Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/01677/2018
HU/01679/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 April 2019	**On 30 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR CHRISTOPHER [F] – 1st Appellant
JN – 2nd Appellant
(Anonymity orders not made)

Appellants

and

ENTRY CLEARANCE OFFICER - SHEFFIELD

Respondent

Representation:
For the Appellants: Mr A Kamal, Solicitor
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are both citizens of Ghana. The first Appellant who I shall refer to as the Appellant was born on 13th May 2000 and is now 18 years of age. The 2nd Appellant, JN, who is his brother was born on 5 June 2009 and is now 9 years old. They appeal against a decision of Judge of the First-tier

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Tribunal Hussain sitting at Hatton Cross on 10 December 2018 in which the Judge dismissed the Appellants' appeals against decisions of the Respondent dated 21 November 2017. Those decisions were to refuse the Appellants' applications for entry clearance to join their mother Mrs [CM], a British citizen, ("the sponsor") under paragraph 297(i)(e) of the immigration rules. This paragraph sets out the requirements to be met by any person seeking entry clearance to join a parent who is present and settled in the United Kingdom. Subparagraph (e) provides that the parent whom the child is seeking to join must have had sole responsibility for the child's upbringing.

The Appellants' Case

2. The sponsor travelled to the United Kingdom in 2011 since when the Appellants had been living with their grandmother in Ghana. Due to the grandmother's age and health conditions she was unable to continue to provide care for them. The whereabouts of the Appellant's father was unknown after he travelled to Libya. The sponsor had been regularly sending money to Ghana for the support of the Appellants and had sole responsibility for the Appellant's upbringing. It was in the children's best interests that they come to the United Kingdom to be looked after by their mother.

3. The Respondent initially refused the application because he was not satisfied that the Appellants were related to the sponsor as claimed but that issue has now been resolved in the Appellants' favour. Cash transfer receipts showed that the sponsor had been regularly sending money to Ghana but there were three beneficiaries on those receipts neither of which were the grandmother with whom the Appellants had said they were residing. Even if she was the beneficiary the Respondent took the view that sole responsibility extended beyond financial support and there was no satisfactory evidence that the sponsor was responsible for making the important decisions relating to the Appellants' upbringing such as those relating to their personal care, education and health.

The Proceedings

4. In January 2014 the Appellants had made a similar application for entry clearance under paragraph 297 which was refused by the Respondent and their onward appeal was dismissed by Judge of the First-tier Tribunal Jones QC sitting at Richmond on 15 May 2015. His decision was overturned on appeal by Upper Tribunal Judge Allen sitting at Field House on 16 October 2015. Although Article 8 was not argued before Judge Jones the issue was of sufficient importance that it ought to have been addressed by the Judge. Judge Allen indicated there was no reason why the matter should not simply be returned to Judge Jones QC for him to complete his determination by considering the claim in respect of Article 8.

5. In fact, that appears not to have happened. Instead the Appellants made a further application for entry clearance on 5 September 2017 and it was the

refusal of that application on 21 November 2017 which gave rise to these proceedings. The deadline for appealing this second decision of the Respondent was 19 December 2017 but the notice of appeal was in fact lodged three days late on 22 December 2017. Form IAFT-4 completed by the Appellant's solicitors gave the Appellants address as care of the solicitors' address who were Nasim and Co in East Ham London E6. They continue to act for the Appellants. Neither the sponsor's address nor the Appellants' address in Ghana was given on the notice of appeal.

6. Due to the lateness of the lodging of the notice of appeal the matter was referred to the Tribunal Caseworker to decide whether time should be extended to enable the appeal to proceed. In extending time the Caseworker noted that the delay was not significant and that both Appellants were minors (at that time). Even though no reason was provided for the delay, time was extended.

7. The Tribunal issued the caseworker's decision on 7 February 2018 to the Appellants care of their solicitors and to the solicitors themselves. On 27 June 2018 the Tribunal sent notice of hearing to the Appellants again care of their solicitors and to the solicitors indicating the appeal would be heard on Thursday, 29 November 2018 at Hatton Cross.

The Decision at First Instance

8. In consequence the matter came before Judge Hussain when there was no representation by either party. The Judge noted the basis of the application and the Respondent's grounds for refusal but stated at [9] of his determination: "At the hearing, the Appellants were not represented either by their sponsor or through their nominated solicitors. I note that on 27 June 2018, a notice of hearing was sent to Nasim and Co solicitors. There has been no explanation for their absence from the hearing. In the circumstances, I resolved to determine this appeal on the evidence before the Tribunal".

9. Judge Hussain concluded that the Appellants had not discharged the burden of proof upon them. It was significant that the sponsor had not attended the hearing which would have been crucial for the Tribunal to assess the level of interest she had retained in the Appellants and how she had supervised their upbringing. There was no written evidence to show that the sponsor had otherwise exercised parental responsibility over the children. This last comment is a reference to the fact that although there were grounds of appeal running to 5 pages which had been lodged in December 2017, there were no witness statements either from the Appellants or their sponsor and there were not even copies of the documents referred to in the refusal letter such as payment slips. Judge Hussain dismissed the appeal and a copy of his decision was sent out by the Tribunal to the solicitors on 31 January 2019.

The Onward Appeal

10. The Appellants appealed against this decision arguing that they had requested an oral hearing on form IAFT-4 but had only received notice of pending appeal and the Respondent's bundle in March 2018. They had not received the notice of hearing dated 27 June 2018 referred to in Judge Hussain's determination. If they had received it both the sponsor and the Appellant's representatives would have attended. They had not filed a bundle of evidence as they were unaware of the date of the hearing. They only became aware of the hearing after receiving the determination. No enquiries were made about their whereabouts on the day of the hearing. It was crucial that the sponsor should attend the hearing in order to give evidence, but she was not aware and thus could not attend. It was in the interests of justice and the best interests of the children that the determination be set aside, and the appeal listed for rehearing.

11. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Grimmett on 26 February 2019. In granting permission to appeal she wrote: "it appears that neither Appellant received the notice of hearing and therefore failed to attend. I grant permission to appeal". I pause to note here that it would of course have been impossible for the Appellants to attend the hearing as they were then, and are still, in Ghana, but I assume that the Judge intended to refer to the non-attendance of the sponsor.

12. The Respondent replied to the grant of permission pursuant to rule 24 on 29 March 2019. The Respondent's letter recited the history of the case stating it was clear that the representatives had received the Home Office bundle in preparation for the hearing, but it was unclear why the notice of hearing was not received or why after receiving the bundle the solicitors had not contacted the Tribunal to check when the hearing date was sent. To date no bundle of documents had been received by the Respondent from the Appellants to deal with any of the matters raised in the refusal notice. The Respondent therefore "tentatively" opposed the Appellant's appeal. The Judge had directed himself appropriately.

The Hearing Before Me

13. In consequence of the grant of permission the matter came before me to determine in the first place whether there was a material error of law in the Judge's decision such that it fell to be set aside and directions for a rehearing be made. If there was not, the decision at first instance would stand.

14. The Appellants' solicitor submitted that the solicitors had not received the notice of hearing and therefore the decision of Judge Hussain should be set aside. For the Respondent it was noted that the Appellant had never followed up the decision of Upper Tribunal Judge Alan who had remitted the matter back to the First-tier Tribunal. They had done nothing about their appeal in 2016 and had been late in lodging their appeal against the 2017 decision. At the conclusion of submissions, I indicated that I would

dismiss the appeal and give written reasons for my decision which I now do.

Findings

15. This case has had an unfortunate history. There is no explanation why the Appellants made a 2nd application in 2017 rather than pursue their previous appeal in 2015/16. When they did appeal against the 2017 decision the notice of appeal did not state either the Appellants' address in Ghana or the sponsor's address in the United Kingdom. Sponsors are not normally served with notice of proceedings by the Tribunal but if instead of giving the solicitors' address for the Appellants the solicitors had given the sponsor's address some of the difficulties in this case might have been avoided. There was no good reason why the solicitors put their own address down as the address for service on the Appellants

16. The solicitors argue that they did not receive the notice of hearing in June 2018 notifying them of the hearing date in November 2018. There are two problems with this argument. The first is that the Tribunal's correspondence has not been returned undelivered to the Tribunal by the Post Office. This includes the decision extending time, the notice of pending appeal, the notice of hearing and the decision of Judge Hussain itself. The solicitors appear to be suggesting that they have received all of these documents except the notice of hearing. Whatever has gone wrong in the solicitors' office, I do not accept that they were not properly served with the notice of hearing nor that the Tribunal failed to serve the Appellants at the care of address given on the IAFT-4. Three notices were sent out each time, one each for the two Appellants and one for the solicitors. None have come back undelivered. I do not consider that any good reason has been given why both the sponsor and the solicitors failed to attend the hearing before Judge Hussain on 29 November 2018.

17. The second problem is the lack of engagement on the Appellants' side with this appeal. I do not consider that it is any argument for the solicitors to say that the Tribunal should have made enquiries of them on 29th November as to where they were. That is not a mandatory requirement and in the course of a busy list it is not possible to investigate matters which should have been put beyond doubt by the solicitors themselves. I am also concerned at the lack of engagement in these proceedings by the sponsor who has not filed and served a statement setting out her claim to have sole responsibility for the care of the Appellants. There was no response to the Respondent's bundle or indeed to the entry clearance managers post appeal review. It is not at all clear therefore that irrespective of the issue of service, this appeal has any merit.

18. I appreciate the point that if a party has not been served there may be a right to set aside the Tribunal's decision but in this case the lack of any evidence filed with the Tribunal prior to the November 2018 hearing undermines any confidence one might have that these proceedings were fully contested. It was open to Judge Hussain to proceed with the hearing

on 29th November notwithstanding the absence of the sponsor and the solicitors. He was entitled to draw the conclusion that the solicitors had been properly served with a notice of hearing as had the Appellants because separate notices of hearing had been sent to them care of the solicitors' address. I do not consider therefore that there was any material error of law in the First-tier Tribunal's decision and I dismiss the onward appeal against the decision of the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellants' appeals.

Appellants' appeals dismissed

I make no anonymity order in relation to the Appellants as there is no public policy reason for so doing. The Appellant is now an adult and the 2nd Appellant will continue to be referred to by his initials.

Signed this 25 April 2019

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 25 April 2019

……………………………………………….
Judge Woodcraft
Deputy Upper Tribunal Judge