IAC-AH-SC/FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/07536/2019
HU/07538/2019
HU/07540/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On 11 December 2020	**On 21 January 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

BRP (FIRST APPELLANT)
ADACP (SECOND APPELLANT)
YNDK (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER – UKVI SHEFFIELD

Respondent

Representation:
For the Appellants: Mr D Eteko of Iras & Co
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of the Côte d'Ivoire. They applied for entry clearance as dependent children to join their mother and sponsor F K (a citizen of Côte d'Ivoire) in the United Kingdom. The application was refused on 24 December 2018.

2. The reasons for refusal were first that it was not accepted that the appellants were the children of the sponsor as alleged because their births were not registered until 2018

and secondly that it was concluded that they had not met the requirements of paragraph 297(i)(a) to (f) of HC 395 because they had not shown that a parent present and settled in the United Kingdom had sole responsibility for their upbringing. The appellants appealed to the First-tier Tribunal.

3. The sponsor F K gave evidence that she had lived with the children until she left for the United Kingdom in 2008. She had left the children in the care of her niece (A K Y) and following A K Y's death the children were left in the care of a cousin, (A K). The appellants had lost their birth certificates when they moved house and had to obtain new birth certificates in order to obtain new passports.

4. She said that she was in contact with the appellants every day and had spoken to them on the morning of the hearing and kept in contact via WhatsApp, Messenger or an internet calling app, Libon. The two eldest children had their own phones.

5. She had visited Côte d'Ivoire in 2013, for two months, and for five or six weeks in 2015. She had not been able to return subsequently.

6. She said that she made the decisions on education, schooling and healthcare. She had a doctor in the Côte d'Ivoire and when the children were ill she called the doctor and they saw him. She paid all the fees. It was put to her that there was a lack of evidence of contact between her and the doctor of the payment of the fees and she said the doctor had provided a report, but in fact there was no report in the appellants' bundle. The sponsor then said that she sent money to her cousin and they paid the fees.

7. She said that she sent money to Côte d'Ivoire every month when she was paid, on occasion it was twice a month, depending on their needs. She had started sending money in 2009. Initially she had sent money to her niece via someone else and then got her own account and sent money directly to the niece. She named four intermediaries to whom she had sent money.

8. She was referred to evidence in the bundle including a summary of money transfers she had made between 3 September 2009 and 3 July 2018. She was asked who the many different named recipients were (the judge noting there were at least ten different named recipients) and she said they were her cousins, children of her brother who had passed away. She supported them because her children were there. She still supported her brother's children because the appellants were with them now. She was asked how much money she now sent and how often and said that when she was paid and did not have her own money issues she sent the equivalent of about £400 and she sent money whenever they asked for it or needed it and sent money every month no matter what.

9. She said that none of the appellants was in contact with their fathers. The fathers did not look after them and she had no contact with them. With regard to a statement dated 29 August 2018, the providers of this were her cousin K A and her husband A Y M. She was referred to a photograph at A20 and said that the photograph in the

top left corner of the page was her and the appellants in 2015 when she visited them after her niece had died.

10. The sponsor's husband K P T gave evidence and among things he said that they had not been able to apply for the appellants to come to the United Kingdom earlier because the sponsor had not had steady employment and had not been granted indefinite leave to remain. He said that no-one but he and the sponsor supported the appellants.

11. The judge did not accept that the evidence showed that the sponsor was the biological mother of the appellants. She was concerned by the fact that there was nothing linking the appellants' birth certificates with the granting of the passports. She expressed some surprise that no DNA test results have been provided to establish the parental link between the sponsor and the appellants.

12. She found that in the alternative had she found the appellants to be the biological children of the sponsor she would have not have accepted that the appellant had shown sole responsibility. The appellants had shown that the sponsor had made many payments over a long period to a large number of people in Côte d'Ivoire. She considered there was no evidence to the standard of proof required that the payments were made for the upkeep of the appellants. The brief statement from the sponsor's cousin and her husband, to which I have referred above, said no more than that they confirmed that since her departure from Côte d'Ivoire the sponsor had entrusted her three children to them and they had been caring for them since under her directions. The judge observed that this was entirely inadequate as a piece of evidence and that it consisted of one sentence of actual evidence and it contradicted the sponsor's evidence because it said that they had looked after the appellants since the sponsor's departure from Côte d'Ivoire. She went on to consider the application of section 55 of the Borders, Citizenship and Immigration Act 2009 to the facts of the case and concluded that the decision appealed again would not cause the United Kingdom to be in breach in its Article 8 obligations because the appellants had not shown exceptional circumstances and refusal would not result in unjustifiably harsh consequences for the appellants such that refusal of their applications would not be proportionate.

13. The appellants sought and were granted permission to appeal against this decision on both grounds.

14. Subsequently the results of DNA tests were provided to the Tribunal which showed conclusively that the appellants are related to the sponsor as claimed.

15. In the circumstances Mr Clarke said that he did not challenge the appeal with regard to the relationship between the appellants and the sponsor and also accepted that the judge's findings at paragraph 64 of the decision were probably flawed in the assessment of Article 8 and the weight attached to the failure to establish a parental relationship. He maintained however the argument with regard to sole responsibility.

