IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000936
UI-2024-000937
First-tier Tribunal Nos: HU/51874/2023
HU/51879/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of May 2024

Before

UPPER TRIBUNAL JUDGE McWILLIAM
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

MICHELLE KYEREWAA ASANTE
MICHAEL OWARE ASANTE
(NO ANONYMITY ORDER MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Mr M Aslam, instructed by Mascot Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 23 April 2024

DECISION AND REASONS

1. The Appellants are citizens of Ghana. They were born on 17 December 2004 and 15 December 2005 respectively. They are sister and brother.

1. The Appellants were granted permission to appeal by the First-tier Tribunal (Judge Parkes) against the decision of the First-tier Tribunal (Judge Farmer) to dismiss their appeal against the decision of the ECO on 6 January 2023 to refuse their applications for entry clearance to join the Sponsor, their mother, Ms Doreen Yemofio.

2. The Appellants' case is that the Sponsor has sole responsibility for them. Their grandmother who has been caring for them is not in good health and is unable to continue to care for them. The Sponsor came to the UK in 2006 when the

© CROWN COPYRIGHT 2024

Appellants were aged 2 and 1. She lived with the Appellants' biological father in the UK until they separated in 2012. They divorced in 2013. Since her arrival in the UK the Sponsor has visited the Appellants once in 2016. Her partner, Ernest Brown, visits Ghana annually as his mother resides there. He and the Sponsor have two British children. The Sponsor also has a son, a British citizen and full sibling of the Appellants. The children all live with the Sponsor and Mr Brown. It was agreed that the Sponsor is the Appellants' biological mother and that she is settled in the UK.

3. The judge had before her a consolidated bundle, the Appellants' skeleton argument and the Respondent's bundle. The judge said that no further documents were relied on at the hearing.

2. On 7 February 2024, one day after the hearing, a supplementary bundle (ASB) was uploaded onto the JCM platform by the Appellants' solicitors which contained evidence that was not before the First-tier Tribunal, namely:-

(1) A letter from the Sponsor's friend indicating that she would accommodate the Appellants on their arrival to the UK.

(2) An email from a doctor relating to the grandmother's health.

4. The documents were before the ECO. They were not included in the Respondent's bundle (RB) or the Appellants' bundle (AB) before the First-tier Tribunal. There were other documents in the ASB, but these were in the bundles before the First-tier Tribunal.

The decision of the F-tT

5. The judge heard evidence from the Sponsor. She set out the legal framework (paras 9 and 10), including the correct burden and standard of proof. The judge made findings of fact (paras 11-30).

6. The judge identified the three issues as follows:-

(a) Whether the Sponsor has sole responsibility for the Appellants.

(b) Whether there are serious and compelling circumstances to make their exclusion undesirable.

(c) Whether the decision is in breach of Article 8 ECHR.

7. The judge found that it was not established that the biological father of the Appellants remained in the UK. The Sponsor's unsupported evidence was that he was in the UK.

8. The judge was not satisfied by the Sponsor's explanation for not having applied earlier for the Appellants to join her in the UK. The judge said there was no independent evidence of the Sponsor's circumstances to support that she did not meet the requirements of the Immigration Rules (IR) prior to 2022 noting that the Sponsor had leave to remain (LTR) in January 2008. The judge considered it surprising that the Sponsor had visited the Appellants in Ghana once only since 2006.

9. The judge considered the WhatsApp chats (para 18) and accepted that the Sponsor is in touch with the Appellants, however, she was not satisfied that the WhatsApp messages were “anything more than general chat” which disclosed general conversations indicative of an ongoing relationship between the Appellants and their mother and siblings. The judge acknowledged the references in the WhatsApp chats to items being bought and money having been sent to the Appellants. The judge found that there was evidence of some financial support.

3. At paras 24 and 25 the judge engaged with the issue of accommodation having noted earlier in the decision that it was not an issue on which the ECO relied. However, the judge said that she would consider it relevant to the issue of sole responsibility. The judge found a material inconsistency in the Sponsor’s evidence concerning where her friend Olivia Asofoadjei lived. The Sponsor’s evidence was after the Appellants arrival in the UK they would live with her friend. The Sponsor said in oral evidence that the Appellants would be walking distance from her home; however, in her witness statement her evidence was that they would be less than an hour away. The Sponsor was not able to give the full address or postcode of the address. The judge said that there was no evidence from Ms Asofoadjei to confirm that she is willing to accommodate the children and there was no description of the nature of the accommodation.

