Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/05675/2019
HU/05681/2019

THE IMMIGRATION ACTS

Heard at : Field House
On : 28 May 2021

Decision & Reasons Promulgated
On 17 June 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ANWAR KABIA
AISHA KABIA

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Capel, instructed by Wilsons Solicitors LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Sierra Leone born on 15 December 2000 and 10 October 2002 respectively. They are first cousins. They applied on 5 December 2018 for entry clearance to the UK under the category of Family Reunion dependant relative of someone with Refugee Status in the UK, to join the sponsor, Fatmata Kabia, the biological sister of the first appellant and the cousin of the second appellant.

2. In their application it was explained that the sponsor had arrived in the UK on 4 April 2011 and had been kept in slavery for the purposes of sexual exploitation. She was subsequently recognised as a victim of human trafficking and granted asylum. She and her brother had lost both parents, her father having passed away in December 2000 and her mother in January 2011. They lived together until the day she fled Sierra Leone, at which time she left her brother with their paternal uncle Santigie Kabia and his daughter, the second appellant. When she arrived in the UK the sponsor lost contact with her brother but subsequently managed to locate both appellants through a friend, Abibatu Sesay, in September 2016. Their uncle had passed away in July 2016 and the two children were on their own and were destitute, living in the streets until they were taken in by a local woman, Aminata, whose family did not want them staying at the house. The sponsor was sending money to them through her friend and wanted them to join her in the UK. It was submitted that the appellants met the requirements of paragraph 319X of the immigration rules. The application included reports of The Child Welfare Society, a charity which operated in various African countries including Sierra Leone, which stated that the children were living in precarious conditions. It was claimed further that the sponsor was able to maintain the appellants from the public funds she received and that she was to be re-housed to larger accommodation so that there was sufficient room for them all to reside together. It was submitted that the refusal of the applications would be disproportionate and in breach of Article 8.

3. In the decision refusing the appellants' claim, the respondent considered that they were not qualifying family members for the purposes of paragraph 352A-352FI of the immigration rules and that Article 8 was not engaged as they had not demonstrated that they had a family life with the sponsor.

4. The appellants appealed against that decision. In response to their grounds of appeal, the respondent accepted that paragraph 319X of the immigration rules should have been taken into account, but considered that the requirements of that rule were not met in any event as it had not been shown that the sponsor would be able to accommodate and maintain the appellants without additional recourse to public funds. The respondent was also not satisfied that suitable arrangements had been made for the appellants' care in the UK. The respondent did not accept that the appellants' relationship to the sponsor had been proven, as the birth certificates and identity documents referred to in the grounds of appeal had not been provided. It was still not accepted that Article 8 was engaged on the basis of family life and it was considered that refusal of entry clearance was proportionate in any event and that there were no exceptional circumstances outside the rules.

5. The appellants' appeal came before First-tier Tribunal Judge Cassel on 12 December 2019. The sponsor and her partner both gave oral evidence before the judge. The sponsor gave evidence of the children's current circumstances, as they had since been thrown out of Aminata's house – her husband had thrown them out when she was away travelling – and were being temporarily looked after by Abibatu in her small, one-room house, where they had to sleep on the floor. The sponsor continued to be very worried about the children's health and the risks to them of kidnapping and exploitation.

6. Judge Cassel did not accept that the appellants and the sponsor were related as claimed and found that even if they were, there was conflicting evidence from the sponsor and her partner about the contact between them and no evidence of telephone contact or financial remittances. There was no evidence of the sponsor's accommodation and no evidence to support the claim that the council had agreed to move her to a larger flat so that the children could be accommodated with her. The judge did not accept the evidence of the sponsor's partner's earnings. The judge found that the requirements of paragraph 319X had not been met and he did not accept that there was family life for the purposes of Article 8. He did not consider that there was a duty under section 55 of the Borders, Citizenship and Immigration Act 2009 as the appellants were not in the UK and he concluded that the appellants could not succeed either within or outside the immigration rules. The judge accordingly dismissed the appeals.

