



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/26018/2016  
HU/26019/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 26 July 2018

Decision & Reasons Promulgated  
On 6 August 2018

Before

UPPER TRIBUNAL JUDGE BLUM

Between

BENNET BISSUE  
DENNIS BISSUE  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

**Representation:**

For the appellants:

Mr E Pipi, Counsel, instructed by Hodders Law

For the respondent:

Ms Willocks-Briscoe, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. These are appeals against the decision of Judge of the First-tier Tribunal Raymond (the judge), promulgated on 17 October 2017, in which he dismissed the appellants' appeals against the respondent's decisions dated 7 October 2016 refusing their applications for entry clearance as the minor dependent children of a parent either present and settled in the UK, or with limited leave.

## **Factual Background**

2. The appellants are nationals of Ghana. The 1<sup>st</sup> appellant was born on 19 June 1998 and the 2<sup>nd</sup> appellant was born on 17 October 2000. They are brothers. On 28 June 2016 they applied for entry clearance to join their father, Bennett Bissie Kwise Senior (sponsor) and his wife, Elsie Hagan.
3. The respondent erroneously considered the applications under Appendix-FM of the immigration rules. As the sponsor had limited leave to remain, and his wife (the appellants' stepmother, assuming their biological mother was indeed deceased) had Indefinite Leave to Remain, the applications should have been considered under either paragraph 297 or paragraph 301 of the immigration rules, a point recognised by an Entry Clearance Manager (ECM) in a review of the decisions dated 11 February 2017. The decisions were nevertheless upheld on the basis that the error was not material given that the respondent's refusal was based on the issue of 'sole responsibility', a requirement common, on the facts advanced, to both paragraph 297, 301 and Appendix-FM.
4. The respondent acknowledged the provision of money transfer slips, photographs and telephone and social media communications as evidence of sole responsibility, but although the money transfer receipts showed the 1<sup>st</sup> appellant's name, none of the photographs showed the appellants and the sponsor together and the evidence of communication all dated from October 2015 onwards. As the sponsor moved to the UK in 2003, the respondent was not satisfied that the evidence showed contact and communication throughout the appellants' lives. The respondent acknowledged the appellants' assertion that their mother abandoned them and the sponsor and that they were later informed that she had died, but there was no evidence that their mother was deceased. The respondent was not satisfied that the evidence demonstrated that the sponsor had day-to-day responsibility for the appellants in respect of their emotional, financial and other needs, or that he exercised full control over the major aspects of their lives such as schooling, religion and medical care. The failure to lodge the relevant appendix form for their applications meant there was no evidence as to how often the appellants saw their sponsor or when they last saw him. There was said to be no reason why the appellants would now seek to join the sponsor and there was no evidence of their claim to live with their grandmother (Mary Tetteh), or of their personal circumstances in Ghana. Nor was the respondent satisfied there were serious or compelling family or other considerations making their exclusion undesirable.

## **The decision of the First-tier Tribunal**

5. As the respondent's decisions constituted refusals of human rights claims, the appellants had rights of appeal under s.82 of the Nationality, Immigration and Asylum Act 2002. The appeals were heard on 27 September 2017 and the appellants were represented by Ms A Seerhra, of Counsel. The appellants provided a large bundle of documents running to 476 pages which included, *inter alia*, payslips and employment documents relating to both sponsors, birth certificates relating to two

children born to the sponsor and Ms Hagan in the UK, DNA evidence, copies of Ms Hagan's passports and residence cards, and bank account statements and money remittance documentation covering several years. Also included were statements from the sponsor and Ms Hagan, and from Ms Tetteh. The judge heard oral evidence from the sponsor and Ms Hagan and oral submissions from the representatives.

