



**Upper Tribunal
(Immigration and Asylum Chamber)** Appeal Number: HU/25979/2016
HU/25981/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 9 April 2018**

**Decision & Reasons
Promulgated
On 19 April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

**Between
MASTER Y K
MASTER S N
(ANONYMITY DIRECTIONS MADE)**

Appellants

and

THE ENTRY CLEARANCE OFFICER-PRETORIA

Respondent

Representation:

For the Appellant: Mr R Toal of Counsel
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Uganda and they appealed against the decision of the respondent 12 October 2016 to refuse to grant them leave to enter the United Kingdom pursuant to paragraph 352D of the Immigration Rules. First-tier Tribunal Judge Herlihy in a decision dated 23 November 2017 dismissed the appellants appeals under the Immigration Rules.

2. Permission to appeal was granted by First-Tribunal Judge Grimmert stating that it is arguable that the Judge made an error of fact when she concluded that the birth certificates did not contain any reference to the mother of the appellants, but the name is included in both certificates.
3. The First-tier Tribunal Judge made the following findings which I summarise. The respondent refused the appellants applications for several reasons. The respondent was not satisfied that the appellants and the sponsor were related as claimed due to doubts over the birth certificates which had been submitted. I have before me DNA report which clearly establishes that the sponsor and the appellants are related as claimed. However, I do have concerns over the birth certificates which have been submitted. Firstly, I note that the original certificates were not submitted with the application and only photocopies were supplied. In addition, the birth certificates were issued some 12 and 13 years respectively after the appellants were born and no evidence was submitted to show what evidence had been produced to the relevant authorities in Uganda which led them to issue the birth certificates so many years after the claim the event.
4. At the hearing the sponsor produced a copy of his asylum interview record and I noted that at question 61 the sponsor when asked about his children's mother he said that when he was aged 28 his parents had forced him to marry a woman. He said that they were married for three years and then went on to say that they had separated after two years prior to the end of the third year and that the marriage had ended because he had been forced into it and he didn't have any feelings for his wife and he agreed to hide the reality of what he actually was so they had stayed together and had children.
5. In considering the totality of the evidence I am not satisfied that the appellants have established that they were part of the sponsor's family unit prior to his leaving Uganda. I find it more likely that if the marriage had ended and that the children would have remained with their mother.
6. I would have expected there to have been a considerable volume of evidence presented by the sponsor to show that from 2003-2014, a period of 11 years, that the children had lived with him. He could have submitted evidence from the children school, who would confirm that he was the main point of contact for the school and possibly paid any relevant school fees and attended any meetings with the school and accompanied them to school. He could have also presented evidence in respect of the children's health records and evidence from any number of witnesses who could have attested to the fact that the sponsor was bringing up the children on his own. I

find that the lack of any reference to the mother and the birth certificate to be troubling.

7. Further, the only evidence that the appellants have produced are two photographs and the statement from [KS]. There was no evidence to prove that the statement had come from him or who he is. There was no address given in the statement and no evidence of his identity. In addition, there was no evidence from father Samson. In addition, I note that the sponsor was inconsistent about questions that were put to him as to whether his children were in contact with their mother initially saying he did not know and then changing his account to say that they had told him that they weren't.
8. Although I accept that the sponsor is the father of the appellants I am not satisfied that the appellants have established that they were part of the sponsor's family prior to his leaving Uganda and claiming asylum in the United Kingdom. There are too many discrepancies in the sponsor's account and there were no statements from the appellants themselves setting out their history, who they lived with, where they lived and who cared for them from 2003 or identifying which school they attended which is reasonable for them to have provided.
9. The appellants allege that the respondent's decision violates their rights protected by Article 8 of the European Convention on Human Rights. Under this article I must decide if there is a family life in the United Kingdom, if there is an interference with the right to private and family life, whether such interference is in accordance with the law and whether it is proportionate.
10. As directed by the case law of the Upper Tribunal I note that the first question to be addressed is whether Article 8 is engaged at all. I am not satisfied that the appellants and the sponsor enjoy a genuine and subsisting family relationship due to the paucity of evidence that the appellants were in the care of the sponsor for over 11 years and I find it likely that the appellants were in the care of someone other than the sponsor from 2003. Having considered all the evidence in the round I find that the discretion is proportionate.
11. The Judge dismissed both appellants' appeals under the immigration rules and Article 8 of the European Convention on Human Rights.
12. The grounds of appeal argue the following which I summarise. The appellants' mother was named in the appellants' birth certificates. The Judge made a mistake of fact amounting to an error of law and/or unreasonably took account of an irrelevant consideration, i.e. her mistaken belief that the mother was not named in the birth certificate. This error of the Judge demonstrates and manifests her failure to give the requisite anxious scrutiny to the appeal concerned with

