Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/11319/2016

HU/11327/2016

HU/11328/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 4 April 2019	**On 24 April 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

ENTRY CLEARANCE OFFICER

Appellant

and

JBO
SAO
EAO
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellants: Mr M Mohzam, Solicitor
For the Respondent: Mrs H Aboni, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The respondents, (hereinafter the claimants) are citizens of Ghana born in July 1999, June 2002 and May 1998 respectively. They applied for entry clearance to the UK as the children of a person settled in the UK, their mother, HD. On 6 April 2016 the appellant (hereafter the Entry Clearance Officer or ECO) refused their applications and the claimants appealed. On

5 March 2016 Judge Birk of the First-tier Tribunal (FtT) allowed their appeals on human rights grounds.

2. The ECO's grounds contend firstly that the judge failed completely to deal with the issue in question, namely an application under paragraph 297 of the Immigration Rules as the three children of a sponsor present and settled in the UK; and secondly that the judge made several mistakes of fact giving rise to real doubt that the judge had the right claimants in mind.

3. I heard brief submissions from the parties.

4. I consider the grounds are fully made out. It is true that the judge correctly identified in several paragraphs that the appeals concerned were against a refusal of entry clearance (see paragraphs 4, 6 and 11), but when it comes to the judge's findings as set out at paragraphs 11 onwards, there is no consideration whatever of paragraph 297. There is a clear finding based on the DNA evidence, that the claimants are related as claimed and that there is family life between them and the sponsor: see paragraphs 16 – 18. But once one gets to paragraph 17, the judge has moved away from considering the claimants and refers thereafter to "the Appellant" in terms that can only denote the sponsor and proceeds on the erroneous basis that the claimants are in the UK and that the issue to be decided is whether the sponsor could remain with them in the UK. At paragraphs 19 – 21 the judge stated:

> "19. In balancing the various factors when considering proportionality, I consider the factors in respect of public interest under paragraph 117A and 117B I find that these weigh heavily in her favour in that she speaks English and she is not dependent upon the state. The Appellant entered and remained in the UK lawfully and so she did not build her private life on a precarious basis. I rely on the findings that I have already made above in respect of her family life which I find are substantial and compelling in her favour when considering their weight. I find that it is also very compelling that she meets Paragraph 301 of the Immigration Rules. I find that it would be very harsh and that she would face serious obstacles in her trying to re-integrate into Nigerian society because all her family are in the UK, she would struggle to find employment and education even with the financial support from her family in the UK.
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> 20. I also consider the impact of her removal from her siblings and although they are too young to formally express their opinions, it is clear from her evidence that she is very closely attached to them and is part of their family group. I find however, that there is a high likelihood that they would be adversely impacted upon them, especially the eldest two, but that this would over the long-term diminish with the care and attention of their parents.

> The children are British nationals who would remain residing in the UK.
>
> 21. My assessment on proportionality is that it weighs overwhelmingly in favour of the Appellant to remain in the UK in order to maintain her family and private life and that it would be disproportionate to remove her from the UK. Therefore, I allow this appeal."

5. As can be seen from paragraph 19, there is the further mistake of fact in the form of the judge's reference to the sponsor's reintegration into Nigerian society.

6. I am left in no doubt that either the judge simply confused the claimants' case with another or wholly misunderstood or forgot that the appeal concerned an application for entry clearance and not an appeal against refusal of leave to the sponsor (who is a British citizen). Either way the decision is manifestly erroneous in law and cannot stand.

7. I see no alternative to the case being remitted to the FtT (not before Judge Birk).

8. The ECO makes no challenge to the judge's finding (based on DNA evidence) that the claimants are related as claimed or to the judge's findings that they have a family life relationship with the sponsor. However, neither of these findings are sufficient to establish whether the ECO's refusal was a proportionate interference or (as an element of that) whether they met the requirements of the Immigration Rules under paragraph 297. Both the issue of whether the claimants met the requirements of paragraph 297 and whether the refusal of entry clearance was proportionate will be live before the next FtT judge.

9. To conclude:

   The decision of the FtT Judge is set aside for material error of law.

   The case is remitted to the FtT (note before Judge Birk), the only facts to be preserved being that the claimants are related as claimed and that there is a family life relationship between them and their mother.

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.

Signed Date: 19 April 2019

Dr H H Storey
Judge of the Upper Tribunal