6. The judge's decision is 50 pages long and runs to 478 paragraphs. The judge scrutinised and commented upon numerous elements of the evidence before him, even those that did not immediately appear, at least at first blush, to be relevant to the issues in contention. The judge set out the personal details of the appellants and the sponsor and Ms Hagan, and the reasons for the respondent's decisions. The judge then set out and commented upon the evidence relating to the marriage history of the sponsor and Ms Hagan, the evidence relating to the appellants' claimed biological mother (Marian Raji), the evidence of financial support, the evidence relating to the sponsor's and Ms Hagan's contact with the appellants, the evidence of the appellants' education, and the evidence relating to the appellants' living conditions. Having set out the burden and standard of proof, and the submissions from the parties, the judge then gave his reasons for dismissing the appeals. Throughout the sections of his decision setting out the evidence the judge made reference to the witnesses' oral evidence. There is however no specific section dealing with the conduct of the hearing itself. At [145] the judge recorded his questing of Ms Hagan and the suggestion he made that the money she was sending to Ghana was not intended for the appellants, and at [146] the judge recorded Ms Seehra's interjection that, in her view, he had 'descended into the arena' given that the Presenting Officer had not followed this line of questioning.
7. Based on the money transfer receipts the judge was not satisfied the sponsor had been sending money to support his children. The judge found, based on the sponsor's bank account, that a substantial part of his income had been regularly depleted by a gambling habit. The judge noted that the sponsor was making a regular weekly payment of £40 to a third party, Kojo Ofori, in respect of his "claimed" son Miguel, and that the few photographs with his "two claimed British children" were taken outside of the family home context. At [346] the judge found that the sponsor had not shown "the slightest interest in visiting his sons in Ghana" even though the sponsor obtained settled status in 2007. There was said to be no evidence that Ms Hagan visited the appellants in 2014, and the appellants' claim that they were ejected by their landlord in 2016 was not consistent with the funds remitted by the sponsor and his wife. The judge was not satisfied that money remitted by Ms Hagan was intended for the appellants but rather for her trading activity. Relying on inconsistencies in Ms Hagan's evidence and deficiencies in the written evidence relating to a Mr Bannor, as well as his assessment of the evidence as a whole, the judge found that 'Marian Raji' was a "fictitious creation" and that the evidence from the sponsor and Ms Hagan was dishonest and dubious, and concluded that neither the sponsor nor Ms Hagan had sole responsibility for the appellants.

## The grounds of appeal and the error of law hearing

8. The grounds essentially contend that, in his conduct of the hearing, the judge 'descended into the arena' and played a substantial part in the interrogation of the witnesses in a manner which was effectively a quasi-inquisitorial role. The judge's conduct gave rise to a perception that he was biased because he conducted an investigation or examination on behalf of society at large and the sponsor saw the judge as a cross-examiner.
9. It was further submitted that the judge erred in law by conducting his own research in respect of the distance of various town and cities in Ghana, and that the judge made material factual mistakes such as stating that the sponsor obtained settled status in 2007. It was additionally submitted that the judge acted in a procedurally unfair manner by failing to seek clarification in respect of the money remittal locations, and in respect of the payments to Kojo Ofori, which it was claimed related to additional classes.
10. The 'error of law' hearing was listed for March 2018, but it was adjourned to obtain the contemporaneous hearing notes maintained by Ms Seehra and the Presenting Officer, and for Ms Seehra to make a statement concerning the conduct of the hearing. The Tribunal was served with the Presenting Officer's manuscript notes, Ms Seehra's manuscript notes and a typed version, and a statement from Ms Seehra. Ms Seehra's statement and her hearing notes, as well as those of the Presenting Officer, indicating that she intervened on two occasions to suggest that the judge was not acting in an impartial manner and that her second intervention occurred after the judge addressed Ms Hagan by saying "*I put it to you*" that the money she remitted to Ghana was not going to the appellants.
11. Mr Pipi adopted his skeleton argument and submitted that the hearing notes showed the judge 'descended into the arena' by asking a significant number of questions and by using language indicative of cross-examination. It was submitted that the judge developed his own theory of the case as the Presenting Officer had not cross-examined on any of the money remittance receipts. Mr Pipi adopted and expanded some of the other grounds and submitted that the judge strayed into areas never raised as issues including, *inter alia*, the allegation that the sponsor had a gambling habit, the suggestion that the sponsor and Ms Hagan were not living together, and the doubts expressed by the judge as to whether Miguel and Acacia-Cerys were the sponsor's children.
12. Ms Willocks-Briscoe submitted that the judge was merely seeking clarification of issues raised by the evidence and that he was trying to understand the evidence in a case that he picked up from the float list. She accepted that "*I put it to you*" could be seen as a term used in cross-examination, but submitted that one had to look at the hearing and the decision in the round, and relied on the decisions in Sarabjeet Singh v SSHD [2016] EWCA Civ 492 and Bubbles & Wine limited v Reshat Lusha [2018] EWCA Civ 468.

