Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17630/2013
OA/17631/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 June 2015	**On 20 July 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ZUCKER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS B
MASTER E
(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Ms Fijiwalla, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, Counsel instructed by Rolli Solicitors London

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify either of the Respondents. Breach of this order can be punished as a contempt of court. I make this order because the Respondents are minors.

2. The Respondents Miss B and Master E are citizens of the Democratic Republic of Congo born on 3 March 2008 and 8 July 2005 respectively. On or about 26 July 2013 applications were made on their behalf, by the

Sponsor, Mr PM pursuant to paragraph 301 of the Immigration Rules on the basis that he was the father of each of the Respondents. On 7 August 2013 decisions were made in the case of each of the Respondents to refuse the applications. The issue of paternity was raised on the basis that when Mr PM was first issued with his student visa dated 2 October 2007 he had stated in the application for that visa that he had no children. Because the credibility of Mr PM was put in doubt by his claim to have had no children, it was not accepted that Mr PM had sole responsibility or that the children were living in exceptional circumstances. The Entry Clearance Officer went on in each case to make reference to Article 8 of the European Convention on Human Rights ("ECHR") and was satisfied that there had been no breach. In the alternative any interference was said to be justified and proportionate.

3. By Notices dated 29 August 2013 the Respondents and each of them appealed. On 18 July 2014 their appeals were heard by Judge of the First-tier Tribunal Griffith. She had the benefit of DNA evidence. That evidence showed that Mr PM was the father of Miss B but not the father of Master E, though Miss B and Master E had the same mother.

4. The circumstances otherwise were that Mr PM had married Mrs STM, a British citizen though at the time of the decision, and for the avoidance of doubt, Mr PM had limited leave to remain in the United Kingdom.

5. Judge Griffith made very positive findings. She heard evidence from Mr PM and his wife. She accepted that Mr PM had only learnt that Master E was not his biological child on 30 June 2014 upon sight of the DNA evidence. She accepted that there would be no one in the Congo to look after these two children who were then in the care of Mr PM's brother who had been offered, and was to take up, a place to study in the United Kingdom, with a course due to begin in September 2014. Judge Griffith also accepted Mr PM's explanation as to why he had answered "No" to the question "Do you have any dependants?"

6. As to the Respondents birth mother she, it was accepted, was living in South Africa and having all but abandoned these two children since June 2010 when she left them with Mr PM's grandmother who since has died.

7. There is no issue about paternity with respect to Miss B. However, at paragraph 34 of her Statement of Reasons Judge Griffith said:-

> *"Although therefore the evidence strongly suggests that the Second Appellant is not the Sponsor's natural child, I do not find it would be in his best interests not to be considered as the Sponsor's natural child for the purpose of this application. I am satisfied that he had been brought up as the Sponsor's son."*

8. Although Judge Griffith described the evidence as to the issue of "sole responsibility" as, "Rather thin", she looked to the available evidence, being payments of substantial sums of money from Mr PM's bank account at various dates in 2012 and 2013 to the same account and found that to be corroborative of Mr PM's evidence that he provided financial assistance

to the children. The evidence of Mr PM and his wife to the effect that regular contact was maintained with the children was also accepted and in particular Judge Griffith accepted that, "it was more likely than not," that Mr PM had made the important decisions regarding the upbringing of the children finding that he maintained sole responsibility since the disappearance of their birth mother. Judge Griffith was guided by the case of ***TD (Paragraph 297)(i)(e): Sole Responsibility) Yemen [2006] UK AIT00049***. In any event Judge Griffith found in the alternative that there were serious and compelling family or other considerations which made exclusion of the Respondents undesirable.

9. Not content with the decision of Judge Griffith, by Notice dated 10 December 2014 the Secretary of State made application for permission to appeal to the Upper Tribunal in respect of each of the children.

10. On 13 October 2014 Judge of the First-tier Tribunal Chambers granted permission but only in respect of Master E. Judge Chambers overlooked the fact that the application by the Secretary of State was in respect of both children. When, on 28 November 2014, the matter came before the Upper Tribunal, the matter proceeded only until it was realised that the application in respect of Miss B had not been considered. In order to ensure consistency of approach it was then decided that the matter would be remitted to Judge Chambers to consider the application for permission in respect of Miss B. On 8 December 2014 permission was granted, thus I am concerned with the appeals of both children.

11. The grounds erroneously make reference to paragraph 297 of the immigration rules whereas the matter was in fact decided pursuant paragraph 301 because of Mr PM not having settled status at the relevant time. However, issue is taken by the Secretary of State with respect to the finding that Master E was to be treated as the child of Mr PM despite the DNA testing. It is the Secretary of State's submission that rule 6 of HC395 (as amended) which defines, *inter alia,* "parent" did not permit the interpretation given by Judge Griffith. The second ground was to the effect that there was inadequate reasoning; essentially it was argued that there was insufficient evidence for the finding. Further within ground two it is submitted that the threshold for serious and compelling reasons, which test Judge Griffith found had been met, was a high one and so she should have found it was not met: reference is made to the case of ***Mundeba (Section 55 and Paragraph 297(i)(f) [2013] UK UT00088***.

