Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13530/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Sent**
On : 9 October 2013	**On : 14 October 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MK
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr A Gilbert, instructed by Rahman & Company Solicitors
For the Respondent: Mr J Parkinson, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Sierra Leone, born in 1998. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him entry clearance to the United Kingdom under paragraph 297 of HC 395, Lord Burns and I, sitting as a panel, found, at an error of

law hearing on 18 June 2013, that First-tier Tribunal Judge Brenells had made material errors of law in his decision on Article 8 of the ECHR. We directed that the decision be set aside and re-made by the Upper Tribunal with respect only to Article 8.

Background to the Appeal

2. The appellant applied for entry clearance to settle in the United Kingdom with his father. His application was refused on 4 May 2012, on the grounds that it was not accepted that his father had sole responsibility for his upbringing. The respondent noted that the appellant's father had gone to the United Kingdom in December 1998 when he (the appellant) was only seven months old and had left him in the care of his mother with whom he continued to reside. The respondent did not accept the claim that his mother and step-father were no longer able to care for him in Sierra Leone.

3. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal before Judge Brenells on 27 March 2013. The evidence before the judge was that the appellant's father had made regular financial contributions towards his upkeep since leaving Sierra Leone in 1998. His mother had married in 2005 and had a child from that marriage. The appellant had lived with his grandmother until 2009 when his mother decided that he should come to live with her and her husband. However her husband was not happy with him living with them and he had returned to live with his grandmother. The judge heard from the sponsor, the appellant's father, who was married with two children who were living with him in the United Kingdom and were British citizens. He concluded that the sponsor did not have sole responsibility for the appellant and he found also that the provisions of paragraph 297(f) of the rules had not been met. He did not consider that Article 8 was engaged, finding that the sponsor was free to return to Sierra Leone and resume his family life with the appellant in that country. He accordingly dismissed the appeal under the immigration rules and on human rights grounds.

4. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant on the grounds that the judge had erred by failing to consider potential family life between the appellant and his father and had erred in finding that Article 8 was not engaged. It was asserted further that the judge, in finding that the sponsor was free to return to Sierra Leone, had failed to consider the sponsor's role as carer for his two British citizen children.

5. Permission to appeal was granted on 13 May 2013 on those grounds.

6. Following the error of law hearing on 18 June 2013, Lord Burns and I reached the conclusion that the Tribunal had made a material error of law, as set out in our decision:

> "Mr Gilbert, in his submissions, did not seek to challenge the judge's findings under the immigration rules, but submitted that errors of law arose in his consideration of Article 8, in particular in regard to the failure to consider the potential family life between the appellant and his father and the potential development of relationships between the appellant and the sponsor's British children.

Mr Deller accepted that the judge had erred in his consideration of Article 8 and that there was no indication in his limited findings that he had taken all relevant matters into account.

In view of Mr Deller's concession, we considered that the judge's decision had to be set aside and re-made, with respect to the Article 8 grounds.

Our preliminary view was that we could go on and immediately hear submissions with a view to re-making the decision, given that this was an entry clearance case and thus would not involve any change in circumstances since the respondent's decision. However, in the light of Mr Gilbert's request for further relevant evidence to be adduced and Mr Deller's acquiescence, we decided to adjourn the proceedings and re-list the appeal for a resumed hearing at a later date."

Appeal hearing and submissions

7. The appeal then came before me on 9 October 2013 in order to re-make the decision with respect to Article 8. The sponsor and his wife gave oral evidence before me and updated statements were adduced from both of them, together with two letters purporting to come from the appellant and from the appellant's grandmother's doctor.

8. The sponsor confirmed that his statements were true and accurate and said that he had received the letter from his son by mail at the end of September 2013. His son had sent it to him and had written it himself. When asked how his son would be taken care of in Sierra Leone if his grandmother was repeatedly being admitted to hospital, he said that he was mostly on his own on those occasions. There were other family members living near him but they could not take care of him as they were not responsible enough and were not willing. If his grandmother was permanently unable to look after him he would be walking on the streets and would be left to make all the big decisions in his life himself. The sponsor said that the appellant's aunt, his grandmother's daughter, also lived in the house with them but she was unwilling to take care of him as she was a businesswoman and was out all day at work. She had not had any role in his son's development. His son's grandfather had been killed during the rebel war. The sponsor said that he wanted his son to come to the United Kingdom as he wanted to be there for him. His son also wanted to be with his half-siblings.

