourse to public funds.

3. The respondent was given permission to appeal Judge Elliman's decision and on 22 November 2013 the appeal was heard in the Upper Tribunal by Deputy Upper Tribunal Judge Wilson. In a decision dated 27 November 2013, Deputy Judge Wilson found an error of law in Judge Elliman's determination, as a result of which he set the determination aside. Deputy Judge Wilson's written reasons are set out in the Appendix to this determination.

4. In the event, illness has prevented Deputy Judge Wilson from re-making the decisions in the appellants' appeals, with the result that a transfer order has been made, enabling me to complete that task. At the hearing before me on 6 March 2014, Mr Goldborough indicated that he would not wish to call any evidence. Ms Williams, however, told me that she had signed a contract of employment with Jays Care Home Limited in February 2014 in order to undertake part-time work as a carer (a job she has done in the past: [18] of Judge Elliman's determination).

5. The sponsor has a small child by a man who is not the father of either of the appellants. It is common ground that this child could not be expected to live in Jamaica. Amongst other things, he suffers from learning difficulties. The care needs of the child have, in effect, meant that the sponsor has been unable to engage in sufficiently remunerative employment to enable the appellants to join her and her young son without creating a situation in which the combined financial needs of the parties, calculated objectively (as they must) could not be met by those parties.

6. At [22] of her determination, Judge Elliman considered the issue of proportionality in terms of Article 8:-

> "I have noted above that the requirements of the rules in respect of maintenance cannot be met and it is tempting to conclude that Article 8 cannot simply override that requirement which has been imposed as a matter of public policy. However, I am also satisfied, as I have already said above, that the sponsor has some savings and resources and would ensure – as she has done so far – that she can arrange her life so as not to have any further recourse to public funds. Her credibly stated intention is to work but simply to do so in a manner that doesn't undermine her role as a carer for her youngest child. She has sought to avoid reliance on public funds so far and it is conceivable that the presence of these two appellants, now teenagers, may assist her both in looking after the youngest and enable her to make arrangements to work more so that she can

> continue to provide for the family. Their presence potentially reduces her reliance on public funds."

7. Concluding that family reunification was desirable, that the sponsor had been involved in the upbringing of the appellants in every way (financial, emotional, practical) and that the relocation of the family to Jamaica would be detrimental to the youngest child, Judge Elliman found in the appellant's favour, concluding that maintaining the refusal of entry clearance represented a disproportionate response.

8. Although her determination has been set aside, I take account of those positive aspects of the judge's findings. However, as Mr Melvin submitted, those findings are incomplete. In particular, they pay no regard to the general burdens which the presence of the appellants would have on the United Kingdom public expenditure. Even if – and Judge Elliman's finding is speculative – the presence of the appellants might help the sponsor to work longer hours, their presence would place additional demands on the United Kingdom's educational resources, as well as its healthcare resources. It is considerations of this kind that have led the Higher Courts to point out that, where a person fails to meet the requirements of the Immigration Rules, it is unlikely that Article 8 can be successfully invoked, particularly where the issue comes down to maintenance without recourse to public funds. As Rix LJ held in AAO v Entry Clearance Officer [2011] EWCA Civ 840:-

> "As Strasbourg and domestic jurisprudence has consistently emphasised... states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens. It is an unfortunate reality of life that states, especially one like the United Kingdom which is generally accessible and welcoming to refugees and immigrants, cannot undertake to allow all members of a family to join together here, even those members who can show emotional and financial dependency, without creating unsupportable burdens."

