IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001658
UI-2021-001058
First-tier Tribunal No:
HU/07831/2020
HU/07828/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

TINAFRANKA EYERAM AWITOR (1)
DELALI DZIMAWLE AWITOR (2)
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr Ator-Osagi, agent, instructed by Paradise Law solicitors
For the Respondent: Mr Gazge, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 7 February 2023

DECISION AND REASONS

1. The respondent appeals with permission against the decision of First-tier Tribunal Judge K Phull promulgated on 20 September 2021 in which she allowed the appellant's appeals against decisions of the respondent made

on 12 October 2020 refusing their human rights claims. To avoid confusion, we shall refer to the parties as they were before the First Tier Tribunal i.e. the Secretary of State as the respondent.

The Appellants' Case

2. The appellants are nationals of Ghana, born on 17 March 2012 and 23 October 2003 respectively. They applied to join the Sponsor, Mr Emanuel Awitor, in the UK on the basis that they were his children, albeit with different mothers.

3. The application for the First Appellant, Tinafranka, was made pursuant to Appendix FM of the immigration rules, on the basis that she was joining the Sponsor and his wife, Stella Dzimawle, who is her biological mother. Ms Dzimawle had been granted entry clearance on 5 December 2018 following a decision of First tier Tribunal Judge Juss dated 15 March 2018 ("the 2018 Decision"); she later arrived in the UK.

4. The application for the Second Appellant, Delali, was made pursuant to paragraph 297 of the immigration rules, on the basis that he was joining the Sponsor who had sole responsibility for him, his mother having played no role in his upbringing since he was three years' old.

5. The appellants' claims were refused by letters dated 12 October 2020 ("the Refusal Letters"). The Refusal Letters essentially said as follows:

   (a) Tinafranka:

   The birth certificate provided was not contemporaneous and was not accepted as establishing the alleged relationship to the Sponsor. It was not accepted that one parent is in the UK with limited leave to enter or remain, or be being granted, or has been granted, entry clearance, as a partner or a parent under Appendix FM, who had sole responsibility, and that the other parent was their partner. The documents provided did not establish the alleged mother had sole responsibility. There were no serious and compelling family or other considerations which made exclusion undesirable. She did not meet the eligibility financial requirement of paragraphs E-ECC.2.1. to 2.4. There was no evidence that the proposed accommodation was adequate. The application was refused under paragraph D-ECC.1.2. of Appendix FM with reference to paragraph EC-C.1.1. (d)

   (b) Delali:

   Paragraphs 297(i)(e) and (f) of the Immigration Rules applied. The birth certificate provided was not contemporaneous and was not accepted as establishing the alleged relationship to the Sponsor. The documents provided did not establish the Sponsor had sole responsibility. No evidence had been provided to established who the relative was with whom Delali was said to have resided for the last five years. The alleged mother's role was unclear. There were no

serious and compelling family or other considerations which made exclusion undesirable. There was no evidence that the proposed accommodation was adequate. The respondent was not satisfied that there was family life with the Sponsor such that Article 8(1) did not apply, or if it did, refusal was proportionate.

6. The appellants appealed those decisions. The appeals were heard by First-Tier Tribunal Judge Phull ("the Judge") on 25 August 2021, after which her decision was promulgated on 20 September 2021.

The First-tier Tribunal's decision

7. The Judge heard evidence from the Sponsor speaking Twi via an interpreter, and submissions from the appellants' representative, Mr Awale. The respondent was represented by counsel Ms Victor-Mazeli. Prior to the appeal hearing, DNA evidence had been obtained which showed that Tinafranka was the Sponsor's biological child, but Delali was not.