7. The appellant sought, and was granted, permission to appeal to the Upper Tribunal against Judge Cassel's decision. Following the grant of permission by the First-tier Tribunal, the matter came before Upper Tribunal Judge Pickup on 14 October 2020. UTJ Pickup found material errors of law in the judge's decision and set aside the decision with no findings preserved. He directed that the decision be re-made in the Upper Tribunal. His reasons for so doing are as follows:

> "2. I have carefully considered the decision of the First-tier tribunal in the light of the submissions made to me and the grounds of application for permission to appeal to the Upper Tribunal.
>
> 3. The grounds argue that the First-tier Tribunal:
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> a. In finding that the appellants are not related to the sponsor as claimed, failed to make findings on the reliability of the submitted birth certificates;
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> b. Failed to have regard to relevant evidence and to give reasons;
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> c. Made a material misdirection in law as to the application of 'best interests';
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> d. Reached an irrational conclusion that article 8 ECHR was not engaged;
>
> e. Erred in finding the decision proportionate;
>
> f. Failed to take into account or give reasons for rejecting the sponsor's explanation for the absence of evidence of phone calls.
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> 4. Permission to appeal was granted on all grounds by the First-tier Tribunal on 31.3.20, considering it arguable that, notwithstanding concerns about the credibility of the sponsor and her partner, as well as the lack of evidence provided in a number of respects, the judge failed to have sufficient regard to, or properly engage with, all the relevant evidence provided, such as the Child Welfare Society evidence or those who had provided witness statements in support. "*It is, therefore, difficult to understand what view the judge took of such evidence, the reasons for that, and the reasons for why it was or may have been rejected.*" It was also considered arguably unclear whether the judge considered the welfare of the children (both appellants being minors at the date of their applications), or whether a proper analysis of the case outside the Rules was carried out.

5. At the outset of the hearing, Mr Tan indicated that he did not resist the appeal, accepting that various parts of the evidence had not been properly considered by the judge.

Relationship of the appellants to the sponsor

6. At [16] of the decision, the First-tier Tribunal Judge was not satisfied that the sponsor and the two appellants were related as claimed but did not provide any reasons for that conclusion. However, in the alternative scenario that they were related as claimed, the judge gave some reasons for concluding that the appellants had failed to demonstrate that they would be adequately maintained and accommodated in the UK without additional recourse to public funds. Reference is made to inadequate evidence of accommodation and finances. It follows that the appellants could not meet the requirements of paragraph 319X. Mr Tan maintained that this aspect of the decision did not disclose an error of law.

7. In relation to consideration outside the Rules, the judge acknowledged the best interests duty from [19] of the decision but failed to state what conclusion was reached as to best interests. On the evidence, the judge found there was little contact between the appellants and the sponsor and insufficient evidence of family life between them to engage article 8 ECHR. However, it is not clear on what basis this conclusion was reached.

8. Considered overall, I find that the decision is without adequate or cogent reasoning. There are blunt findings at various parts of the decision but no adequate explanation as to what was accepted or rejected, or why. Neither was there sufficient evidence of any adequate consideration of the evidence relied on by the appellants.

9. In the circumstances and for the reasons set out above, I find an error of law in the decision of the First-tier Tribunal so that it must be set aside to be remade.

10. After canvassing the matter with the two representatives, I have concluded that the remaking of the decision can be made in the Upper Tribunal but should be at a face-to-face hearing, Field House being the most convenient location for the two witnesses to be called.

Decision
The appeal of the appellants to the Upper Tribunal is allowed.
The decision of the First-tier Tribunal is set aside to be remade in the Upper Tribunal.
I make no order for costs.
I make no anonymity direction. "

Hearing and submissions

8. The matter then came before me for a hearing in order for the decision to be re-made. The appellants had provided further evidence, in accordance with the directions given by UTJ Pickup, in the form of a supplementary bundle containing a further statement from the sponsor, evidence of money transfers and telephone calls from the sponsor to the appellants, the sponsor's tenancy agreement and council tax statement, evidence of the

sponsor's partner's self-employment and tax returns and the sponsor's partner's bank statements.

9. The sponsor, Ms Fatmata Kabia, gave evidence before me. She explained that she had been saving her telephone cards once she realised that she needed them. Her telephone calls to the appellants varied in length because the connection was so bad and she would have to keep calling them back whenever the call was cut off. The money transfer forms now submitted showed transfers made to Anwar directly rather than to Abibatu, as Anwar was now an adult and was able to collect the money himself. Ms Kabia said that her partner, Mr Sesay, had moved in with her in August 2019 after she received permission from the local authority in July 2019. The local authority had been provided with his details but did not need to add his name to the tenancy agreement. The council tax payments were made by Mr Sesay and the statement was in his name. The local authority had also confirmed their previous advice that they would re-house her if the appellants came to the UK. Ms Kabia said that she had been applying for jobs but had not found one yet.

