Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: OA/01384/2013**

OA/01382/2013

OA/23806/2012

OA/22726/2012

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly	**Determination Promulgated**
On 6 October 2014	**On 13 October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

ERICK TONDO

YANICK TONDO

PATRICK TONDO

BRENDA TONDO

(ANONYMITY NOT DIRECTED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Barton counsel instructed by Sabz Solicitors.

For the Respondent: Mr G Harrison Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of these

Appellants. Having considered all the circumstances and evidence I do not deem it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Hague promulgated on 22 October 2013, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellants are all citizens of the Congo. The first two Appellants claimed to be the twin sons of Brigit Bingimenza ('the Sponsor') who had applied for asylum in the United Kingdom and was granted status on 12 June 2012. They claimed to have been born on 30 December 1994. The third Appellant claimed he was born on 25 November 1995 and the fourth Appellant claimed she was born on 2 November 1996 and they claimed to be the Sponsor's nephew and niece orphaned by the war and adopted by her on 10 June 2006.
4. The Appellants all applied for leave to join the sponsor in the United Kingdom. The applications of the first two Appellant were considered by reference to paragraph 352D of the Rules and in relation to the third and fourth Appellants both Rule 352D and 319X were considered.
5. On 29 November 2012 the Secretary of State refused the first two Appellants applications. The refusal letter reasons can be summarised as: it was accepted that the Appellants were the children of the Sponsor but their age was not accepted as being under 18; their birth certificates were not accepted as reliable evidence of age as they could not be verified; the Appellants did not appear from their photographs to be under 18; the birth certificates were not accepted to be genuine because of security and 'other issues.'
6. On 18 October 2012 the Secretary of State refused the applications of the third and fourth Appellants. The reasons can be summarised as follows: paragraph 352D does not apply to de facto adopted children; the documents produced in relation to the birth certificates of the Appellants, their mother, and their parents death certificates were all photocopies; there were discrepancies in relation to the date of death of their parents in the documents and it was not accepted that they were dead; there was no evidence that the sponsor had maintained the Appellants; there was no evidence that the accommodation provided was

adequate; there was no evidence that the Appellant could maintain the Appellants.

The Judge's Decision

7. The Appellants appealed to the First-tier Tribunal and First-tier Tribunal Judge Hague (hereinafter called "the Judge") dismissed the appeal against the Respondent's decision. The Judge acknowledged in his determination that were it is alleged that false documents have been produced the burden of proof is on the Respondent; he stated that the only evidence of the ages and relationships was from oral sources; he found that the birth certificates for the first two Appellants were false for the reasons given in the refusal letters and that this tainted the other documentary evidence; the first Appellant appeared to be older than 18 in his passport photograph; there was no evidence that the Congolese adoption process was the same or similar to the United Kingdom and therefore that the documents relating to that could be relied on; the only oral evidence came from the Sponsor's daughter who was in the United Kingdom when the third and fourth Appellants were adopted and therefore her evidence as to their dates of birth and this process was not reliable. He therefore dismissed the appeals under the Rules. He did not find that Article 8 was engaged by the decision.
8. Grounds of appeal were lodged and on 1 December 2013 First tier Tribunal Judge Chohan gave permission to appeal stating that the Judge had arguable reversed the burden of proof in relation to the allegation of the production of false documents; the Judge made an assessment of age based on a photograph.

9. At the hearing I heard submissions from Ms Barton on behalf of the Appellant that she relied on her skeleton argument.

10. On behalf of the Respondent Mr Harrison conceded that the Judge appeared to have failed to engage with the issue of where the burden of proof lay in relation to the production of false documents.

The Law

11. Errors of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking

into account immaterial considerations, reaching irrational conclusions on facts or evaluation or giving legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue under argument. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence that was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration judge concludes that the story told is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Finding on Material Error

13. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

14. The applications of the first Appellants were underpinned by birth certificates together with other documentary evidence. The refusal letters in relation to the first two Appellants stated that the hologram stamp on the birth certificate had not been in use at the time of the issue of the certificates and cited a report that gave other reasons why the certificates were unreliable. The refusal letter gave no source for the assertion in relation to the hologram nor was there a full reference to the report relied on in relation to the other claimed concerns about the certificates.

