Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/21624/2012
OA/21644/2012

THE IMMIGRATION ACTS

Heard at Field House
On 25th June 2014

Determination Promulgated
On 15th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

J A (FIRST APPELLANT)
S K (SECOND APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellants: Mr A M Kanu of the League for Human Rights
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellants appeal against a determination of Judge of the First-tier Tribunal S J Clarke (the judge) promulgated on 3rd March 2014.

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2. The Appellants are female citizens of Sierra Leone born 16th January 1973 and 28th August 2007 respectively. The first Appellant is the mother of the second Appellant.

3. In June 2012 the Appellants applied for entry clearance to the United Kingdom, the first Appellant applying as the spouse of a British citizen, MK, to whom I shall refer as the Sponsor, and the second Appellant applying as a dependent child.

4. The applications were refused on 24th September 2012. In relation to the first Appellant the Respondent referred to paragraph 281(iii) of the Immigration Rules, not being satisfied that the first Appellant and Sponsor intended to live permanently with each other as spouses, and not being satisfied that the marriage is subsisting. The fact that the parties had married was not disputed, but the Respondent was not satisfied that evidence had been provided, to prove that the parties had kept in regular contact since their marriage which took place in Sierra Leone on 5th April 2012.

5. In relation to the second Appellant the refusal was made pursuant to paragraph 297(i)(e) of the Immigration Rules, the Respondent not being satisfied that the first Appellant had had sole responsibility for her upbringing. It was noted that the Sponsor is not the biological father of the second Appellant, and the Respondent was not satisfied that the second Appellant's father had given consent for her to travel to the United Kingdom.

6. The Appellants appealed and their appeals were heard together on 18th February 2014. The judge heard evidence from the Sponsor and found that the burden of proof had not been discharged in relation to paragraph 281(iii), and was therefore not satisfied that the parties had a subsisting marriage and intended to live permanently with each other as spouses. In relation to the second Appellant the judge found that there was inadequate evidence to prove that the first Appellant had had sole responsibility for her. The appeals were dismissed under the Immigration Rules, and the judge did not consider Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

7. The Appellants applied for permission to appeal to the Upper Tribunal. In brief summary it was contended that the judge had not taken into account relevant evidence and had failed to make any findings in relation to Article 8 of the 1950 Convention.

8. Permission to appeal was granted by Judge of the First-tier Tribunal Lever in the following terms;

> "1. The Appellant seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge Clarke) who, in a determination promulgated on 3rd March 2014 dismissed the Appellants' appeal to settle in the UK under para 281 and para 297 Immigration Rules.
>
> 2. The grounds assert that the judge ignored or did not take proper account of probative evidence in respect of the ongoing relationship in this case. It is further said the judge did not address Article 8 raised within the grounds of appeal.

3. The judge has detailed the evidence that was before him. It does show that there was evidence from a variety of sources to show the nature of this relationship. The judge has referred to some difficulties with that evidence and has also referred to the absence of witness evidence that might have been expected. The judge had said at para 28 that despite the evidence presented but because of deficiencies he dismissed the appeal. It is also the case that he did not deal with Article 8 ECHR.
4. This is a case where it is arguable that the judge may have placed too much weight on evidence that was absent rather than evidence that was present in reaching the conclusion that he did, and perhaps expecting a greater preponderance of evidence to demonstrate an ongoing relationship. Whilst there may have been little merit in an Article 8 case that failed under these rules nevertheless it was a matter that could have been addressed.
5. Whilst it should not be felt that this is a strong case nevertheless I do find that there is an arguable error of law made such that permission should at least be granted.
6. There is an arguable error of law in this case."

9. Following the grant of permission the Tribunal issued directions that there should be a hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal (FtT) had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

10. I firstly heard submissions from Mr Kanu who relied upon the grounds contained within the application for permission to appeal, together with his skeleton argument dated 20th June 2014.

11. Mr Kanu submitted that there had been sufficient evidence before the FtT to prove that there was a subsisting marriage between the Sponsor and first Appellant, and the judge had erred by not taking into account that evidence. The judge had also erred by failing to consider Article 8 which had been raised as a ground of appeal.

