Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18266/2012

THE IMMIGRATION ACTS

Heard at Glasgow
on 1 August 2013

Determination promulgated
on 5 August 2013
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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAMDI IBRAHIM SULEMAN

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

For the Appellant: Mr A Devlin, Advocate, instructed by Neil Barnes, Solicitor
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant identifies himself as a citizen of Eritrea, born on 20 December 1985. By notice dated 27 August 2012, the respondent refused his application, made from Sudan, to enter the UK for the purposes of settlement as the dependent relative (the brother) of a person with limited leave to remain as a refugee under paragraph 319Z of the Immigration Rules. The decision does not mention Article 8 of the ECHR.

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2) The appellant appealed to the First-tier Tribunal. His grounds do not mention the Rules. They state that refusal of entry clearance "constitutes a disproportionate interference with the Article 8 rights of the appellant and the sponsor. The appellant cannot now return to Eritrea and so cannot turn to other relatives for support."

3) First-tier Tribunal Judge Morrow refused the appellant's appeal by determination dated 22 April 2013.

4) Permission to appeal to the Upper Tribunal was granted, on these grounds:

   1 The alleged discrepancy in respect of the money transfers does not exist. The Immigration Judge has misapprehended the evidence before him. At the time of making the statement the sponsor was quite correct in stating that money was sent directly to his brother. The earlier transfers were made to the sponsor's wife, who at that time was living in Sudan with the appellant. This was evidenced in the sponsor's statement at item 2 of the appeal bundle, and the identity of the sponsor's wife was confirmed at item 7 in the appellant's bundle. In short money was sent to the sponsor's wife while she was in Sudan, and after she left Sudan, having obtained entry clearance under paragraph 352 of the Immigration Rules, money was sent directly to the appellant. There is no contradiction. Accordingly the Tribunal has materially erred in law by making a finding that cannot be supported on the evidence.

   2 The findings in respect of the appellant's illness are perverse. All medical reports obtained by a party to litigation are obtained "at their wish". That cannot be a proper reason for dismissing a report. It is further submitted that there is not a significant difference in the two reports, and that even if there were, the two reports are dated a year apart. The respondent was unrepresented and the point about the medical reports was not put to the sponsor. There was no opportunity to explain the alleged discrepancy. This is a material error of law in light of the case of Mehmet Koca [no citation given]. There may well be a cogent explanation for the discrepancy, but no one has had the chance to advance it.

   3 The findings at paragraph 9 of the determination disclose material error in law. If family life is accepted, and there are no good reasons in this case why it should not be, then Article 8 is engaged. The evidence of the sponsor in his screening interview and his statement was that the appellant is part of his family unit. The unchallenged evidence of the sponsor was that the appellant left Eritrea illegally with the sponsor's wife and children. The Immigration Judge appears to have ignored the fact that the appellant is a minor living alone in a country where he remains vulnerable to deportation to Eritrea, a country from which he exited illegally. The Immigration Judge's assessment of proportionality is simply wrong in fact and law, ignoring the evidence of the sponsor, the objective country material before him, and the question of the best interests of the child.

Submissions for appellant.

5) Mr Devlin drew attention to the evidence of the money transfers, made firstly to the sponsor's wife and later to another recipient. The date of the change corresponded with the date when the sponsor's wife travelled to the UK, and with the sponsor's evidence. The judge erred in identifying a discrepancy. The medical reports were largely in similar terms, and not contradictory of one another. The second report was 14 months after the first, and the only difference was that it said that the appellant could not walk independently. It was unfortunately not made clear what assistance he required with walking, but that was not a true discrepancy, and might well be

explained by the appellant's condition being described at two different dates, and having deteriorated in the meantime. The error could be seen as one of procedural unfairness, or as one of failure to take account of a relevant consideration, namely that the reports were made almost a year apart.

6) Mr Devlin then turned to what he said was the most significant error in the determination, in relation to Article 8. The grounds were interrelated, because the judge's only reason at paragraph 9 for not accepting that family life existed turned on the reasons discussed above, now be shown to be erroneous. It was accepted that the appellant could not meet the Immigration Rules, so the next question was whether he had any Article 8 case outwith the Rules to be considered. Mr Devlin referred to Izuazu [2013] UKUT 00045 (IAC), which follows on from MF [2012] 00393 (IAC), holding that where a claimant does not meet the requirements of the Rules it is necessary to assess Article 8 "applying the criteria established by law".

7) In MS [2013] CSIH 52 the Court said:

> The decision maker should examine the circumstances put forward by the applicant and determine whether they disclose a good arguable case that the Rules would produce an unfair or disproportionate result such that the applicant's Article 8 rights would be infringed. It is only if that test is satisfied that there is any need to go on to consider the application of Article 8 in detail.

8) Mr Devlin said that while that referred to a decision maker employed by the Secretary of State, the same principle applied on appeal. The present circumstances amount to a good arguable case. He referred to Mundeba [2013] UKUT 00088 for the proposition that although this is an out of country case, it still requires consideration of the child's best interests. Reliance was placed on headnote (iii):

> Although the statutory duty under section 55 of the UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance issued under section 55.

9) Turning to the European jurisprudence, Mr Devlin said this brought out general principles that in an entry case a proper analysis did not focus on whether and to what extent there would be interference with family life, but on whether the state's positive obligation to promote family life was engaged. The focus should be on whether the state has a duty to facilitate a family reunification. The extent of a state's obligation to admit relatives varies according to the circumstances. It is recognised that a state has the right to control the entry of foreign nationals, and that Article 8 does not impose an obligation to respect a choice of matrimonial residence or to authorise reunion on state territory. Mr Devlin referred to Sen v Netherlands [2003] 36 EHRR 7 at paragraph 37:

> In its analysis, the court takes into consideration the age of the children concerned, their situation in their country of origin and their degree of dependence on their parents. It cannot in effect consider the matter from the sole point of view of immigration, by comparing this situation with that of persons who have only established family bonds after becoming settled in their host country.

10) The next reference was to Toquoabo-Tekle and Others v Netherlands [2005] ECHR 803 at paragraph 49:

> The court has indeed previously rejected cases involving failed applications for family reunion and complaints under Article 8 where the children concerned had in the meantime reached an age when they were presumably not as much in need of care as young children and increasingly able to fend for themselves. In cases of this nature, the court has also examined whether the children had grown up in the cultural and linguistic environment of their country of origin, whether they had other relatives there, and whether it could expected of the parents to return to that country.

11) Relevant issues were an older child's ability to self-care, the ability of relatives to return to join the child, whether relatives left that country voluntarily, and whether they had legal permission to be there. A voluntary departure was against a state's positive obligation to facilitate reunion. The acquisition of a permanent abode was a strong factor in favour of a positive obligation.

12) Mr Devlin next turned to the factors which he said were relevant to this case. The sponsor's statement, although brief, disclosed that the appellant is a child who although he has reached the age of 17 (which would ordinarily tend against a positive obligation) suffers from cerebral palsy. The appellant was born in Eritrea but is now living in Sudan, not his country of cultural and linguistic upbringing. The appellant has refugee status in Sudan, although he appears no longer to be living in a refugee camp but in another community. However, he and his carer are struggling to survive even with financial support from the UK. The appellant's relatives are now not in Sudan but in the UK. It appears that his mother is deceased and his father is in detention in Eritrea. His relatives are here not voluntarily but through the process of refugee recognition and reunion. His relatives could not reasonably be expected to return to Eritrea, and it is at least doubtful whether it was open to them to return to Sudan. All these circumstances made a powerful case in favour of a positive obligation on the state. While that had to be balanced with the UK interest in immigration control and the fact that the appellant does not meet the Rules, there were individual interests outweighing the state interest.

13) The final case to which Mr Devlin referred was Berisha v Switzerland (Application No 948/12), 30 July 2013, in particular paragraphs 56 onwards:

> 56. The Court has previously rejected cases involving failed applications for family reunification and complaints under Article 8 where the children concerned had in the meantime reached an age where they were presumably not as much in need of care as young children and were increasingly able to fend for themselves. In cases of this nature, the Court has also examined whether the children have grown up in the cultural and linguistic environment of their country of origin, whether they have other relatives there, and whether it could be expected that the parents would return to that country (see, for instance, Benamar v. the Netherlands (dec.), no. 43786/04, 5 April 2005; I.M. v. the Netherlands (dec.), no. 41266/98, 25 March 2003; and Chandra and Others v. the Netherlands (dec.), no. 53102/99, 13 May 2003).
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> 57. By contrast, in Sen (cited above), which concerned parents who had left their daughter behind in the care of relatives in their home country of Turkey to settle in the Netherlands, the Court established that the applicants were facing major obstacles to a return to their home country since they had been legally resident in the Netherlands for many years; their two youngest children had

been born and brought up there and were attending school. With regard to those children, who had minimal ties with their home country, and in view of the young age of the daughter who had remained in Turkey (she was nine years old when the application to the domestic authorities was made), the Court considered it more appropriate to let the daughter come to the Netherlands to be reunited with her family there. The refusal of a residence permit for the daughter had therefore been in breach of Article 8 of the Convention (ibid. §§ 39-42).

