



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/03080/2012
OA/03081/2012
OA/03077/2012

THE IMMIGRATION ACTS

Heard at Field House

On 13th June 2013

**Determination
Promulgated**

On 18 June 2013

Before

**UPPER TRIBUNAL JUDGE MARTIN
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE**

Between

**JUMA SOWE
AWA SARR
BRIAN BOJANG
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER - ACCRA

Respondent

Representation:

For the Appellant : Mr R Ahmed (instructed by Samuel & Co, Solicitors)

For the Respondent : Mr I Jarvis (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellants with permission granted by an Upper Tribunal Judge on 16th April 2013 against the determination of the First-tier Tribunal (Judge Mathews) promulgated on 18th February 2013.

2. The Appellants are nationals of Gambia and are the daughters and son of their UK Sponsor. They were born in 1995, 1998 and 2006 respectively and they had applied for entry clearance to settle with their mother in the UK. The applications were refused by the Entry Clearance Officer on 12th January 2012 and it was their appeal against that decision that was heard by Judge Mathews on 25th January 2013. He dismissed the appeal under the Immigration Rules and on human rights grounds finding that the Sponsor had not shown that she had exercised sole responsibility for the Appellants and finding also that he was not satisfied that there was adequate accommodation for them in the UK.
3. Mr Ahmed, on behalf of the Appellants, relied upon the grounds seeking permission to appeal. He referred us to paragraph 7 of the grounds which referred to paragraph 17 of the determination. At paragraph 17 the Judge accepted the Sponsor's evidence that she communicated with the children using phone cards and Skype and that she visited them from 5th January until 6th February 2012. He accepted this on the basis of her oral evidence and having had sight of her passport.
4. Mr Ahmed referred us to paragraph 10 of the grounds which referred to paragraph 21 of the determination. At paragraph 21 the Judge accepted that the Sponsor had sent funds to her children in Gambia.
5. Mr Ahmed pointed out that this is not a case where the Sponsor had left her children in her home country for a long time. She had only come to the UK in 2009.
6. Relying on paragraph 12 of his grounds Mr Ahmed said that it was not clear on what basis the Judge had found that the maternal grandmother had had substantial responsibility for the children's upbringing and why mum had not had sole responsibility. He referred to paragraph 23 of the determination where the Judge made that finding and submitted that it was inadequately reasoned and not based upon the evidence. The Judge, he argued, had not followed the guidance of the Tribunal given in TD (paragraph 297 (i) (e): "responsibility") Yemen [2006] UKAIT 000 49.
7. He referred us to the fact that grandmother has health problems and intends to travel to the USA and that there was a letter confirming that in the bundle together also with a letter from the children's aunt confirming that she was to resume education and would be unable to look after the children.
8. The second ground relied upon by Mr Ahmed was the Judge's finding in relation to the adequacy of accommodation. We indicated to Mr Ahmed that we agreed with him that the Judge had erred in his approach to the accommodation. The Sponsor's oral evidence was that she lived in a three bedroom property. There was a tenancy agreement confirming the three-bedroom property. The Judge's requirement that there should be a property report was an error.

9. Mr Ahmed then submitted that the determination was also flawed in the way in which the Judge dealt with Section 55 of the Borders, Citizenship and Immigration Act 2009. He referred us to the Upper Tribunal case of Mundeba (s. 55 and para 297 (i) (f)) [2013] UKUT 00088 (IAC). He referred to the head note and in particular paragraph 5 of the head note which states that as a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; changing the place of residence where a child has grown up for a number of years when socially aware is important.
10. He submitted that although the Judge made reference in paragraph 18 of the determination to section 55 and the best interests of the child he did not then make proper findings or carry out an analysis of the best interests of children in this case. He submitted also that the Article 8 assessment was insufficient and that if the Judge had carried out a proper balancing exercise he could not have found there were enough reasons to keep these children in Gambia and away from their mother.
11. On behalf of the Entry Clearance Officer Mr Jarvis defended the determination. He referred us to the Court of Appeal case of Buydov v Entry Clearance Officer, Moscow [2012] EWCA Civ 1739 and in particular paragraphs 14 to 16 of that judgement. He referred to paragraph 15 where the Court of Appeal quoted another case which stated that one must look at what has actually been done in relation to the child's upbringing, by whom and whether that is being done under the direction of the parents settled here. At paragraph 16 the Court of Appeal referred to another case where it had been said that the question was a question of fact and each case would depend on its own particular facts. The general guidance is to look at whether what has been done in relation to the upbringing has been done under the direction of the sponsoring settled parent.
12. He submitted that the positive findings relied upon by Mr Ahmed were not as positive as had been suggested. In particular he referred to paragraph 21 in relation to funds sent by the Sponsor pointing out that what the Judge actually said was:-

"I am also prepared to accept that the Sponsor has sent whatever funds she has been able to her children since arriving in the UK, but I can make no findings as to actual amount since there is no documentary evidence."