The Legal Framework

12. The relevant Immigration Rules are 301 and 6.

> *"301 The requirements to be met by a person seeking limited leave to enter or remain in the United Kingdom with a view to settlement as the child of a parent or parents given limited leave to enter or remain in the United Kingdom with a view to settlement are that he:*

i) is seeking leave to enter to accompany or join or remain with a parent or parents in one of the following circumstances:

a) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement; or

b) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to settlement and has had sole responsibility for the child's upbringing; or

c) one parent is being or has been given limited leave to enter or remain in the United Kingdom with a view to 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 without recourse to public funds, in accommodation which the parent or parents own or occupy exclusively; and

iv(a) can, and will be maintained adequately by the parent or parents without recourse to public funds, and

iv(b) does not qualify for limited leave to enter as a child of a parent or parents given limited leave to enter or remain as a refugee or beneficiary of humanitarian protection under Paragraph 319R; and

v) (where an application is made for limited leave to remain with a view to settlement) has limited leave to enter or remain in the United Kingdom, and

vi) If seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

"6 In these rules the following interpretations apply….

"a parent" includes

a) the step-father of a child whose father is dead and the reference to step-father includes a relationship arising through civil partnership;

b) the step-mother of a child whose mother is dead and the reference to step-mother includes a relationship arising through civil partnership and;

c) the father as well as the mother of an illegitimate child where he is proved to be the father;

d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of Paragraph 309A of these rules (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under Paragraphs 297-303);

e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s) inability to care for the child."

Submissions

13. Mr Coleman was not aware of the hearing of 28 November 2014. It was agreed that the matter would simply start afresh. Ms Fijiwalla was content to proceed in that way.

14. Mr Coleman began by addressing the second ground on the basis that it applied to both children. Given the provisions of paragraph 301, it was necessary for the issues of, sole responsibility under 301(i)(b), or there being "serious and compelling family or other considerations which made exclusion of the children undesirable", to be resolved in the children's favour. Mr Coleman's submission was that it was only the documentary evidence that was being described by Judge Griffith as,"rather thin." She had heard evidence from Mr PM and his wife so that the finding that Mr PM had sole responsibility was a finding open to her. The finding was clear and unequivocal. The judge, it was submitted, had rightly been guided by the case of ***TD*** in saying that,

> *"As matter of common sense some responsibility must rest with the carer and the test is, not whether anyone else has day to day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole"."*

Judge Griffith then went on to say that she was satisfied on balance of probability that Mr P M had, "maintained control of the Appellants' upbringing".

15. Ms Fijiwalla for the Secretary of State relied on the grounds and referred to paragraph 16 of the guidance in ***TD***:

> *"Financial support, particularly sole financial support, of a child is relevant since it may be an indicator of obligations stemming from an exercise of responsibility by a parent but it cannot be conclusive."*

The absence of any school reports, Ms Fijiwalla's submitted should have led the judge to a finding that there was insufficient evidence.

16. On this issue I have no hesitation in finding that Judge Griffith was entitled to conclude that Mr PM had sole responsibility. Judge Griffith clearly found Mr PM and his wife credible witnesses; she expressly says so at paragraph 33. At paragraph 14 of the Statement of Reasons she noted that Mr PM's evidence was that he instructed his brother how to deal with the children. Financial support therefore was not, contrary to what is submitted in the grounds, being treated as the determining factor. The judge looked at all the other evidence available. She was entitled to conclude that it was sufficient in the circumstances. Given the burden and standard of proof the finding was open to her.

17. On the issue of "serious and compelling family or other considerations", both Mr Coleman and Ms Fijiwalla pointed to the guidance in the case of ***Mundeba (Section 55 and Paragraph 297(i)(f) [2013] UK UT00088***. That was a case concerned more generally with an assessment of the best interests of a child, but with respect to the issue of whether or not there were serious and compelling reasons, it was said in the headnote at iv:

> *"Family considerations require an evaluation of the child's welfare including emotional needs. "Other considerations" come into 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 enquiry 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 permission."*

18. As to Miss B, the issue whether or not there were serious and compelling reasons is not material because having found that the finding of social

responsibility was one open to Judge Griffith in circumstances in which the issue of paternity is not at large, necessarily the finding that Miss B's appeal should be allowed was one open to Judge Griffith.

