Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
OA/02275/2014
OA/02271/2014

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 7th March 2016	**On: 18th March 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

ST
MST
(anonymity direction made)

Appellant

and

Entry Clearance Officer, Accra

Respondent

For the Appellant: Mr O'Ryan, Counsel instructed by Paragon Law
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are both nationals of Guinea. They appeal with permission[1] the decision of the First-tier Tribunal (Judge TRP Hollingworth) to dismiss their appeals against a decision to refuse to grant them entry clearance under paragraph 352D of the Immigration Rules, as the family members of a recognised refugee present and settled in the UK. They seek leave to enter in order to join their mother, AK (the Sponsor).

[1] Permission was granted by First-tier Tribunal Judge Grant-Hutchinson on the 14th January 2015

The Applications and Appeal to the First-tier Tribunal

2. The Appellants' applications for entry clearance had been rejected because the Entry Clearance Officer (ECO) had not been satisfied that these children were in fact the biological children of the Sponsor. It would appear that there was good reason for that initial doubt. The Sponsor had submitted an application for entry clearance in April 2009 in which she had apparently declared that she had no dependent children. She and her partner M had arrived in the UK that same year and had claimed asylum. He had been interviewed in relation to their claim and had named his own three children, but had not said anything about the Appellants. The only evidence that the relationship was as claimed were birth certificates issued in 2003 which the ECO declined to place weight upon.

3. By the time the matter reached the First-tier Tribunal the Appellants had produced DNA evidence to show that the Sponsor is in fact their mother. The discrepancies arising from the VAF and interview were squarely blamed on their (by then former) step-father M; it was said that he and the Sponsor had split up as a result of his reluctance to support her in her efforts to bring the children here.

4. The appeals were dismissed by the First-tier Tribunal. Judge Hollingworth accepted, albeit with some reluctance, that the "family link" was as claimed. He was not prepared to accept that the children had been part of the Sponsor's household before she left Guinea. Although not in issue before him he looked in some detail at the particulars of the sponsor's asylum claim and rejected as ill-founded the evidence that she had suffered serious harm as a result of her then partner's political activities. This in turn led him to reject her evidence that she had decided to leave her two children behind in the care of a housekeeper because she had to leave the country suddenly and in haste. Judge Hollingworth considered it far more likely that the children would be left with their grandmother or one of the other family members still in Guinea at that time. He rejected her evidence that it had been M who had completed all the relevant forms because she could not write English: he found her to be an "articulate and informed" witness and he did not accept that she would have signed a form without knowing what it said. The determination appears to conclude that the children are and were at all material times living in the household of their grandmother. Paragraph 54 reads:

> "on the available evidence the Sponsor has not discharged the evidential burden that the Appellants were living in the same household unit as her former partner who entered the United Kingdom in 2009 in order to seek refugee status but did not disclose them"

Error of Law

5. At a hearing on the 2nd June 2015 the Appellants gave the following grounds for challenging the decision of the First-tier Tribunal. It was submitted that it was flawed for:

   i) Material misdirection in law. The relevant test was at paragraph 352D (iv). This required the Appellants to show that they were "part of the *family unit* of the person granted asylum at the time that the person granted asylum left the country of his habitual residence". The test applied in the determination appeared to have been whether they were part of the same *household* of the sponsor's former partner. There is a difference between household and family unit. Further there was no suggestion that the claim was founded on a link with their former stepfather. The sponsor is their mother, who has refugee status in her own right.

   ii) Irrationality, procedural unfairness and taking into account irrelevant factors in respect of the Sponsor's credibility. The sponsor has been recognised as a refugee. Her claims about the events which led to that recognition have never been challenged by the Respondent, and were not a matter which required Judge Hollingworth's adjudication. She was not put on notice that any of that was in issue. Much of the determination in taken up with his reasons for rejecting her claims to have been persecuted; this in turn unfairly impacted upon his assessment of her overall credibility.

   iii) Procedural unfairness. The First-tier Tribunal places considerable weight on a VAF in which the sponsor is said not to have named her children, and an interview in which her partner is said never to have mentioned them either. Neither of these documents were ever produced by the Respondent and in those circumstances the First-tier Tribunal was not entitled to place the weight upon them that it did.

   iv) Mistake of fact. At paragraph 13 the determination records that M had brought his own children to the UK in 2009; adverse inference is drawn from this since these applications were not made until 2013. In fact his children were brought to the UK in 2011, considerably shortening the gap.

v) Failure to consider relevant evidence. At paragraph 13 the determination states that there was "no apparent reason" why the Appellants and their 3 step-siblings did not go and live with the Sponsor's mother. In fact an explanation had been offered. That was that M had given instructions that all five were initially to be kept together, and there was no indication that the Appellants' grandmother would have been able or willing to care for three children who had no biological connection to her.

vi) Taking irrelevant matters into account. The determination's preoccupation with the presence of other family members currently in Guinea was not relevant to the resolution of the appeal: the only question was whether the children had been part of their mother's family unit when she left Guinea.