13. I informed the parties, giving brief reasons, that I was satisfied the decision contained material legal errors and that it was appropriate to remit the matter back to the First-tier Tribunal for a full *de novo* hearing.

## Discussion

14. There is no dispute between the parties as to the relevant legal test for the perception of bias. It is conveniently encapsulated in the statement of Lord Hope in paragraph 103 of his speech in Porter v Magill [2002] 2 AC 357, [2001] UKHL 67, as noted in Sarabjeet Singh v SSHD [2016] EWCA Civ 492, at [30]. The ultimate question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In determining whether a judge acted in a way that may generate a perception of bias it is necessary to consider the proceedings as a whole (Sarabjeet Singh, at [36]).
15. I have approached the judge's decision as a whole, having regard to all the evidence relating to the hearing, including the judge's own notes. There was a significant degree of consistency in the hearing notes maintained by the Presenting Officer and those maintained by Ms Seehra, and these are generally consistent with the judge's own notes. Having considered the various notes I find that the Presenting Officer asked the sponsor approximately 30 questions in cross-examination, and that, during the cross-examination, the judge asked 8 questions. The judge then asked the sponsor a further 33 questions. Although most of the questions asked by the judge were non-leading, they related to issues not raised in the Reasons For Refusal Letters and upon which the Presenting Officer did not cross-examine, most notably in respect of the remittal of money to the appellants. A judge is fully entitled to ask questions if the evidence is unclear and in order to obtain clarification. It is however advisable for a judge to inform the Presenting Officer of any areas of concern that have not been covered in either cross-examination or the initial decisions so to avoid the perception that he is either engaging in cross-examination or has developed his own theory of a case. It was as a direct result of such questioning that Ms Seehra made her first intervention.
16. The Presenting Officer asked Ms Hagan approximately 33 questions in cross-examination, during which time the judge asked 3 questions. The judge then asked Ms Hagan a further 33 questions. It is apparent from the hearing notes that the judge asked more questions of the sponsor and Ms Hagan than either of the representatives.
17. At [145] the judge records that he "*suggested*" that the money Ms Hagan was sending was being sent "*in dribs and drabs*" and that this "*could suggest that it was not intended for the appellants.*" I observe once again that the hearing notes maintained by the Presenting Officer are consistent with those provided by Ms Seehra. Significantly, both record the judge stating "*I put it to you*" when addressing Ms Hagan in respect of the money she remitted to Ghana. "*I put it to you*" is a phrase strongly associated with cross-examination. It is indicative of someone asserting a particular point of view or of having formed a particular and opposing view. It is apparent from the

hearing notes maintained by both Ms Seehra and the Presenting Officer, and indeed from the judge's decision itself (at [146]), that Ms Seehra considered the use of the phrase generated a perception that the judge 'descended into the arena' and that he was essentially conducting a cross-examination. I am in agreement with Ms Seehra. It may well be that the judge was merely seeking to understand the evidence in the appellants' bundle, as he stated at [147], but the choice of words used, in the context of the significant number of questions asked, many of which related to issues neither raised in the decisions or in cross-examination, was sufficient to generate a perception in a fair-minded and informed observer that the Tribunal was biased.