16. In his submissions Mr Eteko argued that considering the totality of all the evidence on a balance of probabilities the sponsor had made out her case. He referred to the evidence in the bundle at page 10 to page 111 and at pages 157 to 173. The sponsor had arrived in the United Kingdom and was the only person who had been looking after the children and took all the decisions affecting their lives. The Secretary of State had not challenged this evidence. The decision to entrust the appellants to a family member was solely taken by the sponsor and also after the death of her niece she had decided to ask her cousin to look after them and decided to bring them to the United Kingdom. She was not a big earner and the cost of the application and the appeal had been significant. There was a clear indication of a keen interest vis a vis her children. This could be seen for example in the record of payments at page 71 of the bundle. The judge's findings with regard to the evidence was inadequate and she had failed to look at all the evidence and take it at its face value. In fact she had accepted at face value what the Presenting Officer had said. In light of all the evidence sole responsibility was made out and it was relevant to bear in mind that it could be for a short period as held in the case law.

17. In his submissions, Mr Clarke argued that there were really three issues. First, that the judge had applied the wrong test, second that she had failed to take into account relevant evidence and third with regard to the inconsistency point as between the sponsors and the cousin's evidence.

18. On the first point, it was clear that the judge had set out the test correctly as could be seen from paragraph 53 of her decision. She was clearly aware that the test was whether the parent had continuing control and direction over the child's upbringing, including making all the important decisions in their life.

19. With regard to the second point, though Mr Clarke did not have the appellants' bundle, Mr Eteko had confirmed the relevant pages and that they were not translated. Rule 12(5)(b) required translation so the judge could not be criticised for not taking that evidence into account.

20. As regards the contention that the judge has not taken the sponsor's visits to the Côte d'Ivoire into account and the argument that she had not considered the entrusting of care to relatives and the sponsor's decision to bring the children to the United Kingdom, it was clear that the entrusting of care to relatives had been considered, for example at paragraph 57 and the comments with regard to the cousin's evidence. As regards the other matters, there was no mention of those at paragraphs 57 to 59, but in light of the test in TD (Yemen) [2006] UKAIT 00049, the sponsor had only made two visits to the Côte d'Ivoire, in 2013 and 2015 and it was impossible to see how that could be probative of care and control and likewise with regard to the decision to bring the appellants to the United Kingdom, as that was a prerequisite to an application.

21. As regards the issue of the inconsistency, the judge had been entitled to find as she did in that regard at paragraph 57.

22. By way of reply Mr Eteko accepted that some of the evidence was untranslated but it could not be looked at in isolation. It had to be considered in the light of all the other evidence produced for the appeal. The key issue was the real world situation that responsibility would have been shared as the sponsor would have left the family at home so the children had to be left with family members but because the sponsor could not take the children to school every day and was in a different country the question was who had the last word with regard to the children's lives. In the light of the evidence the sponsor had shown that she was that person. She had made the applications for them to come and had arranged for the DNA test and the case was therefore made out. The judge had been swayed by her findings about the relationship and it was more likely that if that mistake had not been made she would have come to a different finding.

23. I reserved my decision.

24. The outstanding issue, by agreement is that of sole responsibility. As the judge clearly understood, at her paragraph 53, where one parent is not involved in the child's upbringing because she or he has abandoned or abdicated responsibility the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent has continuing control and direction over the child's upbringing including making all the important decisions in the child's life.

25. I have set out above the sponsor's oral evidence with regard to the care and control that she exercises in respect of her children.

26. In her witness statement, dated 28 January 2020, she said that she had decided to entrust her children to her now deceased niece. She herself supported them financially and visited them regularly and after the death of her niece she entrusted her children to her cousin. She said that in light of the financial position of her and her husband they had to plan, save money and allow time for her children and her spouse to establish bonds and they made the decision to apply for the children to join them in 2018. Her evidence is essentially supported by her husband's witness statement of the same date.

27. As has been noted, a good deal of the evidence in the bundle is untranslated and therefore the judge, as Mr Clarke argued, cannot be criticised for not taking it into consideration. The only evidence from those in whose care the children were placed in Côte d'Ivoire is the joint statement of the sponsor's cousin and her husband, to which I have referred above. As I also noted above, the judge observed that the sponsor had made many payments over a long period to a large number of people in the Côte d'Ivoire and the evidence did not show that the payments were made for the upkeep of the appellants. I have not been taken and nor does it appear that the judge was taken to any other evidence to go to show the necessary continuing control and direction over the children's upbringing. As the judge observed, there was no documentary corroboration such as a report from a doctor who the sponsor said she

paid to treat the appellants. The report she said had been provided was in fact not in the bundle and has not been produced.

28. In my view the judge was fully entitled to conclude as she did with regard to sole responsibility. There was, as noted above, a dearth of evidence to show the necessary continuing control and direction and the making of all the important decisions in the children's lives. It is the case that the judge did not specifically refer to the fact of the two visits that the sponsor made to Côte d'Ivoire, other than recording those visits in this regard, at paragraph 21. But, as Mr Clarke argued, it is impossible to see how that can be said to be probative of care and control. Likewise with regard to the decision to bring the children to the United Kingdom, that is of course, as Mr Clarke also observed, a prerequisite to a case being brought in respect of this Immigration Rule. There is no materiality to the failure to refer specifically to either of those matters. There is also the point that the judge was entitled to attach relevance to the fact that the statement of the sponsor's cousin and her husband was on the one hand very brief and also contradictory of her evidence.

29. As a consequence I consider that the judge was entitled to conclude as she did about sole responsibility in this case. Though it is common ground that she erred with regard to the relationship, her decision on sole responsibility has not been shown to be marred by any error of law and as a consequence her decision dismissing the appeal in this case is maintained.

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.

Signed Date 8 January 2021
Upper Tribunal Judge Allen