Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/09516/2015**

HU/03276/2015

HU/08769/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13th March 2018	**On 18th April 2018**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

NIMAT SAJIDAH BIBI HUSNOO (1)
NISHAAT SAMEERAH BIBI HUSNOO (2)
AL HASHIM MUHAMMAD ZACHARIA HUSNOO (3)
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Murphy, of Counsel, instructed by GS Law Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Mauritius born in March 1999, June 1997 and July 2002. The applied in 2014 for entry clearance to join their mother in

the UK; the application was refused and the appeal dismissed. They reapplied in 2015 for entry clearance once again to join their mother, Mrs Nazira Bibi Aucharagram, who is a British citizen living in the UK and their sponsor. Their appeals against these decisions dated 10th June 2015 were dismissed by First-tier Tribunal Judge Chudleigh in a determination promulgated on the 3rd April 2017.

2. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law in failing to consider relevant medical evidence with respect to the appellants' father that formed part of the bundle before the First-tier Tribunal.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law & Remaking

4. The key issue is said by the appellants to be whether the appellants' mother has sole responsibility for them or whether there were other considerations which made their exclusion undesirable, in accordance with paragraph 297(1)(e) and (f) of the Immigration Rules. The issue of sole responsibility is a factual matter to be determined on the evidence, and is distinct from the fact that another parent or relative may provide day to day care.

5. It is further argued by the appellants that at paragraph 15 of the decision the First-tier Tribunal found that there was no medical evidence that the appellants' father was unwell when this was not accurate. Further at paragraphs 24 and 30 it is also said that there was no evidence of communication by the sponsor with the appellant's relatives and school, but this was not factually accurate either. Further there was no finding that the sponsor was not a credible witness, and she provided evidence going to both issues which ought to have been evaluated as well. The First-tier Tribunal therefore failed to take material evidence into consideration and erred in law.

6. Mr Duffy argued that the First-tier Tribunal had meant, when it said there was "no evidence" that there was none except the oral testimony of the sponsor, and that therefore all relevant matters had been considered.

7. At the end of the hearing on error of law I informed the parties that I found that there was a legal error for the reasons I set out below, and it was agreed that the remaking hearing could proceed immediately. I had the relevant bundles and updating evidence copied for all parties, and we had a break so these could be examined and Mr Murphy take instructions from the sponsor. It was also agreed that the respondent would have a month from today's date to make any further written submissions that she wished to make on the death certificate of the appellants' father, and the appellants would have two weeks to reply to any such written submissions from the date of receipt of any such submissions.

8. Mr Duffy submitted that the matter now needed to be remade under paragraph 297(1)(d) of the Immigration rules as the evidence of the appellants was that their father had died. He said that no other matters had been put in issue by the entry clearance officer and so the only question was whether the appellants' father was dead. If the death certificate is genuine then he accepted that the refusal to grant entry clearance would be a disproportionate breach of Article 8 ECHR as the Immigration Rule would be met and there would be no public interest in refusing to grant entry clearance.

9. I reserved my determination on remaking.

10. I did not receive any representations from the respondent by the deadline of 13th April 2018 set in my directions of 13th March 2018.

Conclusions – Error of Law

11. The First-tier Tribunal directs itself correctly by setting out paragraph 297 of the Immigration Rules and citing relevant case law at paragraphs 25 to 27 of the decision.

12. The decision records that the sponsor states that she is in regular contact with the appellants and produced 30 phone cards as evidence in support of this, see paragraph 13 of the decision. She also had demonstrated that she had visited Mauritius on four occasions in 2015 and 2016, see paragraph 14 of the decision. This evidence, along with the sponsor's financial support is accepted at paragraph 28 of the decision.

13. It is the written evidence of the sponsor that at the time of hearing the appellants' father had diabetes, heart and lung problems which means that he was unable to support or care for the children, see paragraph 15 of the decision. It is commented in this paragraph, as contended in the grounds of appeal, that this was not supported by medical evidence. It is concluded at paragraphs 29 and 30 of the decision that there was "no evidence" that the sponsor "directed or controlled important matters such as schooling and healthcare, or that she had any input at all into the day to day needs of the Appellants."

14. At paragraph 24 the conclusion of the First-tier Tribunal is that the sponsor has not had "any significant responsibility" for the children, and this did not change after 2014 when the father became unwell.

15. The evidence before the First-tier Tribunal from the sponsor in her statement was that the appellants' father played no active role in their upbringing as he had become progressively extremely unwell with his heart condition to the point where he provided no emotional or financial support or even accommodation as the children were living on a temporary basis with her uncle as he had asked them to leave him. The evidence from the sponsor was that the appellants' father did not have long to live. Her daughter had also stopped attending school due to this

situation. In addition to the sponsor's testimony there was a medical certificate from a medical officer from the Ministry of Health dated 16th January 2014 confirming that the appellants' father has an ischemic heart condition and impaired lung function in the bundle that was before the First-tier Tribunal.

16. I find that the First-tier Tribunal erred in law by failing to consider this material medical evidence and due to failure to consider or alternatively give reasons for rejecting the sponsor's evidence that she did in fact direct all important matters and had taken on sole responsibility for the appellants.

Conclusions - Remaking

17. I have had regard to the decision of the First-tier Tribunal Judge Eban promulgated on 17th November 2014 which noted that at that time the appellants met all aspects of the Immigration Rule bar that of sole responsibility or serious and compelling family consideration under paragraph 297(1)(e). They were the children of the appellant, they were under 18 years at the date of application and they were not leading an independent life, and they met the accommodation and maintenance requirements of the Immigration Rules.

18. It is accepted by the respondent that all aspects of paragraph 297(1)(d) are met including that the appellants' father has passed away as set out on the death certificate of 13th December 2017.

19. In these circumstances I find that family life exists between the appellants and their mother: she is their biological mother, they were under 18 years at the date of application and remain children or dependent young adults and are not leading independent lives. It was found by the First-tier Tribunal that they kept in regular telephone contact, that the sponsor had visited on four occasions in 2015-2016, and that she provides financial support. I find that the sponsor did become solely responsible for her children as their father became increasingly unwell as described in her statement. The two medical certificates dated 2014 and 2015 evidencing the appellants' father suffering from diabetes, lung and heart disease and his death in hospital December 2017 are strongly supportive of this history. I find that the interference with this family life that refusal to grant entry clearance constitutes is disproportionate given the ability of the appellants to show compliance with the Immigration Rules.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by allowing it on human rights grounds.

Signed: Fiona Lindsley Date: 17th April 2018

Upper Tribunal Judge Lindsley

Fee Award Note: this is **not** part of the determination.

In the light of my decision to re-make the decision in the appeal by allowing it, I have considered whether to make a fee award. I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals. I have decided to make no fee award because none was requested and the remaking appeal relied upon some new evidence.

Signed: Fiona Lindsley Date: 17th April 2018

Upper Tribunal Judge Lindsley