human rights in the best interests of the two children appellants rendering her decision as a whole unlawful.

13. The Judge also found against the appellants that the sponsor had given inconsistent evidence as to the ages of his children, having said that when he claimed asylum they were a year older than they were shown to be by their birth certificates. That inconsistency was reasonably relied upon by the Entry Clearance Officer to find that the sponsor and the appellants were not related as claimed. However, the DNA evidence which the Tribunal accepted that they were related as claimed. Nevertheless, the Judge treated the discrepancy as to their dates of birth as a reason for making a negative credibility assessment. This was not relevant in determining the issue whether the sponsor and the appellants lived as a family unit before he fled Uganda to seek asylum in the United Kingdom.
14. In paragraph 6.6, the Judge gave another reason for disbelieving the sponsor's evidence that the appellants lived with him until he left Uganda. The Judge was wrong to require the sponsor to have provided evidence from the appellants school, health records and evidence from witnesses who could have attested to the fact that the sponsor was bringing up the children on his own since he left in 2003. Fairness required that the sponsor should have specifically asked why he had failed to provide such evidence if its absence was to be relied on against the child appellants. Fairness required that the sponsor be asked about these matters because the circumstances of the sponsor and the appellants which potentially affected the capacity to collect evidence of the kind identified by the Judge in her decision. The Judge failed to take into account the traumatic circumstances in which the sponsor had left his home. The traumatic circumstances in which he fled Uganda as he escaped from police custody having been beaten and tortured and his partner who was detained with him having died because of similar ill-treatment. She also failed to consider the pariah status conferred on the sponsor by his community and relatives who attacked him once his sexuality was discovered. The appellants stopped going to school following the sponsor's flight from Uganda. The sponsor and the appellants have little education and came from a rural community where he spent his days looking after cattle.
15. The Judge failed to consider whether the sponsor should have been treated as a vulnerable witness and whether putative deficiencies in his evidence might have been accounted for by that vulnerability rather than by want of credibility. The Judge did not take into account the sponsor's answer to a question put to him whether he has any medical conditions when he said in court "I have got severe headache from being beaten on the head and it causes memory loss". The appellant said that he had not received treatment in the United Kingdom, but he was registered with the General Practitioner his friend having taken him to the doctor. The appellant was granted

asylum based on his evidence of being tortured in Uganda and the Judge at least should have considered the possibility that he was a vulnerable witness and that was what accounted for those shortcomings in the sponsor's evidence.