9. It is also relevant to observe that, although Article 8 clearly encompasses family reunion within its ambit,

> "23. The trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere.
>
> 24. Where entry is sought for the purpose of family reunion the Immigration Rules, laid before Parliament, represent an attempt by the Government to strike a fair balance between respect for family life and immigration control, which includes economic considerations.... The authorities provide examples of cases which fall outside the rules where the positive obligation of the state under Article 8 requires the giving of leave to enter. Such cases are often difficult and require close analysis of the facts." (Muse v Entry Clearance Officer [2012] EWCA Civ 10; Toulson LJ)

10. In the present case, the sponsor choose to leave the appellants when they were young, in order to come to the United Kingdom for what appears to be economic reasons. The children were left with the sponsor's mother (their grandmother) who has provided a home for them in Jamaica while they have been growing, albeit that the sponsor was found to have sole responsibility and to have made financial contributions to their upbringing. There is evidence that the grandmother has a neuroma in her right hand but there is no medical support for her contention to generally be in "failing health" or for her to "think my time on earth may be coming to a close" (letter of 1 March 2012). At E86, there is a brief letter from a doctor indicating that surgery on her right hand was an option and that the grandmother should "desist from taking on any strenuous activity as this will only serve to aggravate her condition".

11. At E10 and E11, there are letters from the appellants' respective schools. Z is said to be often late for classes, frequently truant and aggressive towards her peers. Counselling revealed that it was "evident that [Z] was hurting because of the separation from her mother and the lack of communication with her father" and that the grandmother's "ill-health" has made it difficult for her to care for Z. The general opinion of teachers was that "[Z's] best interests would be to live with her mother in the United Kingdom". R, meanwhile, has often been "disruptive" and "insolent" and demonstrated "insubordinate behaviour towards both his peers and teachers". Again, he was said to have been referred for counselling "where it was discovered that he is suffering from the absence of his parents, and as such this manifests itself in the above-listed anti-social tendencies". It was thought to be in the best interests of R "to be where his mother is".

12. There are serious problems with the assertions in these letters. To begin with, it is entirely unclear when the asserted behaviour began. The implication is that it was only relatively recently; otherwise one could have expected an earlier referral for counselling to have been recorded. This immediately raises questions, as it is difficult on the face of it to see why the children should only recently have demonstrated problems arising from their separation from the sponsor. In any event, the genuineness of the "counselling" is questionable. No attempt appears to have been made to investigate the circumstances of the sponsor in the United Kingdom or her willingness and ability to provide an environment in which the appellants' behaviour might improve. In conclusion, I consider these letters to have all the hallmarks of having been written to order and that their contents cannot be relied upon.

13. In Mundeba (s.55 and para 297(1)(f)) [2013] UKUT 88 (IAC), the Upper Tribunal (Blake J and Upper Tribunal Judge Dawson) gave guidance on the assessment of family considerations in entry clearance cases, concerning children. The Tribunal considered that the focus needed to be on the circumstances of the child in the light of his or her age, social background and developmental history involving an enquiry as to whether:-

"(a) there is evidence of neglect or abuse;

(b) there are unmet needs that should be catered for; and

(c) there are stable arrangements for the child's physical care."

14. The overall assessment would determine whether the combination of circumstances were sufficiently serious and compelling to require admission. Although the starting point would be that the best interests of a child were usually best served by being with both or at least one of their parents, continuity of residence was another factor, as was change in the place of residence where a child has grown up for a number of years when socially aware.

15. In the present case, there is no evidence to indicate neglect or abuse of the appellants in Jamaica. Despite the problem with the grandmother's hand, they are of an age when they are not dependent upon her for everyday tasks. Indeed, their presence in the United Kingdom was considered by Judge Elliman to be likely to involve the appellant's helping to care for their young half-brother. What they might think about this is unclear. So too is whether they would be suitable part-time carers, assuming their anti-social behaviour, as described by their schools, is or may be true.

16. Like Judge Elliman, I formed a positive impression of the sponsor. She clearly has a genuine desire to see the appellants living with her in the United Kingdom. The fact is, however, that through her choice the sponsor came to the United Kingdom in 2002, when the children were 4 and 7 years old and she has not lived with them since. Judge Elliman considered that the sponsor's witness statement showed her "fighting to remain in the United Kingdom", which suggests that this was the sponsor's main aim (she became a British citizen in April 2012).

17. I accept the veracity of the sponsor's evidence that she has recently undertaken to resume work. This reinforces the findings of Judge Elliman that the sponsor would do her best to ensure that she, her son and the appellants would not be a burden on public funds, albeit that the requirements of the Rules could not be satisfied. However, the yardstick for what is adequate maintenance is, as I have said, objective. It is based on the respondent's assessment of how much money a family needs in order to live without unacceptable hardship. It is problematic to hypothesise that, if admitted, the appellants would, in practice, find themselves part of a family unit that was trying to subsist below that level. Conversely, it is speculative to assume that the presence of the appellants would enable the sponsor to earn sufficient to lift the family above the requisite threshold. The stark reality, which must be faced in determining whether human rights compel the admission of the appellants, is that there is a significant likelihood that reliance on public funds would increase, as well as the additional demands on health and educational provision described in paragraph 8 above. There is, thus, a potent public interest in favour of maintaining the entry clearance officer's decisions, which must be set on the respondent's side of the proportionality balance.

17. Looking at matters overall, I do not find that the positive factors identified by Judge Elliman are such as to outweigh the state's interest in maintaining an effective immigration control, as articulated at [49] of AAO. I also do not consider it has been shown that the appellants are suffering problems in Jamaica, which are likely to be eliminated or, at least, alleviated if they were to come to live in the United Kingdom. As I have said, the evidence from the schools is problematic. The evidence regarding the grandmother's infirmity does not show any consequential adverse impact upon the appellants. It is unclear how they would react to coming to live in a country with which they are unfamiliar, with a mother that they have effectively not known since they were small, and with a much younger half-sibling, who has learning difficulties. Their best interests do not, in short, clearly point towards their coming to live in the United Kingdom.

18. In conclusion, on the evidence before me, I do not consider that maintaining the refusals of entry clearance would violate the human rights of the appellants, the sponsor, the sponsor's young child or, indeed, anyone else.

Decision

19. The determination of the First-tier Tribunal having been set aside, I re-make the decision in the appellants' appeals by dismissing them.

Signed Date

Upper Tribunal Judge Peter Lane

APPENDIX

Decision as to error of law and directions

"1. This is the respondents' application in respect of the decision of the First-tier Tribunal Judge Elliman who in a determination promulgated on 3 September 2013 found for the two minor appellants in their favour in relation to the fact that their mother in the United Kingdom, Alecia Williams, was exercising sole responsibility but also in the same determination accepted that the maintenance requirements of the Rules could not be met at the time of the hearing. That has not really been addressed in detail before me and I think in essence this is not a material matter – it appears clear that the relevant council were prepared to accept the appellants as additional occupants of the emergency housing they were providing for the appellants' mother. That arguably may not impact on the reliance on public funds argument in any material way.

2. What has been argued is that the judge, after going on to find that the appellants could not succeed under the Rules having regard to the decision in **KA & Others [2006] UKAIT 00065,** went on to consider the question as to whether or not the appeal should be allowed in relation to Article 8 without having regard to her earlier finding when assessing question of proportionality. It is against that aspect of the decision of the First-tier Judge that the respondent applies with leave granted in the First-tier.

3. The grounds argue firstly, that the judge should have had regard to the Immigration Rules in making the Article 8 assessment and I have adopted the test that in the hearing today I am looking at the broad principles, not the narrow argument that the human rights should have been considered within the structure of the Immigration Rules in Appendix FM. The advocates agreed that that was a too academic approach and I should look at the substantial merits.

4. The Respondent also argued that whatever approach was adopted there is a requirement to give adequate reasons and there was not a sufficiency of reasons relating to the decision, essentially in relation to the proportionality exercise carried out by the judge in paragraph 22. Although I have listened very carefully to what Mr Young has argued on behalf of the children I am not satisfied that he has really been able to answer the substantial merits of the respondent's arguments. For that it is necessary to go into the detail of the determination.