8. With reference to the relevant paragraph numbers of her decision, the Judge's main findings were as follows:

> [18] The 2018 Decision was her starting point pursuant to Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702).
>
> [19] The 2018 Decision found in favour of Tinafranka and her mother, Mrs Stella Dzimawle.
>
> [21] As regards the current appeal, Tinafranka had been refused entry under Appendix FM, paragraph E-EC1 and Delali had been refused under paragraph 297 of the rules.
>
> [23] It was accepted that the DNA test results confirmed Tinafranka was the Sponsor's biological child.
>
> [24] The DNA test results showed that Delali was not the Sponsor's biological child.
>
> [26] The Sponsor was a credible witness. He sends £300-400 every month to cover the appellants' needs.
>
> [27] The Sponsor's evidence was credible that he makes all the major decisions in relation to the appellants because he explained that he sends remittances for their needs.
>
> [28] The Sponsor has daily contact with the appellants and has visited them, as shown by stamps in his passport.
>
> [29] The letter dated 6 June 2020 from Delali's mother was not included in the papers such that it could not be assessed.
>
> [30] The Sponsor's oral evidence was unchallenged, that he makes all the main decisions for the appellants and that George (their cousin with whom they live) calls the Sponsor regarding decisions for the children.

[31] The Sponsor makes the main decisions for both appellants and has sole responsibility for them.

[32] Adequate accommodation is available for the appellants. Tinafranka satisfied the requirements of the immigration rules.

[33] Delali did not meet the requirements of paragraph 297.

[34] Delali did not meet the requirements of paragraph 309A relating to de facto adoptions because the adoptive parents were not living abroad immediately preceding the application with Delali for the relevant period.

[37] The Sponsor and Delali shared de facto family ties, so that their family life and their relationship continues to develop normally. Both appellants enjoyed a close relationship with the Sponsor as part of his family unit and they were dependent on him and therefore article 8 (1) ECHR was engaged.

[39] The appellants' best interests dictated that their ties with the family must be maintained. There was no good reason why those ties should be severed by their exclusion.

[40] Excluding the appellants would be against the public interest.

[41] Counsel did not challenge the evidence of the accommodation, which was found adequate.

[42] The appellants are dependent minor children of the Sponsor. The public interest was tipped in their favour because their parents and a younger sibling are in the UK; it would be disproportionate to exclude them; they were still minors and required the support of their parents; refusal of entry clearance was disproportionate.

Appeals History

9. On 3 November 2020 the respondent sought permission from the First -tier Tribunal to appeal to the Upper Tribunal on the single ground that the Judge had erred in making a material misdirection in law, due to the following:

   (a) Despite finding that the Sponsor was not Delali's parent and that a de facto adoption had not occurred, the judge found they shared "de facto family ties" when applying Razgar. However, the Judge failed to reference any case law or legal basis for such a finding.

   (b) The Judge incorrectly used the 2018 Decision as a starting point and incorrectly stated that it found in favour of Tinafranka; Tinafranka was not party to the appeal leading to the 2018 Decision.

   (c) The Judge misapplied Appendix FM with regard to Tinafranka in considering whether, and finding that, the Sponsor has sole parental responsibility for both Appellants. This was not relevant to the application as it was made under Appendix FM Child Route ("Family life as a child of a person with limited leave as a partner or parent").

10. On 8 November 2021 First-tier Tribunal Judge L J Murray granted permission to appeal, stating as follows:

> "4. In respect of the first Appellant it is arguable that the Judge failed to apply the correct Immigration Rule as the appeal should properly have been considered under paragraph ECC.1.6 (a), and it is further arguable that Devaseelan does not apply as the first Appellant was not a party to the previous appeal. However, the Respondent will have to prove the materiality of these alleged errors in view of the fact that it is not in dispute that the first Appellant is the child of the sponsor and her mother has limited leave and the Judge appears to find that all other requirements of the Rules are met.
>
> 5. In respect of the second Appellant it is arguable that the Judge failed to give adequate reasons for allowing the appeal under Article 8 in view of the fact that the sponsor is not the second Appellant's father, nor is he related and no adoption has taken place."