9. When cross-examined, the sponsor said that he last visited his son in late 2004/ early 2005. He had planned to go again in 2009 but decided instead that his wife and daughter would go, to form a bond with him. His son was seven to eight months old when he left. The sponsor confirmed that he had had about £5,000 in savings in his bank account before the legal proceedings but he had spent a lot on legal fees. He had intended to put that money aside to bring his son here. Although the letter from his son was dated 21 July 2013 he did not receive it until the end of September 2013 because he had been looking for someone who was going to Sierra Leone who could bring it to him but could not find anyone and so told his son to put in the post. He did not know why the letter was not signed. He did not have the envelope in which the letter was sent as he had thrown it in the bin after taking out the letter and the medical report from Dr Coker. The sponsor confirmed that he had mentioned about his son's grandmother's illness at the hearing

before the First-tier Tribunal. He said that his son's aunt had one child, aged about three or four, but he was not aware if she had a partner or husband. The other relatives who lived nearby were his cousins. They would care for his son in emergency situations when his grandmother had to go into hospital but were generally unwilling to look after him. He had not considered offering them money to care for his son. The sponsor said that his son lived with his mother and grandmother until 2009 and then from 2009 onwards stayed with his grandmother. He then clarified that and said that his son went to stay with his mother when she married in 2005 but then went back to his grandmother's in 2009 because he did not get on with his mother's husband and he was beating him. When Mr Parkinson referred the sponsor to the contradictory evidence in his statement, he said that he had stayed with his mother until 2009 and then in 2009 went to his grandmother's house. His education had been affected by being left alone when his grandmother was ill. She had been ill for six to seven years now.

10. When re-examined about his evidence as to where his son had been living, the sponsor said that he had lived with his mother and grandmother until 2005, when his mother left to go and live with her husband, at which time he remained with his grandmother although he would visit his mother. He did not go to live with his mother in 2005, but would stay there for a few weeks and then return to his grandmother. The sponsor said that he would be happy if his son's cousins would care for him in exchange for payment, but he believed that they would just take the money and not care for him.

11. In response to my enquiry, the sponsor confirmed that his son had written the letter himself, first by hand and then typed on the computer and printed out. His son's first language was Creole but he spoke English in school. When asked whether his son's mother had moved back to live with him and his grandmother after her marriage, he said initially that she had done that one time, but then said that that had occurred several times. Whenever she moved back in with her husband, his son would move back in with them once they had settled down. His mother was still with her husband. She would let him wander about on the streets rather than have him back. The sponsor confirmed that he had two children in the United Kingdom, a boy aged 18 months and a girl aged eight years, both of whom were British citizens.

12. The sponsor's wife then gave evidence before me. She confirmed that her statement was true and accurate and said that the appellant would be very vulnerable if left in Sierra Leone. He had extended family members living near him but that was no substitute for his own parents. She had visited him in 2009 with her daughter who was five years old at the time, to celebrate her daughter's birthday. Since then she had been in contact with him by telephone and through social media and text. Her daughter also communicated with him. Her husband had been affected emotionally by the separation from his son and would feel down after talking to him. The appellant had told her that he could not wait to be living with them. When cross-examined, she said that her husband had not seen his son since 2005 because it was difficult financially as it was very expensive to go there. They had not thought about bringing him here for a visit. They had sponsored him as they wanted him to be part of the family.

13. Mr Parkinson conceded that there was family life between the sponsor and the appellant, on the basis that they were father and son, but submitted that what was relevant was the quality of that family life. There was considerable confusion in the evidence as to where the appellant was living. The sponsor left his son when he was only a few months old and had chosen not return to Sierra Leone to visit him since early 2005. It was not clear how frequent was the contact between them or why he had not sought to visit him since then, given that he had savings. There was nothing to indicate that the letter submitted genuinely came from the appellant and should be accorded no weight. The findings of the First-tier Tribunal, as to the lack of evidence to show that the appellant was at risk, still stood. The letter from Dr Coker had simply been produced to add weight to a situation not previously relied upon, namely the appellant's grandmother's inability to care for him. There was little evidence of family life between the appellant and sponsor and nothing to indicate that the best interests of the appellant or his step-siblings would be materially affected by the refusal of entry clearance. The decision to refuse entry clearance was not disproportionate.

