Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/17804/2013
& OA/17808/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 November 2015	**On 4 December 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

And

NW
AN
(ANONYMITY DIRECTION MADE)

Claimants

Representation:
For the claimants: Ms V Easty, instructed by Iris Law Firm
For the appellant: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimants, NW, and his twin sister AN, are citizens of Uganda.

2. The Secretary of State appealed against the decision of First-tier Tribunal Judge Crawford promulgated 25.2.15, allowing, on article 8 human rights grounds, the claimants' appeals against the decision of the Entry Clearance Officer, dated 30.7.13, to refuse entry clearance to the United Kingdom to join their maternal aunt JN, recognised as a refugee in the UK. The Judge heard the appeal on 11.2.15.

3. First-tier Tribunal Judge Levin granted permission to appeal on 27.4.15.

4. Thus the matter came before me on 14.7.15 as an appeal in the Upper Tribunal.

5. In my error of law decision promulgated 4.8.15 I found errors of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Crawford should be set aside and remade. In essence, I found that there was inadequate justification in the decision of the First-tier Tribunal to consider the appeal outside the Immigration Rules. I also found that there was inadequate consideration of the public interest factors of section 117A, and that the article 8 assessment was inadequately reasoned.

6. The matter then came back to me for a continuation hearing on 21.9.15 at Field House. However, as counsel was late arriving and there had been no compliance with my directions for preparation of the claimant's bundle, no interpreter requested, and insufficient time to deal with the case, the appeal had to be further adjourned.

7. At the aborted hearing of 14.7.15, following discussion with the parties, I confirmed that those findings of fact of Judge Crawford up to and including §24 are preserved. The remaining issues are at large and evidence will be required, although much of the decision to be made will be the application of the law to these facts, including whether there are such compelling circumstances insufficiently recognised in the Rules as to justify going on to consider article 8 ECHR at all.

8. The appeal thus came back before me in the Upper Tribunal on 24.11.15. The start of the hearing was delayed because the Lugandan interpreter booked did not arrive until almost noon.

9. I heard further evidence from the sponsor JN, with the assistance of the interpreter. However, as this is an out of country appeal, the decision has to be made on the basis of the circumstances prevailing at the date of refusal decision, 30.7.13, and, inevitably, some of the evidence strayed beyond that date. There was some difficulty in clarifying exactly what the relevant circumstances of the two claimants were at that date and the sponsor was not the clearest witness, some of her account seemed to change, particularly as to who was looking after the children in July 2013.

10. I accept and adopt the findings of Judge Crawford that prior to coming to the UK as a refugee on 5.3.12, the sponsor lived in a family unit with her own children and the claimants. I make the following additional findings and observations.

11. Whilst the originally three, now two, children were not the sponsor's, but her sister's, I accept that following her sister's death in 2001, they were taken in at a very young age by the sponsor and raised alongside her own children. There was no formal adoption process. The sponsor could have simply claimed they were all her children, but she honestly explained the situation.

12. I have considered the various handwritten letters from the claimants in the appeal bundle. It is not entirely clear that the children wrote these letters, given the very neat handwriting in English with barely an error or correction. However, I conclude on the lower standard of proof that they provide for themselves by foraging in the

forest. They are no longer able to attend school. The letters are very moving and express love and affection for the sponsor, addressed as mummy, and her biological children, referred to as their brother and sisters. There are also letters from the sponsor's children in the UK, explaining how much they miss the claimants. They plead to be reunited as a family.

13. I find that at the date of the refusal decision in July 2013 the claimants were either being looked after by the sponsor's former maid, Susan, or Susan's mother. The sponsor's evidence on this was unclear, they were first looked after by Susan and later by her mother. Susan's mother passed away in 2014 and the children are now fending for themselves.

14. There can be little doubt and I accept on the evidence that prior to the sponsor's departure from Uganda, the claimants enjoyed family life together with the sponsor and the sponsor's three natural children.