12. Mr Nath submitted that the determination did not disclose a material error of law, and the judge had considered the evidence of contact by way of e-mails and telephone and also made findings on money that had been transferred by the Sponsor to the first Appellant. The judge was entitled to conclude that there was some evidence of contact but not enough.

13. It was accepted that Article 8 had been raised as a ground of appeal but not mentioned in the determination Mr Nath accepted that this was an error but not material, because the judge had found that family life had not been established.

14. Mr Kanu responded by submitting that family life had clearly been established and the judge had erred by disregarding evidence, and not taking into account material evidence.

15. I indicated that I intended to reserve my decision, and both representatives agreed that if an error of law was found, then the decision could be re-made without a

further hearing, based upon the evidence that had been submitted to the FtT and the additional bundle submitted on behalf of the Appellants to the Upper Tribunal, the majority of which, had in fact been before the FtT.

My Conclusions and Reasons

Error of Law

16. The Sponsor gave oral evidence before the FtT, and had made a witness statement dated 11th February 2014. His evidence was that he had married the first Appellant, and that they had a subsisting marriage, and intended to live together permanently.

17. I find that the judge erred in making no specific findings upon the Sponsor's evidence. The judge does not specifically reject the evidence, but presumably did not accept it, as the appeal was dismissed. The judge does not give adequate reasons why the evidence was not accepted, and such reasons need to be given, particularly where in this case, the oral evidence was supported to some extent by documentary evidence. It is unclear why the Sponsor's evidence was not accepted.

18. In paragraph 17 of the determination the judge refers to a letter from Kakua Foreign Exchange Bureau dated 10th October 2012 which certifies that payment receipts were issued to the Appellant, following receipt of money from the Sponsor. The judge records;

> "However, without identifying the particular receipts and dates upon them it is of little evidential value if they were post decision, other than on the issue of intervening devotion."

19. It is not clear why the letter is of little evidential value. There were six receipts from Kakua contained within the Respondent's bundle, which were submitted with the application. The file indicates that 21 Kakua receipts were handed in at the hearing. These were original receipts dated between 24th May 2011 and 30th April 2012. These were not post decision, and therefore the judge had a considerable number of receipts, together with a letter from the company which had issued the receipts, but there is no adequate explanation as to why this evidence was of little evidential value.

20. In paragraph 18 of the determination the judge refers to evidence of contact between the Sponsor and first Appellant contained in pages 112 to 159 of the Appellants' bundle. I set out below paragraph 18;

> "18. The chat from page 112 to 131 is all post decision and I repeat the same conclusion. However, pages 132 to 139 are messages in 2011 but they are all from the Appellant to the Respondent. Pages 139 to 159 are two-way correspondence but take place in 2013 and 2014."

21. I find the above paragraph is inadequately reasoned. It is not clear why it appears that little evidential weight was placed upon that evidence. If the judge placed little weight because the evidence was post decision, then prima facie, that would be

wrong if the judge was finding that post decision evidence could not be taken into account. Such evidence is admissible if it relates to circumstances appertaining at the date of refusal as was made clear in DR (ECO – post-decision evidence) Morocco* [2005] UKIAT 00038. I conclude that this paragraph is unclear.

22. The judge set out the following in paragraph 24 of the determination;

> "24. I accept that there are many photographs of the Appellants with the Sponsor found in the Appellants' bundle. There is evidence of contact between the parties, and there are money remittances. There is photographic evidence and there is the oral evidence of the Sponsor."

23. The above findings are clearly correct. In my view, and with respect, the judge does not adequately explain why the evidence summarised above, has not been accepted as proving on a balance of probabilities, that the first Appellant and Sponsor have a subsisting marriage and intend to live permanently with each other.

24. The judge, in relation to the second Appellant reached the following conclusion in paragraph 27;

> "27. There is inadequate evidence regarding the father of the second Appellant and this clearly falls short of showing he attended the various offices to consent to her coming to the UK, and that he had no responsibility for her and did nothing for her."

25. In my view the above paragraph demonstrates that inadequate reasons have been given for concluding that the first Appellant did not have sole responsibility for the second Appellant's upbringing. This is a case where there was no evidence that the first Appellant and the father of the second Appellant had ever married nor were they living together.

