IAC-AH-CJ-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08530/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 10th February 2015	**On 16th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR BENJAMIN MUSOKE SSEKIMPI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Adejumobi, Legal Representative
For the Respondent: Mr A McVeety, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uganda born on 25th July 1995. He applied for entry clearance for settlement to join a parent present and settled in the United Kingdom. His application was considered by the Entry Clearance Officer under paragraph 297 of the Immigration Rules and was refused on 8th January 2013. The Appellant appealed to the First-tier Tribunal. His appeals were linked to those of his sisters' Miss Emma Cynthia Nassozi and Miss Allen Ritah Nanteza. Miss Nassozi and Miss Nanteza are the Appellant's elder sisters. The appeal came before Judge of the First-

tier Tribunal De Haney sitting at Manchester on 21st March 2014. In a determination promulgated on 15th April 2014 the Appellant's appeal was allowed. The appeals of his two sisters were dismissed. There had been no attendance before the First-tier Tribunal by the Appellant's legal representatives or Sponsor.

2. On 15th April 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 14th May 2014 Designated Judge David Taylor granted permission to appeal noting that it was arguable that the judge had failed adequately to provide reasons for his findings on major issues raised in the refusal notice and that regrettably the First-tier Tribunal Judge's reasons were not at all clear nor explained. No Rule 24 response was lodged by the Appellant.

3. It was on that basis that the appeal first came before me to determine whether there was a material error of law. At that hearing the Appellant was not represented. The Secretary of State was. Whilst the decision of the First-tier Tribunal indicated that there was no attendance on behalf of the Appellant the way in which it was written implies that may well be by way of legal representation rather than by an attendance of a Sponsor for it is clear that Judge De Haney had taken into account evidence given by the Sponsor. Having said that strong argument was put to me both in the written grounds and by the Home Office's oral submissions that such findings were wrong. For example the judge concluded at paragraph 16 that the Sponsor was forced to leave Uganda. Miss Johnstone submitted to me that that was a factual error and that the Sponsor is in fact a failed asylum seeker. Further the judge has stated that he is prepared to accept that the Sponsor has taken on sole responsibility for the Appellants and I agreed with the submission made by Ms Johnstone that there was no basis for reaching that conclusion. Further there appeared to have been no evidence to suggest that the Appellant would be permitted to be allowed to live in the accommodation that was being proposed by the Sponsor's landlord and again a lack of reasoning and findings of fact which amount to more than mere disagreement appeared to be sustainable. The Grounds of Appeal at paragraphs 3 to 8 were all sustainable. In particular the judge had not made a finding on the pivotal matter of the Appellant's age at date of application and the submissions made by the Presenting Officer at the hearing. For all the above matters there were material errors of law and I set aside the decision of the First-tier Tribunal.

4. The Secretary of State's representative at the hearing on the error of law did not press me to re-make the decision on the grounds that there was agreement that the Sponsor may well not have been notified of the hearing. In such circumstances I gave directions for the re-hearing of this matter reserving it to myself advising that there be leave to either party to file an up-to-date bundle of evidence upon which they seek to rely at the Tribunal at least seven days pre-hearing.

5. It is on that basis that the appeal comes back before me. The Appellant is now represented by his legal representative Mr Adejumobi. Also in attendance is the Sponsor Miss Grace Nizziwa. The Secretary of State appeared by his Home Office Presenting Officer Mr McVeety. The bundle remains as that that was before the First-tier Tribunal save that there is an additional witness statement served by the

Sponsor dated 20th January 2015. Again for the purpose of continuity I note that this is an appeal by the Secretary of State but the Secretary of State is referred to herein as the Respondent and Mr Ssekimpi as the Appellant.

Evidence

6. The evidence in this matter is that there were originally three Appellants all of whom sought entry clearance to the United Kingdom for the purpose of settlement as adult dependent relatives under Appendix FM of the Immigration Rules. The initial decision was made on 9th January 2013 and on appeal the Appellant's sisters' applications were refused by Immigration Judge De Haney but that the current Appellant's application was however allowed on the ground that the Immigration Judge found that he was aged under 18 at the date of application and therefore could qualify under the Immigration Rules.