15. While the Judge acknowledged that the burden of proof was on the Respondent in paragraph 11 he nevertheless relied on the assertions raised in the refusal

letters without satisfying himself as to the source and quality of the evidence they were based on.

16. The failure of the First-tier Tribunal to fully address and determine the issue of the burden of proof in relation to the production of false documents constitutes a clear error of law in relation to the first two Appellants and taints the whole of the determination. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

17. I therefore found that errors of law have been established and that the Judge's determination cannot stand and must be set aside . Ms Barton and Mr Harrison indicated that they were content for me to remake the decision on the basis of the documents before me.

The Law

18. The burden of proof in this case is upon the Appellants and the standard of proof is upon the balance of probability. I have determined this matter based upon facts that were appertaining at the time the decision of the Entry Clearance Officer being constrained by Section 85(5) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) I am entitled to take into account evidence of matters occurring after the date of the decision providing that they relate to and inform an understanding of facts in existence at the time of the decision pursuant to DR (Morocco) [2005] UKIAT 00038.

19. Where there is an allegation of forgery, it is often suggested that the burden on the Respondent is a high one. However, in Re B(Children) 2008 UKHL 35 the House of Lords said that in fact *"there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not*". There is a flexibility to the standard, but as Richards LJ expressed it in R(N) v Mental Health Review Tribunal (Northern Region) (2005) EWCA Civ 1605 "*the flexibility …lies not in any adjustment to the degree of probability required for an allegation to be proved…but in the strength or quality of the evidence that will in practice be required…"* Cogent evidence is thus required in such cases as Ouseley J said in R (on the application of Beckett) v SSHD 2008 EWHC 2002 Admin to satisfy a

civil Tribunal that someone had been fraudulent or behaved in some other reprehensible manner. The "high probability" standard of proof, as Ouseley J termed it, was addressed to the cogency of the evidence required to prove an allegation of this type rather than to a shift in the standard of proof itself.

20. The leading case on documentary evidence is Tanveer Ahmed (Starred) 2002 UKIAT 00439 in which the Tribunal said that it is usually an error to concentrate on whether the document is a forgery. The only question is whether the document is one upon which reliance should properly be placed. The document should not be looked at in isolation but should be assessed along with any other piece of evidence - in the round.
21. The Appellants appeal is pursuant to Section 82 of the 2002 Act.
22. The appeal must be allowed if I find that the decision against which the appeal is brought was not in accordance with the law or with the Immigration Rules or if the decision or action involved an exercise of discretion by the Respondent, which should have been exercised differently. Otherwise, I must dismiss the appeal.

Findings

23. I am required to look at all the evidence in the round before reaching any findings. I have done so. Although, for convenience, I have compartmentalised my findings in some respects below, I must emphasise the findings have only been made having taken account of the evidence as a whole.

First and Second Appellant

24. The only issue raised in relation to the first two Appellants in the refusal letters was whether the Appellants had met the evidential burden of establishing that they were, as claimed, under the age of 18 as required by paragraph 352D(ii) as it was accepted on the basis of DNA evidence that they were both the sons of the Sponsor.

25. The Respondent had the opportunity to provide evidence as to the reliability of the documents produced by the Appellants and have failed to produce cogent evidence of forgery or unreliability. They bear the burden of proving forgery and providing cogent evidence of it. The writer of the refusal letter asserts that he 'is aware' that the use of a hologram in a birth certificate has only been in use 'for

the last couple of years'. He does not provide the documentary evidence on which his awareness is based and therefore I am unable to conclude that the assertion is made out. There are further references to a '2005 report' in relation to the reliability of documents from the DRC but the report has not been provided or fully referenced so again I am not satisfied that this amounts to cogent evidence of forgery or unreliability.

26. I note that when this application was made it is not disputed that 3 other children of the Sponsor made similar applications for reunion and they produced photocopied birth certificates as evidence of their age and relationship to the Sponsor. Their applications were granted and I accept that the documents they produced although photocopies which were not contemporaneous with their birth must have been accepted as reliable evidence of who they claimed to be.

27. I note that the Sponsor although unable to give evidence now because of health issues arising out of her experiences in the DRC was interviewed at some length by the Respondent and as a result was granted refugee status . I am satisfied that her account was considered to be reliable. I take this into account when determining whether to accept her assertion that the Appellants were born in 1994 as she claims.

28. These Appellants produced photocopies of their birth certificate and copies of their passports as evidence of their age and identity and I have considered whether these are documents that I can rely on. The Appellant's assert that in relation to the documents they were photocopies because the originals were lost in the chaos of their flight from the war. I accept that this is a plausible explanation as to why they have copies rather than originals.

29. The birth certificates were dated 24 July 1989 and thus were not contemporaneous with their birth. This is of course not necessarily fatal to their reliability as there are many countries in which birth certificates are not issued unless required for a specific purpose. I also note that the Appellant's produced documents the Headmaster of their school certifying that they were born on 30 December 1994 as they claim and they were enrolled in the school year 2011-

2012. These documents were consistent with the witness statements provided by the sponsor and her daughter Esther Kahera as to the Appellants age.

30. The Appellant's also produced passports as confirmation of their ages. It was suggested that in relation to the Appellants their photographs in their passports suggest they are older than 18. I accept that it is difficult to assess age based on appearance alone given the effect of different life experience and ethnic issues.

31. Looking at all of the evidence in the round in relation to the first two Appellants I accept that they provided satisfactory evidence to show that it is more likely than not that they were under 18 at the time of their applications and their appeals should succeed.

Third and Fourth Appellants

32. The third and fourth Appellants are not the biological children of the sponsor but , it is claimed, her niece and nephew that she adopted after it was claimed their parents died on 5 January 2006.

33. The refusal letter makes clear that their case could not be considered under paragraph 352D as a 'de facto adoption' does not meet the requirements of the Rules. I am satisfied that treating this as a potentially a de facto adoption is correct given that the Rule requires the Sponsor to be the 'parent'. 'Parent' is defined in paragraph 6 of the Rules. This may include a child who is adopted but the definition requires at 6(d) that the child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the UK. There was no evidence advanced on behalf of the Appellants to suggest that they could meet this definition.

34. Therefore the application of these Appellant must be considered by reference to paragraph 319X of the Rules.

35. I am not satisfied in relation to these Appellants that the evidence is reliable and consistent as there are a number of discrepancies that have not been satisfactorily addressed. The main issue that has not been addressed is that

although it is claimed that the Appellants were orphans whose parents both died on 5 January 2006 the death certificate produced in respect of the Appellant's mother stated that her husband was deceased and did not confirm that he died on the same day. I also note that although their mother registered her own birth in 2000 she did not register the birth of the two Appellants. I also note that there is no evidence as to who registered the Appellant's birth on 10 June 2006 and it is troubling that the registration occurred after the date of the purported adoption. These issues were all raised in the refusal letter this was not satisfactorily addressed in the grounds. Although the Sponsor suggests the practice in the DRC is for relatives to register the birth of relatives and there is no reference to the name of the person registering the birth there is no evidence of that before me. Given these concerns I am not satisfied that the Appellants have met the evidential burden of establishing that they are orphans as claimed and have been adopted by the sponsor as she claims.

36. I also note that the Appellant lives in a two bedroomed house. There is no evidence before me to suggest that the house could accommodate the extra occupants this appeal would result in or that the Sponsor would be granted a larger house. The Appellant therefore cannot meet the requirements of paragraph 319(vi).The Sponsor is unemployed and therefore there is no evidence that the Appellants could be maintained without recourse to public funds and therefore they cannot meet the requirements of Paragraph 319X(vii)

37. There is no evidence before me to suggest that there are serious and compelling circumstances requiring entry clearance to be granted.

38. I have considered whether Article 8 is engaged by the decision. Given my concerns about the exact nature of the relationship between the Appellants and the Sponsor and the fact that there is no evidence they ever lived together as a family I do not accept that Article 8 is engaged by the decision.

Decision

39. **There was an error on a point of law in the decision of the First-tier Tribunal such that the decision is set aside**

40. **I remake the appeal.**

41. **In relation to the first and second Appellant I allow the appeals.**

42. **In relation to the third and fourth Appellant I dismiss the appeals under the Rules and under Article 8.**

Signed Date 12 October 2014

Deputy Upper Tribunal Judge Birrell

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal in respect of the first and second Appellants and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable as I am satisfied that the application could have been granted on the basis of the information before the ECO.

I have dismissed the appeal in respect of the third and fourth Appellants and therefore there can be no fee award.

Signed

Deputy Upper Tribunal Judge Birrell 12.10.2014