14. Mr Gilbert submitted that the compelling circumstances test in the immigration rules was not the appropriate test and there was no requirement for the appellant to show that he was uncared for in Sierra Leone. What was relevant was the family life, and the potential family life, between the appellant and sponsor. Although the family life had been conducted through contact, there was the potential for it to grow. Mr Gilbert relied on the case of Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075 in that respect. The refusal of entry clearance was a barrier to the appellant and sponsor being able to live together. With regard to the sponsor's lack of visits to Sierra Leone, his family was not one of great means and travel was expensive. It was rational to spend his savings on bringing his son to the United Kingdom rather than on holidays to Sierra Leone. The sponsor had made regular financial remittances to his son and there had been continued contact by telephone and social media. There was therefore a close bond, despite the distance. There was a lot of evidence of contact and the documentary evidence should be taken in the round. Mr Gilbert submitted that weight should be given to the letter from Dr Coker and from the sponsor's wife. It was clear that the motivation for bringing the appellant to the United Kingdom now was the crisis leading him to have to remain with his grandmother and her inability to care for him. The refusal of entry clearance was a disproportionate interference with the family lives of the appellant, the sponsor and the sponsor's wife and children.

Consideration and findings

15. It is accepted that the appellant is unable to meet the requirements of the immigration rules and that the only issue is Article 8 in its wider context. It is also accepted that family life exists between the sponsor and the appellant, given the relationship of father and son. It was not suggested by Mr Parkinson that the sponsor could be expected to relocate to Sierra Leone on a permanent basis in order to pursue his family life with the appellant and indeed that could not be the case, given that he has a wife and British children in the United Kingdom. The question before me, therefore, is

whether the nature and quality of the appellant's family life/ potential family life in the United Kingdom is sufficient to render the refusal of entry clearance disproportionate.

16. It was Mr Gilbert's submission that the respondent had erred by focussing on the appellant's circumstances in Sierra Leone and by applying the compelling circumstances test under the immigration rules, rather than focussing on the potential for family life in the United Kingdom. However, whilst there is merit in his submission as to the appropriate considerations, the appellant's inability to meet the immigration rules is, of course, a relevant factor in the assessment of proportionality. Furthermore, it has to be the case that the appellant's circumstances in Sierra Leone must play an integral part in those considerations, given that they form a basis for concluding where his best interests lie as well as a basis for considering the weight to be attached to the evidence as a whole.

17. Accordingly, establishing what the appellant's circumstances are, or were at the time of the entry clearance decision, has to be the starting point, and it is plain that the evidence in that regard is significantly inconsistent and unreliable. Indeed, so inconsistent is the evidence that it fails even to establish where and with whom the appellant was living. As the entry clearance decision properly noted, the evidence produced with the application indicated that the appellant was living with his mother and had always been part of her family unit. The letter accompanying the application, from Capitalvisas, states quite clearly that the appellant was living with his mother and cites the reason for his proposed move to the United Kingdom as being her inability, as a result of her own family commitments, to continue to provide for him by way of financial and emotional support. The letter accompanying the application from the appellant's mother states the same, whilst also mentioning the fact that her husband did not approve of her son being part of their family, and bears the same address as that given by the appellant in his application form as his place of residence for the past five years. There was, accordingly, no indication at all in the appellant's application that he was living anywhere other than with his mother.

18. It was only with the grounds of appeal challenging the refusal of entry clearance that the reference to the appellant living with his grandmother arose. In a statement of "non-impediment" the appellant's mother stated that, following her marriage in 2005 he was living with his grandmother but came to live with her and her husband in 2009, but that owing to her husband's violence, she and her son returned to live with her mother on several occasions thereafter. The sponsor's evidence in his statement before the First-tier Tribunal was that his son remained living with his grandmother, following the marriage of his mother, and lived there until 2009, although visiting his mother on occasions during that period, with an indication that since 2009 he had been living with his mother and violent step-father in Freetown. A letter from the appellant's school in Freetown indicated that he had been attending there since September 2010. His oral evidence before the Tribunal was that he had remained living with his grandmother.

19. The evidence continued to vary following the hearing before the First-tier Tribunal. In his most recent statement the sponsor's evidence was that his son remained with his grandmother after his mother's marriage and until January 2009 when he moved back to

his mother's house and remained there until April 2012, when he returned to his grandmother due to the stressful situation at his mother's house. That was also the evidence of the sponsor's wife in her statement. The details about his whereabouts contained in a letter from Dr Coker, his grandmother's doctor, are somewhat difficult to decipher, but appear to be broadly similar. The sponsor's oral evidence at the hearing before me varied. Initially he stated that his son moved with his mother when she married in 2005 but because of problems with his step-father he returned to live with his grandmother in 2009 and remained living there continuously from then. He repeated the same account when asked to confirm it. However, when confronted with the contradictory evidence in his statement, he changed his evidence and said that his son had remained with his grandmother until 2009 and only visited his mother during that period.