6. The Respondent was that day represented by Senior Presenting Officer Mr McVeety. Mr McVeety accepted that the determination did contain errors of fact and that ground (iv) was made out. He also accepted that the presence of other family members in Guinea (ground vi) was "completely irrelevant". In respect of ground (v) he accepted it to be arguably the case but not that this should result in the determination being set aside.

7. The Respondent's position on ground (i) was that the Appellants were correct to say that the relevant test is the family unit of the mother, but that on the findings as made by the First-tier Tribunal, this was not made out. The background facts to the asylum claim had not been in issue but the Tribunal had been entitled to look with care at the moment that the sponsor fled Guinea, since it was required to do so by the rule itself. Mr McVeety submitted that ground (iii) was factually correct in that the documents had not been produced, but that this was immaterial since the Sponsor herself appears to accept the assertions made in respect of both VAF and M's interview.

8. In a written decision dated 3rd July 2015 I set the decision aside. Having accepted the DNA tests the question before the Tribunal was a relatively simple one: were these two children part of the family unit of the sponsor at the time that she left Guinea? There was no need to embark on a forensic analysis of her asylum claim, nor indeed to make adverse findings on matters already accepted by the Respondent. Nor was there any need to conduct an enquiry into whether there were family members in Guinea then or today who are able to look after these children. The evidence was neatly divided. On the one hand the Respondent could point to the fact that the children had not been mentioned on the VAF or in M's interview. This was at least capable of suggesting that they were not living with the couple at the time that they left Guinea. On the other hand there was the evidence of the sponsor, an accepted refugee, that offered some explanation for those omissions, and the remaining documentary evidence, none of which features in Judge Hollingworth's analysis. There were

for instance photographs of the children together with their step-siblings: if they were all living together it might be thought to follow that they were all part of the same family unit at the relevant time. The Tribunal's formulation of the relevant test at paragraph 54 of the determination does amount to a material error of law. The grounds were made out and the determination set aside.

Re-Making the Decision

9. There followed an unfortunate and lengthy delay in having these appeals finally determined. This was in part because of the difficulty in securing a Mandingo interpreter, and because a hearing was adjourned due to the Sponsor being unwell. The case was finally heard on the 7th March 2016 at Field House. I heard oral evidence from the Sponsor and helpful submissions from both parties. At the end of the hearing I indicated that I would allow the appeals and I now give my reasons why.

My Findings

10. In her written[2] and oral evidence the Sponsor explained her family history as follows.

11. In 2001 she married a Mr T. They had two children, MST born in 2002, and ST born in 2003. The relationship broke down shortly after ST's birth. The children came to live with the Sponsor at her parents' home in Conakry. Mr T lived nearby at his own house and continued to see the children. Mr T is now deceased[3].

12. In 2004 the Sponsor met and fell in love with M. He was separated from his first wife with whom he had had three children. He had a daughter who was approximately 9 and twin girls who were then aged 3. M had custody of the children and they did not see their biological mother. When the Sponsor married M the families were joined together and she was left to care for all five children. In her oral evidence she told me that she had done this on her own with no help. Of her step-daughters she said "they know the care I gave them". The children grew up together. Her daughter MST was very close to the twins since they were only a year apart in age. She showed me some photographs in the bundle which showed four children sitting together. She identified the three girls in the picture as her daughter and the twins, and the boy as her son.

[2] Before me the Sponsor adopted two witness statements, dated 8th July 2013 and 3rd October 2014.

[3] The bundle contains a document purporting to be a death certificate issued in Conakry by the Ministry of Health on the 12th January 2010. This states that Mr T, a mechanic, died of heart failure.

13. The Sponsor and M hoped to add to their family by having a child together, but this did not happen. In 2009 they decided to travel to the UK in order to receive fertility treatment. M went to Sierra Leone in order to apply for their visas whilst the Sponsor remained at home with the children. In the few days that he was away the family home was attacked by people who were politically opposed to M. Finding him absent they instead attacked the Sponsor, and a security guard that the family had employed. Upon his return from Sierra Leone M decided that they needed to leave Guinea immediately. He had secured the visas for himself and the Sponsor and they were therefore able to travel to the UK. They left the children in the care of the housekeeper, with the intention of sending for them later. M left instructions that the children were to be kept together.

14. When they arrived in the UK they both claimed asylum. The basis of the claim was that M had made a number of political enemies in Guinea because of his involvement with a local politician. It was these enemies who had attacked the Sponsor and the guard. M was interviewed in respect of his claim. The Sponsor was told that the immigration authorities could not find a Mandingo interpreter so was asked to wait. When M got home from his interview (presumably conducted in French or English) she asked him if he had mentioned the children; he said that he had not. The Sponsor did not question this, since she presumed that this would all be dealt with at a later stage and she trusted M to sort it all out. In the end the authorities never managed to find a Mandingo interpreter and the claim was assessed without the Sponsor being substantively interviewed.

15. The Sponsor and M were both granted refugee status on the 2nd February 2010. They were living together in Nottingham at the time and had managed to have another child, their son who was born in December 2011. In this period the relationship started to deteriorate. The Sponsor wanted applications made for the children to all come to the UK but M insisted on his own children coming first. He promised that if his own children were successful then he would make applications for the Appellants to come. His daughters were all issued with refugee family reunion visas in 2011 and came to live with their father, the Sponsor and their new baby brother in Nottingham. The Sponsor described this period as very difficult for her. Her step daughters missed their sister and brother a lot and would cry – they would always tell her that they were praying for them to come and join them in the UK. M was stalling and giving excuses why the applications could not be made. This was "heartbreaking" for the Sponsor. In 2012 she came back from work to find that some documents, including her refugee status document, were not where she had left them. M denied having anything to do with this, which "surprised" the Sponsor since he and she were the only two adults living in the house. The arguments that this incident caused led to her finally moving out.

16. After their step-sisters left to come to the UK the Appellants were sent to live in Conakry with their grandmother. Their grandmother is not very well and cannot afford to send them to school. That is where they still are.

17. After she left M the Sponsor met a man from the Ivory Coast. They started a relationship. He helped her to get legal advice about making applications for the children. They are now in a relationship and have a child together.

18. When the Sponsor discovered that the applications had been refused, and why, she was "devastated". She states "the decision affected me badly. I was always crying and feeling very emotional. My heart breaks for my children. I am constantly upset and this is made even worse by the fact that my children cry every time I speak to them". As to the reasons for refusal, the Sponsor recognises that this was because of her own visa application in 2009 and the alleged failure of M to mention the children at interview. She squarely lays the blame for each omission on M. He never gave her an explanation why he did not mention the children on her visa application or at interview. She can only assume that it is because they are not his biological children and he did not want to take any responsibility for them. She points out that she was never given the opportunity to give this information herself. He completed her visa application form in 2009. She cannot read or write English so had no idea what he had written. She trusted him completely: "I come from a culture where as a wife I have to trust my husband's decisions and the fact that I was unable to read or write meant that I could not really question my husband and I had to assume that all he asked me to do was for both our benefit". It was M's attitude towards her children that eventually led to her leaving him.

19. In her oral evidence the Sponsor showed me a photograph of three smiling young women, in what looks like Nottingham town centre. She told me that this was taken this year and it is her (former) step-daughters. She still sees them from time to time in Nottingham and they are pleased to see her. They call her "Mama". She does not ask them about whether they have had any contact with the Appellants because they are living with their father and she is estranged from him.

20. Against this evidence, the Respondent relies on the VAF, completed online in 2009. It is completed in the name of the Sponsor and shows her to have been seeking a visa in order to travel for private medical treatment. This is consistent with her evidence that she was trying to come to the UK in order to get fertility treatment. As an online application, it is unsigned. Mr Bramble was unable to tell me if there had ever been a 'paper counterpart' ie a pro-forma completed by hand and signed by the Sponsor. At part 4, Q44, the question is asked "do you have any dependent children" to which the answer is given "no".

21. The second piece of evidence upon which the Respondent relies is the alleged failure of M to mention the children in his asylum interview. I say alleged

because the Respondent has still not produced that document, notwithstanding numerous attempts by the Appellants' representatives to have it disclosed, and the fact that its absence has been a feature of this appeal since the refusal in 2013. The Sponsor has never seen that document. What she can say is that when she asked her husband whether he had given her children's names, he said that he had not. This would tend to support the Respondent's allegation.