5. It is accepted that at the time of the immigration decision the sponsor's earnings were variable. There is no direct finding and the judge said she was not helped by a clear schedule. What the judge records are payslips from Sports Direct for the sponsor for July, August and October 2012 showing income ranging from

£93 a month to £358. It was agreed at the hearing before the judge that the minimum income support level would be £1,152. Even taking the sponsor's case at the highest therefore of £358 there is a shortfall of just under £800 a month. It is agreed that at date of decision the sponsor had savings of just over £3,000 but that shortfall would mean that if all the appellants were allowed into the United Kingdom it would be used up within four months. £800 is obviously a very substantial shortfall and the reliability of that income is not well-evidenced. As I have said the sponsor just started work and there is no finding of fact on the reliability of that income and indeed by the time of the hearing before the judge the sponsor had stated she had ceased work and was looking for work because of the needs of her son Raheem who everyone accepts has special educational needs.

6. The other matter that causes me concern is paragraph 20. That is where the judge considers it not necessary to determine whether the appellants meet the requirements of paragraph 297(i)(f) that is, is their exclusion undesirable in view of the obstacles of the maintenance payments. That is unfortunate because there are matters contained in the sponsor's evidence that arguably goes to say that the children's exclusion from the UK is undesirable but there is no finding on that point which makes the difficulty of the judge when balancing out matters under **Razgar** very difficult. What she has done finally at the end of that paragraph stating the compelling reasons that tip the balance, desirability of family reunification, the fact their mother have been involved in their upbringing and the relocation of the family as a whole to Jamaica will be detrimental to the youngest child. There is however no reasoning or clear finding as to these matters.

7. What she has not recorded is that the children's exclusion from the United Kingdom would be to their gross detriment and there are grave reasons essentially having regard to the public interest that they should be admitted. That is of relevance and I accept the respondent has quite cogently argued that that is essentially the public interest test. If there are very cogent public reasons why the exclusion of these children from the United Kingdom as of date of decision is undesirable, then the argument of the shortfall of maintenance is a balancing exercise. It would then be within the terms of a proper judicial discretion and an exercise of proportionality on those grounds would be one that I would be satisfied it would not be appropriate to interfere with on review. I am satisfied however that in this particular case the judge has not exercised proportionality on that basis.

8. There is generally an unfortunate lack of findings of fact that could then justify the proportionality decision. As I have said it is both as to the shortfall of maintenance, how that could possibly be met from savings. The judge has certainly said that it is conceivable these two appellants, now teenagers, would assist the sponsor in her employment which is an error firstly looking forward from circumstances as of date of decision and secondly again if that an evidential finding as to a circumstance as of date of decision, if so where is the

evidence to justify that. There is obviously some contrary evidence within the Appellants' bundle which suggests that would be an unrealistic assumption.

9. Whilst I do have regard to the needs of the child in the United Kingdom there is also the need to have due regard to the public interest which ultimately is that these two children when they come here are adequately maintained. It would not be appropriate for two children, who it would appear from their school reports have difficulties in any event, to have a shortfall of income of approximately £800 a month from their mother. It is very substantial.

10. So for all those reasons I am satisfied there was an error of law on this occasion in the exercise of proportionality and I therefore direct that this matter goes forward to a re-evaluation. It is clear there has got to be evidence called. The directions indicate that the matter would not necessarily proceed today. My preliminary view is that as there has been a full hearing in the First-tier it would be inappropriate to return it to the First-tier and the matter should be concluded with a continuation hearing before me as soon as we can manage but if either advocate wants to argue the matter should otherwise be determined I will now hear from you.

11. After hearing no objection to the proposed course I direct that there is a continuation hearing before me on a date to be fixed."

Deputy Upper Tribunal Judge Wilson