20. The evidence of the appellant's place of residence since his mother's marriage in 2005 is plainly wholly inconsistent and unreliable. I have no doubt that the sponsor was not providing me with a truthful account, as clearly reflected in his change of mind when confronted with his own, contradictory evidence. Moreover, his evidence about extended family members reluctantly taking his son in when his grandmother was admitted to hospital is inconsistent with the account, presented in the letter purporting to come from his son, that he was forced to remain alone at such times. The evidence at the time of the respondent's decision was that the appellant had always lived with his mother. At that time, there was no suggestion that he had lived alone with his grandmother. The evidence of remittances of funds from the sponsor shows that the payments have continued to be made to his mother at her address in Freetown. There was no evidence, at the time of the entry clearance decision, of the appellant experiencing domestic violence. At the highest, the evidence suggested that his mother's new husband did not want him remaining with them, a claim which I consider in any event to be of doubtful veracity. I consider that that claim, and the subsequent accounts of domestic violence, of the appellant being sent back to his grandmother, of his grandmother's illness and inability to care for him and of the lack of other family support, have all been fabricated in order to support the claim that it was in his best interests to join his father in the United Kingdom.

21. Such a conclusion is supported by the contradictory and unreliable nature of the documentary evidence. The reliability of the letter from the appellant's school is properly addressed by the First-tier Tribunal's findings at paragraph 20 of their determination. The letter from Dr Ryan is, as stated above, contradicted by the oral evidence and also contradicts the sponsor's evidence of the duration of his son's grandmother's illness. It plainly goes beyond the remit of a family practitioner's area of expertise and is limited in its explanation of the patient's alleged medical condition. The letter purportedly from the appellant is unsigned, not unaccompanied by any evidence of postage, inconsistent with other evidence in its account of his place of residence and contains language suggestive of preparation by an adult rather than a child of 15 years.

22. Accordingly, I do not accept the account of the appellant's insecure and precarious circumstances in Sierra Leone to be a truthful one and find that the situation is more likely than not the one considered by the respondent when refusing entry clearance. Even if it were the case that the appellant had, or has since, been living with his grandmother, there

is no credible or reliable evidence that neither she nor other family members were able to look after him. There is no reliable evidence to suggest that the appellant's best interests would be served by uprooting him from his settled life, leaving behind his mother, his grandmother and other family members, his school and no doubt also his friends, to live with a parent who left him when he was seven months old and whom he had met only once in fourteen years. There is no reliable evidence from the appellant to indicate as such.

23. The appellant's family life with his father is clearly a tenuous one. There is little evidence of contact between them. It has been accepted that the sponsor has been providing financial support for his son. However, other than that, the evidence is limited to a few international telephone cards, which do not in any event identify the frequency of calls or the parties to the calls, and the oral evidence of the sponsor and his wife. In regard to the latter I do not consider the sponsor to be a reliable witness, for the reasons already given, and neither do I place weight upon his wife's evidence which is equally inconsistent in its account of the appellant's place of residence in Sierra Leone. Neither of them provided a reasonable explanation as to why the sponsor had not visited his son in Sierra Leone other than on one occasion eight to nine years ago. There is no reliable or detailed evidence of the sponsor's wife's visit to the appellant in 2009. I do not accept, from the evidence before me, that their circumstances are such that they were financially unable to meet the costs of occasional travel to Sierra Leone to spend time with the appellant. It is relevant to note that the sponsor's wife's evidence was that they had not even thought of inviting him to visit them in the United Kingdom. I find that such actions do not support the claim of a strong family life or one that has potential strength.

24. I return to the question of whether the nature and quality of the family life between the appellant and the sponsor, or indeed between the appellant and his step-mother and step-siblings, is sufficient to render the refusal of entry clearance disproportionate. The answer to that question, based on the findings I have made above, has to be that it is not. Accordingly, the decision to refuse entry clearance was, I find, not in breach of Article 8 of the ECHR and I dismiss the appeal on that basis.

DECISION

25. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside and I re-make it by dismissing the appeal on all grounds.

Anonymity

The anonymity order made in the error of law decision is continued, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date

Upper Tribunal Judge Kebede