Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/03791/2018
HU/03794/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 7 February 2019	**On 27 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

[T R] (FIRST APPELLANT)
[B R] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Karnik, counsel instructed by Imaan solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are nationals of Kenya born respectively on 13 June 2013 and 10 March 2000. They made applications for entry clearance to the United Kingdom on 6 October 2017. They were sponsored by their paternal aunt, Mrs [O], who on 8 September 2017, had obtained a court order from the Nairobi Children's Court appointing her as their guardian. The background to the application is that their

father had died in May 2015, their mother was no longer in contact with them and the children had been living with their elderly and unwell grandparents.

2. The applications for entry clearance were refused in decisions dated 5 January 2018 on the basis that the requirements of paragraph 297(i)(a) to (e) were not met, as the ECO held that it was a requirement that the Appellants be joining a parent and that they were not related to the Sponsor as claimed and further that the guardianship order from the Nairobi Children's Court was not recognised by the UK under the Adoption Recognition of Overseas Adoptions Order 2013. It was accepted, however, that their aunt's offer of sponsorship was genuine and well intentioned and that the requirements for maintenance and accommodation were met.

3. The Entry Clearance Officer's decision was upheld by the Entry Clearance Manager and the Appellants appealed against the decisions to the First-tier Tribunal. The appeals came before First-tier Tribunal Judge Davies for hearing on 11 October 2018. The Appellants were not represented at that hearing, although their aunt attended and gave evidence. There was a Presenting Officer from the Home Office.

4. In a decision and reasons promulgated on 22 October 2018, First-tier Tribunal Judge M Davies dismissed the appeals primarily on the basis that the requirements of paragraph 297(i)(a) to (f) of the Rules were not met, that the adoption was not recognised under UK law and there was an absence of evidence to show that there was family life or that the continued exclusion of the Appellants would be disproportionate.

5. Permission to appeal to the Upper Tribunal was sought, in time, on the basis that the judge erred in law: firstly in failing to follow the Immigration Rules in that it is clear from paragraph 297 of the Immigration Rules that the Sponsor is eligible as a relative, the Rule not being confined to parents; secondly the judge erred in failing to consider the decision in TD Yemen [2006] UKAIT 49, the decision in MK (best interests of the child) India [2011] UKUT 00475 (IAC) and Mundeba [2013] UKUT 88 (IAC); thirdly, that the judge had made a material error of fact in stating at [12] that the Appellants live with their parents, whereas in fact they live with their grandparents. It was asserted that the guardianship of the Sponsor is recognised and that she had a guardianship order and not an adoption order. It was lastly submitted that the judge erred in failing to consider whether there were serious, compassionate and compelling grounds that should justify the appeal being allowed in light of the fact that the grandparents are very old, have signs of dementia and are unable to care for themselves or the Appellants adequately, particularly given the very young age of the first Appellant.

6. Permission to appeal was granted by Tribunal Judge Swaney in a decision dated 29 November 2018 on a number of bases and that all grounds could be argued.

Hearing

7. At the hearing before the Upper Tribunal, Mr McVeety on behalf of the Secretary of State accepted that the judge and indeed the Entry Clearance Officer and Entry

Clearance Manager and the Presenting Officer had materially erred in failing to apprehend that paragraph 297 of the Immigration Rules clearly envisages that the sponsorship can emanate from a relative and not just a parent. This is clearly correct. The parties agreed that the decision could be remade in the Upper Tribunal.

8. Mr Karnik sought to adopt the statement of the Sponsor, dated 24 January 2019, where she sets out details of her family background, in particular, that her father was born on 1 January 1928 and is 91 and that his mother is 86, that her brother, the children's father had died on 16 May 2015 in Kenya and the mother had abandoned them after the death of their father. She asserted she exercises sole parental responsibility for the Appellants, making all the major decisions in their lives and that this has arisen because her parents, due to their ages and poor health, gave their consent for her to have that care and control over the Appellants, as a result of which she applied for and was appointed as their guardian in a court order dated 8 September 2017. The Sponsor states at [8]:

> *"I regularly communicate with the Appellants by phone. I also send them money for their upkeep through money transfers. Since the death of my brother I visited both the Appellants in Kenya every year to see them and attend to their needs. I find this way of caring for them is not suitable and I need more than just an annual visit and long-distance telephone calls. I want to be with them every day so I can raise them properly. I am needed for their proper care and upbringing".*

9. The Sponsor also gave details of her income, which is in excess of the minimum income requirement and that she has one son who is a university student and only lives with them during the holidays, whereas the house has capacity to accommodate five people. Mr Karnik also sought to rely on the judgment of the European Court of Human Rights in Pini and Bertani and Others v Romania [2005] 40 EHRR 13 at [144] and [146], where the Court had found that Article 8 was engaged in a case where there were adopted children.

10. Mr McVeety helpfully accepted in light of the original decision of the Entry Clearance Officer that the only issue in contention was whether the requirements of paragraph 297(i) of the Rules were met. He accepted that there was family life between the Sponsor and the two Appellants and consequently it was open to the Upper Tribunal to allow the appeal.

Findings and Decision

11. Paragraph 297 of the Rules provides *inter alia* as follows:

> *"297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:*
>
> *(i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances …*
>
> *(f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and*

compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care …"

12. It is clear that the Appellants' Sponsor, who is also their aunt and legal guardian does qualify as a relative eligible to sponsor them within the meaning of the Rules. Mr McVeety expressly accepted that paragraph 297(i) of the Immigration Rules was met in full but, for the avoidance of doubt, I find that exclusion of both Appellants is undesirable and suitable arrangements have been made for their care in the United Kingdom. This is because they are currently being cared for by their elderly and unwell grandparents and the Kenyan Court has seen fit to grant the Sponsor a guardianship order, in recognition of her ability and willingness to take over responsibility for their care. The ECO expressly accepted that the maintenance and accommodation requirements of the Rules were met and I find that the Sponsor has made suitable arrangements for their care in the United Kingdom.

13. Mr McVeety also accepted that there was extant family life between the Sponsor and the Appellants. Applying the judgment of the Court of Appeal in TZ Pakistan [2018] EWCA Civ 1109, I find that, given that the requirements of paragraph 297 of the Rules are met, that it should follow that the appeal should be allowed on human rights grounds.

Decision

14. The appeal is allowed on human rights grounds (Article 8).

No anonymity order is made. Any fee paid should be refunded in light of my decision to allow the appeal.

Signed *Rebecca Chapman* Date 25 February 2019

Deputy Upper Tribunal Judge Chapman