The Hearing

11. The appeal came before us on 7 February 2023.

12. It serves no purpose to recite the submissions here at length as they are set out in the record of proceedings. Essentially, Mr Gazge expanded on the grounds of appeal, and made the further submissions of note:

    (a) There is nothing in the Judge's decision to show the financial requirements of the immigration rules were considered or addressed.

    (b) The law was applied incorrectly in respect of Tinafranka. The appeal should have been considered under E-ECC.1.6(a) but the Judge applied E-ECC.1.6 (b). Devaseelan did not apply. Mr Gazge confirmed, however, that the finding that the Sponsor is Tinafranka's biological parent was not being challenged, due to the DNA report. As such, he conceded that the eligibility relationship requirement was on any view met and any error in this respect was not material.

    (c) As regards Delali, the DNA report showed the Sponsor was not Delali's biological father and no adoption had taken place, so the Judge failed to give adequate reasons for allowing the appeal under article 8. It was not open to the Judge to find that there was family life between them as the Judge had not analysed the strength of the bond between them.

13. Mr Ator-Osagi confirmed there was no rule 24 response. He said even though the Judge treated the 2018 Decision as her starting point under Devaseelan, which he accepted was incorrect, she went on to make her own independent findings. In any event, the Judge found the documentary and oral evidence of the Sponsor established that he and the Appellants enjoy a genuine and subsisting relationship, as parent and children. He referred to the Judge's analysis at [40] and said her conclusions were based on her finding that the Sponsor was credible and the evidence was

not challenged. He said he recognised that the Judge had used the phrase "de facto" family ties, when referring to Delali but, he submitted, this was just used to say there were strong family ties, as the Judge had already correctly found the rules concerning de facto adoptions were not met.

14. Mr Ator-Osagi agreed that Tinafranka needed to meet all of the requirements for entry clearance as a child set out in paragraphs E-ECC.1.2 to 2.4. He submitted that even though the Judge may not have explicitly addressed whether the financial requirements were met, the evidence before her clearly showed the combined income of the parents in the UK and this was not challenged; the appellants did therefore meet the financial requirements. The Judge was therefore correct to find the balance was tipped in favour of the appellants as the public interest was reduced in light of this.

15. As far as Delali is concerned, Mr Ator-Osagi submitted the Judge correctly found the requirements of para 297 and 309A were not met, but went on to address article 8 and did so properly. He said the Judge could have made more specific findings concerning the role of Delali's biological mother but submitted that the Judge accepted the Sponsor's evidence of her having no role and that this was sufficiently factored into the article 8 balancing exercise at [31]; the children live with their cousin and there is no third party claiming parental responsibility.

16. At the end of the hearing before us, we informed the parties that we were satisfied that the decision of the First-tier Tribunal is vitiated by material errors of law and that the decision must be set aside. We informed the parties that we would provide full reasons in writing in due course; this we now do.

Discussion and Findings

17. We find the ground of appeal that the Judge made a material misdirection in law to be made out for the reasons we shall now go on to discuss.

18. The Judge erred in stating that the 2018 Decision was her starting point pursuant to Devaseelan. The only person listed as appellant in the 2018 Decision was Ms Dzimawle. Tinafranka is mentioned at paras [13] – [15] in such a way as to indicate that Tinafranka may have applied alongside, or in addition to, Ms Dzimawle but all of the analysis is in respect of Ms Dzimawle. Para [17] finds that "the Appellant discharges the burden of proof" and [19] states that "The appeal is allowed", indicating a single appellant. There is a statement at [15] in respect of Ms Dzimawle, that "Her child is Tinafranka Eyeram Awitor born on 17th March 2013 (WS at para 5)" but that is the extent of any findings in relation to Tinafranka, and it is not clear whether this is actually a finding, or a mere recitation of the evidence.