15. The sponsor's asylum claim was initially refused, but allowed prior to appeal. Her witness statement of 28.3.14 adopts and exhibits the undated witness statement prepared in advance of the appeal hearing. Mr Whitwell took no real issue with the background and factual claim.

16. Subsequent to the grant of asylum, application was made in July 2013 for both the sponsor's three natural children and the two claimants to join her in the UK. The applications of the natural children were granted and they joined the sponsor in the UK in November 2013. The applications for the two claimants were refused, hence the present appeal.

17. It is common ground that the claimants cannot meet the requirements of either paragraph 309A in relation to de facto adoption, or paragraph 352D in relation to family reunion in refugee cases, because the claimants are not the children of the sponsor, or paragraph 319X as a relative of a refugee, because of the financial requirements which the sponsor cannot meet. There is no Immigration Rule route for these claimants in the circumstances of the sponsor's flight from Uganda and arrival here as a refugee.

18. Ms Easty makes the valid point that the sponsor could not have applied for any of the children to join her until she was granted refugee status in the UK. The consequence is that at the date of their applications the claimants could not meet paragraph 309A of the Immigration Rules in relation to a de facto adoption, which requires them to have lived together for a minimum period of 18 months of which the 12 months immediately preceding the application for entry clearance must have been spent together. It was thus a practical impossibility for the claimants to meet the de facto adoption requirements. Ms Easty submitted that the Rule is unfair and incompatible with article 8, because it discriminated against children of refugees. The Rule has been the subject of judicial criticism by the Supreme Court in AA (Somalia) (FC) v Entry Clearance Officer –Addis Ababa [2013] UKSC 81, where, at §25 Lord Carnwath opined that if clear definitions were required to establish 'bright lines' the argument loses most of its force if the bright lines are drawn so restrictively that they have in practice to be supplemented by the much fuzzier lines drawn by article 8. It

was suggested that the Rule ought to be amended to bring it into alignment with international obligations and the practice actually adopted by the Secretary of State.

19. A similar situation prevailed in AA (Somalia) v Entry Clearance Officer –Addis Ababa [2012] EWCA Civ 563. At §35 Lord Justice Davis agreed that appears to be unlikely that most of such applicants would not satisfy the de facto adoption requirements, "But that as I see it, is the balance the Secretary of State has struck. There were and are very difficult issues relating to entry of children claimed to be de facto adopted children…. The balance struck is thus that expressly set out in the relevant Immigration Rules, in determining who is to be regarded as a 'child of a parent' for this purpose. However, at §41, the judge concluded that this interpretation of the Immigration Rules did not lead to any great lacuna. "It must not be forgotten that Article 8 of the Convention is always available to be relied on in an appropriate case – indeed AA in the present case succeeded on precisely that ground. Further, it may be, for example, that applicants in corresponding circumstances may in some cases be able to claim eligibility for family reunion on compelling compassionate grounds. It is also stated at §43, "In any event, as I see it, the balance has been struck in the Immigration Rules by the Secretary of State in a way open to her; and, further, applicants such as AA are able to invoke their rights under Article 8 in an appropriate case."

20. I have considered the issue raised at the hearing before me by Mr Whitwell, as to whether it can properly be said that there are compelling circumstances insufficiently recognised in the Immigration Rules so as to justify granting entry clearly under article 8, on the basis that the refusal decision is unjustifiably harsh, or otherwise disproportionate. The argument is that given that paragraph 319X(ii) includes a requirement and consideration of "serious and compelling family or other considerations which make exclusion of the child undesirable.." there is no need to look outside the Rules. However, I note the refusal decision did not address paragraph 319X and it is conceded that the claimants cannot meet the financial requirements of 319X(vii). Ms Easty does not concede that there are no serious and compelling considerations, only that the financial requirements cannot be met.

