Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/21264/2018
HU/21269/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 October 2019	**On 4 November 2019**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

M M (FIRST APPELLANT)
S A (SECOND APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

[Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the Appellants: Ms S Sharma, Counsel
For the Respondent: Mr T Melvin, Senior Presenting Officer

DECISION AND REASONS

1. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 22 October 2019.

2. These are appeals by the appellants, both citizens of Ghana, against the decision of First-tier Tribunal Judge Sweet ('FtT'), who in a Decision and Reasons promulgated on 16 July 2019 dismissed their appeals, based on their human rights, of the refusal of their entry for the purposes of settlement with their mother, (the 'sponsor'), who is a British national, in the United Kingdom ('UK').

3. The first appellant was born on 30 November 2001. The second appellant, his sister, was born on 28 September 2002. The respondent's decision refusing entry clearance was dated 27 July 2018. The application had been made under paragraph 297 of the Immigration Rules.

4. In essence, the gist of the appellants' claims involved the following two issues: first, whether the sponsor had sole responsibility for the appellants; and second, in the event that there was not such sole responsibility, there were serious and compelling family or other considerations which made the exclusion of the appellants from the UK undesirable and suitable arrangements had been made for the children's care. These were the alternative requirements of paragraphs 297(i)(e) and (f) of the Immigration Rules.

The FtT's decision

5. In his decision dated 16 July 2019, the FtT rejected the appeal based on both sub-(e) and sub-section (f). He did so by reference, at paragraph [29], to the well-known authority of **TD (Yemen) [2006] UKAIT 00049.**

6. Having referred himself correctly to the relevant case law he then did not accept the sponsor's credibility which he regarded as central to the claim. He noted at [30] the sponsor's conflicting evidence about the length of time that the first appellant had been at school and the second appellant's state of health. He also took issue with the absence in correspondence from church supporters of any reference to the second appellant. At [31] he concluded that the sponsor's evidence lacked credibility because of her inconsistency and insufficient evidence on material aspects of the case, such as why the sponsor's sister could not continue to look after appellants just because she was married herself in November 2018.

7. Having rejected the appeal by through the lens of paragraph 297, the FtT then failed to refer to the appellants' human rights, when the appeal was by reference to, (and could only have been by reference to) their human rights under section 84 of the Nationality, Immigration and Asylum Act 2002 Act because of the limited statutory rights of appeal. The FtT confined his analysis to paragraph 297 of the Immigration Rules.

The Grant of Permission

8. In light of the absence of express reference to the appellants' human rights, a Judge of the First-tier Tribunal, Judge Andrew, granted permission to appeal on 6 September 2019 confirming at [2] that she was satisfied that there was an arguable error of law as the FtT did not appear to have considered article 8. This was an appeal on human rights grounds only and whilst the FtT's findings in relation to the Immigration Rules were able to stand, he had not applied those findings to article 8.

The Grounds of Appeal

9. Exploring the grounds further with Ms Sharma, as already identified, one point was the absence of an analysis by reference to article 8. It was also said in the written grounds, albeit in generic terms, that the FtT had ignored the arguments and evidence on the appellants' behalf and had given insufficient reasons for his findings. By way of example, the appellants' aunt had made it clear that she could not continue to provide care, in the absence of the appellant's father, as she was married and arrangements had been intended to be temporary.

10. At the hearing before me, I considered the documents in the bundle before the FtT. I was referred to the witness statements of the appellants' aunt dated 4 June 2019 and the appellants' biological father of the same date, which were at pages [10] to [13] of the appellants' bundle.

11. When I explored with Ms Sharma, in terms of her submissions beyond the issue around the article 8 analysis, of what was said to be wrong about the way in which the FtT reached his decision, Ms Sharma indicated that the FtT had placed 'too much weight' on certain aspects and 'not enough' on others. She gave the example about the medical evidence not being considered by the FtT, although when I explored with her what medical evidence was said to be relevant, which had not been considered, she referred to the fact that the sponsor had been upset, as had the appellants, at the previous refusal of entry clearance. There was a subsequent reference to gynaecological problems which had commenced in 2014, albeit there had been express reference to this by the FtT at [55] of the challenged decision.