16. The respondent's rule 24 response states the following which I summarise. While it is accepted that the Judge at paragraph 6.4 states that the birth certificates contained no reference to the mother's name when it appears that there is a reference to the mother's name albeit on the respondent's copy it is hard to read. It is submitted that this is the only of many reasons given why the Judge has rejected the claim that the appellants formed part of the appellant's household prior to his departure to claim asylum.
17. The Judge's factual error in the circumstances is not material. The Judge outlines the factual discrepancy as part of the assessment of all the evidence provided by the sponsor and this is not directly linked to whether the children form part of the household as at time in question. The Judge found that no evidence had been produced to show that the children resided with the sponsor as he claims between 2003-2014. The Judge in assessing what evidence there is to show to the balance of probabilities that the two appellants were residing with the sponsor prior to his departure from Uganda. This is an obvious point and one that the Judge must be satisfied with. The Judge clearly found that there was insufficient evidence provided to show paragraph 350 2D (iv) was satisfied.
18. At paragraph 6.8 the Judge gave reasons for refusing the appeal and found that the appellant has not satisfied their burden of proof that the appellants were part of the family unit at the time that the appellant left the country of habitual residence. The Judge's reasons include the many discrepancies in the sponsor's evidence and the lack of evidence including from the appellants themselves revealing their history, who they lived with, where they lived and who cared for them from 2003 or identifying which schools they had attended. The Judge gives full reasons for rejecting the evidence of [KS]. The grounds of appeal seek to make excuses for the appellant not to have provided any evidence. The Judge was entitled to find for reasons given that she found the evidence inadequate.
19. The sponsor was represented before the First-tier Tribunal and it was not submitted at the hearing that the sponsor should be treated as a vulnerable witness. There is no evidence that the sponsor was undergoing any medical treatment or therapy or had any ill effects from his persecution in Uganda.

Findings as to whether there is an error of law in the decision

20. The Judge found that the appellants had not demonstrated that they were part of their sponsor's household before he fled Uganda and came to the United Kingdom where he was granted asylum on the basis that he is a homosexual.
21. The Judge who had misgivings about the birth certificates provided by the appellants however accepted that the two appellants are the biological children of the sponsor. Therefore, the grounds of appeal pertaining to the birth certificates has no merit because once the Judge has accepted that the appellants are the biological children, any discrepancies in respect of the birth certificates are immaterial. The Judge relied on the DNA report to find that the sponsor is the appellants father.
22. The issue that the Judge determined against the appellants was that they had not demonstrated that they were part of their sponsors pre-flight family and habitual residence as required by the immigration rules. The Judge found that there are too many discrepancies in the sponsor's account and the appellants applications are not supported by evidence which he found reasonable for the appellants to have submitted.
23. The burden of proof is on the appellants and it is on a balance of probabilities. Therefore, the Judge was entitled to find it was for the appellants to provide evidence to show that they meet the requirements of the immigration rules pertaining to their applications. The grounds of appeal state that the sponsor could not have been expected to provide evidence before he left the country because he had been tortured. However, the appellant has been in this country since 2003 and therefore the Judge was entitled to find that evidence from the appellants at the very least could have been provided. This is a perfectly legitimate enquiry for the Judge to have made given the sponsor's evidence that he has been looking after the children from 2003 onwards while he lived in the United Kingdom.
24. The Judge also took into account the evidence that the appellant gave at his asylum interview which is inconsistent with were to say that his asylum interview. That was that his marriage broke down two years after the wedding and when what it was in its third year. The Judge was entitled to find in the circumstances that the appellants lived with their mother and not the sponsor given that the mother was living in Nigeria and the appellant was in the United Kingdom.
25. The Judge rejected the evidence of [KS] who claimed in a letter that it was him who looked after the appellants after the sponsor fled the country. The Judge found that there was no evidence as to who this person is and where he comes from. The Judge also found there was no address given in his letter and no evidence of his identity. In the circumstances the Judge was entitled to reject this evidence.

26. The Judge also found that there was an inconsistency in the evidence given by the sponsor when he was asked whether his children were in contact with their mother, initially saying he didn't know and then changing his account to say that his children had told him that they were not. The Judge was entitled to find that it would have been expected if the appellant was looking after the appellants from the United Kingdom would have known whether there are in contact with their mother and this is not something he would be inconsistent about.
27. I find that there is no material error in the decision of the First-tier Tribunal Judge. The Judge gave legally sustainable reasons for his finding that the appellants have not demonstrated that they were part of their sponsor's household in Uganda before he fled the country. There is no perversity in his reasoning and his conclusion and I uphold the decision. I find that no differently constituted Tribunal would come to different conclusion on the facts of this case.

Decision

Appeals dismissed for both appellants

Signed by

Deputy Judge of the Upper Tribunal
Mrs S Chana
2018

This 17th day of April