IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005244 & UI-2022-005245
First-tier Tribunal Nos: HU/55386/2021
&
HU/55385/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 August 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

AD & AB
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Lotay of Derby Immigration Aid Consultants
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard by remote video at Field House on 4 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellants] (*and/or any member of their family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify the appellants (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. By the decision of Upper Tribunal Judge Perkins issued 28.1.23, the sibling appellants and nationals of Gambia have been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Caswell) promulgated 2.8.22 dismissing their linked appeals against the respondent's decision of 28.7.21 to refuse their applications for Entry Clearance to settle in the UK as the children of their sponsoring mother, PG, a British national.

2. The appellants have different fathers but the same mother. When PG came to the UK as a spouse in 2010, the appellants were left with their maternal grandmother, until the latter's death in 2020. They then lived with a family friend, AF. It is said that their father has played no role in the lives of the appellants. It is relevant to the claim that the conditions in which they live are said to be overcrowded and dire.

3. In relation to the issue of sole responsibility, at [28] of the impugned decision, the judge found an absence of reliable evidence to show that the sponsor had been exercising sole responsibility for AB.

4. At [29] of the decision, the judge went on to consider serious and compelling family or other reasons under 297(1)(f), providing cogent reasoning for finding that requirement of the Rules not met. Outside the Rules, in relation to article 8 ECHR, it was accepted that there was family life between the appellants, the sponsor and a half-sibling in the UK, the judge referring to "*relationships have been carried on over many years at a distance, with very occasional visits, and supported by modern means of communication*," but found that family life could continue in this way without substantial interference. The appeal of each appellant was dismissed.

5. In summary, the grounds argue that the sole responsibility finding was not adequately reasoned given that the evidence was that no-one other than the sponsor was exercising sole responsibility. It is submitted that in a one-parent case the starting point should be that the sole active parent will likely have sole responsibility. It is also argued that the judge failed to properly consider the "massive amount of evidence of electronic communication in front of her when concluding that the sponsor was not exercising sole responsibility." The remaining grounds argue that there was a failure to consider and take into account all the evidence relating to AB's health problems as a consequence of FGM, and that given the evidence that the appellants were living in dire and overcrowded accommodation, and taking into account the duty to have regard to the bests interests of a child, there were serious and compelling factors making exclusion undesirable. Finally, it is argued that by not putting concerns about the risk of sexual abuse of the child to the sponsor, the appeal hearing was procedurally unfair.

6. In granting permission on all grounds, Judge Perkins considered it arguable that the finding that PG does not have sole responsibility is inadequately explained in the face of evidence that only the mother is exercising responsibility, stating "*It is arguable the judge did not consider properly the evidence of electronic communication when concluding that the mother was not exercising sole responsibility. Further I am concerned that (the) finding that (there) are no "serious and compelling" factors when the evidence appears to be that the child is living in very crowded conditions(s) with a family who intended to offer only temporary accommodation after AB's grandmother's death*."

7. AD was an adult (over 18) when the application for leave, the refusal of which is the subject of this appeal, was made, so he cannot qualify under paragraph 297 of the Immigration Rules. However, Judge Perkins also granted permission in his

case "*because he claims to have a very close relationship with his half-sister, AB, and success in her appeal might impact on the article 8 findings in his.*"

8. It follows that the primary issue in the appeal in relation to AB is that of sole responsibility. Only if AB succeeds in the appeal can AD potentially succeed, and only on article 8 family life grounds.

9. The Upper Tribunal has the Rule 24 replies, dated 2.8.23, and has recently received an appellant's bundle, an appellant's skeleton argument (ASA), dated 23.7.23, and Mr Melvin's respondent's skeleton argument, dated 2.8.23, all of which has been carefully considered. Mr Lotay confirmed that all of the material in the appellant's newly served bundle was before the First-tier Tribunal at the appeal hearing in July 2022.

10. Following the helpful submissions of both representatives, I reserved my decision to be provided in writing, which I now do.

11. In relation to the grounds relying on AB's health issues, I am satisfied that the medical evidence was woefully inadequate and insufficient to demonstrate that AB is in need of medical treatment for the effects of FGM, which took place as long ago as 2012. The only medical evidence after 2014 was from 2020 and related to antibiotic medication for a urine infection and a hospital visit in August that year. The judge addressed this evidence at [24] of the decision and also accepted that the sponsor visited Gambia in 2014 when AB was in hospital for three weeks. This evidence was also referred to at [9] of the decision and the claims of need of further treatment referenced at [7], [9] and [10]. I am satisfied that the judge was entitled to conclude that there was no reliable evidence that AB was in need of medical treatment for FGM or of a further operation which cannot be performed in Gambia, as claimed. However, it was accepted that AB had been subjected to FGM despite being in the care of her grandmother, who is said to have gone against the sponsor's wishes.

12. Whilst it was said that the appellants are grieving the loss of their grandmother, there was no reliable evidence that this remained a significant issue when the grandmother passed away some 18 months before the First-tier Tribunal appeal hearing in July 2022. Many of the other assertions made by or on behalf of the appellants and/or sponsor were without proper evidential foundation, such as the claim that although an adult, AD is not regarded as independent in Gambian society.

13. In relation to the welfare and best interests of AB, the judge had the benefit of an Independent Social Work report, based on remote interviews with the appellants but, when considering the weight to be given to this evidence, the judge was entitled to note that discussion with AB was less than 10 minutes long. The judge was undoubtedly entitled to observe that the author of the report appears to have accepted the claims of the sponsor without close examination. Neither had the issue of the considerable delay in making the immigration application, nor the possibility of AD making a home for himself independently, been adequately dealt with in the report. At [28] the judge concluded that the report, "*relies heavily on, and adopts, the sponsor's claims, so in my judgement is not reliable*." I am satisfied that the judge was entitled to give only limited weight to the report, for the cogent reasons outlined, weight being a matter for the judge.

14. I am not satisfied that the finding that there was no risk of sexual abuse demonstrates any procedural unfairness. It was the appellants' case that AB was at risk of sexual abuse but the foundation for that was the FGM inflicted on her in 2012. I am not satisfied that there was any requirement to put this issue to the

sponsor at the appeal hearing, the judge simply found no reliable evidence of a present risk of abuse.

15. However, I am not satisfied that the issue of sole responsibility was adequately addressed. At [28] of the decision the referred to TD (Yemen) [2006] UKAIT 49, and the lack of documentary evidence to demonstrate that the sponsor had been exercising continuing control and direction of AB's life, including making the important decisions. The judge acknowledged that there was limited evidence in support from AF but observed that there no independent documentary evidence, such as from the school, medical practitioner, or a religious body. One might have expected such evidence and it would have been reasonably possible to obtain it. Neither was there any statement from the adult AD, who was then 20 years of age. On the other hand, the evidence was that no one other than the sponsoring mother was exercising responsibility for AB. The judge made no finding that AF or anyone else was exercising part of the responsibility for AB. The point was made in submissions that where only one parent is involved in the care of a child, the starting point should be that that parent has sole responsibility. There were some factors mitigating against sole responsibility, including the length of time before the application was made. However, there was also evidence supporting sole responsibility, including electronic communication, and visits to the appellants in Gambia, which, whilst referenced by the First-tier Tribunal, does not seem to have been brought into account in the sole responsibility assessment. Even discounting the social work report, the evidence demanded a better reasoned and more balanced assessment. Considering the matter as a whole, I am satisfied that the reasoning provided for the adverse finding is insufficient or inadequate, so that there is an error of law in the making of the decision.

16. In relation to the issue of serious and compelling circumstances under paragraph 297(1)(f) of the Immigration Rules, the evidence was that AF has two wives and several children of his own and that the arrangements for care were intended to be only temporary. Whilst little weight was given to the independent social work report, and the medical evidence was inadequate, there was no real challenge to the assertion that the appellants are living in dire circumstances. AF's evidence together with that of the sponsor supported the claim that the appellants were living in overcrowded and dire circumstances, having to sleep on the floor, yet the judge made no finding of there being serious and compelling circumstances. I am not satisfied that the findings on this issue were adequately reasoned. This is also an error of law.

17. Whilst much of the above relates solely to AB, the dismissal of the appeal of AD must also in question because if AB succeeds, AD may have a stronger article 8 claim based on the sibling family connection with AB so that it may not be proportionate to separate AB from AD. As Mr Melvin pointed out, AD is now 22 and there is a dearth of evidence as to the present circumstances of either appellant in the period since the appeal hearing in July 2022. It follows that this is not a matter than can be remade on the existing evidence but will need to be reconsidered with up-to-date evidence.

18. In all the circumstances, and for the reasons outlined above, I am satisfied that the decision of the First-tier Tribunal is flawed for material error of law and must be set aside in respect of both appellants.

19. In line with paragraph 7.2 of the Practice Statement, I am satisfied that this matter should be remitted to the First-tier Tribunal, as "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or (b) the nature or extent of any judicial fact finding which is necessary

in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

Notice of Decision

The appeal of each appellant is allowed.

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

The appeal is remitted to the First-tier Tribunal to be remade de novo with no findings preserved.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 August 2023