Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/05883/2014
OA/05888/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 10th June 2015	**On 26th June 2015**

Before

UPPER TRIBUNAL JUDGE O'CONNOR
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AS
(Anonymity direction made)

First Appellant

SS
(Anonymity direction made)

Second Appellant

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellants: Mr. P. Turpin of Turpin & Miller solicitors
For the Respondent: Ms. A. Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Given the age of the Appellants we make an anonymity order in relation to each of them, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal)

Rules 2008. Disclosure or publication of documents or information likely to lead members of the public to identify the Appellants is prohibited. The Appellants are referred to herein as AS and SS.

2. This is an appeal by the Appellants against a decision promulgated on 13th January 2015 by First-tier Tribunal Judge Flower, which dismissed the Appellants' appeals against the refusals of entry clearance as dependent relatives of their Sponsor, HS, under paragraph 319X of the Immigration Rules.

3. Permission to appeal to the Upper Tribunal was granted on the basis that it is arguable that the First-tier Tribunal failed to take account of, or make findings of fact upon, evidence pertaining to circumstances at the date of the decision.

Setting aside of the First-tier Tribunal's determination

4. Paragraph 33 of the First-tier Tribunal's decision states:

> "I accept that on the face of it the social work report describes a situation which has probably been going on since at least May 2013, which is when the appellants are said to have gone to live with Mr. M. The information in this report goes far beyond what was put forward by the appellants in their original application, however. In some ways it raises more questions than it answers. It describes a complicated factual scenario and there are many apparent and unresolved inconsistencies, only some of which are outlined above. This report and the situation it describes should be considered by the respondent. I am unable to resolve the evidential conflicts that it raises today."

5. It was not disputed before us, and neither could it sensibly have been, that the First-tier Tribunal's failure (and refusal) to resolve issues of fact emanating from the social work report of Natalie Achten amounts to an error of law capable of affecting the outcome of the appeal - thus requiring the First-tier Tribunal's determination to be set aside.

6. We announced this at the hearing and directed that the decision under appeal would be re-made by the Upper Tribunal.

Re-making of decision under appeal

7. The Sponsor attended the hearing but did not give evidence. Accordingly the evidence we have taken into account is that contained in the Appellants' and Respondent's bundles and the oral evidence provided to the First-tier Tribunal insofar as its determination records such evidence.

8. The ECO refused the Appellants' applications under paragraphs 319X(ii) and (v) of the Immigration Rules. In order to meet the requirements of paragraph 319X(ii), the Appellants must show that there are "serious and compelling family or other considerations" which make their exclusion undesirable, and

that suitable arrangements have been made for their care. Paragraph 319X(v) provides that they must not be leading an independent life, or have formed an independent family unit.

9. In the case of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC), the Tribunal considered the meaning of phrase "serious and compelling family or other considerations" albeit in the context of paragraph 297. It was held that "in deciding what is meant by the rule the words need to be given their natural and ordinary meaning." [29] At paragraph [34] the Tribunal states:

> "In our view, 'serious' means that there needs to be more than the parties simply desiring a state of affairs to obtain. 'Compelling' in the context of paragraph 297(i)(f) indicates that considerations that are persuasive and powerful. 'Serious' read with 'compelling' together indicate that the family or other considerations render the exclusion of the child from the United Kingdom undesirable. The analysis is one of degree and kind. Such an interpretation sets a high threshold that excludes cases where, without more, it is simply the wish of parties to be together however natural that ambition that may be."

10. We have carefully considered Natalie Achten's report. Her CV was also provided to the First-tier Tribunal. We find that she is an independent social worker who works for a refugee trust and specialises in children. Ms Fijiwala accepted (i) that this report had been produced by an independent social worker, (ii) that it accurately described the conditions in which she had found the Appellants to be living, and (iii) that, should we find the report to be reliable, the circumstances set out therein would satisfy the requirements of paragraph 319X(ii) of the Rules.

11. However, she submitted that the Appellants and Mr. M had fabricated the circumstances in which they were purportedly living, the consequence of which is that Ms Achten's report does not properly reflect such circumstances and is not reliable. We have no hesitation in rejecting this submission.

12. It was accepted by the First-tier Tribunal that, although Ms Achten's report post-dated the application and decision, it referred to conditions which had been in place since May 2013, prior to the dates of application and decision.

13. The report describes two visits made to Mr. M's home, the first being an arranged visit, and the second being unannounced. Ms Achten described the conditions in which the Appellants were living on page 3 of her report. She stated that the family lived in a two room flat, but the bedroom used by Mr. M and his wife was in better condition than the bedroom in which the Appellants slept together with the other children. Ms Achten further stated that there were six other children, the oldest of whom was 18 years old, and the youngest of whom was only 8 months old, living in the accommodation.

"The other two rooms look completely different. The paint is getting off the wall and it is very dark. In the bedroom was only one big mattress that the children share all together. In the other room is an old couch and seats. The place was dirty and looked like a temporary home."