10. When cross-examined by Ms Cunha, Ms Kabia confirmed that she had not been working until now because she had had a baby and needed to take care of him. Her partner's income was the only income they had. He paid the rent of £500 a month. It had previously been paid through housing benefit. The money she sent to the appellants came from her partner's salary and the money she received from the government. If they moved to a bigger house, this would be through the housing association and the increased rent would be paid by her partner and also from her income when she found a job. The rent would still be discounted as it would be a local authority property. Ms Kabia agreed with Ms Cunha that a bigger property would be needed to accommodate the appellants. The appellants were still living with Abibatu and had been there since 2018, in the same living conditions. They were not destitute or homeless currently. Ms Kabia said that her mother had been part of the Bondu society and that she had been initiated into the society herself, but she did not continue to follow it. Aisha had been initiated and had gone through the first stage of the Bondu ceremony. Ms Kabia confirmed that the children attended lessons at ISU where they were taught English and Maths, but were not at an actual school. They were looking for jobs in Sierra Leone but there was no work available because of their lack of education.

11. Mr Sesay then gave his evidence. He confirmed that he had moved in with the sponsor on 15 August 2019 and that he paid the rent and council tax. He had signed a contract with BST Electrical Ltd in May 2021. Prior to that he was working for MGL, again as a contractor, but in that job he was paid per task. The work was for Waltham Forest Council. He had been working five days a week, but Covid had had a big impact on the hours of work and he had had a big drop in his income from April 2020 to April 2021. Since May 2021 the work had increased hugely as there was a backlog and he was being paid £18 an hour and working up to six or seven days a week. Mr Sesay agreed with Ms Capel's calculation that his income from the past month had been around £3456. His income would go up as he would shortly get his ECS Gold Card as a fully qualified electrician and could then earn £21 an hour. When cross-examined by Ms Cunha, Mr Sesay agreed that if

his income went up, his partner would receive less money from the government. Their rent would remain the same, but in any event he was hoping to get a mortgage by the end of the year. He also intended to buy and sell property. Prior to living with the sponsor he had lived with his fiancée and their child in a council property. He contributed to the upbringing of his child from that relationship. He had left that property in early August 2019 and lived with friends before moving in with the sponsor. They were married on 19 December 2019 in a civil marriage. He had a child with the sponsor. Mr Sesay said that he did not know about the father of the sponsor's eldest child and he did not know why the sponsor had left Sierra Leone. He was from Sierra Leone himself and had last visited there in 2018. He had a sister there and a nephew, but his sister would not be able to look after the appellants as they lived a long way away from her.

12. Both representatives made submissions before me.

13. Ms Cunha submitted that there was insufficient evidence to show that the appellants were destitute or in danger of becoming destitute imminently. In any event, leaving two adults destitute in Sierra Leone would not infringe the UK's obligations under the ECHR. The appellants' relationship to the sponsor did not fall within the immigration rules and did not constitute family life outside the rules under the principles in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Rai v Entry Clearance Officer, New Delhi [2017] EWCA Civ 320. In the alternative, the public interest outweighed the appellants' interests and the UK had to protect its own resources here. Ms Cunha submitted that it was not accepted that the appellants were 'relatives' for the purposes of paragraph 319X as they had not been part of the same household as the sponsor before she came to the UK, but in any event there were no serious and compelling family or other considerations as they were being looked after in Sierra Leone. Their best interests were served by being in a place where they were being looked after. No weight should be given to the Child Welfare Society reports as they were speculative in stating that the appellants would become destitute if they did not come to the UK. The appellants had formed an independent life in Sierra Leone and did not, therefore, fall within the immigration rules at the time of the refusal decision. The previous and current situation was that the appellants would not be accommodated and maintained adequately without recourse to public funds. They would be a burden on the taxpayer and, furthermore, they were now adults. The refusal of entry clearance was proportionate.

14. Ms Capel submitted that the appellants met the requirements of paragraph 319X as children of a relative who was a refugee in the UK. They met the requirements in terms of relationship to the sponsor. As for the accommodation and maintenance requirements of the rules, Ms Capel invited the Tribunal to consider the unusual circumstances of Covid 19 in assessing whether the sponsor could meet the threshold. Ms Capel relied on the HMRC self-assessment at pages 33 to 34 of the supplementary bundle which showed an income for 2020/21 for the sponsor's partner, after tax, of £18,167.67, and an average weekly income during the pandemic of £348.44, by her calculation. She submitted that the situation for May 2021, after the pandemic, was very different, and relying upon the documents at pages 39 to 43 she calculated an average weekly income of £864. That compared with the Government's income support threshold for a couple over 18 with four

children of £391.20. That was sufficient to demonstrate adequate funds for the appellants. As for the accommodation, the current residence would not be statutorily over-crowded, but in any event there was enough leeway in the sponsor's partner's income to enable them to move to a larger property. The appellants had a family life with the sponsor, for the purposes of Article 8, given that the immigration rule itself allowed for that. The appellants had not formed an independent life and their best interests were not being met where they were, as their lives were in danger. Ms Capel relied upon the Child Welfare Society reports as independent evidence of the appellants' circumstances. There were compelling reasons outside the immigration rules and the proportionality balance was in the appellants' favour.