58. Moreover, in the case of Tuquabo-Tekle and Others, (cited above, §§ 47-52), the Court found a violation of Article 8 of the Convention regarding the refusal of a residence permit on the ground of family reunification to Mrs Tuquabo-Tekle's daughter, who was, at the time of the domestic application, already fifteen years old. As well as establishing that the parents were facing major obstacles to a return to their country of origin, Eritrea, the Court ruled that the particular circumstances of the daughter's situation in her home country - her grandmother, who was taking care of her, had taken her out of school and she had reached an age where she could be married off - were such that she should be allowed to be reunited with her family in the Netherlands. The Court held in that case that the daughter's age should not be the sole element that led to a different assessment from that arrived at in the case of Sen (cited above), in which the daughter had been some years younger.

59. Turning to the present application, the Court notes that as, inter alia, in the case of Sen (cited above), the applicants are living where they are because of their conscious decision to settle in Switzerland rather than remain in their home country. After their marriage in 2007, the second applicant joined her husband, the first applicant, who had already been living in Switzerland for ten years and was in possession of a permanent residence permit, with the aim of establishing a family life there. Subsequently, a fourth child was born to them and the second applicant also received a permanent residence permit for Switzerland. Nevertheless, the applicants were not prevented from maintaining the degree of family life they had had for many years before 2007. After the first applicant had moved to Switzerland in 1997, he had visited the second applicant and his children regularly and had a third child with the second applicant in 2003. He had also supported them financially.

60. As regards the situation of the three children, the Court considers that, despite the applicants' contentions, they must still have solid social and linguistic ties to their home country, where they grew up and went to school for many years. Although the children are now also well integrated in Switzerland, the Court is of the view that their period of stay in the respondent State is not long enough for them to have completely lost their ties with their country of origin. With regard to the fact that their grandmother looked after them for more than two years and is, after all, still living there now, it must also be assumed that they have strong family ties to Kosovo. Furthermore, the applicants have not disputed that L.'s health has in fact improved to the extent that it would not be a hindrance for her to return to her home country, and, with regard to the alleged financial dependence of R. on the applicants, the Court cannot see why he, as well as his sister, could not be supported at a distance, especially when it is considered that they are now 19 and 17 years old respectively. Lastly, with particular regard to the youngest of the three children, B., the Court notes that the applicants are not prevented from travelling - or even staying - with her in Kosovo in order to ensure that she is provided with the necessary care and education so that her best interests as a child are safeguarded.

61. In conclusion, and also taking into account the applicants' conduct in the domestic proceedings, which was not irreproachable, it cannot be found that the respondent State has failed to strike a fair balance between the applicants' interest in family reunification on the one hand and its own interest in controlling immigration on the other. Although it may well be that the applicants would prefer to maintain and intensify their family links with the three children in Switzerland, Article 8 does not guarantee a right to choose the most suitable place to develop family life (see above, §§ 48, 49). The respondent State has therefore not overstepped the margin of appreciation it enjoys under Article 8 of the Convention.

62. It follows that no violation of Article 8 can be found on the facts of the present case.

14) Mr Devlin observed that although this appellant is aged 17, he is significantly disabled. His carer in Sudan is no longer able to look after him, through her own ill-health. There can be no return to the appellant's home country and he has no remaining family links in Eritrea. He is in need of medical and social care as well as financial assistance. While each case is different, Berisha shows the nature of the factors which may come into play, and this falls closer to the successful than to the unsuccessful instances in the European court.

15) Mr Devlin said that the grounds should all be upheld, and a decision should be substituted taking into account the best interests of the child and the Strasbourg jurisprudence on the positive obligation which could arise to admit an applicant. The First-tier Tribunal decision fell to be reversed.