18. The perception that the judge developed his own theory of the case, indicating that he 'descended into the arena', is further apparent from his decision where, despite no issue ever having been raised in respect of the sponsor's relationship with Miguel and Acacia-Cerys, the judge refers to these children as the sponsor's "*claimed*" children ([340] & [434]) and ventilates his doubts as to the relationship because family photographs were taken "*somewhat unusually outside of the family home context that this Tribunal regularly finds is the venue of preferred choice whenever it is presented with photographs meant to show family life.*" I find it doubtful that the judge was rationally entitled to draw an adverse inference on this basis, but, in any event, the judge's concern was never put to the witnesses or the appellants' representative. Nor were any concerns expressed by the judge in respect of the residential addresses provided by the sponsor and Ms Hagan in respect of the dates of Miguel and Acacia-Cerys's birth (see [23] to [30]) ever put to the witnesses. Then at [461] the judge makes the astonishing comment that, because there are weekly payments to someone called 'Kojo Ofori' in respect to Miguel, that person, "*for all that one knows*", may be Miguel's biological mother. There was no rational basis for the judge's observation, and any concerns harboured by the judge as to the parentage of Miguel and Acacia-Cerys, even if relevant to the issues in contention, were never raised. This alone constitutes a material error of law.
19. It is apparent from reading the decision that there are other instances where the judge expressed doubts as to the legitimacy or reliability of the evidence before him but failed to make these concerns known to the parties. For example, at the outset of his decision the judge notes that the appellants' DNA Sample Declaration Forms identified that their "*aunt*" and parent/guardian was Bernice Bissue" and not Mary Tetteh, and holds this against the appellants at [445]. The witnesses were never asked to explain why Bernice Bissue was identified as the parent/guardian. More significantly, the judge made adverse credibility findings and rejected much of the evidence relating to financial support prior to 2015 because many of the money remittance receipts related to regions outside Accra. The hearing notes produced by the Presenting Officer and by Ms Seehra, and the judge's own notes, indicate that the Presenting Officer asked no questions concerning the money transfer receipts and that, while the judge did inquire about the various recipients, he asked no questions about the location of the recipients. Neither the sponsor nor Ms Hagan were therefore made aware that the judge harboured concerns relating to the location of the money transfer recipients, and such concerns were not readily apparent from the face of the documents. Had the sponsors been informed of the

judge's concerns they would have had the opportunity to offer an explanation. The failure of the judge to make his concerns known constitutes a procedural impropriety rendering the hearing unfair. The judge additionally found that the sponsor had a gambling habit (339), a finding based on his bank account statements, and that this habit regularly depleted a substantial part of his income. Once again, the sponsor was not given an opportunity to respond to the judge's findings, an omission that constitutes a procedural impropriety.

20. In proceeding on the basis that the sponsor obtained settled status in the UK in 2007 and that there was therefore no reason for his failure to visit the appellants from that date (see [346] and [352]), the judge has made a mistake of fact that constitutes an error of law and has taken into account an irrelevant consideration. There was no evidence that the sponsor became settled in 2007. His statement states that he was first granted leave to remain on 20 February 2013 as a partner under Appendix FM (10-year route), and the bundle of documents has a copy of a LTR residence card issued on 6 October 2015 and valid until 6 April 2018. To the extent that the judge took into account the failure by the sponsor to visit the appellants from 2007, he placed weight on an inaccurate and irrelevant consideration.
21. Having holistic regard to the factors, and for the reasons given, I find the appellants have not had a fair hearing. In these circumstances it is appropriate to remit the appeals back to the First-tier Tribunal to be heard afresh by a judge other than judge of the First-tier Tribunal Raymond.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material legal errors and is set aside.**

**The joint cases are remitted back to the First-tier Tribunal for a *de novo* hearing, to be considered by a judge other than judge of the First-tier Tribunal Raymond.**

### **Directions**

**The appellants are to serve on the respondent and the Upper Tribunal a further copy of the bundle of documents upon which they intend to rely.**



Signed

30 July 2018

Date

Upper Tribunal Judge Blum