Consideration and findings

15. I start by setting out the provisions of the relevant immigration rules, in paragraph 319X:

> "Requirements for leave to enter or remain in the United Kingdom as the child of a relative with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection.
>
> 319X. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that:
>
> (i) the applicant is seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee or person with humanitarian protection; and:
>
> (ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection 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; and
>
> (iii) the relative is not the parent of the child who is seeking leave to enter or remain in the United Kingdom; and
>
> (iv) the applicant is under the age of 18; and
>
> (v) the applicant is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (vi) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join without recourse to public funds in accommodation which the relative in the United Kingdom owns or occupies exclusively; and
>
> (vii) the applicant can, and will, be maintained adequately by the relative in the United Kingdom without recourse to public funds; and
>
> (viii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, holds valid leave to remain in this or another capacity."

16. As this is a human rights appeal, the starting point is whether family life has been demonstrated for the purposes of Article 8(1). There was no challenge by Ms Cunha to the relationship between the appellants and sponsor. Her challenge was to the existence of family life for the purposes of Article 8(1), but she did not dispute the claim that they were related as siblings/cousins. The relevant birth and death certificates have been produced which confirm the relationships as claimed and I note also that the author of the Child Welfare Society had no doubt as to the relationship, having interviewed the appellants twice (see [43] of the later report).

17. There was some discussion about the anomaly arising from a possible scenario where it was considered that the appellants' relationship to the sponsor did not amount to family life for the purposes of Article 8(1) but the appellants otherwise being able to meet the requirements of paragraph 319X on the basis of simply being 'relatives', there being nothing within the rules to suggest that 'relative' was defined by 'family life'. That was resolved by both parties agreeing that the immigration rules were human-rights compliant and, as this was effectively a family reunion rule, it must be the case that it envisaged that an ability to meet the requirements of the rules necessarily accepted that family life was established.

18. In any event, I accept that there is a subsisting family life between the appellants and the sponsor on the basis of the available evidence. Although the appellants and the sponsor have not lived together for several years and had had no contact for a period of about five years, the circumstances which arise in cases of refugee family reunion are such that periods of separation are inevitable. It is clear from the evidence, which I accept, that the sponsor has been supporting the appellants financially for some time and that there is regular telephone contact between them. Such contact and support, and the strength of the family ties, is confirmed in the Child Welfare Society reports. In the light of that evidence, I accept that family life exists, and that it exists despite the fact that the appellants are now over the age of 18, on Kugathas principles.

19. With regard to proportionality, the starting point is the consideration of the appellants' ability to meet the requirements of the immigration rules, both at the date of the respondent's decision to refuse entry clearance and at the current date. Having found that the relationship requirement is met, I turn to the requirement in paragraph 319X(ii) for there to be serious and compelling family or other considerations making exclusion of the child undesirable. I find that that has been established, both at the time of the respondent's decision and at the current time.

20. I accept the evidence before me as demonstrating that, since the death of the second appellant's father and the first appellant's uncle Santigi, in July 2016, the children's situation has been precarious and any care received, from Aminata and Abibatu, has been temporary. I do not agree with Ms Cunha that there has developed an independent family unit formed in Sierra Leone, but it seems to me that the appellants continue to rely on the sponsor for their financial support and for arrangements for their care pending the resolution of their application to join her in the UK. There is a detailed and persuasive independent report of the children's circumstances in Sierra Leone, from the Child Welfare

Society, which provides a picture of the compelling circumstances in which the appellants find themselves and attests to their vulnerability. There are two reports, the first dated 14 November 2018 and the second dated 4 December 2019. Focussing on the second report, I note the confirmation, at the bottom of page A25 of the appeal bundle, of the assessment of the appellants' circumstances as being totally independent and it is clear that their circumstances are consistent with those related by the sponsor in her evidence before me. The report, at [30], refers to the deterioration in the appellants' emotional situation and, at [32] and [33], to the risks they were facing – for the second appellant, of being forced to join the Bondo Society and of rape and being forced into prostitution and for the second appellant, of being symbolically killed or mutilated. At [36] the report refers to their current living situation as "devastating" and of the children being "extremely vulnerable". The report concludes at [56] that it is clearly in the appellants' best interests to join the sponsor in the UK. I do not agree with Ms Cunha that that is a purely speculative opinion. On the contrary, it is clearly based upon a careful and detailed analysis of their situation.

