IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002362
First-tier Tribunal Nos:
HU/55077/2022
IA/07486/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Ms H J
(ANONYMITY ORDER MADE)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr M Moksud (Counsel)
For the Respondent: Mr C Bates (Senior Home Office Presenting Officer)

Heard at Manchester Civil Justice Centre on 20 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge McAll, promulgated on 1st February 2023, following a hearing at Manchester on 25th January 2023. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Gambia, and was born on 3rd March 2004. At the date of the hearing before Judge McAll, she was 18 years old. She appealed against the refusal of her application to join her sponsoring father, Mr Basiru Jeng, under paragraph 297(1)(e) and (f). The basis of the refusal was that the Sponsor did not have sole responsibility for the Appellant and nor were there any serious and compelling or other considerations which made the Appellant's exclusions from the UK undesirable. Furthermore, there were no exceptional circumstances that would justify the grant of leave outside of the Immigration Rules under Article 8 of the ECHR.

The Appellant's Claim

3. The Appellant claims that she is the daughter both of the Sponsor, and of the Sponsor's former wife, Mrs Fatou Jagne (or Jeng), and that she was abandoned by her mother at an early age, to be cared for by the Sponsor, who entrusted her day-to-day care into the hands of his sister, who was also known as Fatou Jeng. She has always acted on instructions of the Sponsor, in providing care for the Appellant and the Sponsor has control over the life of the Appellant. However, she can now no longer remain in her country as there is nobody there to care for her and there are compelling reasons to grant her entry clearance.

4. The Sponsor himself claims that he came to the UK in 2006, where he met his current wife with whom he struck up a relationship, and whom he married in 2008, returning back to Gambia together where they got married. This is the Sponsor's third marriage, with his first wife having passed away, and his having divorced his second wife, namely, Fatou Jagne. The Sponsor has four children in total, two from his first marriage, and two from his marriage with Fatou Jagne.

5. Fatou Jagne, the Appellant's aunt (and the sister of the Sponsor), it is being asserted, is no longer able to look after the Appellant because Fatou Jagne is in a relationship with someone else and has her own children to look after, such that she can no longer provide the necessary care for the Appellant. On the other hand, the Sponsor himself can provide the accommodation and the requisite care for the Appellant should she come to the UK, especially as there is no-one else left in the Gambia to look after her.

The Judge's Findings

6. The judge found that the Appellant, contrary to what was being asserted, had in fact lived with various members of her family, including her mother and sister, during her life, "and she has done so under the direction of her mother and sponsor" (paragraph 33), which meant that she had not been abandoned by her natural mother. The judge found that the Sponsor had chosen to move to the UK in 2006 and had at some point chosen to divorce the Appellant's mother, but that

he was satisfied that "the sponsor has maintained contact with the Appellant's mother and his other daughter MJ and he has visited family members in Gambia 'every year'" (paragraph 33). This being so, "family life for this Appellant has continued to exist with her sponsor in a manner that her sponsor has chosen", and that the "Respondent's decision does not interfere with that chosen lifestyle and it can continue as it has always done, particularly now that the Appellant has become an adult herself" (paragraph 33).

Grounds of Application

7. The grounds of application state that the judge had, during the course of his hearing, violated the well-known "Surendran Guidelines for Adjudicators", which arose from the decision in **MNM (Surendran guidelines for adjudicators) Kenya [2000] UKIAT 00005**, because he had conducted the appeal in an inquisitorial fashion, asking a large number of questions himself, given that on the day of the hearing there was no Home Office Presenting Officer present.

8. Permission to appeal was initially refused by the First-tier Tribunal on 6th June 2023, but then granted by the Upper Tribunal on 3rd August 2023. A Rule 24 response was furnished by the Respondent on 25th August 2023 placing reliance on the decision in **Muwyinyi v SSHD (Immigration Law Update, Vol-3, No.3, p.13)** where the president observed that Adjudicators were not bound to accept accounts at face value but could and should probe apparent improbabilities, provided that they did not involve themselves directly in questioning Appellants or witnesses, save as was absolutely necessary.

Submissions

9. At the hearing before me on 20th September 2023, Mr Moksud, appearing on behalf of the Appellant submitted that the judge's interventionist approach was best exemplified at paragraphs 23 to 25 where, he had asked some 20 questions himself of the Sponsor, thereby violating the "Surendran Guidelines", and putting himself in the position of a Home Office Presenting Officer, where one was not in attendance.

