Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/05269/2014
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THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 October 2015	**On 21 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MS MARIAM JALLOH
MASTER ROMEO SOLOMON KOILOR
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Goddard, Southwark CAB
For the Respondent: Ms A. Fujiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are cousins, born respectively on 6 May 2001 and 10 August 1997. They are nationals of Sierra Leone. On 4 February 2014, they applied for entry clearance to join their Sponsor, Ms Katmu Lansana-Woneh, who is the mother of the first Appellant and the aunt of the second Appellant, in the United Kingdom. On 4 March 2014, the applications were refused on the basis that the Entry Clearance Officer was not satisfied that paragraph 297(i)(d), (e) and (f) of the Immigration Rules were met.

2. The Appellants appealed and their appeals came before First Tier Tribunal Judge Traynor for hearing on 26 February 2015. In a decision promulgated on 12 May 2015, he dismissed the appeal.

3. An application for permission to appeal to the Upper Tribunal was made out of time on 8 June 2015 on the basis that the Judge materially erred in law: (i) in his treatment of the documentary evidence; (ii) in his approach to the evidence generally; (iii) in his treatment of the sole responsibility point; (iv) in his treatment of the family or other compelling circumstances requirement; (v) in his approach to Article 8; (vi) in his consideration of Articles 3 and 7 of the UNCRC.

4. Permission to appeal was granted by First Tier Tribunal Judge White on 10 August 2015, who also extended time, on the basis that the First Tier Tribunal Judge arguably erred in law:

   (i) with regard to the reliability of the death certificate the Judge imposed too high a requirement in requiring corroborative evidence;

   (ii) in failing to apply the guidance in TD (Yemen);

   (iii) in failing to consider the reliability of the post decision documentation in the round;

   (iv) in his flawed approach to the reliability of the documents;

   (v) in failing to give sufficient weight to the best interests of the Sponsor's British citizen child, with regard to the question of the Sponsor relocating to Sierra Leone.

Hearing

5. At the hearing before me, Mr Goddard sought to rely on the grounds of appeal. He submitted that it was illogical for the Judge to have repeatedly dismissed evidence on the basis that it was self-serving and that this created an impossible evidential burden beyond the balance of probabilities. The Judge failed to explain why he accepted the Respondent's position that the documents are untrustworthy, whereas the burden of proving that they are untrustworthy shifts to the Respondent *cf.* MA (Switzerland) and Singh v Belgium. He submitted that the documents are easily verifiable in this case as the ECO is in the region.

6. In respect of Ground 3 and the issue of sole responsibility he submitted that the Judge had got this wrong following TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. He failed to take account of the fact that sole responsibility can be held for a short time and the changes of circumstances in the case. The Judge applied the wrong sole responsibility test at [76] where he focuses on day to day care rather than sole responsibility and crucially failed to make a finding as to who has responsibility for the children *cf.* TD (Yemen) [2006] UKAIT 00049. In respect of Ground 4 and whether there are family or

other compelling circumstances rendering exclusion undesirable, at [80] the Judge acknowledges that the child is not able to attend school but does not consider it to be a significant factor but only whether accommodation available to him, yet accommodation is only a very small part of it and there is no consideration that the child is an orphan and no one is willing to act as his carer: [79] & [80].

7. In respect of Ground 5 and Article 8, Mr Goddard submitted that this stands or falls with the Rules with one exception. The Judge considered alternatives to the children coming to the UK and at [83] held that the sponsor and her 7 year old British child could relocate to Sierra Leone. This is a clear error of law *cf.* Sanade as the Home Office accept it is not reasonable to expect a British child to leave the UK. He submitted that the Judge further failed to engage with section 55 *cf.* Mundeba but there is no clear finding on this or Article 7 of UNCRC *viz* every child has the right to live with their parents.

8. In response, Ms Fijiwala sought to rely on the rule 24 response. She submitted that, in respect of Ground 1, the Judge has properly dealt with the death certificates at [69-71]. He does not just dismiss them out of hand. At [70] he goes on to consider the fact that certificates can be issued without corroboration. Evidence could easily have been provided by family members but was not. She submitted that the burden was not upon the Respondent as the documents were not considered a forgery but simply documents that cannot be relied upon and it was up to the Appellants to prove their case. She disputed that the Judge has placed an impossible evidential burden upon the Appellants but rather has provided reasons as to why the documents are self-serving and there was independent evidence that could have been provided.

