Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/10824/2015
IA/10826/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th June 2016	**On 15th July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS EMMANUELLA NAA AMERLEY GYAPONG (FIRST APPELLANT)
MR DANIEL NII AMARTEY GYAPONG (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R Sharma, Counsel
For the Respondent: Mr K Norton, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of Ghana born respectively on 17th June 1997 and 6th June 1999. They are brother and sister. The Appellants' immigration history is set out in detail in the decision and reasons of Judge

Davies at paragraphs 2 to 5. I have given due and full consideration to these paragraphs.

2. On 19th November 2014 the Appellants had applied for indefinite leave to remain in the United Kingdom. This was despite the fact that their visa valid for six months from 14th October 2013 to 14th April 2014 had expired. Their claim was based under paragraph 298 of the Immigration Rules, namely that they sought indefinite leave to remain as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom. Those applications were refused by Notices of Refusal dated 4th March 2015.

3. The Appellants appealed and the appeal came before Judge of the First-tier Tribunal M Davies sitting at Hatton Cross on 19th October 2015. In a decision and reasons promulgated on 12th November 2015 the Appellants' appeals were dismissed under the Immigration Rules and on human rights grounds.

4. On 26th November 2015 Grounds of Appeal were lodged to the Upper Tribunal. On 17th May 2016 Judge of the First-tier Tribunal Shimmin granted permission to appeal. Judge Shimmin noted that the grounds requesting permission to appeal argued that the judge had erred in:

   (1) relying on evidence in the form of a witness statement admitted after the hearing which was not put to the Appellants or the witness, and

   (2) the approach of the judge to the funds available to the Appellants.

   Judge Shimmin considered that both grounds constituted material errors of law and that it was arguable that the failure of the judge to let the Appellant or witness answer a deficiency in the witness statement was unfair and that the judge's consideration of the funds available to the Appellant was also an error.

5. On 26th May 2016 the Secretary of State responded to the Grounds of Appeal. In summary the Rule 24 response submitted that the judge directed himself appropriately and that the evidence submitted posthearing was submitted by the Appellants themselves and that it had always been within the Appellants' knowledge that the Respondent disputed there was sole responsibility for the Appellants by their father and as such they had had every opportunity since the refusal letter to adduce the evidence to support their case or to provide an explanation when submitting the requested letter. In any event the Rule 24 reply contended that even if it were found to be in error to have referred to the witness statement, it was contended that the error would not be material and that it is noted that the witness statement formed a small part of a significant number of findings made by the judge and those findings would, it was contended, be undisturbed even if no reliance had been placed on the witness statement or the Appellants were given the opportunity to comment upon it.

6. With regard to the funds it is submitted in the Rule 24 reply in reliance upon *Ahmed (benefits: proof of receipt: evidence) Bangladesh [2013] UKUT 84* that the burden was on the Appellants to demonstrate that they had the relevant funds by way of a schedule setting out the sources of income and how the weekly calculation was made. The Rule 24 response noted that it was open to the judge given the lack of evidence to determine that the Appellants had failed to discharge the burden upon them when considered in line with the Immigration Rules on what is considered to be public funds and that the finding was not solely based on the fact that the Appellant was in receipt of child tax credit.

7. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellants appear by their instructed Counsel Mr Sharma. Mr Sharma is extremely familiar with this matter. He appeared before the First-tier Tribunal and he is also the author of the Grounds of Appeal. The Respondent appears by her Home Office Presenting Officer Mr Norton.

8. Whilst I am not rehearing this matter, I am also referred to an up-to-date bundle of documents provided by the Appellants' legal representatives. In particular that bundle introduces new evidence so far as it relates to the Sponsor's finances, bearing in mind that the Judge of the First-tier Tribunal had noted in his determination that no schedule of income and expenditure had been included. I am also provided with a letter from the headmaster of Christ Mission School, Accra stating that Daniel was a student there between 2008 and December 2013 and that he lived with his grandparents who were his guardians and responsible for his education. Mr Norton does not object to any of this additional evidence being before me albeit that all legal representatives acknowledge that the issue extant is whether or not there are material errors of law in the decision of the First-tier Judge.

Submissions/Discussions

9. Mr Sharma is grateful with the concession made that the letter by Christ Mission School could be admitted in evidence, bearing in mind that part of the thrust of the Grounds of Appeal emphasised the failure to allow questions to be put to a witness. Mr Sharma points out that there had been a previous hearing in this matter on a visit visa appeal but that at the hearing before the First-tier Judge the Home Office Presenting Officer merely waived the visit visa decision in front of the Tribunal and the judge decided that it was relevant to hear evidence. Copies of the witness statement, i.e. the witness statement that was before the visit visa appeal, were therefore sent in afterwards to the judge. Mr Sharma alleges that an unfair prejudice arose to the Appellants thereafter in the allowing in of this documentation without the right of cross-examination or response. He points out that none of the material from the earlier visit visa had been placed before the Tribunal for the purpose of the appeal and the reason was that it was a lack of relevance in relation to the papers not supplied.

10. At the judge's request the witness statement from the visit visa appeal was sent in by email. It was only served because the judge wished to see it. The judge thereafter took points from that witness statement and the Appellants were never given the opportunity to answer them. Mr Sharma submits that in such circumstances it was wrong of the First-tier Tribunal Judge to make adverse findings on the basis of evidence on which the witnesses had no opportunity to comment. Further, he refers to the email that attached the witness statement to the judge, the content of which is set out at paragraph 12 of his Grounds of Appeal and he contends that it was necessary at least for the First-tier Tribunal Judge to make reference to the submissions and to raise any conflicts that had arisen.

