



IAC-AH-KRL-V1

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

Appeal Number: OA/09628/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 8 October 2015**

**Decision & Reasons Promulgated
On 27 October 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**BAA
(ANONYMITY DIRECTION MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER – NAIROBI

Respondent

Representation:

For the Appellant: Mr H Hans, instructed by Henry Hyams & Co, Solicitors
For the Respondent: Mr M Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, BAA, was born in 1999 and is a citizen of Kenya. She had applied for entry clearance to join her sister in the United Kingdom under the provisions of paragraph 297 of HC 395 (as amended):

“297. 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/she:

- (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; and
- (vii) does not fall for refusal under the general grounds for refusal."

The appellant's application was refused by the Entry Clearance Officer Nairobi on 12 June 2014. The appellant appealed to the First-tier Tribunal (Judge Turnock) which, in a decision promulgated on 24 February 2015, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The grounds of appeal are primarily concerned with the judge's alleged failure to follow the Upper Tribunal decision in *Mundeba (Section 55 and paragraph 297(i))* [2013] UKUT 00088 (IAC). The head note reads:

- (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.
- iv) Family considerations require an evaluation of the child's welfare including emotional needs. 'Other considerations' come in to 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 backgrounds and developmental history and will involve inquiry as to whether:-
 - a. there is evidence of neglect or abuse;
 - b. there are unmet needs that should be catered for;
 - c. there are stable arrangements for the child's physical care;

The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.

- v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important: see also SG (child of a polygamous marriage) Nepal [2012] UKUT 265 (IAC) [2012] Imm AR 939.

3. It appears from the grounds that the appellant only sought entry to the United Kingdom on the basis that there were family and other considerations making her exclusion undesirable. The appellant heard evidence from the sister (sponsor) and considered all the documentary evidence. She set out in some detail the nature of the care arrangements which had existed for the appellant in Kenya. Those arrangements are somewhat convoluted, as were the relationships within the appellant's family. The judge accepted that the DNA evidence before him established on a balance of probabilities that the appellant is the full sister of the

sponsor in the United Kingdom. He accepted that the appellant indicated that she no longer wished to live with Mr O in Kenya, stating that "it's very difficult if I am not in school I get passed to people who look after me ... my life is being put at risk." The judge wrote this:

"There were raised, in the notice of refusal, a number of concerns which have not been satisfactorily addressed. Although Mr O has provided a statement and an affidavit he has not explained why he is referred to as the husband of the appellant's grandmother or why he brought the appellant to the UK and what they did whilst they were in the UK. I am not satisfied that he has properly explained how the appellant came to be in the care of Mrs A who he described as a "village mate." It is difficult to accept ... the circumstances of the appellant would not be well-known and that when Mr O took responsibility for the appellant they would not have inquired into her history. I am not satisfied that the circumstances of the appellant have been properly detailed and I am not satisfied as to the level of support she receives and what other relatives she has in Kenya. I am not satisfied that she has discharged the burden on her to establish that she meets the requirements of the Immigration Rules."

4. The response of Mr Hans, for the appellant before the Upper Tribunal, to those remarks was that the judge should have asked questions of the sponsor whom he had before him at the court hearing. I disagree. It is the duty of the appellant and her representatives (I note that the appellant was represented by the same solicitors before the First-tier Tribunal) to present their case in a clear and coherent manner to the First-tier Tribunal. The concerns outlined by the judge in the paragraph which I have quoted above are referred to also in the notice of refusal: it is clear that the ECO was also confused regarding the arrangements made for the appellant's care. It is not the case that the judge has determined the appeal on a basis which was completely new and which the appellant and her representatives have had no opportunity to answer. It was not for the judge to ask questions in order to perfect the appellant's evidence; the judge should only ask questions necessary to clarify evidence which has already been presented to him or her. Crucially, as the judge indicated in the passage which I have quoted, the burden of proof in such appeals rests on the appellant and the judge was fully entitled, on the basis of the evidence which was put before him and which he has analysed in considerable detail, to find that the burden of proof had simply not been discharged in this instance. His approach to and analysis of the evidence was entirely sound. He reached a conclusion which was plainly available to him on the basis of the evidence. In the circumstances, the appeal is dismissed.

Notice of Decision

5. This appeal is dismissed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of

her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 26 October 2015

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 26 October 2015

Upper Tribunal Judge Clive Lane