12. Ms Sharma also invited me to consider that it was possible that the sponsor did not have a detailed insight as to the appellants' upbringing, which had resulted in the FtT drawing adverse inferences about her credibility, because in reality the appellants' father, with whom she had shared parental responsibility up until April 2018, had lived with the appellants on a day-to-day basis and therefore it was hardly surprising that he would have more detailed knowledge in contrast to the sponsor. I was invited to consider that the aunt no longer was willing to provide a caring role for the children, at least the younger of whom remained a minor, so that there were clearly exceptional compelling circumstances in

this case. They previously had lived with one parent (their father) throughout their lives until April 2018 and now they had no-one.

The respondent's submissions

13. Even if there were an issue with the absence of an analysis of human rights, what the FtT had done was reach the conclusion that this was a manufactured claim. What the FtT was being asked to consider was that after around fifteen years of looking after the appellants, their father was now abdicating all responsibility whatsoever, from April 2018 onwards, which happened to coincide precisely with the time that the appellants applied for entry clearance. Whilst it was now contended that the sponsor could not possibly return to Ghana having lived in the UK for sixteen years, nevertheless she had lived for the vast majority of her life in Ghana, and the fact that this was a manufactured claim was supported by the fact that there had only been one attempt to visit in sixteen years, to which the FtT had given consideration at [26]. The FtT was unarguably entitled to reach the conclusion that he did about the sponsor's credibility. There was no explanation for why correspondence from those supporting the appellants, for example churches, has only referred to one child and indeed the FtT had been entitled to criticise why the appellants' father would be induced to write the brief statement that he did, only a copy of which had been provided and dated in the same handwriting as the aunt's statement, purporting to abdicate parental responsibility.

14. There were no serious or other compelling circumstances. In this case there was limited evidence of family life over a period of sixteen years as evidenced in the bundle as nearly all the appellants' family life had been with their father. Where the FtT was unarguably entitled to conclude that the requirements of paragraph 297(i)(e) and (f) were not met, then a stand-alone article 8 claim could not possibly succeed and therefore ultimately the error was not material.

Discussion and conclusions

15. On the one hand, the FtT had erred in not making an express reference to article 8, when the appeal only lay in respect of the appellants' human rights by virtue of section 84 of the 2002 Act. On the other hand, the FtT was correct to take as he did his starting point the Immigration Rules, namely the lens through which the appellants' human rights claims could be considered and he correctly identified both the Rules in question and the relevant case law. The question, therefore, noting the analysis within the Immigration Rules was whether the wider human rights analysis outside the Rules resulted in a different answer to the questions posed by paragraph 297, noting section 117B of the 2002 Act and the need for a proportionality assessment.

16. While the issue by reference to article 8 necessarily must be broader than the initial consideration under paragraph 297, I do not accept the criticisms of the FtT's analysis under the Immigration Rules. I further conclude that the subsequent proportionality exercise, by reference to article 8 and based on the same findings, would not have resulted in any different conclusion, so that the FtT's decision should not be set aside.

17. In reaching this conclusion I had first explored with Ms Sharma the basis on which it was said that the way in which the FtT had reached his conclusions in relation to paragraph 297(e) and (f) could be criticised. Her criticism was very limited and mostly generalised. The one example she gave was about a failure to consider the sponsor's illness from 2014 onwards, when this was in fact expressly referred to by the FtT at [15].

18. The FtT had also assessed, as a central issue, the witness statement of the appellants' father and the FtT set out clearly his concerns about why the father would be prepared to write such a statement, when he had had the main, if not sole parental responsibility for the appellants for almost the entirety of their lives, cohabiting with them from 2003 until April 2018.