21. In all the circumstances, I am satisfied that there are compelling circumstances on the facts of this case, inadequately reflected in the Immigration Rules, so as to justify consideration outside the Rules on the basis of family life under article 8 ECHR.

22. In considering article 8, I bear in mind that it is relevant and must be taken into account, which I do, that the claimants cannot meet the requirements of the Rules, which form the Secretary of State's response to private and family life claims.

23. I also bear in mind the section 55 duty, to have regard to the best interests of the children, and do so, both in respect of the claimants and the sponsor's natural children in the UK. I am satisfied that notwithstanding their cultural background and lives in Uganda, the best interests of the claimants are to be reunited with both sponsor and her children so that they can continue family life.

24. Both Mr Whitwell and Ms Easty agreed that in consideration of the Razgar stepped approach to article 8, the first four steps are met and that the crucial issue is the

proportionality assessment. I accept that there was family life between the claimants and the sponsor, and indeed between them and her three biological children. On the basis of the preserved findings of Judge Crawford, Mr Whitwell does not challenge the existence of family life. That family life is gravely interfered with by the decision to refuse entry clearance. However, the refusal was lawful and in pursuit of a legitimate aim of protecting the economic well-being of the UK through immigration control. The crucial issue is, as in most cases, the proportionality.

25. I take into account as I must pursuant to section 117A & B of the 2002 Act that immigration control is in the public interest. It would appear that the claimants can speak English but they are not going to be financially independent, given that the sponsor herself is not financially independent. These factors weigh against the claimants.

26. In addition to the above factors and in particular the public interest in immigration control, if granted entry clearance the claimants are going to be a burden on the State. Further, despite the letters written in good English, given that the sponsor herself speaks little English and required an interpreter, I am not satisfied that the claimants speak English. Section 117B provides that it is in the public interest that those seeking to enter the UK speak English. I take into account, even if they are fending for themselves now, that at the date of the refusal decision they were being looked after. The also reside in their home country, where they have social and cultural ties.

27. On the other hand, in the proportionality balancing exercise between the public interest in exclusion and the rights of the claimants and the sponsor and her family to continuation of family life there are significant factors in favour of the claimants. I bear in mind that at this stage it is for the Secretary of State to demonstrate that the decision is proportionate to their rights. First, the claimants spent some 12 years living as a family unit with the sponsor and her natural children, raised by her as their mother with no distinction between the children. The family was divided only because of the circumstances now accepted by the Secretary of State that resulted in the flight of the sponsor from persecution in Uganda, leaving behind all her children. She was not able to bring them with her, for the reasons set out in her witness statement. She made application for them all to join her, once she was granted refugee status. It was not practically possible to do so before then. It follows that by the delay in granting refugee status, the claimants lost the opportunity to join the sponsor in the UK under paragraph 309A. A further separation took place when the natural children were granted entry clearance but these claimants refused. As a refugee the sponsor cannot return to Uganda and thus family life cannot be continued there. I have to consider not just the family life rights of the claimants but also those of the sponsor and her natural children. Effectively, this was one single family for several years before the sponsor was forced to flee Uganda. There must be in the circumstances a significant public interest in permitting the family as a whole to be reunited; it is in the best interests of the claimants and the nature children of the sponsor. The separation of family members was caused by factors outside the sponsor's and the claimants' control.

28. Taking all of these factors, both for and against the claimants, together in the round, it becomes very clear that there are compelling and compassionate circumstances which make the refusal decision both unjustifiably harsh and entirely disproportionate. The balance falls clearly and firmly in favour of the claimants such that the appeal against refusal of entry clearance should be allowed.

Decision:

The appeal of each claimant on immigration grounds is dismissed;

The appeal of each claimant on human rights grounds is allowed.

Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal made an order. Given the circumstances, I continue the anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make a full fee award.

Reasons: The appeals have been allowed.

Signed
Deputy Upper Tribunal Judge Pickup

Dated