Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers:
OA/23024/2012
OA/23025/2012
OA/23026/2012

THE IMMIGRATION ACTS

Heard at: Manchester	**Determination Promulgated**
On: 18th September 2014	**On 22nd October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Hawo Osman Abdi
Abdiweli Mohammad Gar Hirsi
Ayaan Mohamed Garad Hirsi
(no anonymity order made)

Appellants

and

Entry Clearance Officer, Nairobi

Respondent

For the Appellant: Mr Brown, Counsel instructed by Bolton and District CAB
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellants are all nationals of Somalia. They are respectively a mother and her two minor children born in 2006 and 2009. They appeal with permission[1] the decision of the First-tier Tribunal (Judge

[1] Permission to appeal was initially refused by First-tier Tribunal Judge Nightingale on the 24th

Heynes) to dismiss their appeals against the ECO's decision to refuse them entry clearance as the dependent family members of a refugee.

2. The Sponsor is a Mr Mohammad Hirsi Esse. He is a national of Somali, formerly habitually resident in Hargadera refugee camp, Kenya. On the 28th September 2011 Mr Esse was interviewed by an official from the UNHCR in respect of his application to be admitted to the UK under the "Gateway" programme. He told that officer that he was single and that he had no children. His application was successful and on the 16th January 2012 he entered the UK having been granted refugee status.

3. On the 13th September 2012 the Appellants made applications to join him as his dependent family members. The First Appellant made an application as his spouse under paragraph 352A of the Immigration Rules. She stated that they had married in August 2002. The Second and Third Appellants made applications as Mr Esse's children under paragraph 352D. They relied on birth certificates issued by the Kenyan authorities which named Mr Esse as their father.

4. The applications were all rejected. In notices dated 18th October 2012 the Respondent points out that Mr Esse had made no mention of being married with children in his application for entry clearance under the Gateway programme. He had in fact been part of a different family unit, it being claimed that he was a dependent member of his sister's household.

5. By the time the matter came before the First-tier Tribunal DNA evidence had been produced which confirmed that the Second and Third Appellants are the biological children of Mr Esse. The First-tier Tribunal had regard to the evidence given by Mr Esse. It was the Appellants' case that his relationship with the First Appellant had been kept secret in the camp where they were both living for fear of discrimination and trouble. He is from the Ogaden tribe and the First Appellant is Madiban. When he met her she already had a child by another man. He was concerned that his family would not approve. She was concerned that she would be at risk from her own clan. They therefore conducted the relationship in secret. Documentary evidence included money remittance slips showing he had sent her money and a marriage certificate purportedly issued on the 6th May 2002. He admitted to having lied to the officer who conducted the Gateway interview. He wanted to hide his relationship with the First Appellant from his sister; his representative acknowledged that it was also in order to gain advantage under the resettlement scheme.

6. The First-tier Tribunal accepted that since Kenya was the Sponsor's former country of habitual residence, a marriage conducted there

December 2013 but was granted upon renewed application on the 28th January 2014 by Upper Tribunal Judge Rintoul.

prior to entry to the UK could qualify for consideration under the refugee family reunion provisions: AA (Marriage : Country of Nationality) Somalia [2004] UKIAT 00031. It was accepted, on the basis of the unchallenged marriage certificate, that the marriage had taken place in 2002. The DNA evidence demonstrated that the children were the Sponsor's, and on that basis the Tribunal was prepared to accept that the relationship between the First Appellant and Sponsor was subsisting at least until the birth of the Third Appellant in 2009. The Tribunal was not however prepared to find that the Appellants were part of the Sponsor's family unit at the date that he left the camp. His account of their secret relationship was "wholly incredible". It was not possible that he would have managed to keep the relationship hidden from his family for ten years and the fact that his sister apparently has no problem with it illustrates how unlikely it is to be true (the determination also notes that his account of making off at night to see his secret family was at odds with the evidence given by his sister during the Gateway process which was that he was always at home with her). The Sponsor had shown himself to be "transparently untruthful and unreliable" and the Tribunal was not prepared to accept anything he said without corroborative evidence. There was no evidence that he had been supporting the Appellants before he left Kenya, nor indeed until shortly before they made their applications. The fact that he was prepared to leave them behind, unprotected, in a refugee camp indicated that he was no longer in a relationship with the First Appellant at the time that he left. It was therefore not accepted that he intends to now live with her in the UK. As to the Third and Second Appellants, it followed from the finding in respect of their mother that they could not succeed, being unable to show that they were part of the Sponsor's family at the time that he left Kenya.