22. I have considered all of this evidence in the round, and I remind myself that the burden of proof rests on the Appellants who must show, on a balance of probabilities, that they were part of the family unit of their mother at the date that she left Guinea.

23. At the time of the decision to refuse the Entry Clearance Officer had the following evidence available. There was a lady claiming to be the mother of these children. She relied on birth certificates which had not been issued contemporaneously with the births. There was no DNA evidence. Against this was the fact that this lady had apparently denied having any children when she applied for her UK visa, and that her husband had subsequently listed his own children as his dependents, but not mentioned the Appellants. Entry Clearance Officers must apply strict evidential requirements before granting entry clearance to children. This scrutiny is driven in part by the need to maintain immigration control, but also by the need to safeguard against the trafficking of minors. In those circumstances it was entirely understandable that these applications were refused for the reasons given.

24. Today the position is quite different. I have available to me evidence which goes to circumstances pertaining at the time of the decision. I have the DNA evidence which establishes beyond any reasonable doubt that the Appellants are the biological children of the Sponsor. We also have the detailed evidence of the Sponsor about her circumstances and how it came to be that the visa application form did not mention the Appellants. That form is now the centrepiece of the Respondent's case, and I consider it below in the context of the Sponsor's evidence. Before I do I say something about M's interview. I have never seen that interview record and it is entirely unclear in what context the omission was made. Was it the case, for instance, that M was not asked about his family circumstances, or was he asked directly and denied the Appellants' existence? There is very limited weight I can place on a document I have never seen, and in the circumstances there is a limit to the weight I can place on evidence that did not emanate from one of the parties to this appeal. Mr Bramble fairly recognised this, but asked me to take into account the Sponsor's own evidence about what M had told her. I have done this in my overall assessment.

25. I have had the opportunity of hearing oral evidence from the Sponsor. She answered the questions put to her in a straightforward and open manner. I found there to be no material inconsistencies in her evidence. I note that the

Sponsor was recognised as a refugee in 2011 and there has hitherto never been any challenge to her credibility. I found her evidence to be detailed, cogent and consistent. I found her evidence about how the visa application form was completed by M to be credible, and consistent with the document itself. It is an online application made to Freetown and it is unsigned. I accept her evidence that she trusted her then husband to complete this form for her, and to subsequently handle all their legal affairs. She has advanced "cultural" reasons for this division of labour in the household and I have taken this into account, but I would observe that it is easy to understand how any husband, anywhere, would be left to perform such tasks when the wife has five young children to care for. She had not reason to imagine that he would, for whatever reason, give false information on that form. Whilst his subsequent behaviour might suggest a nefarious motive, it may be that there is a perfectly innocent explanation for M's mistake. For instance, he may not have considered the children to be "dependent" on his wife since he was the breadwinner. I note in this regard that he makes no mention of his own three children for whom the Sponsor had at that point been the *de facto* mother for a period of five years. The Respondent has accepted that M and the Sponsor were a married couple when they arrived, and it was subsequently recognised that his three daughters formed part of the family unit prior to the flight from Guinea: the fact that they do not feature at Q44 of the VAF would appear to suggest that it could simply have been a misunderstanding on M's part.

26. I accept the Sponsor's evidence that her relationship with M broke down because of his failure to take responsibility for the Appellants and to support their applications to come to the UK. Overall I am satisfied that the answer given at part 4 of the VAF was not given by the Sponsor herself, and that it did not reflect the true position. I have assessed her oral evidence in the round with the Respondent's evidence, the photographs of the children, the DNA evidence and the fact that her relationship with M has now broken down. Having done so I am satisfied, on a balance of probabilities, that these children were part of the Sponsor's family unit at the time that she left Guinea.

Decisions

27. The decision of the First-tier Tribunal is set aside.

28. The decision in the appeal is re-made as follows:

"the appeals are allowed under the Immigration Rules".

29. I was not asked to make a direction for anonymity but I do so because of the young age of the Appellants:

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

Upper Tribunal Judge Bruce
7th March 2016

Fees

Each Appellant paid a fee of £140 to pursue their appeal. I have allowed each appeal and I am satisfied that in light of the way that the evidence developed these fees should be returned to the Appellants. The DNA evidence was made available in April 2014 and the Respondent given an opportunity to reconsider the decisions in light of that evidence. The Respondent maintained the decision relying on two pieces of evidence, only one of which was belatedly produced.

Upper Tribunal Judge Bruce
7th March 2016