11. Mr Sharma takes me to paragraph 31 of the judge's decision noting that he heard oral testimony from all three attendees, namely the Appellants and their witnesses, particularly bearing in mind his finding that he was not satisfied that they were telling the truth and the claim that the Appellants had been living with their maternal grandparents prior to coming to the UK rather than with their mother, then it is only right that they should have been given the opportunity to answer the questions set out in the witness statement and that the failure to do so creates a procedural unfairness. Further, he submits that the judge also misdirects himself as to the facts and circumstances in this case and to the documentation to be found in a previous bundle including the witness statement of the Appellant in which there is evidence he submits confirming residence with the grandparents. He submits that these issues have not been addressed by the judge.

12. He further points out that the Tribunal clearly did not have before it the letter from the Appellants' school and that based on the lack of evidence regarding residence the judge wrongly made findings that the Appellants were not living with their grandparents.

13. Finally he contends that the approach adopted to the funds available to the Appellant was erroneous and that the finding to be found at paragraph 55 and thereafter is in conflict with the guidance given in *KA (adequacy of maintenance) Pakistan [2006] UKAIT 00065* as addressed in *Ahmed (benefits: proof of receipt: evidence) Bangladesh [2013] UKUT 84 (IAC)*.

14. Mr Norton relies on the Rule 24 stating that it had been accepted by the judge that if the Appellants were living with their parents they were also living with their mother and he refers me to paragraphs 5 to 7 and paragraph 21 of the decision. He contends that on its facts the witness statement, which is the subject of this appeal, gives no support for the case and the fact the Appellants were not able to comment thereon does not help them. Further he takes me to paragraph 31 pointing out there is a clear finding that the judge did not believe what he had been told. Consequently he submits that there is no unfairness as the Appellants were given the opportunity to provide the further (old) witness statement but that did not help them. He states that it is the Secretary of State's position that that witness statement was not going to be of assistance to

the Appellants and consequently there is no material error in law in the failure to allow questions to be put to the Appellants thereon.

15. So far as the maintenance calculation is concerned Mr Sharma accepts the criticism that the judge has not been in a position to carry out the calculation because the up-to-date figures were not before him, albeit that there is now an updated schedule in the current bundle. However he maintains the position that there was a misdirection by the judge and a miscalculation of the level of income available. Mr Norton indicates that he agrees that the information was not before the judge and that what was required were details of tax credits for the two younger children who are British citizens and not subject to this appeal and that the judge was entitled to consider that adding two more children would require more provision of public funds.

The Law

16. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

17. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings

18. The main thrust of the Appellants' Counsel's submission is that there has a procedural unfairness by reliance by the First-tier Tribunal Judge on evidence within a witness statement that he specifically asked to examine <u>after</u> the conclusion of the evidence and that he has made reference to this without giving due and proper consideration to an attached email or giving consideration with a response by way of cross-examination or further evidence-in-chief. It is the contention of the Secretary of State that

even if such an error has arisen it is not material because there is no benefit to be found to the Appellants. It is the very strong submission of Mr Sharma that that is not the case. Questions of procedural unfairness need to be dealt with carefully. In this case there is a possibility that had the judge had the opportunity to have a full explanation of issues that were before him that he might have come to a different decision. This is particularly important bearing in mind the adverse findings of credibility made at paragraph 31. In such circumstances the correct approach is to find that there are material errors of law in the decision of the First-tier Tribunal Judge and set it aside and to order the matter to be remitted to the First-tier Tribunal and reheard.

19. In addition there are arguments made by Mr Sharma that the conclusion of the First-tier Tribunal Judge conflicts with the guidance given in *KA* and *Ahmed* that the receipt of further funds to the Appellants' father's two British children adds to the proper funds available rather than evidence a diminished ability to maintain the Appellants. I accept that the Appellants have not helped themselves by providing up-to-date financial details but that that is now available. In such circumstances in the interests of fairness again it is appropriate that this evidence be considered by the Tribunal and I direct that all issues to be reheard are at the remitted hearing.

Administrative Request

20. I am advised by Mr Sharma that the first Appellant has sponsorship to attend a course at university in Finland presumably starting in September. In such circumstances he asks that this decision be expedited and in the event that there is to be a rehearing that that too be expedited. Mr Norton acknowledges the position and does not raise any objection.

Decision and Directions

(1) The decision of the First-tier Tribunal discloses material errors of law and is set aside.

(2) None of the findings of fact are to stand.

(3) The matter is remitted to be heard at Hatton Cross on the first available date 21 days hence with an ELH of two hours before any Immigration Judge other than Immigration Judge M Davies.

(4) That in view of the pending place for the first Appellant at university in Finland the administration do its utmost to list the appeal during August 2016.

(5) That it is recorded that the Appellants' representatives have lodged an up-to-date bundle attached to a letter of 15th June 2016. In the event that they wish to add any further material to that bundle then it must be lodged and served within fourteen days of receipt of these directions.

(6) That there be leave to the Secretary of State to also file any further documents upon which they seek to rely within fourteen days of receipt of this decision.

(7) That in the event that the Appellants seek an interpreter for the remitted hearing then they do notify the administration at Hatton Cross within seven days of receipt of these directions.

No anonymity direction is made.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 15 July 2016

Deputy Upper Tribunal Judge D N Harris