16) I asked Mr Devlin to clarify where the appellant fell short of the Immigration Rules. Mr Devlin said that the appellant did not fall into the class of dependent relatives eligible for admission by way of family reunion, and that even if he did fall into a category for admission he could not succeed in meeting the accommodation and maintenance requirements. I further enquired whether the Rules could be taken as broadly incorporating any of the Strasbourg jurisprudence. Mr Devlin submitted that there could always be cases outwith the Rules, on the test of a strong arguable case. This case under the Rules produced a result contrary to the Strasbourg jurisprudence and therefore fell to be allowed outwith the Rules. The appellant although he was only a sibling fell within the sponsor's pre-existing family unit.

17) I also enquired whether the likely cost of the appellant's care in the UK would be of any relevance. Mr Devlin accepted that it was only realistic to expect that there would be costs, and that was a relevant consideration, but said that nevertheless the balance was still significantly in favour of the appellant. He was anxious to point out that this is not a straightforward health case, because of course the appellant could not meet the high test required by N v UK. It was nevertheless material to consider the medical aspects of the impact on his physical and mental integrity in terms of Article 8. Mr Devlin accepted that the case would be more difficult if it concerned a healthy 17 year old, perhaps able to make his own living, but he said that the appellant did not found primarily on his medical condition. Although the medical condition is a compassionate circumstance on the appellant's side, his case is fundamentally based on family life and not on medical considerations. The positive obligation on the UK state did not arise because of the appellant's need for medical treatment.

Submissions for respondent.

18) Mr Mullen firstly sought to argue that there is no error of law, or alternatively that even if there are errors the determination should stand. I indicated in the course of his submissions that I was satisfied that errors are made out along the lines of the grounds and Mr Devlin's submissions, and that the decision would require to be remade.

19) In relation to the remaking of the decision, Mr Mullen firstly argued that there is no family life between the sponsor and the appellant. The information the appellant has provided is rather skimpy, but it appears that the sponsor left Eritrea for Saudi Arabia around 1997 to 1998, and lived in Saudi Arabia for many years thereafter. Over time, he developed family life with his wife and children there. The appellant was born on 20 December 1995 (not 20 December 1985 as erroneously stated at paragraph 1 of the First-tier Tribunal determination) and was only 2-3 years of age when the sponsor left. From birth until around September 2011 the appellant was cared for by his parents in Eritrea and was not part of the sponsor's family unit. It does not appear that the sponsor has lived for any significant period, if at all, in family with the appellant. There was then a fairly short period when the appellant moved with the sponsor's wife and their children to live in Sudan. There is no presumption of family life between the appellant and his brother, and it was not established by the evidence. If there is no family life, the case goes no further. Even if there were sufficient family life to require consideration, there is not enough to show a disproportionate interference. The appellant has refugee status in Eritrea, and there is no evidence of risk of *refoulement* to Eritrea. Any family life was relatively brief, no more than one year, and carried on without any direct contact with the sponsor. The medical evidence fell short of showing that the appellant did not have the capacity to live independently. The appellant's sister-in-law and the children had been granted visas and had left within a month for the UK. This did not suggest that the sponsor was living in any undue difficulty or that the rest of the family saw any problem in leaving him with a carer in Sudan. If his situation had been as desperate and he was as close a family member as now portrayed, he would not have been left so readily. While Mr Mullen acknowledged that each case turns on its own facts and circumstances, in Mundeba there was found not to be an obligation to admit a female 15 year old orphan from DRC to join her sister in the UK. The appellant was not said to be in any danger in Sudan. There was no reason why financial support could not continue from the UK, so that he could obtain any assistance he requires from another carer if necessary. There was no real description of his needs. It was anomalous that the payments of £100 per month were at exactly the same level while he was living with his sister-in-law and other family members and thereafter. The payments were said to have been for his support, but presumably they were for the sponsor's wife and children while they were in Sudan. It could be taken that after they left the full sum of £100 per month was available for his benefit and would go significantly further. The impact on public funds of the appellant's arrival was likely to be considerable, in terms not only of accommodation and maintenance but of ongoing medical care. The appellant had not established family life, or alternatively had not produced evidence which placed an obligation on the UK to promote family life by permitting his entry.

Reply for appellant.

20) Mr Devlin said that it was not known what other income the appellant's relatives had in Sudan and there was no full picture of their circumstances. It was known from the sponsor, from the medical reports and from a supporting letter that the appellant suffers from significant disability and that his carer is no longer able to look after him.

It could not properly be inferred from the continuing payments of £100 per month that he was better off once his relatives left. Mr Devlin accepted that family life was of short duration. However, after July 2011 the appellant's situation had changed radically. Until then he lived in Eritrea with his parents, while the sponsor and his family lived in Saudi Arabia. Following the sponsor's expulsion from Saudi Arabia and the family later moving to Eritrea, there appeared to have been a further period when the appellant was cared for by his father. Despite the brevity of family life with the sponsor, the significant point is that the appellant has now no mother, effectively no father (as he is in detention in Eritrea) and is connected by way of family only to his brother, sister-in-law and their children. He became part of that unit as a disabled young man otherwise effectively orphaned and so likely to be in a state of high emotional as well as financial dependence. While the others had left the appellant behind, they had not done so without ensuring that he had a suitable carer. At best they had been living in Eritrea as refugees and no doubt their conditions there had not been salubrious. His sister-in-law was left with the care of children aged 11, 9, 6 and 3. It was not surprising that the interests of the children in moving to the UK would be given a high priority, but that did not imply that there was no family life also involving the sponsor.

21) Mr Devlin finally said that although it remained his primary submission that there was sufficient evidence to allow the appeal at this stage, the alternative would be to remit the case to the First-tier Tribunal for the appellant to amplify his evidence, and to covering such matters as the extent of his disability and his likely care costs, if any.

Discussion and conclusions.

22) I reserved my determination.

23) As indicated above, I explained in the course of submissions that I was satisfied that error was shown on all 3 grounds and that the decision requires to be remade. The errors emerge sufficiently from what is related above. They are fundamental to the outcome and it could not properly be supported, as Mr Mullen effectively sought, by other reasons altogether.

24) I deal firstly with the last matter raised by Mr Devlin. While it is for the respondent to justify any interference with Article 8 rights, it is for an applicant to put before the respondent all the circumstances relevant to his family and private life to show that any obligation on the respondent arises, and what the extent of any interference might be. The appellant should have ensured that all relevant information was before the Entry Clearance Officer. He has had ample opportunity to bring further evidence since then. The Upper Tribunal's Procedure Rules and Practice Directions require the earliest possible notice where an appellant asks for further evidence to be considered. The suggestion that the appellant might improve his case comes much too late. It is appropriate to decide the case on the evidence available.

25) No doubt the appellant has always been regarded as a member of the sponsor's family in the broad sense, but he is not a member of the primary family unit of the nature which is presumed to qualify for consideration under Article 8. The facts that the appellant has a disability (leading to some higher than normal degree of dependence on others) and (so far as is known) no other remaining or accessible close relatives are in favour of extending family life for Article 8 purposes to the relationship between an adult and a minor sibling. Against that are the facts that the appellant is almost adult, suffers from no intellectual rather than physical disability, has never lived as a family member of the sponsor, and has had very little if any direct contact with him since infancy.

26) I find the case on the borderline as to whether family life is shown for Article 8 purposes, and proceed on the basis that there is just enough to require further assessment of the merits.

27) The relatively slender basis for finding family life to exist is one factor against the appellant's case.

28) Mundeba says that family considerations include evaluation of the child's welfare and unmet needs, leading to an assessment of whether the combined circumstances are sufficiently serious and compelling to require admission. However, the cogency of the case for a state obligation to enable family life to be developed by admitting an applicant must be much less where childhood has almost run its course. The circumstances relied upon to make this a compelling case have very little to do with the appellant being a child. He has not spent his childhood so far with the sponsor and has only a short period of childhood left. His particular needs are not as a child but as a person of poor health, needs which are likely to increase not decrease as he leaves childhood behind him. Although Mr Devlin did what he could to shift the emphasis, that is trying to have it both ways.

29) Although the medical issue is only part of the overall proportionality assessment, and so not subject to the full stringency of N v UK, it is the major plank. The appellant's best interest issue is essentially his health and not his youth. He would have no case worth arguing if he were either (a) his present age and entirely healthy or (b) of the age of majority and disabled.

30) The UK is entitled to make rules about the class of dependent relatives who will be admitted, and to apply accommodation and maintenance requirements. It is a further relevant consideration that the appellant's medical condition is likely to be a significant burden on public funds.

31) This case does not disclose such interference with family life interests that the UK state is obliged to promote family life by admitting the appellant, irrespective of the requirements of the rules.

32) The determination of the First-tier Tribunal is **set aside**, but for all the above reasons the decision substituted is that the appeal is again **dismissed**.

33) No order for anonymity has been requested or made.

2 August 2013
Judge of the Upper Tribunal