26. The judge erred in not considering Article 8, as this should have been considered, as it was raised as a ground of appeal, and the appeal had been dismissed under the Immigration Rules.

27. For the above reasons the determination of the FtT is set aside.

Re-making the Decision

28. I have taken into account all the documents that were before the FtT. This includes the Respondent's bundle which is not indexed or paginated, and the Appellants' bundle comprising 194 pages. Also before the FtT were the Kakua Foreign Exchange receipts, which appear to be the original receipts, and there are 21 in number. I have also taken into account the Appellants' bundle that was before the FtT comprising 194 pages. The Appellants' bundle produced to the Upper Tribunal comprising 87 pages consists in the main of documents that had already been produced to the FtT.

29. I bear in mind that in relation to paragraphs 281 and 297 the burden of proof is on the Appellants and the standard of proof a balance of probability. As this is an appeal

following refusal of entry clearance, I must look at the circumstances appertaining at the date of refusal, that being 24th September 2012.

30. In considering whether the first Appellant and Sponsor have a subsisting marriage, I have taken into account the guidance given by the Asylum and Immigration Tribunal in GA Ghana* [2006] UKAIT 00046. In summary the guidance is that when considering whether a marriage is subsisting, there must be consideration not only of whether there has been a valid marriage which formally continues, but there must be an assessment of the current relationship between the parties, and a decision made as to whether in the broadest sense, this relationship comprises a marriage properly described as "subsisting."

31. I find as a fact that the first Appellant and Sponsor married on 5th April 2012 in Sierra Leone. In making this finding I take into account the marriage certificate that has been produced, together with photographs of the wedding ceremony, and the evidence of both parties. In addition the Sponsor's passport confirms that he was in Sierra Leone between 26th April 2011 and 9th May 2011 which is when the parties state that they first met, and that he was in Sierra Leone between 30th March 2012 and 12th April 2012, when the marriage took place.

32. I am satisfied that the Sponsor visited Sierra Leone again following the marriage, and that the visit took place between 29th November 2013 and 17th December 2013. The Sponsor's passport confirms that he was in Sierra Leone in that period. I am satisfied that the purpose of that visit was to spend time with the Appellants. There are numerous photographs of the Sponsor and Appellants together contained at pages 73-111 of the Appellants' bundle that was before the FtT. Photographs show not only the wedding ceremony, but the Appellants and Sponsor together on various other occasions. I attach weight to this evidence, and have taken into account the guidance given by the Upper Tribunal in Naz (subsisting marriage – standard of proof) Pakistan [2012] UKUT 00040 (IAC) and set out below the second paragraph of the head note to that decision;

> "(ii) Post decision visits by a Sponsor to his spouse are admissible in evidence in appeals to show that the marriage is subsisting: DR (ECO: post-decision evidence) (Morocco*) [2005] UKIAT 00038 applied."

33. The documentary evidence proves, in my view, that the Sponsor has been sending money to the first Appellant. As previously mentioned, there are receipts from Kakua Foreign Exchange Bureau covering a period between 24th May 2011 and 30th April 2012. There is a letter in the Respondent's bundle from that company, dated 10th October 2012 confirming that the receipts were issued to the first Appellant, in respect of remittances received from the Sponsor in the United Kingdom. There are also some receipts from Bakadies International Limited, together with an undated letter from the managing director of that company confirming that the Sponsor has been using the company to remit funds to the first Appellant in Sierra Leone.

34. In addition there are Western Union transfer receipts contained at pages 45-61 of the Appellants' bundle showing the transfer of funds from the Sponsor to the first Appellant. I attach weight to the documentary evidence, which supports the contention made by both the Sponsor and first Appellant, that money has been sent to the first Appellant in Sierra Leone. In my view this evidence supports the contention that the parties are married, and that they have a subsisting relationship and intend to live permanently with each other.

35. There is evidence of contact between the parties following their marriage. This is contained in pages 112-194 of the Appellants' bundle. There are some telephone records and e-mails and telephone cards. In relation to this evidence I have taken into account the guidance given by the Upper Tribunal in Goudey (subsisting marriage – evidence) Sudan [2012] UKUT 00041 (IAC) and set out below the head note to that decision;

> "(i) GA ("Subsisting" marriage) Ghana* [2006] UKAIT 00046 means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted.
> (ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the Sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other.
> (iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant."