7. The grounds of appeal are that the First-tier Tribunal made the following errors of law:

    - Perverse reasoning. If the Sponsor is found to have lied in his Gateway interview about having a wife and children, that conclusion cannot rationally lead to a conclusion that they were not part of his family unit when he was interviewed
    - Failure to take into account the evidence of intervening devotion
    - Inadequate assessment of Article 8 ECHR

8. The Respondent opposes the appeal on all grounds.

Error of Law

9. In granting permission Upper Tribunal Judge Chalkley found some merit in the first point:

> "It is arguable that the First-tier Tribunal Judge's approach to the sponsor's evidence was impermissible, given that his deception related to whether he was married, and it was accepted that he was married"

In other words, it could be said to be perverse to reject the proposition that this man is currently married (and intends to remain so) because he lied and said that he wasn't in 2011. If he lied on that occasion and was in fact married with children, that raises a presumption that he is still married now. That is not however the sum total of the First-tier Tribunal's reasoning. The Tribunal rejected the contention that this was a subsisting relationship on another ground, namely that the Sponsor voluntarily left the Appellant's in a refugee camp without his protection. The point in the grounds of appeal that there are "no protection needs" in the camp is surprising to say the least, given that this Tribunal frequently hears evidence of the vulnerability of lone women (with or without young children) in Dadaab. That was a finding properly open to the First-tier Tribunal.

10. In respect of the Sponsor's reliability as a witness, the point that the determination makes is a simple one. He has shown a willingness to lie to immigration officials for his own end: little weight can therefore be attached to his evidence about the claimed situation today. It is apparent from the determination that Judge Heynes was singularly unimpressed with the Sponsor. He had told lies to take advantage of the Gateway scheme, he had lied in the present appeal in concocting the account of the 'secret' relationship and on that basis Judge Heynes was not prepared to take anything he said at face value. At 40 he says this: "a person who shows such a persistent disregard for the truth cannot complain if the fact-finding exercise is obscured by his dishonesty". That is effectively a finding that the Appellants have not discharged the burden of proof. It is not irrational.

11. In respect of the evidence of intervening devotion this amounted to one photograph sent to the Sponsor from Kenya, and nine money remittance slips, all but two of which are recorded as having been considered in the determination. Aside from these two slips, dated in the weeks following the application, all of the other material was expressly considered. The First-tier Tribunal declined to place significant weight on the material that was recorded, and I cannot think its conclusions would have been different if the two later slips had also been included in its deliberations. It was accepted that the children are his, and it would be natural – and indeed obligatory – that he support them financially. That does not establish that he is in a subsisting relationship with the First Appellant.

12. This leads to the troubling aspect of this case. That is that these

children are excluded from enjoying refugee family reunion rights with their father. The grounds of appeal rely on Article 8, and it is correct to say that the reasoning on Article 8 in the determination is scant. It is however clear that any interference with the children's right to enjoy a family life with their father is in this case entirely disproportionate since on their case their father has only gained entry to, and status in, the UK by lying about their existence. The simple answer to any Article 8 case is that he should return to Dabaab to be with his children. The question remains whether the biological children of the Sponsor could be considered to be members of his *family unit* even if he were not living with them at the time that he left Kenya. The relevant paragraph of the Rules is 352D:

> 352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom are that the applicant:
>
> (i) is the child of a parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom; and
>
> (ii) is under the age of 18, and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
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> (v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.

13. The only matter in issue is (iv). Mr McVeety submitted that the plain and ordinary meaning of those words would exclude children who were living in a another household with another main carer prior to the Sponsor's departure from Kenya. I would agree. At the hearing I did however indicate that I would look, with the parties' consent, at the relevant Immigration Directorates Instructions to see if there is any policy or concession therein that might assist the Second and Third Appellants. I could find nothing. Any references to the term "family unit" are invariably preceding by the words "living together in…".

14. I find that the determination of the First-tier Tribunal contains no error of law. The burden of proof was on the Appellants and on the limited evidence available the First-tier Tribunal was entitled to reach the conclusions it did.

Decisions

15. The decision of the First-tier Tribunal contains no error of law and it is upheld.

16. I make no direction as to anonymity. No such direction was requested and I see no reason to make one.

Deputy Upper Tribunal Judge Bruce
21st October 2014