



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

Appeal Numbers: OA/09247/2015
OA/09251/2015

THE IMMIGRATION ACTS

**Heard at Priory Courts, Birmingham
On 18th January 2019**

**Decision & Reasons
Promulgated
On 11th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BBA
OBA**

(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer
For the Respondents: Mr M Bradshaw of Counsel instructed by J Benson
Solicitors Limited

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against the decision of Judge J Macdonald (the Judge) of the First-tier Tribunal (the FTT) promulgated on 28th September 2017.

2. The Respondents before the Upper Tribunal were the Appellants before the FTT and I will refer to them as the Claimants.
3. The Claimants are sisters and nationals of Nigeria born 8th October 2001 and 12th July 1998 respectively. They are now 17 and 20 years of age.
4. The Claimants were both minors when they applied for entry clearance to enable them to join their father (to whom I shall refer as the Sponsor) in the UK.
5. The applications were refused on 8th May 2015.
6. The appeals were initially heard on 21st July 2016 and dismissed but that decision was subsequently set aside by the Upper Tribunal and the appeals remitted back to the FTT to be heard afresh.
7. The judge heard the appeals together on 19th September 2017 and heard evidence from the Sponsor and his son. The judge found that the Sponsor had exercised sole responsibility for the upbringing of the Claimants and paragraph 297(i)(e) of the Immigration Rules was satisfied. The judge therefore did not go on to consider paragraph 297(i)(f). The judge found that Article 8 of the 1950 European Convention on Human Rights was engaged and placed weight upon the fact that the Immigration Rules were satisfied. The judge found that refusal to grant leave to enter the UK was neither necessary nor proportionate and therefore allowed the appeals on human rights grounds.
8. The Secretary of State applied for permission to appeal to the Upper Tribunal. The grounds are summarised below.
9. It was submitted that the judge had applied an incorrect standard of proof, having applied too low a standard.
10. It was submitted that the judge had failed to make a finding on a material matter. The evidence indicated that the children had been left completely alone by their grandmother for months at a time and it had been submitted, as there was no evidence of neglect, that their mother was involved in looking after them. It was contended that the judge had failed completely to deal with this submission or the submission that there were alternative care arrangements.
11. It was submitted that the judge had erred in rejecting the submission that the Claimants' mother was involved in their upbringing, given the evidence of communication between the Claimants and Sponsor in which the Claimants refer to their mother. It was submitted that it was not open to the judge, on a balance of probabilities, to accept as credible the claim that the children in fact called their grandmother mother. There was no supporting evidence to confirm this.
12. It was submitted that the judge had erred by failing to provide adequate reasons for allowing the appeals.

13. Permission to appeal was initially refused by Judge Pickup of the FTT.
14. The application was renewed to the Upper Tribunal. It was submitted that if the Claimants' mother was not looking after the children, somebody else was. That was relevant to a finding as to the issue of sole responsibility. If the Sponsor had abdicated responsibility to someone else, then the finding that the Sponsor had sole responsibility was clearly unsustainable. It was submitted that in an appeal involving children, it cannot be dismissed as irrelevant, that the Sponsor may not have given an accurate picture as to the true position in Nigeria. If an accurate picture had not been given, the finding could not be made that the Sponsor genuinely had sole responsibility for the Claimants' upbringing.
15. Permission to appeal was granted by Deputy Upper Tribunal Judge Chamberlain in the following terms:
 - “2. It is arguable that the judge has failed to give sufficient reasons for his finding that the Sponsor had sole responsibility for his children. He has failed to engage with the evidence that the Appellants were left alone for long periods of time and the implications of this finding on who was responsible for them during these long periods. Given that it appears that the judge did not have a full picture of the Appellants' circumstances, it is arguable that he has given inadequate reasons for finding that the Sponsor had sole responsibility for them. The grounds are arguable and merit the grant of permission to appeal.”
16. Following the grant of permission the Claimants lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In brief summary it was contended that the judge had not erred in law, and had made findings open to him and provided sustainable reasons for those findings.
17. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FTT had erred in law such that the decision must be set aside.