19. Having stated at [23] and [24] that the results of the DNA test showed the appellants to have different mothers, and having noted at [21] that the Refusal Letters refused their claims with respect to different parts of the

immigration rules, the Judge should have addressed each appellant in their own right as against those rules. Whilst some attempt to do so can be seen from the analysis of the rules applying only to Delali in [33], much of the decision refers to both appellants together and makes findings such as those in [31], [37] and [39] concerning sole responsibility and family ties. We are therefore not satisfied that the Judge properly undertook the task of analysing whether the correct rules were met with respect to each appellant. Rather, the Judge's unclear analysis, which appears to have lumped together the appellants, informed (and so infected) the Judge's consideration of the public interest and overall assessment of the article 8 claim outside the rules.

20. As stated in the applicable Refusal Letter, Tinafranka needed to meet the requirements of Appendix FM, E-ECC.1.6. which states as follows:

> "One of the applicant's parents must be in the UK with limited leave to enter or remain, or be being granted, or have been granted, entry clearance, as a partner or a parent under this Appendix (referred to in this section as the "applicant's parent"), and
>
> > (a) the applicant's parent's partner under Appendix FM is also a parent of the applicant; or
> >
> > (b) the applicant's parent has had and continues to have sole responsibility for the child's upbringing; or
> >
> > (c) there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."

21. As can be seen, (a), (b) and (c) are in the alternative such that only one need be met. The DNA report confirmed that the Sponsor and Ms Dzimawle are Tinafranka's biological parents, which addresses the concern in the Refusal letter about the birth certificate not being contemporaneous. It was accepted that both parents are in the UK, the Sponsor's status not being challenged and Ms Dzimawle having been granted entry clearance and having come to the UK after the 2018 Decision. It is therefore clear that Tinafranka meets the requirements of E-ECC.1.6(a). The Judge stops short of making this finding at [23], albeit the preceding paragraphs indicate the correct rule was being considered. We accept, as Mr Gazge did, that any error regarding whether the relationship requirement is met by Tinafranka, is immaterial. No challenge is made to the Judge's finding in [32] that the accommodation requirement is met.

22. Having said that, the Refusal Letter for Tinafranka clearly states that "You do not meet the eligibility financial requirements of paragraphs E-ECC.2.1. to 2.4." Although this challenge is noted by the Judge at [9], we cannot see any attempt to go on to analyse whether this requirement is met. Her findings at [41] that financial independence was not in issue, and at [26] concerning the amount of support sent to the appellants, are not sufficient, as these relate to the (in Tinafranka's case, erroneous) question

of sole responsibility and public interest considerations in section 117B rather than the rules. This omission means that the Judge's finding at [32] that Tinafranka meets the requirements of the immigration rules is unsafe and tainted by a material error of law.

23. The Judge's decision at [40] shows that she adopted the erroneous finding that Tinafranka meets the requirements of the immigration rules into account when conducting the balance exercise under article 8. The finding is used as a reason to tip the balance in favour of Delali despite his not meeting the rules. We cannot be satisfied that the Judge would have reached the same decision in allowing the appeal had she found Tinafranka did not meet the rules. Finding both appellants did not meet the rules would have meant tipping the balance significantly towards the public interest side. The overall article 8 analysis, is therefore infected by the erroneous findings concerning Tinafranka.

24. The Judge was correct to find at [34] that Delali did not meet the requirements of rule 309A of being a de facto adopted child. The Sponsor came to the UK in 2007 and the application was not made until June 2020. The Judge finds at [33] that para 297 is not met. It is now clear that the Sponsor is not Delali's father. Neither of Delali's parents are in the UK.

