IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001070
UI-2023-001071
UI-2023-001072
UI-2023-001073
First-tier Tribunal No:
HU/50969/2022
HU/50968/2022
HU/50970/2022
HU/50971/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 July 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

MLN
GPL
PKL
TLM
(ANONYMITY ORDERS MADE)

Respondents

Representation:
For the Appellant: Ms E. Everett, Senior Home Office Presenting Officer
For the Respondent: Mr P. Nathan, counsel instructed by Duncan Lewis Solicitors

Heard at Field House on 9 June 2023

The Appellant is in this appeal is the Entry Clearance Officer however, for ease of reference, we refer to the parties as they were at the First-tier Tribunal hearing.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellants, the Sponsor and/or any member of their family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellants or Sponsor, likely to lead members of the public to identify the Appellants, their Sponsor and/or any other family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. In short, First-tier Tribunal Judge Grimes granted the Respondent permission to appeal against the decision of First-tier Tribunal Judge Munonyedi (hereafter "the Judge") (dated 14 February 2023) on 12 April 2023. In the decision the Judge allowed the Article 8 ECHR appeals of the four Appellants partly by reference to 319X and 319XAA of the Rules.

The Judge's decision

2. We seek to only summarise some of the core findings made by the Judge in the interests of judicial brevity and the fact that many of the points are elaborated upon in the reasons given later in this judgment:

    a. The Appellants made their applications to enter the United Kingdom on the basis of the family reunion route on 1 September 2021 due to their claimed relationship as the children of a refugee (the Sponsor), a DRC national who succeeded in her asylum claim in the UK on 26 February 2020, §1.
    b. The core of the Respondent's refusal (dated 14 January 2022) related to the Respondent's rejection of the adoption certificates (dated 18 June 2013) which were submitted with the entry clearance applications as such adoptions are not recognised under domestic UK law (The Adoption (Recognition of Overseas Adoptions) Order 2013), §2.
    c. The Judge also recorded the Appellants' counsel's concession that the Appellants were not able to take the benefit of the de facto adoption Immigration Rules, §8.
    d. At §21, the Judge made the overall finding that the evidence given by the Sponsor (and the witness Ms Douglas) was credible.
    e. The Judge concluded that the Sponsor had adopted the children under the DRC Family Code in 2013 and had done so largely because the Sponsor was, at that time, working as a senior civil servant and

wanted the Appellants to take the benefit of any entitlement that arose from her position, §23.

f. The Judge also considered the expert report provided by Dr Kodi (dated 13 January 2023) and concluded that it was helpful, §36.
g. Furthermore, the Judge weighed into the assessment of the credibility of the Appellants' claims that the Sponsor had herself been found credible in respect of her asylum claim by the Tribunal in 2020, §37.
h. The Judge therefore concluded that the Appellant had reliably made out their claim that they have lived with the Sponsor in a parent-child relationship until 2015 when the Sponsor came to the United Kingdom and who was then later compelled to claim asylum, §44.
i. Applying Article 8 ECHR, the Judge found that the Appellant had established an Article 8(1) ECHR family life with the Sponsor and also noted that Appellant TLM was still under the age of 18 at the time of the hearing and therefore applied s. 55 of the BCIA 2009 by considering the child's best interests as a primary consideration, see §§52 & 60.
j. The Judge also sought to apply the terms of para. 319XAA of the Immigration Rules and found in the Appellant's favour at §§63-64.
k. In the alternative, the Judge also considered whether or not there were *exceptional circumstances* in the appeal (meaning whether were unjustifiably harsh consequences as a result of the decision under challenge) and concluded that there were such circumstances. In coming to that conclusion the Judge noted the following:

    i. That the family life between the Sponsor and the Appellants was disrupted because of the Sponsor's experience of persecution, §71.
    ii. Having lost contact with the Sponsor in 2015, the Appellants had had to fend for themselves and were initially living with an elderly aunt but that she had left the Appellants in order to return to her home village because of ill health, §71.
    iii. The Appellants are "needy adults" who require the support and parental guidance of the Sponsor; they require a period of stability and the experience of parental involvement on a face-to-face basis, §72.
    iv. Subsumed into this conclusion were the Judge's earlier findings: the Appellants are wholly financially dependent upon the Sponsor who also offers them with emotional support, §53; the Sponsor had previously been able to provide the Appellant's with a comfortable home, education, treats, medical treatment and love/support but that the Sponsor's departure from the DRC in 2015 (and subsequent difficulties) had turned the Appellants' lives upside down, §53; Appellant GPL was gang raped and other adult members of the family fled the country leaving the Appellants effectively abandoned, §53; the Appellants' educations stopped in 2015 and they are constantly hungry, §54.