The Upper Tribunal Hearing

18. Mr Mills relied upon the grounds upon which permission to appeal had been granted. It was submitted that the incorrect standard of proof had been used and that was fatal to the decision which must be set aside.
19. Mr Bradshaw accepted that the standard of proof referred to by the judge at paragraph 45 was incorrect. It was accepted that the correct standard should be a balance of probabilities. Notwithstanding the incorrect standard of proof, I was asked to find that there was no material error of law in the decision, and that the Secretary of State was seeking to reargue the case. I was asked to find that an explanation had been given by the Sponsor and his son as to why there was reference to “mum”, this reference was in fact referring to the Claimants' grandmother, and I was asked to find that the judge had made findings open to him on the

evidence and provided adequate reasons. I was asked to dismiss the appeal of the Secretary of State.

20. At the conclusion of oral submissions I reserved my decision.

My Findings and Conclusions

21. I find the judge erred in law and did so materially, in applying an incorrect standard of proof. At paragraph 45 the judge recorded the standard of proof as follows;

“It is for each Appellant to satisfy me that she has an Article 8 family or private life which will be interfered with by the decision under appeal. The appropriate standard of proof is that there should be substantial grounds for believing that there is a real risk of the Appellants’ human rights being breached. If that is shown, the Respondent must establish that the decision is lawful, taken in pursuit of a legitimate aim and necessary and proportionate in a democratic society.”

22. As conceded by Mr Bradshaw the correct standard of proof when making findings of fact, and when deciding whether the Immigration Rules are satisfied is a balance of probability. The standard applied by the judge is a lower standard than the balance of probability.

23. This appeal involved substantial fact-finding. Therefore, the standard of proof applied to fact-finding should be the civil standard of a balance of probabilities not the lower standard referred to by the judge. In my view the application of the lower standard of proof renders the findings made by the judge unsafe. This without more amounts to a material error of law.

24. I also find that the judge gave inadequate reasons for finding that the Sponsor had exercised sole responsibility. The judge at paragraph 60 described the documentary evidence submitted on behalf of the Claimants as not extensive. At paragraph 59 the judge found that the grandmother frequently went to the United States to stay with her daughter leaving the Claimants on their own for substantial periods of time. While in the United States the grandmother was not exercising control and direction or even day-to-day responsibility. The judge found that day-to-day responsibility did not appear to have devolved upon any particular person although it was said that next door neighbours kept an eye on the Claimants.

25. During this period of time the Claimants would have been 12 and 15 years of age. The judge did not give adequate reasons for accepting as credible the account that the Sponsor was content for this situation to carry on and did not provide adequate reasons for considering that the Claimants’ mother was not involved in their care in those circumstances, given the frequent reference by the Claimants and the reference by the Sponsor in WhatsApp communications to “mum”.

26. The incorrect standard of proof and inadequacy of reasoning means that the decision must be set aside.

27. The decision must be remade. I have considered paragraph 7 of the Senior President's Practice Statements. I am conscious that these appeals have previously been heard on two occasions in the FTT. However, there are no findings which can be preserved. There will be extensive judicial fact-finding required. The appropriate forum for such fact-finding is the FTT rather than the Upper Tribunal.
28. I therefore find that it is appropriate to remit these appeals to the FTT to be heard afresh.
29. It would seem appropriate, given the address of the Sponsor, for the appeals to be heard at the Birmingham Hearing Centre. If that is not appropriate representations will need to be made to the Tribunal. The appeals are to be heard by an FTT Judge other than Judge Moore and Judge J Macdonald.

Notice of Decision

The decision of the FTT involved the making of an error of law such that it is set aside. The appeals are allowed to the extent of remittal to the FTT with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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

Signed

Date

Deputy Upper Tribunal Judge M A Hall

18th January 2019

TO THE RESPONDENT FEE AWARD

I make no fee award. The issue of any fee award will need to be considered by the FTT.

Signed

Date

Deputy Upper Tribunal Judge M A Hall

18th January 2019