7. The Sponsor in this matter is the Appellant's mother. She confirms and adopts her three witness statements in particular her latest witness statement dated 20th January 2015. She advises that she came to the UK on 29th August 2003 fleeing political persecution in Uganda. She claimed asylum but her claim was not successful. The Sponsor became an overstayer but her case was dealt with pursuant to the legacy amnesty granted by the Secretary of State some seven years later when the Sponsor was granted indefinite leave to remain in the UK and subsequent to that she has become a British citizen. She advises that neither she nor her legal representatives were advised of the hearing on 21st March 2014 before the First-tier Tribunal Judge. She sets out the factual history of this matter at paragraphs 5 to 13 of her witness statement all of which I have read and taken into account. She states that whilst in the UK she maintains contact with the children by telephone as this is quicker and easier than trying to contact them by email. When she left Uganda she left the children in the care of the convent at Lubaga. She advises that the Appellant was born on 25th July 1995 and at the time of his birth it was not compulsory to register childbirth in Uganda although the nurses would write a record of the birth if a child was born in a hospital. She states that the Appellant was born in Mulago Hospital in Kampala and she remembers that after he was born the nurses gave her a piece of paper confirming his birth. She states that she used this paper to obtain the Appellant's BCG immunisation dose given by public health nurses within the hospital.

8. Further she states that when it was necessary for the Appellant to obtain a passport in order to secure a visa it was necessary prior to making such application to have a birth certificate available. To obtain the birth certificate as a minor she advises it was necessary for an adult to sign on the child's behalf but that that adult did not need to be a parent because the parent was not providing information about the date of birth. She states that she was the person who provided this information so that when the signature was required she asked the children to go to one of the clan elders as they would be likely to know about the Appellant's father as they were members of the same clan or alternatively to remember when Benjamin was born. She advises that

this is exactly what took place and someone else signed as if he was the father. She merely states in her witness statement:

> "I am afraid these sort of things happen in Uganda anyway because people are willing to help orphans."

9. The Sponsor advises that at the time of application she had four jobs and that she lives in two-bedroomed accommodation. She produces to the court photographs. These photographs are old ones and she states that they depict the children when she left in 2002 and another photograph depicts them some years later.

10. Under cross-examination by Mr McVeety he refers to the fact that the latest witness statement refers to the birth certificate and to the suggestion (mentioned above) that someone else had signed the birth certificate. He enquires who signed it and the Appellant replies it was an elder who signed it as if he was the father. Mr McVeety therefore points out to the Appellant that the birth certificate is false even if it is her contention that it is accepted. The Sponsor's reply is that elders do sign these documents on behalf of children without their fathers and when questioned as to whether the Ugandan authorities are content with this situation she advised that she believes that they are. She further confirms that so far as the two elder children are concerned (who are of course not the subject of this appeal) they too had their birth certificates signed for by a clan elder and not by their natural father.

11. The Sponsor advises that she speaks regularly to her son and the last time she spoke to him was actually the day of the hearing and that she last saw him in May 2014. She advises that his sisters resided with him in Uganda and that the children all attended school and that she made payment towards this although she does not have receipts available from the school. She states that she last saw the children's father in May 2002 and she does not know what had happened to him since then. She confirms that there would not be objection to anyone else living in her property with her and produces a letter from the relevant agency. She further confirms that she sends money regularly to Uganda contending that she sends £1,300 a month. When queried as to how she can afford this amount she states that her income from two current jobs totals approximately £2,000 per month and that the Appellant is now at college studying computer studies for which the fees are some £200 per month and which she pays.

