Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06267/2017
HU/06268/2017

THE IMMIGRATION ACTS

Heard at Manchester
On 14th November 2018

Decision & Reasons Promulgated
On 6th December 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

[J M]
[M M]
~~(NO ANONYMITY DIRECTION MADE)~~

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr C Holmes, Counsel, instructed by Bolton Citizens Advice
For the respondent: Mr. A McVeety, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Permission has been granted to appeal the decision of First-tier Tribunal Judge Alis who, in a decision promulgated on 13 February 2018, dismissed the appeals on human rights grounds.

2. The appellants are brother and sister, and nationals of the Democratic Republic of Congo. The 1st appellant was born on 10 December 2001; his sister was born on 2 March 2003.They applied for entry clearance for the purposes of settlement as the adopted children of their paternal uncle, Mr [JM] and his wife, [L].

3. Mr [M] was granted refugee status in June 2009; his wife having been granted status in June 2007. The sponsors did not resume living together until 2011.

4. The applications were refused because the adoption was not recognised by the United Kingdom. Consequently, the immigration rules could not be met. The respondent saw no basis outside the rules which would justify the grant of leave.

The First tier Tribunal

5. The appellant's representative accepted the applications could not succeed under the rules. The appeal was on freestanding article 8 grounds.

6. The evidence was that the sponsors were given care of the two children in June 2003 by way of an adoption procedure in the DRC. This was because their parents were not looking after them properly. Mr [M] fled his home country in December 2003 and his wife continue to take care of the children. Then, in 2006 she also fled, having made arrangements with a Pastor to look after the children. Contact was then lost and it was not until December 2012 they were located, living with a relative of the Pastor.

7. The person who located them, Ms [OM], is described as a cousin. She agreed to look after them and received remittances from the sponsors. They moved with her to Bunia Town and in 2013 to Kinshasa where they have continued to live. It was then indicated that Odbul's marriage had ended and she was no longer in a position to care for them and would have to leave them on a certain date because she intended studying. Medical reports as to the children's mental states had been submitted.

8. First-tier Tribunal Judge Alis accepted that family life existed between the appellants and their sponsors. The judge also accepted that when the sponsors took care of the appellants in the DRC their natural parents were unable to care for them properly. The judge saw some discrepancies in the evidence and did not accept that Odbul would cease caring for them on a certain date as was suggested. The judge

found the medical evidence of limited help and pointed out the significant delay of 5 years before the applications were made.

9. The judge referred to section 55 and pointed out the appellants had lived most of their lives apart from the sponsors. The judge did not find anything adverse against the appellants or sponsors but pointed out that no effort had been made to regularise their situation by way of an adoption which would be recognised in the United Kingdom. The judge concluded by finding the decision to be proportionate.

The Upper Tribunal

10. Permission was granted on the basis it was arguable the judge had not identified the appellant's best interests. Also, at paragraph 45 the judge had said that the best interests assessment in relation to them did not automatically resolve the reasonableness question. The grant of permission states that what this reasonableness question is, was unclear. It was arguable the judge thereby misdirected himself in the proportionality assessment.

11. In the original hearing the presenting officer questioned whether family life existed between the appellants and their sponsors. The judge found at paragraph 33 that there was family life. Had the judge found to the contrary then this would effectively have been the end of the matter. However, the finding of the existence of family life has not been challenged by the respondent in the Upper Tribunal.

12. Both representatives were in agreement that there were errors. Whilst the judge at paragraph 45 referred to the best interests of the appellant as being a primary consideration the judge made no clear finding on what that was. Furthermore, in the same paragraph the judge states that the best interests assessment does not automatically resolve the reasonableness question. In referring to a *reasonableness* issue (my emphasis) the judge is asking the wrong question. Applying the Razgar sequential approach the final question is the proportionality of the decision.

13. I suggested that possibly this was a slip in terminology and that the judge meant to allude to proportionality. Mr McVeety suggested this seemed improbable and the Judge's reference to their best interests not resolving the reasonableness question appears to be taken from MA (Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705.Reasonableness considerations apply to an in country appeal, for instance, in relation to a parent or child leaving in the context of paragraph 276 ADE(vi) or in consideration of section 117 B (6). The use of the phrase to an entry clearance application suggested the judge had applied the wrong test and was considering factors more relevant to removal.

Conclusions

14. The judge did set out all the facts clearly and made the significant finding that family life existed. However, the judge was required to demonstrate a fuller analysis of what was in the appellants best interests. The judge had indicated they were in their country of nationality and had lived most of their lives apart from the sponsors. However there was no evaluation of their lives in that country and their prospects in the United Kingdom and the judge's conclusion is unclear.

15. It also is apparent that the proportionality test has not been set out and instead the notion of reasonableness imported. Mr McVeety acknowledge that it was not clear precisely what the judge was applying in reaching a decision on the appeal and did not oppose present application.

16. Having regard to these factors is my conclusion that the decision, particularly the comments in paragraph 45, demonstrate a material error of law which means the decision cannot stand.

17. I would set the decision aside and remit the matter to the First-tier Tribunal. The finding of the existence of family life is preserved, this not having been challenged by the respondent.

Decision

18. The decision of First-tier Tribunal Judge Alis is set aside and the matter remitted for the First-tier Tribunal to determine where the best interests of the appellant's lie and to determine the proportionality of the decision in all the circumstances.

Francis J Farrelly
Deputy Upper Tribunal Judge