19. The difficulty with respect to Master E however is that the issue of serious and compelling circumstances may be a matter to be considered in the context of any article 8 ECHR considerations applicable in the case of Master E. The question which has not been addressed at all is whether Mr PM and his wife could return to the Congo to look after the children even if on a temporary basis whilst Mr PM's brother is in the United Kingdom for studies. As this is an entry clearance case the relevant date is the date of the decision and not the date of the hearing and that is true also with respect to any human rights issues.

20. I turn to the issue concerning the meaning of the term "parent."

21. Despite the valiant attempts by Mr Coleman to persuade me that the finding of Judge Griffith was one open to her I disagree. There are clearly public policy considerations which apply where children are concerned. Mr Coleman sought to persuade me that the category of persons who might be included within the term "parent" was not closed. He pointed to other terms which were defined such as, for example, "sponsor" which, "means the person in relation to whom…" or "working illegally means working in breach of conditions of leave…". Whereas the term "a parent" is followed by the word "includes".

22. Reliance was placed on the fact that there was a birth certificate which was accepted as genuine. The difficulty for Mr Coleman is that whereas a child born to married parents gives rise to a presumption that a child is the child of the "father" a child born to a couple who are not married even where there is a birth certificate gives rise to circumstances only that there is a prime facie case of paternity based upon the certificate. In this case the presumption and/or prima facie evidence is rebutted by DNA evidence. Mr Coleman sought to persuade me that the DNA evidence only rebutted the biological presumption but did not affect the legal status. I cannot accept that submission not least because even if it were the case that Mr PM maintained parental responsibility, persons with parental responsibility are catered for within the definition of parent under category (e). As Master E was not born in the United Kingdom it seems to me that the rules are intended to provide safeguards and it is not possible in my view to stretch the meaning of "parent" to include the relationship contended for by Mr Coleman as between Mr PM and Master E.

23. That however is not the end of the matter.

24. Mr Coleman sought to persuade me that I should nevertheless allow the appeal of Master E on human rights grounds. I mentioned to the representatives that there had been no cross-appeal so that the issue was not before me but on reflection having regard to section 117A of the Nationality, Immigration and Asylum Act 2002 I realise that have no discretion but to have regard to Article 8. The same was true of Judge Griffith. The Entry Clearance Officer was quite right to have regard to

Article 8 in the refusal. Judge Griffith erred and her failure to deal with Article 8 is in fact "Robinson obvious": see ***R v Secretary of State for the Home Department Ex Partae Robinson*** ***[1997] 3 WLR 1162***. It may be that the facts of this case are so exceptional that Master E should nevertheless be permitted entry clearance but such a decision can only be made after clear findings having regard to Section 117B and an investigation by the judge as to why it would not be possible (if it is so contended) for Mr PM himself not to be able to return to the Congo or otherwise make other provision with respect to Master E and that will necessarily also involve consideration of the guidance in cases such as ***EV (Philippines and others) v Secretary of State for the Home Department*** ***[2014] EWCA Civ 874*** and ***Zoumbas v Secretary of State for the Home Department*** ***[2013] UK SC74***.

25. I am mindful of the fact that the issue of human rights was not fully canvassed before me and I have considered whether it would be appropriate to bring the matter back for further submission but there is, in my judgment no real prejudice of the Secretary of State if this matter is remitted to the First-tier Tribunal because she will be able to make all of the submissions that she feels appropriate at that stage.

26. In all the circumstances I remit the matter to the First-tier Tribunal in respect only of Master E given that the issue of human rights was not adequately addressed; that findings of fact are for the First-tier Tribunal; and having regard to paragraph 7(2) of the Senior President's Practice Statement of 25 September 2012 - clearly evidence will have to be received.

Directions re Master E

1. The appeal in respect of Master E is remitted to the First-tier Tribunal (Taylor House)

2. The findings of fact by Judge Griffith shall be preserved.

3. The hearing in the First-tier Tribunal with respect to Master E shall be confined to human rights issues.

4. The hearing shall not be before Judge Griffith.

5. The Secretary of State shall consider whether a report from Social Services should be obtained in order to assist the Tribunal in determining whether appropriate arrangements would be in place for Master E in the United Kingdom given that the matter concerns a child, who is not the biological child of the Sponsor or the Sponsor's wife.

6. Time estimate of two hours.

7. No interpreter is required.

Notice of Decision

The appeal by the Secretary of State in respect of Miss B, the First Respondent is dismissed. The decision of the First-tier Tribunal in her appeal is affirmed.

The appeal by the Secretary of State in respect of Master E, the Second Respondent is allowed. The decision of the First-tier Tribunal contained a material error of law and, subject to the directions which are set out above, is set aside to be remade in the First-tier Tribunal.

Signed **Date**

Deputy Judge of the Upper Tribunal Zucker