Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/19578/2012
OA/19529/2012
OA/19537/2012
OA/19545/2012
OA/19540/2012

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 22 November 2013	**On 9 December 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

FEVEN TEKLE AMINE (FIRST APPELLANT)
DAWIT ELIAS TEWOLDE (SECOND APPELLANT)
NOH ELIAS TEWOLDE (THIRD APPELLANT)
NEBI ELIAS TEWOLDE (FOURTH APPELLANT)
LIDIA ELIAS TEWOLDE (FIFTH APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER – CAIRO

Respondent

Representation:

For the Appellants: Ms J Robinson instructed by BHD Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DECISION AND REMITTAL

1. The appellants are citizens of Eritrea who were born respectively on 7 January 1977, 12 September 1999, 27 April 2002, 6 January 2005 and 27 September 2007. On 10 July 2012, they applied for leave to enter the United Kingdom as the spouse (first appellant) and dependent children (second, third, and fourth appellants) of Elias Tewolde Tekle, (the sponsor) who had been granted indefinite leave to remain as a refugee in July 2008.

2. On 20 September 2012, the Entry Clearance Officer refused each of the appellants' applications under para 352A (in the case of the first appellant) and para 352D (in the cases of the other appellants) of the Immigration Rules (HC 395 as amended). In relation to the first appellant, the ECO was not satisfied that their marriage was genuine and subsisting and that it had, in any event, taken place before the sponsor had left Eritrea to claim asylum in the UK. In relation to the remaining appellants, the ECO was not satisfied that they formed "part of the family unit" of the sponsor before he left Eritrea. The ECO also concluded that the appellants were not entitled to entry clearance on the basis of Art 8 of the ECHR.

3. The appellants appealed to the First-tier Tribunal. The appeal came before Judge W L Grant. In respect of the first appellant, it was accepted that she could not meet the requirements of the family reunion rule in para 352A. She had married the sponsor (for a second time) after he had left Eritrea. The judge dismissed her appeal under Art 8 of the ECHR. In relation to the remaining appellants, the judge dismissed their appeals under para 352D on the basis he was not satisfied that they formed "part of the family unit" of the sponsor prior to him leaving Eritrea and, in addition, the judge dismissed their appeals under Art 8 of the ECHR.

4. The appellants sought permission to appeal to the Upper Tribunal. That permission was initially refused by the First-tier Tribunal but on 27 August 2013, UTJ Latter granted the appellants permission to appeal to the Upper Tribunal. By that date, the fourth appellant had died and so the appeals before me concerned only the first, second, third and fifth appellants.

5. Before turning to the parties' submissions, it is helpful to set out briefly the background to these appeals. The first appellant and sponsor married in July 1999. The second appellant was born as a result of an extramarital affair by the sponsor in September 1999. The children of the sponsor and first appellant were born in April 2002, April 2004 and January 2005. In May 2007, the first appellant and sponsor divorced. In January 2008, the sponsor married another woman in Eritrea. On 1 May 2008, the sponsor left Eritrea and on 4 July 2008 claimed asylum in the United Kingdom. He was granted refugee status on 7 July 2008. In September 2009, the sponsor divorced his second wife. In September 2011, the appellants left Eritrea and moved to Sudan. In January 2012 the appellants initially applied for entry clearance to join the sponsor but their applications were refused. On 13 May 2012, the sponsor

and first appellant remarried. The appellants then made the applications, the subject of these appeals, on 10 July 2012 which were refused on 20 September 2012.

The Submissions

6. Ms Robinson, who represented the appellants, submitted that Judge Grant's decision could not stand for three reasons.

7. First, she submitted that Judge Grant had made adverse findings concerning the sponsor's divorce from his second wife and also made allegations of forgery or deceit against the first appellant and sponsor. Ms Robinson submitted that the validity of the sponsor's divorce from his second wife was not in issue before the judge. The judge failed to raise the issue or any suggestion that documents relied on were forgeries at the hearing. That, Ms Robinson submitted, was unfair and in breach of the Surendran guidelines (see MNN (Surendran guidelines for Adjudicators) Kenya [2000] UKIAT 0005). Those errors, Ms Robinson submitted, tainted or coloured the judge's adverse finding that the child appellants had not formed a family unit with the sponsor prior to his departure from Eritrea.

8. Secondly, Ms Robinson submitted that the judge had failed to give reasons for his finding that the child appellants had not formed a family unit with the sponsor before his departure but were, instead, living with the first appellant apart from the sponsor.

9. Thirdly, Ms Robinson submitted that the judge's findings in respect of Art 8 were perverse, in particular that there was no family life between the appellants and the sponsor.

10. On behalf of the respondent, Mr Richards acknowledged that as the respondent had not been represented before the judge he could not cast any light on what had happened at the hearing. He accepted, however, that there was no reason to doubt what was said in the grounds prepared by the appellants' (then) Counsel who had represented them before the judge. Mr Richards did not seek to support the judge's decision on the basis of the first ground upon which Ms Robinson put their case before me.

Discussion

11. In my judgment, the judge's decision cannot stand on the basis of Ms Robinson's first submission which I accept in substance.