9. In respect of Ground 3 and the issue of sole responsibility, the Judge has had proper regard to the decision in TD (Yemen) and it was not accepted that the Sponsor had held it either short or long term at [76]. There was inconsistent evidence regarding why the Sponsor had not visited the Appellants. The Judge applied the correct test and finds that care arrangements are in place and the Sponsor is following her own life. The Judge was satisfied there were others caring for Mariam and made a clear finding the Sponsor has not had care and control over Mariam. There was no evidence she was paying for education and healthcare or directing this [77]. At [78]-[79] the Judge considers the Sponsor's lack of knowledge and finds that she is not telling the truth regarding family members in Sierra Leone. Family members had attended the funeral of her mother. The Judge's plausibility finding was based on custom and the culture of families living together in a compound in Sierra Leone. At [73]-[81] it was open to the Judge to find the Sponsor does not have sole responsibility for Mariam and that she had not discharged the burden of proof.

10. In respect of Ground 4 and Romeo, the Judge has clearly reasoned why he finds Romeo is not living in the claimed circumstances at [77]-[80].

The Sponsor admitted that her sister owned property that may pass to Romeo and it was open to the Judge to find the Sponsor was not telling the truth and that his father or family members were involved in his welfare. On the correct standard of proof the children have continued to live on that compound and their fathers are playing a role. In respect of the fact that the schools have been closed due to Ebola crisis, this was not a material consideration for the Judge as it occurred in April 2004 after the date of decision (March 2014). The Sponsor has not said that the children have been exposed otherwise to risk.

11. In respect of Article 8 the Judge properly dealt with this. He has considered section 55 at [82] and he has clearly considered the best interests of the children. The decision will maintain the status quo and therefore interference is proportionate. There is nothing incorrect with that finding and in the alternative the Sponsor could relocate to Sierra Leone with Lucy. That is merely an option for the Sponsor and not a requirement that they go to Sierra Leone. There were no errors in the determination and the findings were open to the Judge.

12. In his reply, Mr Goddard stated that in relation to the death certificates he was not suggesting all the burden was upon the Respondent but the starting point should be that if someone is disputing without clear reason the burden shifts. There is a shared burden but that point has not been engaged with by the Judge. In respect of the evidence as to a family compound he drew my attention to the letter from the Government/Social development officer. He submitted in respect of Article 8 and maintaining the status quo that there is a long line of caselaw that says Article 8 has a positive obligation. Even in SS (Congo) it says where there are exceptional circumstances an entry clearance application can succeed.

Decision

13. I reserved my decision, which I now give with my reasons. I find that First Tier Tribunal Judge Traynor erred materially in law in dismissing the Appellants' appeal in the following material respects:

13.1. In respect of Grounds 1 and 2, the Judge considered the issue of the death certificates of the Appellants' fathers at [69]-[71] of his decision, concluding at [71]:

> "I am satisfied that the documents which have been produced can be regarded as nothing more than self serving and do not persuade me upon a balance of probabilities that they are proof of an actual death ... I do not accept that such evidence is proof of the death of the fathers of each of the Appellants because I find that it has always been open to the sponsor to have adduced additional evidence which may have supported her claims."

I have carefully considered the submissions of both parties on this issue. Whilst I accept Ms Fijiwala's submission that the burden of proving that

the documents could be relied upon was not upon the Respondent as she was asserting that they were unreliable absent corroborating evidence rather than forged, I find that the Judge's reasons for not accepting that the death certificates were proof of the deaths of both the Appellant's fathers are unsustainable. Firstly, it was erroneous for the Judge to disregard this evidence on the basis that it is self-serving, given that all evidence submitted in support of an appeal could be termed in this manner, as the purpose of submitting evidence is to support the case. It is thus a meaningless term. It is also inaccurate and there is nothing inherently self-serving about a death certificate. I further note that this did not form part of the basis relied upon by the Entry Clearance Officer in refusing the application. Secondly, a point taken by the Entry Clearance Officer against the Appellants was the delay in registering the deaths until November 2013. The delay was explained by the Sponsor in her evidence, recorded at [33] where she stated that the documents were genuine; records were not kept during the war because there were simply too many deaths and society had effectively broken down and the Registry was also burned down. She also stated that she had arranged for the deaths to be registered in 2013 because she knew she would require this evidence in support of the applications. Whilst it was not incumbent upon the Judge to accept the Sponsor's evidence, it was incumbent upon him to make a finding on her credibility in this respect and this he failed to do, despite essentially accepting the content of her evidence on this point. Ultimately, the Judge rejected this evidence because it was uncorroborated by further evidence e.g. a witness statement from Michael Lahai's brother, who the Sponsor stated had obtained the death certificates on her behalf. It is well-established that it is an error of law to require corroboration *cf.* Kasolo v Secretary of State for the Home Department (13190). Moreover, whilst I accept that additional evidence may have assisted the Judge, equally I find that such evidence could have been disregarded on the basis that it was self-serving.