19. I was conscious that this was an appeal hearing on an error of law, rather than a first instance hearing, and I had to consider whether in reaching the conclusions that he did, the FtT had erred in failing to take into account relevant considerations, or alternatively that the conclusions that he reached about the sponsor's evidence lacking in credibility were irrational.

20. I concluded that on the evidence before him, the FtT was entitled to conclude that the claimed severing of parental responsibility between the appellants and their father, with whom they had lived for virtually the entirety of their lives, was not reliable; and that it was open for him to reach the conclusion he did about the sponsor's credibility. The fact that the appellants' father had not, as claimed, severed parental responsibility for them went to the core of the appeal and undermined the claim that their aunt would not care for them, even accepting that serious and compelling family or other considerations, for the purposes of paragraph 297(i)(f), might still exist even if there were shared parental responsibility. Nevertheless, the appellants' domestic circumstances, in terms of accommodation and day-to-day supervision and care, at the time of the FtT's decision, was in the context that the claimed abandonment by their father had not been accepted. The FtT was unarguably entitled to conclude that on the evidence before him, there was not enough evidence that there were serious, compelling or other financial circumstances. Whilst the reasoning and conclusions may have been brief, they reflected the relatively limited evidence before the FtT.

21. In considering the difference, if any, that the assessment of human rights would have made to the FtT's eventual conclusion; and adopting the well-known five stage analysis of **Razgar v SSHD [2004] UKHL 27,** on the one hand I accept that there is a family life between the appellants and the sponsor, although on the evidence before the FtT, it appears that the

sponsor was very much the minor partner in terms of the sharing of that parental responsibility. Nevertheless, the fact that the sponsor plays a more minor role partly by virtue of distance but also because of the more major role played by the appellants' father, does not exclude the natural existence of family life between a parent who remains in contact, albeit one that lives so far away, and albeit one who visited their children only once in the sixteen years since she has been outside the UK. Despite the limited nature of that family life, it is possible that the refusal of entry clearance would, whilst maintaining the status quo, be significant enough to have engaged the appellants' rights under article 8 where the children are minors; and noting their best interests pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009.

22. However, on the assessment of proportionality, based on the FtT's findings and applying them to a human rights analysis, I conclude that the FtT would inevitably have reached the same decision as under the Immigration Rules, namely ultimately that it was a proportionate decision. Using the balance sheet approach to proportionality, on the one hand, there is the existence of family life, as I have already indicated. It could well be, and I am prepared to accept, that the appellants are proficient in English, for the purposes of section 117B of the 2002 Act, and as found by the FtT, there is a sufficiency of financial means and accommodation for the appellants.

23. However, the overwhelming counterweight against any human rights claim succeeding, is that what paragraph 297 of the Immigration Rules seeks to reflect, in the appellants' article 8 rights, is the welfare of children where there are no longer two parents who continue to have parental responsibility; or where there is shared responsibility, there are clear, compelling family or other considerations which mean their exclusion is undesirable. In other words, in a case such as this, the assessment under paragraph 297(i)(e) and (f) of the Immigration Rules really does go to the heart of that proportionality analysis, for the simple reason that it cannot follow that it is in the best interests of these two minor appellants to be moved from their country of origin, Ghana; from the people with whom, and communities in which, they have lived the entirety of their lives, to move with their mother; where parental relations continue with their father and where there is not reliable evidence that the appellants' father has relinquished parental responsibility; or that the childrens' move to the UK is in accordance with his wishes or with his consent. By analogy with the rigour of the procedures for international adoption cases, any First-tier Tribunal, when faced with the concerns about the sponsor's credibility and the very limited evidence presented to the FtT about the circumstances in Ghana, would have inevitably reached the conclusion that the appeals by reference to article 8, outside the Rules, would have failed, and therefore based on the findings and considerations included in the FtT's decision, the omissions relating to the article 8 analysis should not result in the FtT's decision being set aside.

Decision on error of law

24. I conclude that there are no errors of law in the FtT's decision such that it should be set aside. The appellant's appeal is dismissed.

Signed J Keith Date 30 October 2019

Upper Tribunal Judge Keith