IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/02872/2014
OA/02873/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons Promulgated**
On 11th December 2014 & 20th January 2015	**On 11th February 2015**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

HNB
GWB
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Miss A Faryl of Counsel instructed by Beachwood Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. This is the Appellants' appeal against the decision of Judge Dickson made following a hearing at Bradford on 1st August 2014.

Background

2. The Appellants are citizens of the DRC born on 16th June 1998 and 15th May 2000 respectively. They applied to come to the UK to join their sister but were refused entry clearance. The Entry Clearance Officer he was not satisfied that they were related as claimed, nor that their father had died nor that their mother had abandoned them. There was no evidence to demonstrate that they had ever met the Sponsor or that she had ever provided them with financial support, and although there was evidence of an adoption in the DRC courts, it was not recognised by the UK. The application was also refused on accommodation grounds.

3. The judge had before him DNA evidence which supported the relationship as claimed. He was satisfied that the Appellant and the Sponsor were siblings, and that the Sponsor and her husband had been responsible for the Appellants' maintenance since July 2008. So far as accommodation was concerned he stated that at the time of the decision there may not have been satisfactory accommodation under the Housing Act.

4. He wrote as follows:

> "The Appellants are well supported by the Sponsor and they are living with the lawyer who obtained their adoption in the DRC courts. It is reasonable to assume they have a good standard of living by DRC standards. The second Appellant is attending school and studying for his A levels and the first Appellant is at present attending a training centre in order to learn to sew.
>
> I have considered the relevant matters as set out in Mundeba. There is no Article 8 claim in this case. The Appellants have not established that there are serious and compelling family or other considerations which would make their exclusion undesirable. It follows that this appeal must be dismissed."

5. The Appellants sought permission to appeal on the grounds that the judge had erred in erroneously assessing the circumstances as at the date of hearing rather than as at the date of decision. As at that date, on the evidence before the judge, there was a temporary arrangement for them to live with the lawyer who assisted with the adoption and his wife. Furthermore the judge did not make any decision as to whether the accommodation rules were satisfied.

6. Permission to appeal was granted by Judge Lambert on 14th October 2014.

7. On 5th November 2014 the Respondent served a reply accepting that the judge may have erred in considering postdecision evidence as to whether there were serious or compelling circumstances but submitting that this was immaterial in light of the fact that the circumstances which existed as at the date of decision were very similar to those considered by the judge.

The Hearing

8. Miss Faryl submitted that it was absolutely clear that the judge had erred in looking at the circumstances as at the date of hearing. It was equally clear that he had not had regard to the evidence before him from the lawyer dated 25th June 2013 which stated as follows

> "Sir
>
> Further to your correspondence dated 15.5.2013 requesting me to keep Miss Bikuta Ndundu Helange and Mr Bikuta Wasongamo Grace for aid (assistance) until all steps are finished with the aim to join you in England.
>
> Given that Congolese law expressly grants you the parental authority of the said children following the judgment dated May 7 2014 the court Assossa Peace of Kinshasa/Kasa-Vubu. On this, I put my service your request. Knowing that you will pay my fees.
>
> Please accept Sir the assurance of the best feelings."

9. Mr Diwnycz did not, as he put it, resist the application.

Consideration of whether there is an error of law

10. There are a number of errors in this determination. First the judge wrongfully considered matters as they were at the date of hearing and not as at the date of decision, which is material because he did not take into account the evidence that the lawyer was looking after the children in a temporary capacity until they could join the Sponsor in the UK. Second, he did not make a clear decision in relation to accommodation. Third, he did not make any findings in respect of the Appellants natural parents, one of whom is said to have died, and the other is said to have abandoned them.

11. The determination of Judge Dickson is set aside and must be re-made. It was hoped that the resumed hearing could continue immediately but it quickly transpired that the Sponsor, who has since moved to a larger property, did not have with her evidence of the compliance of the previous accommodation with the requirement of the Housing Acts.

The Resumed Hearing

12. At the resumed hearing the Sponsor gave brief oral evidence. She adopted her witness statement and explained that her father had died on 1st April 2008. When she went to the DRC in July of that year her mother had disappeared and had left the children with a neighbour. When the neighbour became unable to look after them the children passed to the care of the lawyer who had arranged for their adoption by the Sponsor and for the application for entry clearance.

13. She provided two further letters from that lawyer confirming the facts as stated by the Sponsor and in particular confirming that the temporary arrangement, for which he was being paid, could not be considered permanent.

14. She explained to Mr Diwnycz that, so far as the accommodation was concerned, it had been intended that the family would live in the home provided by Unity Homes and Enterprises, although they have since in fact moved to a larger house. The document from Unity Homes states that the accommodation before the Entry Clearance Officer was a three-bedroomed house with two double bedrooms and a single bedroom and a large living room, not a through room, with a separate kitchen.