13.2. In respect of Grounds 3 & 4 and the contention that the Judge failed to apply the guidance in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049, in respect of sole responsibility and the family or other compelling requirement, I find that the Judge fell into error at [76] where he held that: "*I am satisfied that on a balance of probabilities there have been other people either within or without the sponsor's family who have been caring for Mariam and that it is these individuals who have been exercising day to day decisions concerning that child's care and welfare.*" It was not disputed that the Sponsor had delegated care of her daughter to others, initially her sister, Lois and after her death in May 2012, her ageing mother, who died on 28 August 2013 and after that, with a church member, Michael Lahai, who looked after Mariam along with her cousin and co-Appellant, Romeo. In 2014 she moved Mariam to live with a friend, Angela Bangura. However, the test as set out in TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 at [52](ix) was: "*not*

whether anyone else has day-to-day responsibility, but whether the parent has continuing control and direction of the child's upbringing including making all the important decisions in the child's life. If not, responsibility is shared and so not "sole." The Sponsor's evidence was that she had continued to make the important decisions in the Appellants' lives, including where they were to live and with whom and their education and health: [25]-[31]. The Judge at rejected the Sponsor's evidence at [75]-[80] essentially on the basis that the evidence was self-serving and it was likely that the children were living on a family compound, but there is no clear finding as to whether or not the Sponsor has retained control and direction of Mariam's upbringing. The closest he comes to a finding on this issue is at [76] where he states: *"I find that on the balance of probabilities that care arrangements that were in place and which were not necessarily being controlled by the sponsor, were satisfactory..."* Either those care arrangements were being controlled by the Sponsor or not but a finding needed to have been made on this central issue. In respect of Romeo, I consider that the Judge's finding at [80] that he is living in circumstances which are so serious and compelling that his exclusion from the United Kingdom would be undesirable is unsustainable, given that it is based on the Judge's finding at [78] that they are living on a family compound. Whilst this may have been the case when their grandmother was alive, the only basis for this finding is an undated letter from the Social Development Officer written when she was still alive, which the Judge at [74] rejects, yet it clearly forms the basis for his finding at [78] that the children are living on a compound as there was no other evidence before him to this effect. The Judge's finding at [79] that Romeo has inherited property from his mother further contradicts his earlier finding in that, if this were the case, it fails to explain why he was living on a family compound.

13.3. in respect of Grounds 5 and 6 and the contention that the Judge erred in his approach to Article 8 and in failing to give sufficient weight to the best interests of the Sponsor's British citizen child, with regard to the question of the Sponsor relocating to Sierra Leone, I agree with Ms Fijiwala that the Judge was not at [83] imposing a requirement that the Sponsor return to Sierra Leone. However, the entirety of the Judge's findings in this respect are predicated upon the basis that the Appellants are residing with and being cared for by relatives with whom they continue to reside (on the family compound) and for the reasons set out at 13.2. above I do not consider this to be a safe or sustainable finding.

14. For these reasons, I find that First Tier Tribunal Judge Traynor erred materially in law in dismissing the appeals. I do not consider that any of his findings can be sustained and therefore, the matter will have to be remitted back to the First Tier Tribunal to make findings of fact on all the material issues. Whilst I have found that the Appellants are not required as a matter of law to corroborate their case, it would assist consideration of the case to have the issues raised by the Entry

Clearance Officer addressed by way of further evidence and with regard to Article 8, for statements from the Appellants to be submitted.

Notice of Decision

15. The appeal is allowed to the extent that it is remitted for a hearing de novo in the First-tier Tribunal, to be heard by a judge other than First-tier Tribunal Judge Traynor.

No anonymity direction is made.

Deputy Upper Tribunal Judge Chapman

2 December 2015