12. In his determination, at para 10, the judge noted that the respondent did not place in issue the fact that the sponsor and first appellant were divorced in May 2007. Likewise, the ECO did not call into question the validity of the sponsor's remarriage to the first appellant or of his divorce from his second wife as he claimed in September 2009. These were matters, of course, that could not have been raised by the respondent at the hearing before the judge since the respondent was not

represented. Whilst the judge's Record of Proceedings shows that the sponsor was asked questions about his divorce and remarriage, including a letter relied upon by the appellant but discounted by the judge in para 14 of his determination, it is clear from the record of the proceedings by the appellant's (then) Counsel that the judge did not directly raised any issues as to the validity of the sponsor's divorces, first from the first appellant and subsequently from his second wife.

13. In para 13, the judge said this in relation to the sponsor's divorce from his second wife:

> "The sponsor was granted refugee status on 07 July 2008. He claims that he divorced Mary Ghirmay in September 2009. He relies on a document in the respondent's bundle which has not been translated. With the help of the court interpreter we identified it as a document showing that the divorce took place on 25 September 2009 and that it is signed by a total of 7 people, namely 2 representatives from his side, 2 from her side, a mediator, Mary Ghirmay herself and he sponsor's uncle. There is no indication on the document of the location where the document was prepared or signed. It does bear the insignia of the Eritrean government. I did not have to admit this document because it has not been translated but I waived the requirements of the Procedure Rules. However that does not mean that I place weight on it. The appellant claims to be a Christian as opposed to a Muslim who would be able to be married to more than one wife. I have never seen the certificates relating to either of his claimed marriages or his claimed divorce from the first appellant. He was not present when the divorce from Mary Ghirmay took place and her whereabouts were totally unknown to him since the date of his departure from Eritrea. There is no evidence before me to show that in Eritrea it is possible to divorce in absentia. Given that there is no address on the document, that there is no indication in it that the presiding Judge or Registrar saw the marriage certificate or had any idea who the sponsor was, I can place no weight on it. If it is the case that the sponsor fled Eritrea having failed to report for signing at the local police station then I find it highly unlikely that he would have allowed his personal details to be placed before a representative of the authorities for any reason and he gives no explanation for the fact that Mary Ghirmay suddenly reappeared at the divorce registry after he had effectively removed her from his life when he left the country some 15 months earlier."

14. Likewise, at para 14 of the determination the judge dealt with a letter relating to the sponsor's divorce from and reconciliation with the first appellant as follows:

> "There is a letter in the respondent's bundle which bears 4 signatures and this letter has been translated into English. It is dated 05 June 2012 and states that the appellant and the sponsor divorced in May 2007 but reconciled in October 2009 with the help of village elders. It states that the 4 children were looked after by their father (the sponsor) during the divorce and they lived with him since May 2007 up to their parents' reconciliation in October 2009. That is simply not true because the sponsor was not present in Eritrea after 01 May 2008. I place no weight on this letter."

15. Then, in relation to both documents the judge reached the following conclusion at para 14:

> "The two documents show that the appellants and/or the sponsor are prepared to rely upon documents which if not forged have been prepared to help their cases and here I refer back to the birth certificates and taking the documents in the round I make an adverse finding of credibility. There is a letter from the fifth appellant in the

> respondent's bundle. At its highest it is self-serving. I place no weight on it in any event. The documents to which I have referred are totally unreliable as evidence of the facts which they purport to set out and as such undermine the credibility of the appellants and their applications."

16. The judge's conclusion is as follows: either he took the view that the documents were forged or that they were "prepared to help their cases" which, at least by implication, suggests that they are otherwise than 'speaking the truth' in their contents. As the Surendran guidelines make clear (at [8]):

> "There might well be matters which are not raised in the letter of refusal which the Special Adjudicator considers to be relevant and of importance ... Where these are matters which clearly the Special Adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto."

17. I am not satisfied that the judge raised the issues which troubled him in paras 13 and 14 of his determination with the appellants' representative. Certainly as recorded, the submissions of the appellants' representative did not seek to address the points raised in paras 13 and 14. Had they been raised by the judge, that omission would be somewhat surprising.

18. In my judgment, the judge should have raised these matters with the appellants' legal representative if he intended to rely upon them in his determination. None of these points were raised in the ECO's refusal decisions. The appellant was, therefore, not given the opportunity to deal with the points taken against her by the judge. Ms Robinson told me, for example, that there was evidence which dealt with the apparent discrepancy in para 14 which stated that the child appellant had lived with the sponsor after his divorce from the first appellant in May 2007 until he and the first appellant were reconciled in October 2009. The discrepancy arises because the sponsor could not have been in Eritrea after May 2008 when he came to the UK. The point is, however, that as these matters were not raised by the judge, the appellants and their representative had no opportunity to deal with the points relied on by the judge including the implication that the documents are forgeries.

19. It is not necessary to deal with Ms Robinson's second and third submissions because, in my judgment, the failure by the judge to raise these matters at the hearing, as she submitted, tainted the fact-finding process and his ultimate adverse findings in relation to all the appellants which cannot, as a result, stand.

Decision and Disposal

20. For these reasons, the decision of the First-tier Tribunal involved the making of an error of law and the decisions to dismiss each of the appellants' appeals are set aside.

21. Both representatives indicated to me that the proper course was for the appeals to be remitted to the First-tier Tribunal for a *de novo* re-hearing with none of the judge's findings standing. I agree that is the proper course. Ms Robinson, on instructions,

asked me to remit the appeal to the Newport Hearing Centre, given that the sponsor lives in Cardiff.

22. The appeal is remitted to the First-tier Tribunal for a de novo rehearing (not before Judge WL Grant).

Signed

A Grubb
Judge of the Upper Tribunal