15. Mr Diwnycz made no submissions save to rely on the Entry Clearance Officer's reasons for refusal. He was content that a finding be made that accommodation was satisfactory. He was not going to doubt the Sponsor's evidence that the mother had disappeared and did not challenge any of the documents from the DRC, including the document from the High Court of Kinshasa dated 7th May 2013 awarding custody of the children to the Sponsor. He made no submission that the high threshold set in paragraph 297(i)(f) was not met.

Findings and Conclusions

16. The DRC is not a signatory to the Hague Convention and the adoption order from the High Court in Kinshasa is not recognised here. The Sponsor has not made any application in the UK for an inter-country adoption and the requirements of paragraph 316A are not met.

17. Accordingly, the relevant paragraph is 297(i) which sets out the requirements to be met by persons seeking indefinite leave to enter the UK as children of a relative present and settled in the UK. The relevant provision here is that the Appellants are seeking to join a relative present and settled in the UK and there are serious and compelling family or other considerations which make exclusion of the children undesirable and suitable arrangements have been made for their care.

18. The original judge made no adverse credibility findings. Although the Entry Clearance Officer originally doubted that the relationship was as claimed the issue has been settled by DNA evidence and the Sponsor has been proved to be the biological sister of both Appellants. It is accepted that the Sponsor has been responsible for the Appellants' maintenance since July 2008 and she paid for them to be looked after, first by neighbours and then by the lawyer who obtained the adoption order. Monies have also been sent for the school fees. No issue is taken with the authenticity of the death certificate.

19. The underlying facts are therefore no longer in dispute.

20. The Appellants' father died in April 2008, and shortly thereafter their mother, who is from Angola, disappeared. Since that time responsibility for the Appellants' welfare has passed to the Sponsor who has made the arrangements for their care. For the subsequent five years the children were looked after by a neighbour and, at the date of decision, they were living in a one-bedroom flat with the lawyer who had prepared the adoption and visa papers.

21. In Mundeba (Section 55 and para 297(i)(f)) [2013] UKUT 00088 the Tribunal held that, whilst the statutory duty under Section 55 of the UK Borders Act 2009 only applies to children within the UK, the broader duty under the UN Convention on the Rights of the Child explained why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under Section 55.

22. The Tribunal held that the focus must be on the circumstances of the child in the light of his or her age, social background and developmental history and will involve enquiry as to whether –

    (a) There is evidence of neglect or abuse;

    (b) There are unmet needs that should be catered for;

    (c) There are stable arrangements for the child's physical care.

23. "Serious and compelling" requires more than the parties simply desiring a particular state of affairs and sets a high threshold excluding cases where it is simply the wish of the parties to be together. In that case the Appellant was being looked after by the Girl Guides Association. His sister was in straitened circumstances supported through income support and DLA and has a 4 year old child who suffers from sickle cell anaemia. She had never cared for him, they had been separated four years and were now maintaining communication by electronic means.

24. The Tribunal observed that:

> "Our conclusion is that on the evidence before him it was fully open to the judge to conclude that the threshold in paragraph 297(i)(f) had not been reached. We doubt whether he could lawfully have concluded that it had been reached. It is not the case that any 15 year old orphan who has a sister in the UK must be admitted irrespective of his actual circumstances or the prior history of the relations between the Appellant and the proposed carer."

25. The facts here are rather different. The Sponsor took responsibility for the Appellants following the discovery that they had been abandoned and made arrangements for them to be cared for by neighbours, which came to an end when the neighbour became ill. The Sponsor and her husband then made an application for guardianship which was granted in May 2013. The Sponsor and her husband are financially independent and their application is supported by social services. No issue is taken with the

Sponsor's ability to provide suitable care for them in the way that a parent would.

26. The very temporary nature of their accommodation is not evidence of neglect or abuse, but it is evidence both of instability and of unmet needs. A roof has been provided but the unchallenged evidence is that this is a short term commercial arrangement, and it could not be described as secure. No provision is being made for the children's emotional needs, which are best addressed by being with the Sponsor. It is now some seven years since they have been without a family to care for them.

27. The Sponsor left the DRC as a refugee and, on the evidence, never intended to bring her younger siblings to the UK until her parents were no longer able to care for them either through death or through abandonment. She made arrangements for them to stay with neighbours for the five years after her parents died/abandoned them but when that arrangement came to an end. This is not a case where the Sponsor simply wants her siblings to be with her.

28. The fact that the Sponsor has been able to make a commercial arrangement with the lawyer who conducted the guardianship proceedings on her behalf to accommodate the children temporarily in his one bedroom flat is not a proper basis to conclude that they thereby do not fulfil the requirements of paragraph 297(i)(f).

Decision

29. The original judge erred in law. His decision has been set aside. This is re-made as follows. The Appellants' appeals are allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date **10th February 2015**

Upper Tribunal Judge Taylor