14. Ms Achten expressly identified that on the second visit, which was unannounced, she still found Mr. M's wife, some of his children and the Appellants at the same place. She then goes on to describe the sanitary facilities, which are located outside the house. "There is a latrine and a bathroom that are shared with surrounding neighbours. There is no running water but they buy water from a nearby tap."

15. On the second unannounced visit Ms Achten went for a walk with the Appellants outside of the home. She states "during the second home visit I noticed that SS and AS were not free to talk and took them out for a walk." She reported that SS had started crying and "opened up immediately that sometimes they are not treated well at Mr. M's place. She stated his wife and the other older children often abuse them". On the final page of her report she states "The money HS sends does not seem to be used for AS and SS …..I have my doubts that AS and SS are well taken care of at Mr. M's home."

16. On the balance of probabilities we find that the report of Ms Achten can be relied upon and conclude that it gives a clear and unbiased view of the conditions in which the Appellants are living, and were living as of the date of the ECO's decision. Any inconsistencies are contained in the information given to Ms Achten, and we find that she has reported what was told to her, as well as what she saw. We do not find that there is any inconsistency in the fact that Ms Achten was told different things by the Appellants on her second visit to what she was told on her first visit. Her first visit was prearranged and the second was unannounced. During the second visit, Ms Achten took the Appellants away from the home environment in order to talk to them alone. It is understandable that the Appellants would open up to an independent person away from the home environment, especially given that this was the second time that they had met her. Any discrepancies in what Ms Achten was told do not undermine her evidence as to the circumstances in which she found the Appellants.

17. It was submitted by Ms Fijiwala that there were other relatives in Uganda with whom the Appellants could live, namely ZS, SS's older sister. She had gone missing from the Mr. M's home. She was still missing at the time of Ms Achten's visits, and her whereabouts are still unknown. It was suggested that she might have gone to live with a boyfriend, but even if she has, neither the Appellants nor the Sponsor know of her whereabouts. At the date of the decision, she was not an adult, being only 17 years old. We do not find that it would be possible for the Appellants to live with a 17 year old, whose whereabouts are unknown.

18. It was further submitted by Ms Fijiwala that there was some significance in the fact that the death certificates for SS's aunt and mother indicate that their deaths were not medically certified, whereas there was in fact evidence in the form of medical certificates of cause of death which pre-dated the death certificates. These certificates had been provided after the application. It was submitted that therefore the death certificates were not accurate when they stated that the deaths had not been medically certified. It was suggested by Ms Fijiwala that there was a possibility that the aunt was still alive.

19. Mr. Turpin submitted that the deaths were both reported by ZS, who was only 16 years old at the time. Both deaths were reported on the same date, 2nd September 2013. Her aunt had died some three months prior to this, and her mother some two weeks earlier. There was no evidence of what ZS had taken with her to report the deaths. The original certificates were provided, and there has not been any suggestion these are false. Despite the fact that medical certificates were in existence when the death certificates were produced, we find that the certificates can be relied on to show that SS's aunt and mother have died. We find on the balance of probabilities that there are no other family members in Uganda who can care for the Appellants.

20. We find that Ms Achten's report can be relied on to show that there are serious and compelling family or other considerations which make the Appellants' exclusion from the United Kingdom undesirable. Having considered all of the evidence before us we find that the Appellants meet the requirements of paragraph 319X(ii) of the Rules.

21. At the hearing before the First-tier Tribunal, the issue of accommodation was raised for first time. Ms Fijiwala submitted that this issue had still not been addressed and that we could not be satisfied now that accommodation would become available.

22. Judge Flower was satisfied that adequate arrangements could be made to accommodate the Appellants in the UK. She states, inter alia, that "I have no doubt that assistance will be given to him [the Sponsor] to find larger accommodation should the need arise" [30]. Judge Flower relied on the evidence of Mr. Stansfield, Director of Emmaus Oxford, who has assisted the Sponsor in the United Kingdom. There is a letter from Mr. Stansfield dated 6th March 2014 at page 60 of the Respondent's bundle. There is also evidence in the Respondent's bundle to show that the Sponsor had researched available accommodation, and that he had the funds in order to be able to afford appropriate accommodation.

23. We find, as Judge Flower did, that suitable arrangements have been made for the Appellants' care in the UK, and that they will be adequately accommodated here.

24. Turning to paragraph 319X(v) of the Rules; Ms Fijiwala indicated that she had no submissions to make in relation to this paragraph but nevertheless maintained that the Appellants could not satisfy the requirements therein. We find that as of the date of the ECOs decisions, 1st April 2014, SS was 15 years old and AS was 11 years old. We find that they were not living independent lives nor had they formed independent family units. We find that both Appellants meet the requirements of paragraph 319X(v).

25. For the reasons given above we allow the each Appellant's appeal on the basis that they each meet the requirements of paragraph 319X of the Immigration Rules.

Decision

The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

We re-make the decisions under appeal, allowing them under the Immigration Rules.

Signed:

Deputy Upper Tribunal Judge Chamberlain