4. The judge took into account an affidavit from the Appellants’ grandmother (Millicent Koramah) dated 18 May 2022. The grandmother’s evidence was that the Appellants had been left in her care but the Sponsor has sole responsibility for them. She said that she is old and in poor health. However, the judge took into account her evidence that she was still in employment as a “Petty Trader”. The judge found that she was capable of working and bearing in mind her age (60) did not consider her to be elderly. The judge noted that there was no medical evidence which would “suggest that she is unable or even unwilling to continue to provide the care that she has done for almost all their lives”. The judge found that the children have a close relationship with their grandmother and visit extended family members in Ghana and that the Sponsor’s evidence concerning family members in Ghana was contradictory. The judge found evidence that the Appellants were living their own lives.

5. The judge noted the Sponsor’s evidence was initially that Michelle was at school, however then she stated she was home and studying to rewrite two subjects as she had not done very well in her exams.

6. The Sponsor did not know the Appellants’ address. The judge said that it could be expected that the Sponsor would know this in order to provide it to schools and other agencies and she found that it was surprising that she could not. This caused her to question the Sponsor’s level of involvement with the Appellants.

7. At para 15 the judge engaged with letters from the Appellants’ school. Although the pronouns used by the judge are confusing (this was not a matter raised by Mr Aslam), we are satisfied that the judge was considering letters relating to both Appellants. The judge stated as follows:-

> “There is a letter from Michelle’s and Michael’s school Christ Ebenezer Preparatory School dated 28/03/2022. The letters are in almost identical terms. They states (sic) that Michelle and Michael were

enrolled in the school from a young age and was brought to the school by his grandmother. The letter states that the sponsor calls the school to check on their academic performance and Mr Brown came to the school to check on their progress whenever he comes to Ghana (although how the Head would know when he visits Ghana is unclear to me). Mr Brown is referred to as his father, which plainly he is not. The letter also states he may miss his 'biological parents' which is a curious phrase when there is no other mention of his biological father, unless the Headmaster is not aware who his father actually is? The sponsor was asked about whether she had any school reports. She said she was not sent them and they were given directly to the children. I found this to be very surprising. If a child is given the report it would be to pass on to the parent, the fact that the sponsor had no reports to produce and was never sent them is, I find, indicative of the fact that she is not the person with whom the school considers to be the first port of call. The sponsor accepted that in an emergency the school would call the grandmother, although she did say they would call her as well. Whilst Mr Karim rightly submits that she is the person on the ground and it makes sense to call her first. However, I am not satisfied when looking at all this evidence together and in the absence of receipts for payment of fees, and evidence of reports, that the sponsor is the person who makes all the decisions regarding the appellant's education".

8. The judge directed herself in relation to the case of TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049. She set out para 52 which summarises the question of sole responsibility under the IR. The judge accepted that the Sponsor has played a role in the Appellants' lives. She has kept in touch with them and visited them once and she has paid money to the Appellants' grandmother for their upkeep. However, the judge said on the basis of all the evidence she was not satisfied that "this equates to her having sole responsibility". The judge accepted that the Sponsor exercised some responsibility over the Appellants but that it was shared with the grandmother. The judge was not satisfied that once the Sponsor moved to the UK she continued to be the only person with sole responsibility. The judge said when viewing the evidence the Sponsor and the Appellants had not shown on the balance of probabilities that it was more likely than not that their grandmother has not played a major role in their lives and made some or all of the decisions. The judge found that the Appellants' grandmother had day to day responsibility for the Appellants and was not satisfied that the Sponsor made all the decisions in relation to their lives.

9. The judge went on to consider serious and compelling or other circumstances at para 23. She found that the case "falls some way short of there being serious and/or compelling or other family circumstances to make their exclusion undesirable". The judge found that there was nothing specific to their personal circumstances that is serious and/or compelling. The judge took into account that the Appellants have a brother and half-siblings in the UK with whom they are in contact having read the WhatsApp communications.

10. At paras 26–30 the judge considered whether the decision breached the Appellants' rights under Article 8 ECHR. The judge applied the Razgar test (R v Razgar v SSHD [2004] UKHL) and concluded that she was satisfied that there was

family life between the Appellants and their family in the UK whilst acknowledging that at the date of the hearing the Appellants were adults. The judge considered proportionality taking into account that the Appellants could not satisfy the IR. The judge noted that the Appellants had lived with their grandmother for the majority of their lives (seventeen years at the date of the hearing) and are fit and healthy. The judge found that there was no "credible evidence this arrangement does not meet their needs or that it cannot continue".

