Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/03496/2014
OA/03497/2014
OA/03500/2014
OA/03504/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17th March 2015	**On 24th March 2015**
Prepared on 17th March 2015	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MRS HALIMO ALI OMAR (FIRST APPELLANT)
MR MOHAMMED ALI YUSEF AHMED (SECOND APPELLANT)
MR ABDIKARIM ALI YUSEF AHMED (THIRD APPELLANT)
MR ABDIMAJID ALI YUSEF AHMED (FOURTH APPELLANT)
(NO ANONYMITY ORDERS MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Mr A. Chelliah, Solicitor
For the Respondent: Ms E. Savage, Home Office Presenting Officer

DECISION AND REASONS

The Appellants

1. The Appellants are all citizens of Somalia. The first Appellant, born on 30th January 1974, is the mother of the second, third and fourth Appellants and I shall refer to her as the Appellant. The three children were born on 20th July 1997, 18th March 1999 and 4th March 2001 respectively. They all appeal against the decision of Judge of the First-tier Tribunal Lawrence

sitting at Hatton Cross on 3rd November 2014 in which he dismissed their appeals against decisions of the Respondent to refuse to issue the Appellants with family permits under Regulation 12 of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The Appellants wished to join Mr Ali Yusef Ahmed, a citizen of Norway of Somali origin ("the Sponsor"), who is said to be married to the Appellant and said to be the father of the three children.

2. Regulation 12 provides that an Entry Clearance Officer must issue an EEA family permit to a person who is a family member of an EEA national (who is residing in the United Kingdom in accordance with the 2006 Regulations) where (inter alia) the applicant will be joining the EEA national in the UK. The burden of proof of establishing that rests on the applicant and the standard of proof is the usual civil standard of balance of probabilities.

3. The Respondent was not satisfied that the relationship between the Sponsor and the Appellants was as claimed. In support of their applications the Appellants had submitted photocopied documents to the Respondent, namely the marriage certificate of the Appellant and the Sponsor and birth certificates for the three children. The Respondent did not attach any weight to those documents because they were photocopies and therefore could not be authenticated.

The Proceedings at First Instance

4. At the hearing the Sponsor produced what was said to be the originals of the marriage certificate and the birth certificates and also produced DNA test results which purported to show that he was the father of the three children. The Judge was concerned about this documentation and at paragraphs 6 to 11 of his determination set out in some detail his concerns about them. Specifically he was concerned that if indeed the certificates had been issued several years ago they would not still be in the apparently pristine condition that they were now. He was also concerned as to certain discrepancies in them, for example the Appellant's date of birth was recorded on the marriage certificate as 1st January 1974 whereas when she put her date of birth in her application form to the Respondent she stated 30th January 1974. Although the documents were said to have been authenticated by the Somali government the authentication was not dated.

5. For these reasons the Judge placed no weight on the documents as showing that the parties were related as claimed. He then went on to deal with the DNA tests and dealt with the DNA evidence at paragraph 12 of his determination where he said:

> "12. The Sponsor has submitted DNA test results. These purport that the Sponsor is the biological father of the minor Appellants. [The Presenting Officer] asked the Sponsor what identity documents [had been shown] to the test centre. The Sponsor told me that

they submitted their birth certificates. I note that on the front of the documents, which is in Somali, only the mother's name is recorded. The Sponsor's name does not appear. However, on the reverse side, which is in English, the Sponsor's name is recorded. There is no explanation as why on the Somali side, the Sponsor's name does not appear but does appear on the English side.

13. The documents do not encourage me to attach any weight to any of them. I do not find that the document which purports to be a marriage certificate is genuine and that it demonstrates the first Appellant is married to the Sponsor. I remind myself it records a different date of birth for the first Appellant than in the application form. I do not accept the birth certificates are genuine. I do not accept they are reliable to be used for identity. Consequently, I am unable to attach any weight to the DNA test results."

He found that the Appellants were not related to the Sponsor as claimed and dismissed the appeal.

The Onward Appeal

6. The Appellants appealed against that decision taking issue with the Judge's findings on the alleged pristine condition of the certificates and submitted that in any event the DNA results should have been considered separately. The application for permission to appeal came on the papers before First-tier Tribunal Judge Osborne on 28th January 2015. In granting permission to appeal she wrote that the Judge had made his findings:

> "without the benefit of any expert evidence on the condition or contents of the certificates and further placed no reliance on the DNA results which were provided showing that the Sponsor was the father of the children in question due to perceived lack of information on the accompanying paperwork.
>
> The Judge made no findings about other matters raised within the notice of refusal such as the absence of evidence of intervening devotion."

7. The Respondent replied to the grant of permission by letter dated 6th February 2015 stating that the Judge had given detailed reasons why he rejected the evidence submitted starting with the sustainable finding that the Sponsor had not submitted the original documents to the ECO as he now presented them to the court. The ECO had expertise and was not to entertain photocopied documents for obvious reasons.

The Hearing Before Me

8. At the outset it was submitted on behalf of the Appellant that the issue in the case was whether the Appellant was the wife of the Sponsor (who was

present in court) and whether the dependent children were their family members. The reason why the marriage certificate was in as good a condition as it was, having been created on the day of the marriage on 1st January 1996, was because it had been kept in a briefcase all this time. There should be a presumption in favour of the validity of the documents. The Judge had not recorded the evidence given about the DNA test results correctly. The Sponsor had said that the Somali community identity documents had been submitted to the tester when the Appellants gave their DNA samples.

9. For the Respondent it was acknowledged that the only issue in the case was whether the parties were related as claimed. The Cellmark evidence had been before the First-tier Tribunal and had been taken into account by the Judge as had the other documents.

10. At this point I indicated that I had on the file the First-tier Tribunal Judge's manuscript note of the evidence and submissions made to him at the hearing. In relation to the DNA evidence the Judge had recorded the evidence of the Sponsor in cross-examination as follows:

> "I have provided DNA evidence. My wife and children provided Somali documents as identity for the DNA. They have to register with the Somali community; once registered the Somali community provides an ID card. I was not there when the ID cards were issued."

Then in re-examination the Sponsor said that "my wife and children have no passports. They only have identity cards as refugees".

Findings

11. At the end of the hearing I indicated that I had found a material error of law such that the decision at first instance fell to be set aside and that I would remake the appeal by allowing it. I now give my reasons for those findings.

12. The main issue in the case was whether the parties were related as claimed. The Judge found that they were not. Had the case turned on an assessment of the credibility of the documents put in support of the claimed relationship I would not have found an error of law. The Judge gave cogent reasons why he could place no weight on either the marriage certificate or the birth certificates. Copies only were produced to the Entry Clearance Officer and quite rightly the Entry Clearance Officer could not assess copy documents. The Judge's finding that the documents were in pristine condition was one which was open to him as it was to a certain extent a matter of simple observation. The Judge was entitled to disbelieve the Sponsor's evidence that the certificates had been kept safely in a briefcase since 1996.

13. The difficulty was that there was a second quite discrete piece of evidence, namely the DNA test results. Whether the Sponsor or another

person had decided to "improve" the evidence by producing documents after the fact might not have a bearing on whether the DNA evidence was acceptable. The Judge placed no weight on the DNA evidence because he was not satisfied that proper identification documents had been produced to the sample taker such that he could not be sure whose DNA had in fact been tested.

14. Had the only documentation being submitted to the tester been the marriage/birth certificates that finding too would have been unimpeachable and clearly open to the Judge on the evidence. The problem was that that was not in fact the evidence which was received by the Judge as can be seen from the handwritten note that the Judge took at the hearing (see paragraph 10 above). It was clear that the Appellants had submitted their Somali community identity documents to the sample taker at the time they provided the samples. That is recorded on the Cellmark declaration form where both the nature of the document, that it was a Somali community ID, and the document number was recorded. There is also a photocopy of the document itself in the Appellants' bundle.

15. The Judge was wrong in law to reject the DNA evidence on the grounds that there was a lack of documentation to prove the identity of those giving the samples. His decision falls to be set aside and the decision on the appeal remade. I am satisfied that the Appellants were indeed the ones who were tested and that the test results show that they are related to the Sponsor as claimed. He is the father of the second, third and fourth Appellants. As that was the principle issue in the case and as I find as a fact that the Appellants are able to show the relationship their appeals must succeed. I find they are entitled to be issued with family permits under Regulation 12. As I have allowed the appeals under the 2006 Regulations no issue as to Article 8 arises.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by allowing the Appellants' appeals against the Respondent's decision to refuse to issue family permits.

Appeals allowed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

I have considered making a fee award as I have allowed the appeals. I find that the DNA evidence was conclusive but it was not submitted to the Respondent at the date of decision. What was submitted to the Respondent was clearly insufficient for the reasons which I have given. I do not consider therefore that the Respondent's decision is such as to attract a fee award notwithstanding that I have allowed the Appellants' appeals. I therefore make no fee award in this case.

Signed this 23rd day of March 2015

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Deputy Upper Tribunal Judge Woodcraft