21. However, that is not the end of the matter. The ability of the sponsor to accommodate and maintain the appellants without recourse to additional public funds remains a contentious issue. The respondent, in refusing entry clearance, considered that the requirements of the immigration rules were not met in that respect and, in the appeal before the First-tier Tribunal, Judge Cassel also considered that the limited evidence before him did not show that the requirements were met. Although Judge Cassel's decision was ultimately set aside with no findings preserved, it is of note that the grounds seeking permission to appeal his decision did not challenge his findings in that regard and that was not a ground upon which permission was granted or which was found to be in legal error. There is no further evidence of the sponsor's partner's income at that time or at the time of the respondent's decision refusing entry clearance and the evidence was that the sponsor was herself dependent upon public funds at that time. Accordingly, for those reasons, I find that the appellants were not able to meet the requirements of paragraph 319X, with particular reference to paragraph 319X(vii), at the date of the relevant decision. That is of course a factor weighing against the appellants in the Article 8 proportionality balancing exercise.

22. Turning to the current situation, Ms Cunha maintained the position that the requirements of paragraph 319X could not be met in relation to accommodation and maintenance, although with no particular analysis of the evidence provided. Ms Capel, however, presented calculations based upon the evidence of the sponsor's partner's income during the pandemic and in the weeks following the lifting of the lockdown restrictions in submitting that the requirements were met at the current time. Those calculations showed that the income available to the sponsor and her husband was, on the basis of Mr Sesay's contract with BST Electrical Limited, well above the income support threshold for a family of six. Even taking account of the rent paid by the sponsor's partner and the council tax payments, that appears to be the case. I take on board Ms Capel's submissions in relation to the impact of Covid 19 on the sponsor's partner's income and, given the nature of his work, am prepared to accept that his income is likely to increase, as suggested by the four payslips from BST Electrical Ltd, although I would assume that the sponsor's access to Universal Credit would then decrease. The evidence of the sponsor's

partner's income is, admittedly, somewhat limited, consisting of only four payslips without bank statements for the relevant period showing corresponding entries. However, the bank statements for the previous period show regular weekly remittances and I have the oral evidence of Mr Sesay which I accept. Indeed, Ms Cunha did not challenge that evidence and I am prepared to accept, on the balance of probabilities, that there is sufficient to demonstrate that the appellants' presence in the UK would not lead to further recourse to public benefits. Likewise, with the accommodation available to the family, Ms Capel submitted that the sponsor's house, consisting of two bedrooms and a living room, would not be statutorily overcrowded with the presence of the two appellants, and again that was not challenged by Ms Cunha. In such circumstances the proposed move to a larger council property would not be a material consideration.

23. In conclusion, and drawing the above considerations together, I make the following findings. I accept that Article 8(1) is engaged on the basis of family life between the appellants and the sponsor, despite the appellants no longer being minors, but considering their level of financial and emotional dependence upon the sponsor, albeit from afar. As for proportionality - aside from the appellants' age at the current time being 18 and above, the requirements of paragraph 319X would be met in terms of the family connection and the compelling family and other considerations, as well as the accommodation and maintenance requirements as discussed above. Whilst that cannot assist the appellants in actually meeting the requirements of the immigration rules *per se*, it is a matter of significant weight in the proportionality balancing exercise, particularly when considering that they were both minors at the time the application was made and are currently only 18 and 20 years old. As caselaw has established, there is no "bright line" to be drawn once a child turns 18. It is clear that the appellants are still very much dependent upon the help of the sponsor and any care provided to them in Sierra Leone through the sponsor and that their best interests undoubtedly lie in joining their only living family member in the UK. For all of these reasons, and in light of the very compelling reports from the Child Welfare Society, I accept that there are particularly compelling circumstances justifying a grant of entry clearance outside the rules and that the public interest is outweighed as a result of those particular circumstances. I would according allow the appellants' appeals on Article 8 grounds.

DECISION

24. The making of the decision of the First-tier Tribunal involved an error on a point of law and has been set aside. I re-make the decision by allowing the appeals.

Signed *S Kebede*
Upper Tribunal Judge Kebede Dated: 3 June 2021