13. With regard to the grandmother's physical problems he referred to the fact that the Judge had in fact rejected the claim that she had been unable to cope and at paragraph 20 had said:-

"I note too that I have a letter from the children's grandmother Mrs Jallow. It was received in December 2012. It sets out that Mrs Jallow wishes to travel to the United States in order to help one of her other children with childcare. She states that she will be in the USA for six months. I am willing to find Mrs Jallow has some health problems, but that letter persuades me that she still

able and indeed willing to undertake childcare responsibilities, her health is not in my judgement a bar to such matters."

14. He suggested that the Judge, on the evidence before him was entitled to reach the conclusion that grandmother had substantial responsibility for the children's upbringing. My Jarvis referred to other documents in the bundle which supported that finding that were also referred to by the Judge.
15. He referred us to a document headed "Appeal against Decision;" a document prepared by the Sponsor. She said in that document:-

"I also do call to take part in decisions concerning their education, health, emotional well-being and very important decisions regarding their future in life."

That, he submitted indicates a shared responsibility rather than sole responsibility. He submitted that the determination, when read in its entirety showed that the findings made by the Judge were properly reasoned and supported by the evidence before him.

16. As regards the best interests of the children, Mr Jarvis referred to paragraph 18 of the determination where the Judge indicated that in his considerations he had at the forefront of his mind the need to consider the best interests of the children at all times and that he was under a duty to address such interests. Again at paragraph 25 the Judge said:-

"The fact that the children have relatives in the Gambia who have acted as responsible carers and whose health and circumstances have allowed them to be carers, prevents me finding that the compassionate circumstances are such that their entry to the UK is required. Indeed the proposed move would interfere with their settled home life and education, a matter that weighs heavily in considering their best interests."

17. Mr Jarvis referred to paragraph 30 of the determination in which the Judge said that the children were settled and well cared for in the Gambia and do not demonstrate compassionately compelling circumstances beyond the fact that their mother has chosen to move to the UK.
18. In response Mr Ahmed suggested that the sentence from the "Appeal against Decision" referred to by Mr Jarvis in fact indicated that mother had had sole responsibility. He argued that the Sponsor's case was that she was the person who made decisions in relation to the children and that was what the letter said. He reiterated again that mother had only left the children in Gambia for a short period of time.
19. He referred to paragraph 15 of Buydov relied upon by Mr Jarvis and indicated there was nothing in the determination to indicate that the Judge had considered and made specific findings in relation to sole responsibility in this case.

Findings

20. We find that the Judge did make an error of law in his treatment of the question of accommodation.
21. However, we do not find that the Judge erred in any other respects and thus the error in relation to accommodation is not material such that the determination should be set aside. The evidence in this case, out of the Sponsor's own mouth, in the statement prepared by her confirms that she was exercising joint responsibility with her mother.
22. The other evidence also supports the finding that grandmother had been exercising responsibility. The statements from both grandmother and grandfather make it quite clear that they had guardianship and responsibility for the children since their mother left the Gambia in 2009. In her statement mother refers to the fact that she was brought up by her grandparents as is the custom in Africa. It seems to us that what happened in this case is that mother did leave the Gambia, transferring responsibility for the children to her parents. She would now like to reclaim that responsibility and have the children with her in the UK. However, the evidence does not support the argument that in the intervening period she has had sole responsibility for their care. On the basis of the evidence before him the Judge's findings were entirely reasonable, properly reasoned and open to him on the evidence.
23. We are not impressed either by the argument that the Judge did not properly deal with section 55 or article 8. The judge clearly had the best interests of the children in his mind and he referred to it more than once in the determination. The fact that they are well cared for and have spent their entire lives in the Gambia, that they have relatives there and are settled there all supported his finding that the refusal to grant entry clearance was not a disproportionate breach of their right to family life nor was it a decision contrary to their best interests.
24. The appeal to the Upper Tribunal is dismissed.

Signed

Date 14th June 2013

Upper Tribunal Judge Martin