11. The judge considered s.55 of the BCIA (Borders, Citizenship and Immigration Act 2009) and said as follows: "I am not satisfied that [the Appellants] are not being well cared for and thriving in their current environment. I am satisfied that they have contact with their extended maternal family who live in Ghana and other friends locally who provide support".

12. The judge considered the best interests of the two British step-siblings at para 29 who live in the UK and their full brother noting that it was not proposed that the Appellants would join them in the family home but the Sponsor's evidence was that she would apply for council accommodation and in the meantime they would live with a friend. The judge said "[o]n balance, I am not persuaded that there is any credible evidence before me to show that it is in the best interests of the British half-siblings/sibling for the appellants to join them in the UK". The judge found "[w]hen looking at the totality of the evidence I am not persuaded that disruption of the current status quo is in their best interests". The judge concluded that there was nothing in the circumstances "that weighs sufficiently against the strong public interest in firm immigration control, to tip the balance in the appellants' favour".

The Appellants' Case

13. We will deal with the grounds of appeal in turn including the oral submissions made by the parties. Mr Terrell relied on a skeleton argument.

14. Ground 1 is in two parts. Mr Aslam resiled from the first part of ground 1. He conceded that it did not identify an error of law. We will deal with the ground briefly. We remind the author of the grounds what the UT said in VV (grounds of appeal) Lithuania [2016] UKUT 53 about reviewing grounds of appeal. The ground claimed that there was procedural unfairness arising from the First-tier Tribunal not taking into account the documents which were uploaded onto the JCM forum one day after the hearing. We found the grounds unhelpful because they do not make clear what documents were in the ASB and not before the First-tier Tribunal. We were able to identify these at the hearing. They are a letter from the Sponsor's friend indicating that she would accommodate the Appellants on their arrival to the UK and an email from a doctor relating to the grandmother's health. It was asserted that the Sponsor was asked various questions in cross-examination and in response to some she stated that she had supplied evidence which was not in the Appellants' bundle which included the letter from a friend, recent money remittances and the Sponsor's mother's medical circumstances. In support of the ground the Appellants submitted a witness statement from their legal representative.

15. It was sensible of Mr Aslam to not pursue this. He accepted that the Appellants' solicitors had failed to comply with Annex A of the First-tier Tribunal President's Practice Statement No 1 of 2022. A party may not rely on late evidence without

the Tribunal's leave although it is open to a party to make an application to rely on late evidence. Paragraph A.17 states as follows:-

> "A party may apply to adduce material evidence after the hearing has concluded but only in exceptional circumstances. Such material will only be admissible upon application unless the Judge has directed the provision of that material. The application must be made using the online procedure, unless it is made orally at the hearing. Any material ruled admissible must be uploaded".

16. The Appellants' solicitors did not make an application to admit the late evidence. They did not use the "online procedure". The ASB was simply uploaded onto the platform. We are mindful of the need to ensure procedural rigour: Maleci (Non-admission of late evidence) [2024] UKUT 28 and TC (PS compliance - "issues-based" reasoning) Zimbabwe [2023] UKUT 164.

17. Not only did the Appellants' solicitors fail to comply with the Practice Direction, Mr Aslam conceded that the application fell at the first hurdle of the Ladd v Marshall test (Ladd and Marshall [1954] 3 All ER 745) because it had not been shown that the evidence could not have been obtained by reasonable due diligence. It was accepted by Mr Aslam that there was no blame attributed to the judge. It was accepted that although the documents were not in the Respondent's bundle (RB), this is a matter that was not picked up by the Appellants' solicitors despite the time available to them to prepare the case. Moreover, it was not picked up by Counsel at the hearing. The point made about evidence being before the ECO but the decision was silent on it is not an indication that the ECO has accepted the evidence.

18. In any event, we have considered the medical evidence relating to the grandmother in the ASB from Dr Maxwell W. Onassis-Fiadjoe, a senior medical officer/stress disorder therapist at Kaneshie Polyclinic to the Sponsor which states as follows:

> "That notwithstanding, the ever clear and present danger is the incessant and wanton stress being put on her by unfortunately, your two children (her grandchildren), especially as they are in their teens, with all the attendant adolescent related burden on her.
>
> In this regard, I will once again strongly urge you, to let your kids come over to you soonest, looking at the attendant effects on stress being put on her, regarding her age too, to avoid further deterioration of her health and well-being, as well as averting any consequences on her health".

19. Had this evidence been in the AB it is difficult to see how it could have made any difference to the outcome of the appeal. At its highest it does not support that the Sponsor is unable to take care of the Appellants. Moreover, the judge was entitled to attach weight to the affidavit in the RB which indicated that the grandmother was working and not elderly.

20. In respect of the letter from the Sponsor's friend indicating that she would accommodate the Appellants on their arrival to the UK. This is a short letter of 27 July 2022 agreeing to accommodate the Appellants on their arrival. Accommodation was not an issue raised by the ECO. The evidence had it been

considered would not have made a material impact on the outcome. It was the Sponsor's inability to identify the address /location of the friend's house which concerned the judge and not the availability of accommodation. Any rational judge would have reached the same conclusion had this evidence been before them. There would have been no material difference in the outcome of the proceedings had the letter been before the judge.

21. The second element of ground 1, on which Mr Aslam relied, was that there was procedural unfairness arising from what the judge said at para 15 relating to the letters from the Appellants' school. This is because the judge raised questions which were not explored at the hearing or put to the Sponsor for comment and according to the grounds this has led to speculation resulting in unfairness.

22. We find no error of law. There was no evidence submitted by the Appellants about what happened before the Tribunal. There is no witness statement from Counsel who drafted the grounds of appeal (who was not Mr Aslam). There has been no effort by the Appellants' solicitors to obtain a transcript of the hearing. In these circumstances we agree with Mr Terrell that it is difficult to see how the ground can get home. In any event, we have considered the findings made by the judge at para 15 concerning the letters. The judge did not find that the letters were not genuine which we concede would have amounted to an error. The judge considered what weight she should attach to them in accordance with Tanveer Ahmed [2002] UKAIT 439. The judge was entitled to consider that the weight to be attached to them was diminished because that were in identical terms. There was an issue raised by the judge concerning Mr Brown, the Appellant's stepfather. The letters stated that Mr Brown came to the school whenever he comes to Ghana. The judge was entitled to query how the headmaster would know when he visited Ghana. The judge was similarly entitled to attach weight to the reference in the letters to Mr Brown being the Appellants' biological father. The issues raised by the judge in relation to the letters are matters that could reasonably be expected the Appellants' Counsel to be alert to. We do not know what the Sponsor was asked or said (if anything) in relation to them. Credibility was in issue. The respondent did not accept sole responsibility and it was for the Appellants to establish on the balance of probabilities that they satisfied the requirements of the IR. That the Appellants' representatives chose not to raise the issues covered by the judge in relation to evidence that they submitted in support of the Appellants' appeal can reasonably be assumed to have been a choice by them in how to conduct the appeal.

23. Ground 2 is otiose insofar as paras 8–10 are concerned because they are dependent on the first part of ground 1.

24. Paragraph 11 of the grounds again concerns the judge's findings at para 15. It concerns the sentence "However, I am not satisfied when looking at all this evidence together and in the absence of receipts for payment of fees, and evidence of reports, that the sponsor is the person who makes all the decisions regarding the appellant's education". The assertion is that in the AB before the Tribunal there were school fee receipts (AB/74 and 75) which the judge overlooked. The two receipts for the payment of school fees date back to 2015 (the judge was concerned with the position in 2022) and do not identify the Sponsor. We are not persuaded that the judge did not take these into consideration and in any event the receipts do not support that the Sponsor paid school fees and are of limited evidential value.

25. The same ground asserts that the judge failed to consider the Sponsor's evidence about the school reports together with the chat log (AB/124). The Sponsor's evidence was that she had not been sent the school reports and that they had been given directly to the Appellants. We find that there is no error of law and that the judge rationally concluded that the evidence was indicative of the school not considering the Sponsor to be the "first port of call". There is reference in the grounds to the following part of the chat log at (AB/123) which reads as follows:-

> "20/02/2023, 15:13 – Michael my son: Mum please i need money for something
>
> 20/02/2023, 15:22 - Michael my son: Which is pocket money cos I have nothing on me
>
> 20/02/2023, 15:37 - AM BLESS: I want to see your report first
>
> 20/02/2023, 15:38 – Michael my son: This message was deleted
>
> 20/02/2023, 15:39 - Michael my son: They don't give us our report to be brought home
>
> 20/02/2023, 15:40 - AM BLESS: so how do they want your parents to know
>
> 20/02/2023, 15:40 - Michael my son: It's been pasted in school".

26. The ground does not represents an accurate reading of the decision of the judge. Moreover, the part of the chat log relied on is selective. Mr Terrell drew our attention to the full conversation where the Sponsor's son admits to the Sponsor that some of the reports are sent "through grandma's phone". Moreover, the judge made reference throughout the decision to the WhatsApp messages and there is no support that she did not take them into account. We remind the author of the grounds of what the Upper Tribunal said in VV concerning the duty to help further the overriding objective and drafting grounds of appeal. The grounds seek to argue that evidence was not taken into account by the Tribunal when it can be seen from the decision read fairly and as a whole that it was.

27. In relation to the WhatsApp messages Mr Aslam agreed that the evidence was extensive. They appear at pages 107–222 of the AB. The extract on which the Appellants relied related to a conversation on one day (20 February 2023). There is nothing to support that Counsel at the hearing referred the judge to this specific part of the evidence and there is nothing in the grounds of appeal or the skeleton argument before the First-tier Tribunal referring specifically to this part of the evidence. It is unreasonable to expect the judge to trawl through the evidence in order to find something to support the Appellants' case. We remind the author of the grounds what the Upper Tribunal said in Lata (FtT: principal controversial issues) India [2023] UKUT 163 about the obligations on representatives.

28. We now turn to ground 3. It is asserted that the judge did not properly reason the findings in relation to the Appellants' biological father with reference to paragraph 13(a). This is a misrepresentation of the decision. It is clear from a

proper reading of paragraph 13(a) that there was insufficient evidence before the judge to establish on the balance of probabilities that the biological father remains in the UK. That was a rational conclusion bearing in mind the lack of evidence on the issue. Furthermore, this appeal was not pursued on the basis that entry clearance should be granted because both parents are in the UK. We remind the author of the grounds that an application for permission to appeal on the grounds of inadequacy of reasoning in the decision of the First-tier Tribunal must generally demonstrate by reference to the material and arguments placed before that Tribunal that the matter involved a substantial issue between the parties at first instance and that the Tribunal either failed to deal with that matter at all, or gave reasons on that point which are so unclear that they may well conceal an error of law: VV. Mr Aslam accepted in relation to the Appellants' biological father that there was nothing more that the judge could have said about this (the issue concerning a letter dating back to 2015 from the Sponsor to respondent relating to another application).

29. At paragraph 17 of the grounds (ground 3) the Appellants submit that paragraph 297(i)(d) "does not care" if there is another relative looking after the children, the issue is whether the other parent is involved in contrast to paragraph 297(i)(e). It is stated that this raises an important point of law as the Appellants submit that the issue of sole responsibility relates primarily if not exclusively to the issue of whether one or both parents are involved rather than whether other relatives have stepped in because of geographical separation. This was not raised before the First-tier Tribunal. If a legal argument is raised which was not raised before the First-tier Tribunal, unless a point was one which was Robinson obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules: Lata. Moreover, this submission is flatly contrary to TD, where it was held that responsibility, for the purpose of the IR, "may be undertaken by individuals other than a child's parents" (para 52(iii)). Mr Aslam was sensible resiling from this part of ground 3. He conceded that there was no proper argument that TD did not apply and that the judge properly applied the guidance in that case.

30. Ground 4 challenges the judge's assessment under Article 8 and s.55 BCIA 2009. It is asserted that it was erroneous and irrational of the judge to say at paras 28 and 29 that there is nothing to say that is in the best interests of the Appellants or their UK siblings for them to be together. The ground is misconceived. The Appellants were adults at the time of the appeal hearing and they were outside of the UK (T (entry clearance - s.55 BCIA 2009) Jamaica [2011] UKUT 483). Section 55 does not strictly apply to them. In any event, we find that the judge's findings in relation to the Appellants' and their siblings' best interests at paragraphs 28–29 are rational bearing in mind the facts of the case.

31. Ground 5 makes an unsupported assertion that the judge engaged in speculative and unreasoned findings with reference to paras 22(ii), 13(b) and paragraph 15. The grounds do not seek to explain this. In any event, we find that the judge made findings that are grounded in the evidence and adequately reasoned. The case cited in the grounds (K v Secretary of State for the Home Department [2006] EWCA Civ 1037) relates to an asylum appeal where a different standard of proof applies. Again we remind the author of what the UT

has said about the drafting of grounds of appeal: VHR (unmeritorious grounds) Jamaica [2014] UKUT 367 and Lata.

32. We do not find a material error of law in the decision of the judge and we maintain the decision to dismiss the Appellants' appeal.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 May 2024