



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/25141/2016
HU/25142/2016
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THE IMMIGRATION ACTS

Heard at Field House
On 21 August 2018

Decision & Reasons Promulgated
On 4 September 2018

Before

UPPER TRIBUNAL JUDGE WARR

Between

J S A M

J S A M

J S A M

(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Ezeoke of Counsel

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Ghana born on 12 August 2001, 9 May 2007 and 22 November 2009 respectively. They appeal from a decision of the First-tier Tribunal following a hearing on the papers on 24 July 2017 to dismiss their appeals against the

decision of the Entry Clearance Officer on 31 August 2016 to refuse their applications to join their father, the sponsor, in the United Kingdom. At that stage it was accepted that the appellants were related as claimed to the sponsor but not that they were related to their mother who lives with the children in Ghana. The Entry Clearance Manager however conceded that the parties were related as claimed but that not all of the specified documents in relation to the sponsor's employment had been provided. Furthermore, the children had applied with their mother under Appendix FM but no appeal had been received from her.

2. At the hearing before the First-tier Tribunal the First-tier Judge stated she had no sight of any papers relating to the appellants' mother's decision. The judge made the following findings in paragraphs 13 to 15 of her decision:

- “13. The Appellants' mother married the Appellants' father, their Sponsor, on 28 April 2015, in Ghana. The children have always lived with their mother in Accra, Ghana. The children have spent all their lives in Ghana and have never lived in the UK. Their father left Ghana on 29 August 2009 to come to England and is a British Citizen.
14. The Appellants and their mother have lived separately from the Sponsor since he entered the UK in 2009. The Sponsor met another woman, whom he married and subsequently divorced. He then reignited his relationship with the children's mother and married her in 2015.
15. The Appellants' mother wishes to join her husband in the UK. The Appellants' and their mother have continued to live in Ghana throughout. I remind myself of *Huang* (see below) that the mere existence of a family relationship is not sufficient for the applicability of Article 8(2).”

3. The judge concluded her determination as follows:

- “30. None of the qualifying children are British citizens. The Sponsor moved to the UK in 2009 and gained British citizenship. Whilst in the UK he met and married another woman, whom he subsequently divorced. The Sponsor married the Appellants' mother in 2015 and planned for his family to join him in the UK.
31. There appears to have been little or no consideration as to whether the Sponsor could return to Ghana to join his family. The children and their mother have always lived in Ghana. It is open to the Sponsor to return to Ghana in order to be reunited with his family.
32. I do not consider that there are any exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of entry clearance outside the Immigration Rules. I accept that this decision may result in limited interference with the Right to Family Life as described in Article 8. However, this is a qualified right, and I am satisfied that the decision is justified and proportionate in the interests of maintaining an effective immigration control.
33. Having considered this on the balance of probabilities I am satisfied that the decision to refuse entry clearance was proportionate. I do not consider

that the refusal of leave to enter the United Kingdom has or would breach the United Kingdom's obligations under the Convention."

4. The judge accordingly dismissed the appeals under the Rules and also on human rights grounds.
5. Permission to appeal was refused by the First-tier Tribunal and an application for permission to appeal was lodged out of time with the Upper Tribunal. The Upper Tribunal extended time and granted permission on 5 June 2018. The Upper Tribunal Judge noted that although the representatives in their grounds had referred to paragraph 297 that was not the relevant Rule. The relevant Rules were contained in paragraph E-ECC.1.6 but these Rules were to the same effect as the subparagraphs of paragraph 297. The Upper Tribunal Judge continued:

"Unfortunately, by directing herself in accordance with EX.1 of Appendix FM and paragraph 276ADE, the judge has arguably failed to consider the relevant factors as to whether the sponsor has sole parental responsibility and whether the appellants' situation in Ghana is such that there are exceptional and compelling circumstances which render their exclusion undesirable. Ultimately on the facts as set out at [14] and [15] of the decision, the appellants may face an uphill struggle in persuading the judge that any error in this regard is material, but it is arguable that the appellants are entitled to a decision that considers their cases based on the applicable law rather than treating their cases as if they were in-country claims."
6. At the hearing before me Mr Ezeoke argued that the appeal should be remitted for a fresh hearing in the light of the failure to apply the correct Rules.
7. Mr Avery however submitted that the judge had properly directed herself on the human rights claim and the error in relation to the Rules made no material difference. It was difficult to see how the sponsor could succeed on the sole responsibility point given that the children had been living with their mother for many years in Ghana. There was no evidence to indicate that the mother did not have sole responsibility. Accordingly given that there was no material difference between the relevant Rules any appeal was bound to fail.
8. It is perhaps unfortunate in this case that the sponsor did not arrange for an oral hearing before the First-tier Tribunal and further that the family did not apparently take legal advice at an earlier stage.
9. It is said in the grounds that the judge failed to make any reference to the DNA evidence but the judge in fact does note that the relationship issue had been conceded by the Entry Clearance Manager.
10. In relation to sole responsibility the grounds refer to **TD (Yemen) [2006] UKAIT 49**. The sponsor had said he had sole responsibility for the appellants.

11. However, I find that for the reasons set out by the Upper Tribunal when granting permission that the error was not material in the circumstances of this case. The headnote in **TD (Yemen)** reads:

““Sole responsibility” is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child’s upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child’s upbringing, including making all the important decisions in the child’s life. However, where both parents are involved in a child’s upbringing, it will be exceptional that one of them will have sole responsibility. “

The children have been living with their mother in Ghana and on the facts as set out by the First-tier Judge, it is not realistic to suppose that if the appeal were remitted as requested it could conceivably be found that the sponsor had sole responsibility for the family. The most that could be established would be the exercise of some shared responsibility.

12. As was noted when permission was granted these appeals are against the refusals of human rights claims and the judge had set out the relevant law relating to Article 8 outside the Rules. I am not satisfied that there is any merit in the other arguments advanced in the grounds and there was no attempt to develop them before me. Arguments were not advanced that there were serious and compelling family or other considerations which made exclusion of the children undesirable.
13. For the reasons I have given these appeals are 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 him or any member of their 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.

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal Judge made no fee award and I make none.

Signed

Date: 28 August 2018

G Warr, Judge of the Upper Tribunal