



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/00206/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 2nd December 2014**

**Decision and Reasons
Promulgated On 17th
December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

**MISS HAMDA ABDI RAHMAN MOHAMED
(ANONYMITY NOT DIRECTED)**

Appellant

and

THE ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellant: Mr Abdi Malik Mohamed, the appellant's paternal cousin
and voluntary representative

For the Respondent: Mrs R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Somalia who was born on the 2nd May 1999. She appeals (with permission) against the decision of First-tier Tribunal Judge Hindson, promulgated on the 15th July 2014, to dismiss her appeal against

the respondent's decision to refuse her application for entry clearance as the daughter of Mr Abdi Rahman Mohamed (hereafter, "the sponsor") who has been granted Humanitarian Protection in the United Kingdom.

Background to the appeal

2. The respondent had accepted that the appellant was the sponsor's daughter. The respondent was not however satisfied that the appellant had been a part of his family unit immediately prior to his flight from Somalia. As pre-flight membership of sponsor's family unit was a requirement for entry clearance under paragraph 352FG of the Immigration Rules, it followed that the application fell to be refused. The respondent also considered that there nothing "exceptional" in the appellant's circumstances to warrant consideration of the appellant's case, outside the Immigration Rules, on the basis of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.
3. There was no attendance by or on behalf of the appellant at the hearing of the appeal on the 11th July 2014. In commenting upon this state of affairs, Judge Hindson made the following observations at paragraphs 3 and 4 of his determination:

No one attended the hearing and no explanation for non-attendance was provided. There was a problem with the court file. In the notice of appeal the appellant's name was erroneously given as her father, Mr Abdirahman Ahmed. As this is the document that is used to create the file, it was created using his details as the appellant. In the form, the appellant's details are given as the sponsor. Another man, Mr Abdiquaqni Mohammed is named as the appellant's representative. His connection to the appellant is not clear, though he seems not to be a professional representative.

Because of the way the file was created, no notice of hearing was sent to the appellant. None could have been sent in any event because the address that has been provided for her is "Somalia". However notices of hearing were sent to her father, who is the sponsor, and to her representative. As both were properly served with the notice of hearing, and neither attended or provided any explanation for not attending, I decided to proceed in their absence.

4. Judge Hindson thereafter considered that the sponsor's absence had 'substantially undermined' the credibility of her application. He thereafter reasoned, at paragraphs 14 and 15 of his determination, as follows -

However, even taking the appellant's case at its highest, she cannot succeed since she was clearly living with her mother prior to her father leaving Somalia; it seems that she has not lived with her father since her parents separated. Whilst I do not know when that was, it is clear that it was before her father left Somalia because subsequent to him leaving the appellant's mother, and before he left Somalia, he established a relationship with another woman and her children. This family was then admitted to the UK under the family reunion provisions.

I am not satisfied that the appellant was part of her father's household at the time that he fled Somalia and the appeal must therefore be dismissed.

5. Permission to appeal was granted by Judge Brunnen in the following terms:

The grounds on which permission to appeal is sought submit that neither the Appellant's father nor her representative received any notice of the hearing. If, unbeknown to the Judge, this occurred, then it is arguable that his decision to proceed with the appeal in the absence of both sponsor and representative has led to procedural unfairness amounting to an error of law.

6. On the 10th October 2014, the respondent served a 'Rule 24 Notice' in response to the granting of permission to appeal. The material part of this reads as follows -

The Judge of the First Tier at paragraph 4 of the determination clearly records that notice of hearing was sent to the appellant's father who is the sponsor and to her representative and that as both were properly served with the notice of hearing that he was satisfied he could proceed in their absence. The respondent does not accept, without evidence, that a procedural error occurred in this respect.

Analysis

7. I begin by expressing my sincere thanks to Mr Abdi Malik Mohamed for putting the appellant's case so clearly and effectively at the hearing before me. Mr Abdi Malik Mohammed is the nephew of the sponsor (who was also present at the hearing) and is the paternal cousin of the appellant. Also in attendance at the hearing was Mr Abdi Qani Mohamed. Mr Abdi Malik Mohamed explained that Mr Abdi Qani Mohamed is the sponsor's carer. He is also of course the person who was nominated as the appellant's representative in the Notice of Appeal to the First-tier Tribunal. However, of the three of them, only Mr Abdi Malik Mohamed had a fluent command of the English language. I therefore permitted him to represent the appellant for the purposes of these proceedings.

8. Mr Abdi Malik Mohamed said that neither the sponsor nor his carer (Mr Abdi Qani Mohamed) had received notice of the hearing of the appeal, on the 11th July 2014, before the First-tier Tribunal. He also said that whilst it was correct to say (as is stated in the Notice of Appeal to the First-tier Tribunal) that the appellant had lived with her mother following the separation of her parents, the sponsor, his new wife, and her children, had nevertheless continued to live at the next-door property in Somalia.

9. With regard to notice of the hearing in the First-tier Tribunal, I find that it is unlikely that neither the sponsor nor Mr Abdi Malik Mohamed received it. The Tribunal file shows that they were each sent a Notice of Hearing, at their separate addresses, by second-class post on the 16th April 2014. The possibility that both notices were coincidentally 'lost in the post' is one that I find to be highly improbable. Moreover, the fact of their presence at the hearing in the Upper Tribunal is an implicit acknowledgment that they had received notices that were posted to them at precisely the same addresses as those that were issued by the First-tier Tribunal. This renders it even more unlikely that the sponsor did not receive notice of the earlier hearing.

I thus find that it is far more likely that the sponsor simply overlooked the hearing date in the First-tier Tribunal of which, I am satisfied, he had been notified. I am accordingly satisfied that it was not procedurally unfair to proceed to determine the appeal in his absence.

10. Even if there had been a procedural irregularity in the First-tier Tribunal, I would nevertheless have been satisfied that such was not material to the outcome of the appeal. This is for the following reasons.
11. If the First-tier Tribunal had dismissed the appeal solely upon the basis of the sponsor's absence at the hearing, then I would have found that to be a material error of law. This is because the judge failed to have regard to (a) the fact that a sponsor's presence at the hearing is not an evidential requirement of proof of an appellant's case, and his absence could not therefore warrant the drawing of any adverse conclusion; and (b) the possibility that an event had occurred which both prevented his attendance at the hearing and his ability to notify the Tribunal of the reasons for his absence.
12. However, the Tribunal also considered the appellant's case as it was stated in the Notice of Appeal. It thereafter concluded that the appellant had failed to prove that she was part of the sponsor's pre-flight family unit. That was a conclusion that was reasonably open to the Tribunal upon the evidence that was before it. Whether it would be possible to reach a different conclusion, in light of the claim that the appellant and her mother were living next-door to the sponsor and his 'new' family prior to the sponsor's flight from Somalia, is a matter that can now only be determined in any future application for entry clearance to the United Kingdom that the appellant may choose to make.

Notice of Decision

13. The appeal is dismissed.

Anonymity is not directed.

Signed

Date **17th December 2014**

Judge Kelly
Deputy Judge of the Upper Tribunal