Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/22757/2016
HU/23700/2016
HU/23705/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 September 2018	**On 15 November 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

AKYEMPEMHENE [S]

First Appellant

[N S]

Second Appellant

[A S]
(NO ANONYMITY ORDERS MADE)

Third Appellant

and

ENTRY CLEARANCE OFFICER, ACCRA

Respondent

Representation:
For the Appellant: Mr Karim of Counsel
For the Respondent: Mr Lindsey, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Ghana born in 1972, 2004 and 2006 respectively. They are father and his children. They appeal against a decision of the respondent made on 24 August 2016 to refuse the application of the first appellant for entry clearance to join his spouse who has indefinite leave to remain.

2. The basis of the refusal was that the respondent was not satisfied that the relationship is genuine and subsisting. Also, there was insufficient evidence to show that he is the biological father of the children. His application was refused under paragraph E-ECP.1.1 of Appendix FM of the Immigration Rules (E-ECP.2.6 and 2.10). The applications of the second and third appellants were refused in line.

3. They appealed.

First tier hearing

4. Following a hearing at Hatton Cross on 12 September 2017 Judge of the First-tier Tribunal Traynor dismissed the appeals.

5. He heard oral evidence from the sponsor, Victoria [O]. The crux of her evidence was that she was in a relationship with the appellant between 2002 and 2006 during which the two children were born. Soon after the birth of their second child they broke up and she married another man in 2009 moving to the UK to join him. Her relationship with the first appellant continued but only as one of the parents of the children who had remained in Ghana with him. She was actively involved in the parenting during this period. Her marriage to her first husband ended in 2014. Later that year the personal and romantic aspects of her relationship with the first appellant resumed and they married in 2015.

6. The judge's findings are at paragraph [54]ff of his decision. He noted that following receipt of a DNA report it was conceded that the first appellant is the biological parent of the children as is the sponsor but that it was still not accepted that the relationship between the first appellant and the sponsor is genuine and subsisting.

7. The judge next considered the birth certificates of the children. He found them to be "*wholly unreliable documents*" [56] because the name of the first appellant as father was different. The explanation that his customary name had been used was not believed.

8. Also, the judge found against the appellant that photographs of the wedding in 2015 did not show the children present. He did not believe the claim that they had been there before her brother had to take them to school. He also considered other photographs of the sponsor, first appellant and children to be *"staged."* [58]

9. In further criticisms the judge found that there was no evidence that the parents had been playing an active role in the lives of the children. In that regard he gave no weight to the sponsor's oral testimony which he noted [59] "*was prompted by her representative at the commencement of the hearing*." Also, while there was evidence of "*spasmodic"* money transfer payments since 2011 [60] by the sponsor there was no evidence that it had benefitted the children. In addition, there was "*very limited*" evidence of WhatsApp communication between the sponsor and the children [61]. Finally, it had not been explained why the relationship having resumed in 2014 and they having married in 2015 the sponsor did not return to Ghana for the next two years.

10. The judge concluded that there was "*no credible evidence of a family relationship, let alone family life*" [62] and even if there is it is of such limited quality that refusal of the application would not be a breach of Article 8.

11. They sought permission to appeal which was refused, but was granted on 16 August 2018 on reapplication to the Upper Tribunal.

Error of law hearing

12. At the hearing before me Mr Karim made several points. First, the judge had erred in giving consideration to how much the sponsor plays in the upbringing of the children. This is not a sole responsibility case but whether there is a genuine and subsisting relationship. In any event, there was ample evidence before the judge about remittances, communication and in connection with schooling to show the closeness between sponsor and the children. Also, it was wrong to find that there was no family life and no credible evidence of family relationship not least because they are biologically related and the children live with their father.

13. The grounds further allege that the judge gave inadequate consideration to evidence before him in support of the genuineness of the relationship between the sponsor and the first appellant, in particular, the sponsor's visit in 2017, the numerous WhatsApp communication and money transfers. He also made no findings in respect of the first appellant's evidence by his witness statement which supported the sponsor's evidence. Finally, the judge engaged in extensive speculation on issues including the photographs being staged and money being sent by the sponsor to salve her conscience [60]. He also did not explain what he meant when he said he did not give weight to the sponsor's evidence because she had been "*prompted*" by the representative.

14. Mr Lindsey's position was that the judge had reached proper findings. He disputed that the judge had become side-tracked into considering an issue that was not before him, namely, sole responsibility. It was right to consider the pattern of contact between the sponsor and all the appellants as part of the assessment of the relationship looked at in the round. Any

errors on other matters were not material in light of the careful and detailed consideration of the case.

Consideration

15. In considering this matter it is clear that the judge in his detailed decision realised that the issue was whether the relationship between the sponsor and the first appellant is genuine and subsisting and that sole responsibility was not a separate issue. However, I agree with Mr Karim that at some points he became side-tracked from his consideration of the real issue. For example, he gave considerable attention to the birth certificates [54-56]. It is unclear why he focussed on that when the DNA evidence had conclusively established the parental relationship. Further, (at [61]), he seems to have dealt with the WhatsApp evidence mainly in the context of whether it showed a genuine and subsisting relationship between the sponsor and the children rather than their father.

16. Whilst it is clearly unnecessary for a judge to refer to every piece of evidence before him, I consider that he failed to make findings on relevant evidence such as the numerous WhatsApp messages which are clearly between husband and wife and which are in loving, and indeed at times, intimate terms. These are dated 2014/2015 and are consistent with the claim that it was from that time that they resumed a close relationship. There is also evidence of money transfers from the sponsor to the first appellant over the period 2012 to 2015. He made no findings on the sponsor's evidence that much of the communication between her and her husband was done by Viber, Skype and similar, for which there are no records.

17. Moreover, the judge's criticisms relate entirely to the sponsor's evidence. He did not have regard to the first appellant's statement, which albeit brief, supports the sponsor's account.

18. In addition, I again agree with Mr Karim that several findings of the judge rely on speculation. For example, at [61], he speculates that the photographs were *"staged*". No reasons are given. He says it again at [58]. At [60] he speculates that the sponsor sent money to the first appellant to "*salve her conscience*". Again, no reasoning is given and it is unclear how on the evidence the judge could reach this conclusion. At [57] he speculates that it is not beyond the "*bounds of possibility*" that the children were not at the wedding because they had been residing with the sponsor's mother. At [58] he further errs in speculating, as he himself states he is speculating about the children living with their grandmother following the sponsor taking up the relationship in 2009 with the man who was to become her first husband. He also failed to make clear what he meant by the representative "*prompting*" the sponsor. If he meant that the sponsor was being led in her evidence he should have put that to the representative. In any event, I can see nothing in the judge's record of proceedings to indicate any issue in that regard.

19. I consider that these difficulties with the decision looked at cumulatively mean that it cannot stand. It is set aside to be remade.

20. An additional voluminous bundle (20 September 2018) was submitted on behalf of the first appellant in the event error of law was found. It was agreed that no further oral evidence or submissions were required.

21. It contains numerous further items in support of the claim. These include Money Gram receipts, more WhatsApp messages, phone call records between the sponsor and the first appellant with confirmation that the number relied on is the appellant's. There are also various items including (date stamped) photographs showing the children at the wedding, a letter from their school confirming they had attended the wedding in the morning before being required to return to school for exams, more photographs of the sponsor and first appellant and the children together in informal settings on other occasions, and receipts for school fees and school uniform. It is clear that the sponsor has visited from the UK when able to do so. Her current passport records visits in 2014, 2015 and 2017.

22. I see no reason why I cannot place reliance on these various items. They strongly support the claim that the relationship between the first appellant and the sponsor is genuine and subsisting. I find there to be compelling evidence of mutual devotion and that they intend to live together permanently in the UK.

23. The appeals succeed.

Notice of Decision

The making of the decision of the First-tier Tribunal showed material error of law. It is set aside and remade as follows: The appeals are allowed.

The First tier Tribunal did not make an anonymity order. No application for an anonymity order was made to the Upper Tribunal. I see no need to make an anonymity order.

Signed Date 9 November 2018

Upper Tribunal Judge Conway