Submissions/Discussions

12. Mr McVeety states that he relies on the Notice of Refusal pointing out that the issue in question is that the Appellant (via his Sponsor and/or legal representatives) has to demonstrate that the Appellant is the age that he says he is and that the only evidence available is the birth certificate which cannot be relied upon. He submits that it is already conceded that somebody else has signed the birth certificate purporting to be the Appellant's father and that only two scenarios can be construed from that namely that if the Appellant's father actually had signed it then he would be still involved in the Appellant's life and that the appeal would fail on that basis. Alternatively that somebody else has masqueraded as the Appellant's father.

13. He points out that there has been no evidence produced to the Tribunal to show that the Ugandan government accepts other signatories on birth certificates and no documents have been produced to show that a child can be moved from one country to another. He therefore submits that the Appellant cannot meet the requirements of the Rules and that there has been a clear lack of ongoing contact pointing out that the last photograph that was produced is one from 2008.

14. He further submits that there is a considerable conflict in the evidence as to who has actually brought up these children pointing out that it is the Secretary of State's contention that it may well have been their natural father and that in any event if the Appellant was over 18 at date of application he cannot succeed. He points out that it is not possible to rely on the birth certificate and that if the signatory therein was not the Appellant's father then it is not unreasonable to expect that an explanation would not have been forthcoming at that time.

15. So far as Article 8 is concerned he would ask me to dismiss the Appellant's claim pointing out that he cannot succeed under or outside the Immigration Rules and that in fact all that would be taking place is the maintenance of the status quo. He asked me to dismiss the appeal.

16. Mr Adejumobi asked me to look at the evidence in the round and takes me back to the initial witness statement signed by the Sponsor in which he pointed that she had had three children and that that evidence had never been challenged. He asked me to look solely at the birth certificate in the context that it is evidence in the round although he acknowledges that the birth certificate cannot specifically be relied upon. He submits that the Appellant's date of birth is correct.

17. So far as the issues of maintenance and accommodation are concerned he takes me to the original tenancy agreement which points out the permitted occupation for the property is three persons and at present the Sponsor is living alone and therefore there would be no breach of a tenancy agreement if the Appellant were to move in with her. Further he takes me to the original bundle and the contention that at the time of the Appellant's application the Sponsor had four jobs and no dependants in the UK and he submits that she meets the maintenance requirements and contends that she has sole responsibility for him relying on the fact that whilst he was living at the convent a power of attorney was granted to the sisters but that the Sponsor still maintains sole responsibility.

18. In the alternative Mr Adejumobi submits that the Appellant should succeed pursuant to Article 8 of the European Convention of Human Rights but makes no further submissions on that point.

Findings

19. The Appellant's application is based under paragraph 297 of the Immigration Rules namely an application for entry clearance for settlement to join a parent present and settled in the United Kingdom. The Appellant's application was made on 11th December 2012. Notice of Refusal was dated 8th January 2013. It is unfortunate that

it took some fifteen months before this matter was brought before the First-tier Tribunal Judge. The judge acknowledged that the relevant law is now set out under the Immigration Rules under paragraph FM (i.e. that is the considering paragraph rather than the original paragraph 297 of the old Rules). The judge accepted that the Appellant was 17 years old at the date of application and on that basis allowed the appeal also being satisfied that the Appellant would be adequately maintained and provided with adequate accommodation having considered the financial position of the Sponsor and her accommodation.

20. The pivotal issue is the credibility and reliability of the birth certificate produced on behalf of the Appellant. Evidence has been given as to what is effectively a system of practice of birth registration in Uganda and a purported acceptance of forged documentation in order to obtain birth certificates signed by clan elders in the absence of a relative. That evidence is solely to be found in the written and oral testimony of the Sponsor. I find that birth certificate totally unreliable. Mr Adejumobi is frank enough to acknowledge that the birth certificate cannot be specifically relied upon and merely seeks to rely upon it "in the round". I find the Sponsor's testimony on this issue not to be credible. If the process upon which birth certificates are issued are as she says they were then no explanation is provided as to why such evidence was not given before the First-tier Tribunal. It is only on the re-hearing of this matter that this issue is now raised and addressed. Such failings to properly address the issue is the starting point of the lack of credibility of the Sponsor's testimony. However that is not the only basis upon which credibility is brought into issue. If such a practice is regularly adopted in Uganda then I would have expected that the Appellant and/or her representatives would at least have attempted to produce some objective or corroborative evidence regarding it. It is not as if they do not know that this is a key issue in this appeal. No such evidence is made available nor is any explanation provided as to why that is the case. That again emphasises the finding of adverse credibility.

21. In such circumstances whilst it is for the Appellant to discharge the burden of proof even allowing that that may merely be on the balance of probabilities I am not satisfied that the Appellant approaches this threshold at all. It is a requirement that the Appellant was under the age of 18 when he made his application. The evidence surrounding the Appellant's date of birth lacks any sustainability as to its credibility. Even allowing that the burden of proof is on the balance of probabilities I am not satisfied that the Appellant has shown that he was under 18 as his date of birth and therefore the Appellant cannot meet the provisions of the Immigration Rules.

22. That indeed remains the thrust of the Secretary of State's appeal which for the above reason therefore succeeds. For the record I am satisfied that evidence has been produced that if the appeal had failed the Sponsor's accommodation would be adequate for the Appellant to reside in.

23. Finally I turn briefly to the issue of Article 8. I do so because the Appellant cannot succeed under the Immigration Rules and it is therefore necessary to look at Article 8 outside the Immigration Rules.

24. In any consideration of an Article 8 claim the starting point is the law itself. Article 8 states:

    (a) everyone has the right to respect for his private and family life, his home and his correspondence;

    (b) there should be no interference by a public body with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

25. The general approach to Article 8 cases is that in *Nhundu and Chiwera (01/TH/00613)*. In those cases the Tribunal said that, in deciding claims under Article 8, there is a five stage test which must be applied in order to determine whether a breach has occurred:

    (i) does family life, private life, home or correspondence exist within the meaning of Article 8;

    (ii) if so, has the right to respect for this been interfered with;

    (iii) if so, was the interference in accordance with the law;

    (iv) if so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

    (v) if so, is the interference proportionate to the pursuit of the legitimate aim?

    Those were essentially the five questions endorsed by the House of Lords in *Razgar [2004] UKHL 27*.

26. Thereafter there has been a plethora of authorities and the law now is such that if an applicant cannot satisfy the Rules then there either is, or is not, a further Article 8 claim. That was the view expressed in *MM (Lebanon) v Secretary of State for the Home Department [2014] EWCA Civ 982* and has found support and backing in the decision of *Haleemudeen v Secretary of State for the Home Department [2014] EWCA Civ 558*. The Court of Appeal held that where the Article 8 ECHR elements of the Immigration Rules are not met, refusal would normally be appropriate but that leave can be granted where exceptional circumstances in the sense of unjustifiably harsh consequences for the individual would result.

27. That cannot be the position in this instant case. As Mr McVeety submits all that is being done is the maintenance of the status quo. The Sponsor and the Appellant have lived apart at the Sponsor's own choosing (she could have returned when she was acknowledged to be a failed asylum seeker) at her own instigation. The Appellant has been brought up at a convent and has lived with his sisters. They

have family life together. There is nothing to stop any of the children visiting the Sponsor in the UK or through other means particularly those of modern information technology i.e. Skype and email. Public interest and in particular the economic wellbeing of the United Kingdom is now a primary consideration in the maintenance of effective immigration control. There is nothing within this case that can possibly bring it within the requirements of Article 8 of the European Convention of Human Rights for all the reasons set out above. In such circumstances the Appellant's appeal pursuant to Article 8 is also dismissed.

Notice of Decision

The Appellant's appeal is dismissed both under the Immigration Rules and under Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed Date **13th April 2015**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date **13th April 2015**

Deputy Upper Tribunal Judge D N Harris