25. The Judge found, however, that Delali lived with the Sponsor until the Sponsor came to the UK and that he then lived with the Sponsor's partner until she came to the UK in December 2018. She found the Sponsor and his partner have always considered themselves to be Delali's parents since he was 3 years old. The Judge said, at [33], that the relationship continues so that there has been a genuine transfer of parental responsibility. That, however, is to disregard entirely what had been said by the respondent. The Refusal Letter stated:

> "I note your alleged father entered the UK in 2007 and has resided there since, you have provided no evidence concerning how many occasions you have met your sponsor or what role he plays in your day to day life since he left Ghana in 2007. I further note you have provided a supporting letter from your alleged mother dated 06/06/2020, this states that she is resident in Ghana and that she is still in contact with you. It should also be noted that your mother was the one who registered your birth in 2015.
>
> You have further stated for the last 5 years you have resided with a relative; however, you have provided no evidence to establish who this relative is. It is not clear from the documents provided what is your alleged mother's role in your life and in absence of evidence of your alleged father's role, I am not satisfied that your sponsor has had sole responsibility for your upbringing. I therefore refuse your application under paragraph 297(i)(e) of the Immigration Rules."

26. The Judge notes at [7] the respondent's submission that:

> "Delali's mother is still alive and there is no evidence she has left his life. The Appellants live with a cousin. There is no evidence that their situation is uncomfortable".

27. The Judge notes at [29] that the letter from Delali's mother was not in the respondent's bundle so she was unable to assess it. She appears at [30] to accept the Sponsor has sole responsibility mainly based on his oral evidence not being challenged. She says at [33] that "I accept that the sponsor and his partner have always considered themselves to be Delali's parents since he was 3 years of age." She does not address the question of Delali's biological mother's involvement, or make any findings about it, despite it being specifically challenged both in the Refusal Letter and submissions. It cannot be said that, had she done so, she would have reached the same conclusion as regards sole responsibility. The Sponsor's evidence was that he took over Delali's care when Delali was 3 years old. The application states that Delali was born in 2003; he would therefore have been 3 in 2006. The Sponsor came to the UK in 2007 and so was only directly involved in Delali's life for a year or so before Delali was left in the care of Ms Dzimawle. Ms Dzimawle then came to the UK in 2018, leaving Delali in the care of a cousin. We were not directed to any evidence before the First-tier Tribunal from this cousin confirming that Delali's mother has no role in his life, or where she lives in relation to Delali etc. The Sponsor's witness statement evidence does not go into any detail beyond simply stating that the mother is not interested in Delali and that the Sponsor has cared for Delali since he is 3. As above, we know he was not physically present after Delali was aged 4. Clearly Delali's mother is still 'on the scene' in some way, as she registered the birth certificate in 2015 and provided the letter mentioned in the Refusal Letter. Overall, we find that the Judge gave insufficient reasons as to why she found the Sponsor had sole responsibility for Delali, particularly when viewed against the evidence that the Sponsor is not the father of Delali.

28. This error is material because it is plain that the Judge considers, at [31], there to be a commitment and bond between the Sponsor and Delali and it is a strong persuasive factor in her article 8 analysis. She finds at [37], that the children's best interests "dictate that their ties with the family must be maintained" but does not consider that part of Delali's interests may be to maintain some kind of relationship with his mother, and the impact that the grant of entry clearance to Delali would have upon his relationship with his mother.

29. Overall, we find these errors infect the decision as a whole such that it cannot stand.

Conclusion

30. We are satisfied the decision of the First-tier Tribunal did involve the making of errors of law and we set it aside.

31. Given that the errors identified undermine the findings as a whole, none of the facts found can be sustained.

32. Given the extent of fact-finding that is required, we are satisfied that the appropriate course of action is for the appeal to be remitted to the First-

tier Tribunal with no findings preserved, to be determined by a judge other than Judge Phull.

Notice of decision

1. The decision of First-tier Tribunal Judge Phull promulgated on 20 September 2021 is set aside.

2. The appeal is remitted to the First-tier Tribunal for rehearing, with no findings preserved.

Signed: L. Shepherd

Date: 20 February 2023
Judge of the Upper Tribunal
Immigration and Asylum Chamber