The error of law hearing

3. We heard submissions from both representatives as to the issues for the Upper Tribunal to determine. We are grateful to Ms Everett for paring down the number of issues that arise from somewhat broad brush nature of the Grounds of Appeal.

The Respondent's Grounds of Appeal

4. In summary the Respondent argued the following:

    a. Ground 1 – the Judge failed to take into account the Sponsor's evidence about the children given during her screening interview; additionally her conclusions on the claimed adoptions were inconsistent with the expert view of Dr Kodi.
    b. Grounds 2 & 3 – the Judge failed to properly assess the family support available to the Appellants in the DRC and failed to take into account that three of the Appellants were over 18 years old at the date of the hearing.
    c. Ground 4 – the Judge erred in her assessment of paragraph 319X and 319XAA of the Rules in the appeal of TLM.

Ground 1

5. We do not have to say very much about this ground as Ms Everett indicated that she did not think it was arguable. We agree with Ms Everett that there is no merit in the two points made within the Respondent's first Ground. In short, as the points were not pursued, we simply note that the Judge did expressly consider the credibility point raised by the Respondent relating to the fact that the Sponsor had not referred to the four Appellants as her children in her screening interview (during the process of making her asylum claim), at §24. The Judge made lawful findings as to why that did not materially affect the Sponsor's credibility.

6. We also should record that there is no tension between Dr Kodi's expert report and the conclusions reached by the Judge that the Appellants were in fact adopted under DRC law by the Sponsor in 2013.

7. It is clear to us that Dr Kodi concluded that the evidence before him supplied by the Sponsor did show an adoption process which had been properly carried out in the DRC, as noted by the Judge at §32. We also make our own observation that Dr Kodi gave unchallenged evidence that the formal adoption procedures were not always closely followed in intra-family adoptions in the DRC (see paragraph 26 of the report) and even indicated that he himself had been able to adopt his four nephews in Kinshasa (see the same paragraph) despite Article 656 of the Family Code, at least on one interpretation of its wording, indicating that this might not be possible.

Grounds 2 & 3

8. We have combined Grounds 2 & 3 together as this reflects the nature of the submission from Ms Everett before us at the hearing. In essence Ms Everett argued that the judgment did not sufficiently engage with the personal circumstances of the Appellants in the DRC by, for instance, not expressly engaging with whether or not other members of the family were providing support and assistance to the Appellants. Ms Everett also suggested that there was a lack of clarity as to the position of the biological parents in the lives of the Appellants.

9. We have taken Ms Everett submissions and the written grounds into account but can see no merit in them. In our judgement it is abundantly clear that the Judge made detailed and lawful findings about the circumstances under which the Sponsor came to act as mother for her nephews and nieces. The Judge's assessment of the adoptions carried out in the DRC was not unlawful and is therefore also materially relevant to the Judge's overall assessment and understanding of the nature of the present and historical relationship between the Sponsor and the Appellants.

10. As to Ms Everett's suggestion that the biological mother of one of the Appellants could still be involved in their life, we can see no basis in the evidence or the arguments put before the First-tier Tribunal Judge for that assertion before us and we therefore reject it.

11. We therefore decided that there was no lack of clarity or any ambiguity in the Judge's reasoning or findings (especially at §§25-27 and §§53-55) and we also conclude that the Judge knew full well the ages of the Appellants at the date of the hearing and recognised that three of them were over 18 at that time; we therefore reject the Respondent's arguments in Grounds 2 & 3.

Ground 4

12. In granting permission Judge Grimes considered that Ground 4 had more obvious force than the others. In this Ground, the Respondent asserts that the Judge erred in finding that Appellant TLM met the requirements of 319X of the rules as it was the Sponsor's friends (and not the Sponsor herself) who were providing financial remittance to the Appellants and nor was there any evidence to indicate what kind of accommodation would be available to the Appellants in the UK.

13. The Respondent further contended that it was incumbent upon the Judge to consider the appeals by reference to paragraph 319XAA of the Rules and averred that the Judge had materially erred by reference to sub-paragraphs (b) and (d):

> *"319X.*
> *...*
> *(vi)(a) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join in the UK without recourse to public*

funds and in accommodation which the relative in the UK owns or occupies exclusively; or
(b) there are exceptional circumstances (as defined in paragraph 319XAA); and

(vii) (a) the applicant can, and will, be maintained adequately by the relative in the UK without recourse to public funds; or
(b) there are exceptional circumstances (as defined in paragraph 319XAA); and…"

"Granting leave to enter or remain where there are exceptional circumstances

319XAA. Where the requirements of paragraph 319X (vi)(b) or (vii)(b) apply, the decisionmaker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which may justify a grant of leave to enter or remain, for the same duration as the Sponsor ("leave in line").

Where the applicant is a child under the age of 18 years who is seeking to join a relative with refugee status or who is a beneficiary of humanitarian protection in the UK, relevant factors when considering whether there are exceptional circumstances include:
(a) they have no parent with them; and
(b) they have no family other than in the UK that could reasonably be expected to support them; and
(c) there is an existing, genuine family relationship between them and the UK based relative; and
(d) they are dependent on the UK based relative.

In the event of a refusal of leave to enter or remain if the decision maker is not satisfied there are exceptional circumstances, consideration will also be given to whether refusal of the application would be a breach of Article 8 ECHR."

14. The author of the Grounds asserted that the Appellants have family in the DRC with whom they live and who can support them emotionally and financially (b); it was also contended that the fact that the Sponsor's friends provide for the Appellants' financial needs meant that the terms of subparagraph (d) could not be met. The drafter went on to argue that these omissions were material to the Judge's ultimate positive conclusions under Article 8(2) ECHR.

15. We were initially troubled by the absence of any direct engagement with the issues of maintenance and accommodation in the judgment under appeal; this is especially so where counsel who drafted the Appellants' skeleton argument accepted that these two requirements of the rules could not be met by the Sponsor (see paragraph 20). Of our own motion we also

noted the mandatory requirement in section 117B(3) of the NIAA 2002 and the requirement to consider whether or not a person would be reliant on public funds as part of the overall Article 8(2) proportionality assessment.

16. We raised with the parties our own preliminary observation that paragraph 319XAA of the Rules did not in fact apply to these Appellants on the basis that the statement of changes which introduced this paragraph into the Rules (via HC 17 on 11 May 2022) indicated that it would not apply to any applications made before 28 June 2022. We also observed that paragraph 319XAA is no longer in the Rules at all.

17. We are grateful to Mr Nathan for his assistance - he accepted the Tribunal's observations about the introduction of paragraph 319XAA but went on to indicate that, although the paragraph had been removed from the main body of the Rules, the policy of this paragraph had been transposed into the new 'Appendix Child staying with or joining a Non-Parent Relative (Protection)' at CNP 3.3. and 3.4.:

> *"CNP 3.3. Where an applicant does not meet the eligibility requirements of CNP.3.1. and CNP 3.2., the decision maker must consider whether a grant of permission to stay or entry clearance is appropriate based on exceptional circumstances which include where:*
>
> *(a) the applicant has no parent with them; and*
>
> *(b) the applicant has no family other than in the UK that could reasonably be expected to support them; and*
>
> *(c) there is an existing, genuine family relationship between the applicant and the UK-based relative; and*
>
> *(d) the applicant is dependent on the UK based relative.*
>
> *CNP 3.4. Where the applicant does not meet the requirements in CNP 3.1. and CNP 3.2. and the decision maker is not satisfied that there are exceptional circumstances under CNP 3.3. consideration must be given to whether refusal of the application would be a breach of Article 8 ECHR, because such a refusal would result in unjustifiably harsh consequences for the applicant or their family member, whose Article 8 rights it is evident from the information provided would be affected by a decision to refuse the application."*

18. Mr Nathan contended that, whilst acknowledging the introduction of 319XAA to applications made on and after 28 June 2022, the underlying policy is now housed in Appendix 'Child staying with or joining a Non-Parent Relative (Protection)' which waived the requirements for maintenance and accommodation under certain circumstances and was therefore still material to the Article 8(2) assessment performed by the Judge.

19. In seeking to assess Ground 4, we start by finding that the Respondent's grounds are partly inaccurate in asserting that the Sponsor's friends were the ones providing financial support to the Appellants and not the Sponsor. This is a misreading of §§14 & 17 of the judgment - the evidence before the

Tribunal, which is not otherwise challenged by the Respondent, was that the Sponsor's friends had facilitated the sending of the Sponsor's own money to the children in the DRC through their bank accounts because, initially, the Sponsor did not have her own banking facilities. This is in fact reflected at §53 of the judgment in which the Judge notes that she had seen numerous copies of money transfers made by the Sponsor to the Appellants.

20. Having said that, there is no further engagement with the detail of the Sponsor's financial circumstances in the UK and we note there is no assessment of the Sponsor's evidence in her witness statement (at paragraph 60) that she was only working part-time because of her own mental health issues.

21. We have also borne in mind that by the time of the First-tier Tribunal hearing, three of the Appellants were over 18 years old and therefore no longer children for the purposes of the rules. Paragraph 27 of the rules does not assist the Appellants either as it only prevents refusal in respect of the applicant reaching maturity by reference to the application of paragraphs 296 – 316 (and EC-C of Appendix FM) – in these appeals the material issue related to 319X which is not covered by this provision.

22. Mr Nathan argued that the Tribunal could nonetheless take into account the executive policy in the current Appendix 'Child staying with or joining a Non-Parent Relative (Protection)' rules as relevant to the assessment of the public interest in Article 8(2).

23. In our view the terms of para. 27 did not allow three of the Appellants to benefit from the child rules in 319X or in the later Appendix cited above at the date of the First-tier hearing.

24. In our judgement the important thing to bear in mind is that the terms of the Article 8 rules, albeit being an important starting point to the assessment of Article 8(2) ECHR, cannot restrict the Tribunal to only considering the policy issues identified by the Respondent in those rules.

25. We also conclude that the potential areas of discretion expressed in 319XAA (and as later transposed to Appendix 'Child staying with or joining a Non-Parent Relative (Protection)') simply reflect the kind of key themes to be assessed by a Judge when assessing Article 8(1) & (2).

26. We therefore concluded that the Judge did err in law when finding that the child Appellant (TLM) took the benefit of the exception in paragraph 319XAA of the rules at §64.

27. We also consider that the Judge erred in not applying section 117B as required in section 117A.

28. We however do not think that these errors amount to material errors of law on the basis that it is our firm view that a judge could not have come to a different conclusion even if those errors had not been made.

29. In coming to that conclusion, we have reminded ourselves of the Judge's detailed and lawful assessment of the enduring nature and strength of the relationship between the Appellants and the Sponsor which has been in existence since the Appellants were born (apart from the hiatus during the time when the Sponsor was claiming asylum in the UK and had temporarily lost contact; contact which was later restored as described in the judgment). We have also taken into account the extensive findings as to the parlous nature of the conditions in which the Appellants have found themselves residing in in the DRC since 2015. We consider those conditions plainly support the Judge's observation that the Appellants (whether children by law or not) are needy people who are living in a particularly vulnerable state. The Judge also made perfectly lawful findings as to the ongoing intensity of emotional connection leading to a finding of family life under Article 8(1) despite the fact that three of the Appellants were adults by the date of the First-tier hearing.

30. We conclude that the Judge was perfectly entitled to weigh in the further significant factor of the additional vulnerability experienced by GPL having been gang raped and the legacy of other family members leaving the DRC in recent times. It was perfectly proper for the Judge to factor in that the Appellants' aunt no longer resides with them (since March 2020) because of ill health. We also note that the Judge recorded that GPL had previously tried to find work but had been exploited and abused and therefore had to stop; the other Appellants had not been able to find work (§16).

31. We have therefore concluded that the Judge's finding of ongoing family life and the overall assessment of the circumstances in the context of the unduly harsh consequences test were lawful. The Judge had plainly identified exceptional features which applied to all of the Appellants whether a minor or a very young adult at the date of the hearing. We find that there was no material error of law in the decision dated 9 March 2023.

Notice of Decision

We dismiss the Entry Clearance Officer's appeal.

I P Jarvis

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber