Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2024-000818
First-Tier Case Number: HU/52397/2023
LH/04618/2023

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 21st May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

JEROME LUCAS KIVUMBI
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Paul Coleman, Sponsor
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 7 May 2024

The Appellant

1. The appellant is a citizen of Uganda born on 20 September 2013. He appeals against a decision of Judge of the First-tier Tribunal Rothwell dated 23 October 2023 which dismissed his appeal against a decision of the respondent dated 6 September 2022. That decision in turn was to refuse the appellant's application for entry clearance.

The appellant wishes to join his mother and stepfather Mr Paul Coleman (the joint sponsors) in the United Kingdom. The joint sponsors married in Uganda on 04/05/2018.

The Appellant's Case

2. The appellant's case is that he is presently staying with his maternal grandmother during school holidays but due to her age this arrangement cannot continue. During term time he attends a boarding school paid for by the joint sponsors. The appellant's birth father Mr Hassan Kivumbi born 28/02/1987) who is a national of Uganda has abandoned him. The joint sponsors in the United Kingdom now have sole responsibility for him.

The Decision at First Instance

3. The respondent refused the application under Appendix FM section E-ECP because the appellant did not meet the eligibility relationship requirements. The respondent did not accept that the appellant's mother had sole responsibility for the appellant. There were no serious or compelling circumstances such that the application should be allowed within the rules or outside them under article 8 (right to respect for private family life).

4. Judge Rothwell upheld this as she did not accept that the appellant's father had abandoned the appellant. She did not accept that the appellant was no longer living with his father, see [30] of the determination. She based her views partly on the statutory declaration made by the appellant's mother and father to the effect that the appellant would live with the father.

5. At [37] the judge summarised the appellant's circumstances in Uganda:

> … in Uganda the appellant has close family members around him to support him, which includes his father, his maternal grandmother, and his maternal uncle. The plan was that he would live with his father, and on the evidence before me I have found that he remains living with his father during the school holidays. He is doing well at school, and there is no evidence of any emotional and mental health issues, although I accept that he would prefer not to be at boarding school and would like to live with the sponsor. He is in regular contact with the sponsor, his stepfather, and half-brother, and they visit Uganda when they can.

The Onward Appeal

6. The appellant appealed against this decision largely repeating the appellant's case before the First-tier. The grounds argued that the appellant's mother had sole responsibility for the appellant, that his mental health was being affected by the fact that he had no parent around him and his grandmother's health was frail. It was in the appellant's best interests that he be granted entry clearance to the United Kingdom to live with the joint sponsors.

7. The First-tier refused permission to appeal finding that the grounds amounted to no more than a disagreement with Judge Rothwell's decision. The appellant renewed his application for permission to appeal to the Upper Tribunal where Deputy Upper Tribunal Judge Skinner granted permission to appeal. Judge Skinner agreed that the appellant's grounds were merely an attempt to reargue the case. However he granted permission to appeal on the grounds that the Judge had not complied with the duty imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 as she had failed to assess what was in the Appellant's best interests.

8. While the Judge had considered the Appellant's circumstances in Uganda, she had not considered what the appellant's circumstances would be in the United Kingdom or reach any conclusion about whether remaining in Uganda or coming to the United Kingdom was in the Appellant's best interests. This error arguably vitiated the finding that the Appellant's family life was not interfered with by the respondent's decision. Judge Rothwell had not considered what the Appellant's family life would look like were the appellant to be granted entry clearance. Judge Skinner directed that the onward appeal be limited to the section 55 point to include an argument as to whether any such error would be material.

9. The respondent submitted a rule 24 response to the grant of permission to appeal. The rule 24 response made three main points. The first was that pursuant to the case of **AZ [2018] UKUT 00245** the Upper Tribunal should not grant permission to appeal on a ground not raised by the party appealing unless that ground had a strong prospect of success (and not merely arguable). The judge had not specifically identified whether the ground that he gave permission to appeal on had such strong prospects of success. The reference in the grant to looking to see whether any error was material indicated some doubt on Judge Skinner's part as to whether the ground did have strong prospects.

10. Secondly the judge said that the section 55 point was a Robinson obvious point but had not indicated why that was so. Section 55 did not apply to children outside the United Kingdom. In any event the respondent had considered the best interests of the appellant in a document dated 9 January 2023.

11. Thirdly the appellant had not raised any argument at the hearing about what his family life would look like were he to be granted entry clearance. The Upper Tribunal did not have jurisdiction to consider this appeal.

The Hearing Before Me

12. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

13. The joint sponsors attended but were unrepresented unlike in the First-tier when they had been represented by counsel. I invited the presenting officer to indicate why the respondent opposed the onward appeal to enable the joint sponsors to have a greater opportunity to contest what was being said on behalf of the respondent. The presenting officer relied on the rule 24 response which I have summarised above. The judge was evidently not sure of the strength of the argument that a new ground could be relied upon. Although it was accepted that judge Rothwell had not said in terms that she had considered the best interest of the appellant pursuant to section 55 however she had found that the appellant could not meet the immigration rules. The appellant had close family around him.

