The Upper Tribunal
(Immigration and Asylum Chamber)
number: OA/18816/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On October 14, 2014	**On October 15, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

MASTER MULUE SIMON BREHE
(NO ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Abdullah (Legal Representative)
For the Respondent: Mr McVeety (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born August 5, 1999, is a citizen of Eritrea. On August 2, 2013 he applied for entry clearance as a child to enter the United Kingdom under paragraph 352D HC 395. The respondent refused the application on September 3, 2013.

2. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on October 4, 2013 and on May 6, 2014 Judge of the First Tier Tribunal Edwards (hereinafter referred to as the "FtTJ") heard his appeal and dismissed it in determination promulgated on May 8, 2014.

3. The appellant lodged grounds of appeal on May 19, 2013 and on May 30, 2014 Judge of the First-tier Tribunal Gibb granted permission to appeal finding it arguable the FtTJ had erred.

4. The matter came before me on July 22, 2014 and on that day I found the FtTJ had failed to consider all relevant matters when considering whether there were good arguable grounds or compelling circumstances not sufficiently recognised under Appendix FM and/or paragraph 276ADE where refusal would result in unjustifiably harsh consequences for the appellant. The FtTJ considered evidence provided by the witnesses who attended the hearing but failed to have any regard to:

    a. The conditions the appellant allegedly lived in.
    b. The fact the appellant's carer is not prepared to look after him.
    c. The age of the appellant and the fact he has a five-year old sibling living in the United Kingdom

5. I indicated that as the respondent had not been represented at the original hearing and the appellant wished to adduce further oral evidence that a resumed hearing would be necessary as there was no interpreter booked and both witnesses (Ms Lemlem Weldegebriel (sponsor) and Mr Adane Berhane) needed the interpreter.

6. The matter came back before me on the date set out above.

PRELIMINARY ISSUES

7. The appellant was not in attendance and Mr Hussain explained that he was in difficulties. Neither the sponsor nor the witness was in attendance despite an indication given in July that they wished to give additional evidence. As regards Mr Berhane he explained that there had been no contact with him since the last hearing. However, the sponsor had been into the office last week and informed his colleague that she had lost contact with the appellant and no longer wished to attend court in support of the application. She agreed to

come back and see the solicitor yesterday but failed to keep her appointment. She was spoken to on the phone and said she had gone to an alternative appointment. Mr Hussain confirmed she was offered another appointment but the sponsor cancelled the appointment and reiterated she would not be attending today's hearing.

8. Mr Hussain confirmed his client was the appellant but he was legally funded by the LAA in respect of the sponsor. He indicated he was therefore without instructions and in a difficult situation as he had no evidence to call.

9. I indicated that I had no alternative but to deal with the appeal in the absence of both witnesses. I also indicated that I would have to take into account the sponsor's refusal to attend the hearing.

SUBMISSIONS

10. Mr McVeety submitted the appellant did not meet the Immigration Rules and in particular he failed to satisfy paragraph 352D HC 395 because he could not show he was part of his mother's family unit at the time she fled or that the sponsor was a refugee. If he did not meet that Rule then in order to be admitted as a child the appellant had to meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules and as the sponsor has chosen not to attend the hearing and through her solicitor has said she has lost contact with him there were no good arguable grounds or compelling circumstances to consider this appeal outside of the Rules.

11. He submitted the sponsor had only seen the appellant twice since she left him in 2001 and the evidence of contact was poor. No weight should be attached to the witness statements especially as they had chosen not to attend the hearing. The sponsor was unable to maintain or accommodate the appellant without recourse to public funds and this is a matter I am required to have regard to following the implementation of Section 117B(3) of the 2002 Act which states-

> "It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are

financially independent, because such persons —

(a)are not a burden on taxpayers, and

(b)are better able to integrate into society."

12. Mr McVeety submitted that the appeal should be dismissed.

13. Mr Hussain felt unable to make any constructive submissions in view of the fact there was no sponsor.

FINDINGS

14. The appellant applied for entry clearance under what is commonly described as the family reunion provisions. These are contained in paragraph 352D HC 395. The sponsor's asylum application was refused and in effect that ends any possibility the appellant could succeed under paragraph 352D HC 395.

15. The appellant provided a letter asking to be allowed to live with his mother because his life was in danger and he was living with someone who no longer wanted him. There was a letter to that effect in the appellant's original bundle.

16. The sponsor provided two statements but in absenting herself for no good reason from the hearing I find unable to attach any weight to the contents of those statements. The respondent was entitled to cross-examine her about:

    a. Her lack of contact since 2001.
    b. Her personal circumstances and how she would be able to maintain and accommodate the appellant.
    c. Her son's personal circumstances.

17. The appellant cannot meet the requirements of Appendix FM. There is no evidence that the maintenance or accommodation requirements set out in sections E-ECC2.1 and E-ECC2.4 can be met. The application under Appendix FM must therefore fail and that assumes the appellant had been able to demonstrate that he had not formed an independent family unit as set out in section E-ECC1.3. The failure by the sponsor and witness to attend and give evidence does not assist this appellant.

18. The appellant cannot apply under paragraph 276ADE HC 395 because he is not living in the United Kingdom. He therefore has no private life.

19. I have considered whether this is a case that should be considered outside of the Immigration Rules and I have considered the approach set out in R (Nagre) v SSHD [2013] EWHC 720 (Admin); MF (Nigeria) v SSHD [2013] EWCA Civ 1192; Gulshan (Article 8 - New Rules - Correct Approach) [2013] UKUT 00640 (IAC); Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC) and MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985).

20. This is a case where the appellant and sponsor have had extremely limited family life and little evidence has been advanced to support the appeal. The failure of the sponsor to attend her own son's hearing despite her solicitor's advice is jut an additional factor that undermines the appellant's position. In circumstances where the only basis to be allowed entry is on the grounds of family life a refusal to attend the hearing fatally undermines the case.

21. I am satisfied that based on the above facts and findings there is no good arguable grounds or compelling circumstances that would persuade me that refusing the appellant's entry clearance application would be unjustifiably harsh. I therefore find no basis to consider this appeal outside of the Rules and find the Immigration Rules properly address article 8 ECHR.

DECISION

22. There was a material error of law and I have remade the decision. I dismiss the appeal under the Immigration Rules.

23. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the application did not succeed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis