



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/20574/2013
OA/20578/2013

THE IMMIGRATION ACTS

Heard at Field House

On 15 April 2015

Determination

Promulgated

On 7 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

M A M

F A M

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellant: Mr G Hodgetts, Solicitor, instructed by South West Law

For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The appellants are nationals of Somalia born on 1 January 1998 and 1996 and are brother and sister seeking entry clearance with a view to settlement under paragraph 297 of the Immigration Rules. The decision currently under appeal was a refusal by the Entry Clearance Officer made on 25 October 2013.

2. The appellants had made previous applications which were refused on 2 August 2012, on the basis that the respondent did not accept that the appellants' mother had disappeared in December 2011 as claimed. The respondent did not accept that the sponsor had sole responsibility for the children and the Entry Clearance Officer in 2012 decided that the sponsor's income was insufficient to adequately maintain the two children. In relation to the first applications and refusals, a decision was issued by Judge of the First-tier Tribunal Burnett on 25 April 2013. He made a credibility finding against the sponsor and dismissed the appeal under the Immigration Rules and on human rights grounds.
3. On 12 August 2014 Judge of the First-tier Tribunal McLachlan heard the appeal against the refusal of the second applications made by the appellants using the decision of Judge Burnett as the starting point further to **Devaseelan** and she also dismissed the appeals under the Immigration Rules and on human rights grounds.
4. An application for permission to appeal was made on the grounds that the judge had failed to deal "properly" with the testimony of an independent third party witness, Ms S M A. She testified that she who had been told by the sponsor that his wife had gone missing, and had, on ten separate occasions, during her visit to Uganda managed to talk with the two appellant children, and gave the evidence that the children were very unhappy and that "When the girl talked about her mum she started crying. She was missing her and her siblings". It was argued that implicitly the judge accepted the independent evidence of her visit but did not deal with the substance of the witness's testimony. The criticism that the judge made that this witness had not given evidence at the previous hearing on 25 April was irrational because she could not give a direct evidence as she had not made her visit prior to that time.
5. A second challenge to the determination was that the judge had failed to take into account the witness statements of the minor appellants. Following **ZH (Tanzania) [2011] UKSC 4** the best interests of the children required the evidence to be put forward and their views sought.
6. Thirdly, there was a failure to make clear findings on whether the judge accepted the sponsor had four missing children in Somalia and to engage with the documentary evidence on that issue. The presence of the four missing children gave motivation for the sponsor's wife.
7. At the hearing before me Mr Hodgetts outlined the documentary evidence that the judge had failed to take into account and this included the Ugandan government document confirming that only two children were with M, the wife and mother, when she was issued with an asylum seeker certification on 17 November 2010. Her other children were not listed. Similarly in October 2013 a renewable asylum document again showed only two children were present in Kampala. Secondly, the Luberi Triangle parish letter confirmed the appellants were in the care of F. Thirdly, the Uganda Somali community letter of 23 March 2013

corroborated the account. Fourthly, the photographic evidence showed the sponsor's six children pictured together when younger in Somalia and, fifthly, the medical evidence that the sponsor had talked to his GP over the years concerning his depression as a result of the disappearance of his wife.

8. The fourth ground referred to the money transfer receipts. Mr Hodgetts once again at the hearing made the point that the judge's approach on this was incorrect because the sponsor would have been expected to send remittances for his children even during a time when he knew that the mother would not be there.
9. The absence of any money transfers receipts in 2011 to the sponsor's now missing wife had no relevance and was neutral in terms of probative value.
10. It was not clear whether the Tribunal accepted that the money transfers were in fact made to Ft from May 2013 to date. There was a failure to make clear whether the transfers to the respective carers was made.
11. There was an irrationality in the approach made regarding the 2010 application. It was stated it was irrational of the First-tier Tribunal to reason that the four missing children of the sponsor "would not have been listed in the application of November 2010 if he did not know the whereabouts of those children at that time". It would have been a material misrepresentation for those the applicants not to have listed the four children as dependants despite being missing. The children were still the sponsor's dependants. The fact that the whereabouts of those four children was not disclosed on the 2010 application form was consistent with the fact that there was no knowledge of their exact location.
12. Ground 6 of the application for permission to appeal related to the evidence of S in the USA, the person who had previously had care but had left for the USA. Judge Burnett rejected the fact that the wife had gone missing in part because there was no evidence that S had taken over the care of the children or had gone to America. Evidence was produced that S was living in the USA in 2014 which showed that IJ Burnett proceeded on a flawed factual basis.
13. Overall the judge failed to take into account relevant evidence and explanations from the sponsor and submissions made in the skeleton argument dealing with these matters.
14. In submissions Mr Hodgetts outlined his reasoning set out in the permission to appeal.
15. Mr Richards roundly rejected that there was a material error of law and stated on reading the decision as a whole that Judge McLachlan was entitled to follow the decision of Judge Burnett.

Conclusions

16. The key point in the determination of Judge Burnett is the whereabouts of the mother M. The sponsor described in his statement [27] that she had not seen her other four children since the end of 2009 and had left Uganda to go in search of them.
17. At [30] of Judge Burnett's determination he found that *the sponsor did not provide any information as to his wife's and his children when he entered the UK in 2006* and when interviewed stated that K was his first wife. In his statement for the appeal before Judge Burnett he stated that K was his second wife. As a result Judge Burnett found that "this interview demonstrates that the sponsor is prepared to tell lies to fulfil his desires and wishes". This finding on credibility which is separate from other findings made by the judge largely underpinned the remaining findings. A further key issue which underpinned the findings of Judge Burnett was that the children were listed in the application of the wife M to enter the United Kingdom in 2010 (they had been missing since 2009). The judge added [28] "It is notable that the sections 4.18-4.21 are not filled in. This part of the form requested information as to where the children are living and who would be travelling with the applicants."
18. Challenge was made to this but the fact is that the question asked was whether these are dependants and they were listed as dependants, not listed as missing and no information was given when it was specifically directed on the form that it should have been.
19. At [19] Judge McLachlan made a specific finding resting on that of Judge Burnett that the sponsor had not contacted any international agencies to assist in searching for his wife and the other children such as the Red Cross and Judge Burnett was not prepared to accept that M had left the children alone with S and Mo in Uganda. She found that M was still with the children and concluded that their welfare needs were being met by their mother. The judge had previously found that the mother M had listed as dependants all her six children by their names
20. However, the timeline was raised as a relevant issue in this appeal and Judge Burnett's decision was made in part on the fact that S had not shown that she had gone to the USA. Documentation was then produced but Judge MacLachlan made an error regarding the date the documentation placed S in the USA. At [30] the judge stated
"Given the significance of the change in the circumstances of the children in May 2013 as regards the supposed caring arrangements it is unsatisfactory that travel documents showing exactly when S travelled to the USA are not produced."
21. In fact the date of the earliest document was not 27th June 2014 but 12th July 2013. Thus there was an error relation to the documentation and bearing in mind the reference to the significance of the change in circumstances as identified above, I find this is an error of law.

22. There was also further criticism of the judgment in relation to the evidence of the witness, Miss A and the lack of engagement with the evidence of the children. I do find that this was evidence with which that the judge should have engaged. The judge made the point that the photographs did not demonstrate that the sponsor's wife was not there but the judge neither engaged directly with the evidence of Miss A in relation to what the children had told her despite accepting that the children were visited on ten occasions nor made any reference to the testimony of the children themselves. As asserted the witness Miss A had not made her visit by the time of the previous hearing and she could not have given direct evidence relating to the children at that time.
23. Albeit that the statements of the children were taken by telephone, their evidence was not addressed by the judge at all and the weight of the evidence not evaluated. The judge made no attempt to evaluate the evidence in relation to the children and thus it would appear that there was a failure to assess witness evidence properly
24. Where a witness account is corroborated by another witness' account this can add to its credibility **SA Iran** [2012] EWHC 2575. **AK Turkey** [2004] UKIAT 00230 confirms that *'save in those exceptional cases where the material facts are not in issue between the parties, it is an essential part of an adjudicator's responsibility to make clear findings of fact on the material issues and to give proper intelligible and adequate reasons for arriving at those findings'*.
25. The judge did make a specific finding at [40] that the appellants' mother had not left them alone in Uganda but nonetheless did not engage with the submissions made in the skeleton argument as to the explanations given by the appellant in relation to the discrepancies in the evidence.
26. I find that the errors of law perhaps by themselves are insufficient to make a material difference, nonetheless, cumulatively, may make a material effect to the outcome. As the errors of law found *may* affect the findings on credibility, they run to the heart of the decision and I set aside the decision of Judge McLachlan.
27. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement

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. The appeal involves minors.

Signed

Date 30th April 2015

Deputy Upper Tribunal Judge Rimmington