10. Mr Bates, on the other hand, submitted that there was no witness statement from Counsel that twenty questions had been put. The judge was entitled to seek clarification of the evidence before him by probing matters. His was a difficult case where the Appellant's mother shared the same name as the Appellant's aunt, with whom she was said to be living, namely, the name of Fatou Jagne. The judge had begun by enlisting the help of Mr Moksud of Counsel, asking him to enquire of the Sponsor how it was that the name of Fatou Jagne was shared by both the Appellant's mother and her aunt, noting also that "there has been slightly different spellings of the family name at various parts of the evidence" (paragraph 19). This showed that the judge was simply setting out to have the evidence before him clarified. There were, however, no birth certificates for either the Appellant's mother or her aunt to verify their names, and even before the judge began his own enquiry, the evidence was already falling apart.

11. The Sponsor's witness statement (at paragraph 3) maintained that the Appellant's biological mother had abandoned her "when she was only 5 years old", but that if the Appellant was born on 3rd March 2004, then she would have only been 2 years of age, when the Sponsor came to the UK in 2006. The judge

observes that when this inconsistency was pointed out to the Sponsor, he then maintained that the Appellant's mother "had actually abandoned the Appellant in 2009", and that "no explanation was provided to explain how we felt he could have been confused on this point given that meant he had actually left the Appellant in the care of her mother and not his sister when he left Gambia for the UK in 2006" (paragraph 21).

12. Thereafter, even having divorced his second wife, the Sponsor gave evidence of how he had then fathered a second child with her, and this is why the judge held that,

> "I am satisfied that far from abandoning the Appellant in 2006 or 2009 (as the sponsor has claimed both dates) the Appellant's mother and her father have maintained close relations and that they have a second child together who the Appellant and the Sponsor have contact with" (paragraph 24).

13. In the circumstances, when reference is made to the remittances sent by the Sponsor (at paragraph 26) the judge could not be satisfied that these were solely for the benefit of the Appellant.

14. In reply, Mr Moksud, quite to his credit, made it clear that his submission was only that the judge had been too interventionist, and not that he had been hostile to the Appellant from the outset, because he "as quite cool and calm" even when he asked the questions. Indeed, he went on to say that, "my impression was that the judge was questioning in order to clear himself, but then used that as a basis for refusal". Mr Moksud submitted that given that the hearing was over the internet by way of a remote hearing, he ought to have carried on asking the Appellant's Counsel to put such questions as were necessary to the witness, rather than entering the fray, and assuming the questioning himself. He asked that there should be a finding of an error of law and a remittal back to the First-tier Tribunal.

No Error of Law

15. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law, such that this determination should be set aside. My reasons are as follows.

16. First, as was indicated by the First-tier Tribunal Judge who initially refused permission, the decision in **WN (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213**, makes it quite clear (at paragraph 25) that,

> "…. No witness statement from the Appellant or the representative identified what had or had not been put to the Appellant during the course of the hearing, nor was there any evidence which compared the Secretary of State's refusal letter and the points taken by the Adjudicator; nor was there any evidence which compared the witness statement from the Appellant, which the Secretary of State would not have had, with the points taken by the Adjudicator",

17. Indeed, "The advocate who signed the grounds of statutory review was not the advocate who had signed the grounds of appeal or had appeared before the Adjudicator. There was simply no evidence at all as to what had happened". As the decision goes on to state, allegations about what happened in front of the

Adjudicator are made far too often with no supporting evidence. It is made clear that, "credence should not be given to allegations not supported by evidence". This indeed is exactly what has happened in this appeal because the grounds are drafted, not by Mr Moksud who had appeared before Judge McAll, but by F. Chowdhury of Counsel and there is no evidence of what had happened at the appeal hearing. Indeed, at the hearing before me, Mr Moksud, quite properly made it clear that Judge McAll, "was quite cool and calm" and was not proceeding on the basis of a preconceived notion, but probing the evidence, after which he made the decision on the evidence as it was put before him.

18. Second, and in any event, there is no material error of law here because even before one gets to paragraphs 23 to 25 (where it is alleged that intrusive questions were asked by the judge of the witness) the evidence of the Sponsor is already beginning to unravel and the judge refers to "inconsistencies in the evidence in regard to the level of contact the Appellant and Sponsor have had with the Appellant's biological mother" (paragraph 20). The Sponsor's evidence, which was initially that he had left Gambia in 2006 when the Appellant was 5 years old, which was later changed to his having left in 2009, when the Appellant was 2 years of age, thereby leading the judge to the conclusion that the child could only have been left with her natural mother (paragraph 21), led the judge to express consternation as to how the Sponsor could have been confused on a matter of such importance. The judge's final conclusion that the Sponsor continued to retain contact with his second wife, Fatou Jagne, to the extent that she conceived a child for the second time after the birth of the Appellant, such that the Appellant could not be said to have been abandoned, was plainly a decision open to the judge. Accordingly, the judge's findings in relation to paragraphs 297(1)(e) – (f) were entirely sustainable.

Notice of Decision

19. There is no material error of law in the original judge's decision. The determination shall stand.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18th October 2023