36. In my view, the evidence of contact between the parties, proves on a balance of probabilities that their relationship is subsisting. Their evidence, together with the documentary evidence of e-mail and telephone contact, proves in my view, that they have a subsisting marriage.

37. The evidence of the parties, taken together with the documentary evidence of contact, money remittances, and of a visit by the Sponsor to the Appellants after the marriage, proves on a balance of probabilities that the requirements of paragraph 281(iii) of the Immigration Rules are satisfied, therefore the appeal of the first Appellant should be allowed.

38. In relation to the second Appellant, I am satisfied that she is the daughter of the first Appellant. She is not the biological daughter of the Sponsor. The FtT gave leave to include in the grounds of appeal, reliance upon paragraph 297(i)(f) which is set out below, in addition to reliance upon paragraph 297(i)(e) which relates to sole responsibility;

> "(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;"

39. The second Appellant's birth certificate gives the name of her biological father. There is no evidence that he has played any part in her upbringing, although there must still be some contact between himself and the Appellants, as he has provided two letters to support the first Appellant's application for entry clearance. These are contained at pages 43 and 44 of the Appellants' bundle, which was before the FtT. One of the letters was certified on 10th December 2013, before a consular officer in the Ministry of Foreign Affairs and International Cooperation in Freetown, in which the biological father gives his approval for the second Appellant to travel with her mother to join the Sponsor in the United Kingdom, who is described as the second Appellant's stepfather. The other letter is dated 23rd October 2012, and sworn by the biological father before a justice of the peace in Freetown, in which consent is given for the second Appellant to travel with her mother and settle in the United Kingdom.

40. In considering sole responsibility, which is the test set out in paragraph 297(i)(e) I have taken into account the guidance given in TD Yemen [2006] UKAIT 00049. In paragraph 52(ix) of TD the Tribunal stated;

> "The test is, not whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of a child's upbringing, including making all the important decisions in the child's life. If not, responsibility is shared and so not sole."

41. The Tribunal indicated in TD that sole responsibility is a factual matter to be decided having considered all the evidence. Responsibility is a practical consideration, and one must look to who in fact is exercising responsibility for the child. The responsibility may have been for a short duration, in that the present arrangements may have begun quite recently. It is not therefore the case that a parent must prove that they have had sole responsibility for a child since birth.

42. The evidence indicates that the first Appellant and the second Appellant's biological father were never married. They were not living together when the application for entry clearance was made, as I accept the evidence that the relationship between the first Appellant and Sponsor began in July 2010, and they physically met for the first time in April 2011 when the Sponsor visited Sierra Leone.

43. I conclude, that on a balance of probability, the first Appellant has had sole responsibility for the second Appellant's upbringing and therefore the requirements of paragraph 297(i)(e) are satisfied and the appeal should be allowed on that basis.

44. If that were not the case, I would find in the alternative that paragraph 297(i)(f) applies although I accept that there is a high threshold. In my view if the second Appellant's mother was granted entry clearance, and the second Appellant had been living with her mother in Sierra Leone, taking into account the age of the second Appellant, there are serious and compelling considerations which mean that the second Appellant should not be separated from her mother, and this would make her exclusion from the United Kingdom undesirable.

45. As I allow the appeal under the Immigration Rules, although Article 8 was raised as a ground of appeal, it was raised as an alternative if the appeal was not allowed under the rules, and there is therefore no need to go on and consider Article 8.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside.

I substitute a fresh decision.

The appeals are allowed under the Immigration Rules.

Anonymity

The First-tier Tribunal made an anonymity direction pursuant to rule 45(4)(i) of The Asylum and Immigration Tribunal (Procedure) Rules 2005. This was because the second Appellant is a minor. I continue that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Dated 7th July 2014

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

As the appeals are allowed I have considered whether to make a fee award. I do not consider it appropriate. Some of the evidence which has persuaded me to allow the appeals was not made available to the decision maker. There is no fee award.

Signed Dated 7th July 2014

Deputy Upper Tribunal Judge M A Hall