14. For the appellant Mr Coleman argued that the judge had got matters wrong. The appellant lived on the streets when he was not at school. All school fees were paid by the joint sponsors. Section 55 applied to children in the United Kingdom which meant that it applied to the appellant's younger brother who was living in the United Kingdom and who missed the appellant very much. The maternal grandmother was elderly and was looking after the appellant as best she could. The appellant's father had no accommodation having lost it due to financial problems. The judge at first instance had asked for proof of the father's eviction but in Uganda it was not possible to obtain documentation of that sort. There had been great stress on the joint sponsors as a result of these proceedings. The appellant was taken to school at the start of term by his uncle on a motorbike taxi. The appellant was provided with two meals a day at the school and he was in a dormitory with 16 other children. The appellant spoke perfect English. During school holidays he stayed with his maternal grandmother. The appellant's circumstances had changed.

Discussion and Findings

15. The first point to deal with in this onward appeal is the question of jurisdiction as the respondent states that the Upper Tribunal has no jurisdiction to consider a new ground introduced into the proceedings by the tribunal itself. Strictly speaking it is not the case that the issue of the appellant's best interests were not raised in the grounds of onward appeal submitted by the joint sponsors against the decision of the First-tier Tribunal. When, on 18 February 2024, the appellant appealed against the First-tier decision the grounds stated that it was in the appellant's best interests that he be granted leave to enter the United Kingdom as a child dependent.

16. Had the grounds not stated this I would not have found that it was open to the Tribunal when granting permission to appeal to put in a ground of its own into the onward appeal. Given that section 55 does not apply to children outside the United Kingdom it cannot be said to be a Robinson obvious point that the judge should have dealt in specific terms with section 55.

17. The leading authority on this situation is the Upper Tribunal decision in a presidential panel of **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC).** The head note to this case states:

(i) *The exercise of the duty by the Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require.*

(ii) *Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is "an action concerning children...undertaken by…administrative authorities" and so by Article 3 "the best interests of the child shall be a primary consideration".*

(iii) Although the statutory duty under s.55 UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under s.55….

(iv) … The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.

(v) As a starting point the best interests of a child are usually best served by being with both or at least one of their parents…

18. The argument that the appellant is not with his father was rejected by the judge for the reasons she gave in her determination. This aspect of the onward appeal is as the two previous permission judges indicated merely a disagreement with the trial judge's findings. The judge was aware that the appellant was making a claim outside the rules under article 8 and had a separate section in her determination to deal with it. The immigration rules provide a ground for admitting a child into the United Kingdom which is that there are serious and compelling reasons why the child should be admitted. This brings the rules into line with the jurisprudence under article 8.

19. The difficulty for the appellant was that the judge could not find any such reasons in this case. She summarised the appellant's circumstances in Uganda but evidently did not find any serious or compelling reasons within those circumstances as to why the appellant should be admitted. As **Mudeba** makes clear it is generally in the best interests of the child that they should be looked after by at least one if not both natural parents. That was the situation the judge found here. The appellant was being looked after by a parent. It might have been helpful if the judge had specifically directed herself to the wording of section 55 in her determination to deal with what **Mudeba** refers to as the broader duty on decision-makers to consider the best interests of the child. It is however implicit in the determination that the judge having set out the appellant's home circumstances was satisfied with them. The fact remains that the judge did not find any reason in this case why the appellant should be admitted. There were no adverse factors in the appellant's home circumstances justifying admission.

20. I do not accept the respondent's argument that the Upper Tribunal has no jurisdiction in this matter since I find that the issue of the appellant's best interests was raised albeit in a very brief reference in the grounds of onward appeal. It was not however a strong ground because the judge had considered very carefully what the appellant's home circumstances were and that there were no serious or compelling circumstances in the case. I agree that an article 8 analysis should bear in mind the position of all relevant family members which in this case would include the appellant's younger brother, but as this is an out of country appeal and because the test of sole responsibility was not met exceptional circumstances had to be found. That such circumstances existed was not the judge's decision in this case.

21. Another point raised in the grant of permission was that the judge at first instance should have considered what the appellant's position would be if entry clearance was granted. I do not find that there is merit in this ground. There cannot be an obligation on the United Kingdom to develop article 8 family life as opposed to protecting family life which already exists. To invite the tribunal to look at what the appellant's life might be like if entry clearance was granted is to invite the tribunal to speculate on the future which would not be a reasonable course of action. For these reasons therefore I find that there is no material error of law in the judge's decision and I dismiss the onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I was not asked to make an anonymity order and there is no public policy reason why one should be made.

Signed this 7th day of May 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge