IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04249/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination & Reasons Promulgated**
On 22 April 2015	**On 13 May 2015**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

ASSIA AHMED SHARIF ADAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ADDIS ABABA

Respondent

Representation:
For the Appellant: Mr D Ball, Counsel instructed by Hersi & Co Solicitors
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of Somalia, born on 15 June 1996, against the decision of First-tier Tribunal Judge Robinson, who sitting at Hatton Cross on 24 October 2014 and in a determination subsequently promulgated on 5 December 2014, dismissed the appeal of the Appellant, against the decision of the Respondent dated 24 February 2014 to refuse her application for an entry clearance as the child of a relative present and settled in the United Kingdom.

2. In refusing the Appellant's application, the Respondent took account of the basis upon which the Appellant's previous application for entry clearance had been refused in a decision dated 24 June 2011, to join the same Sponsor in the UK.

3. It was noted in terms of the present application that the Appellant claimed that her mother had abandoned her in Ethiopia, in order to assist her sister.

4. In that regard, the Entry Clearance Officer considered that the Appellant had provided inadequate evidence to satisfy him that this was the case and in any event it was not understood why the Appellant's claimed mother would not take the Appellant with her on her travels, given that she was a minor.

5. It was further noted that the Appellant had failed to provide any evidence that she had registered as a refugee in Ethiopia and that were she genuinely residing in serious and compelling circumstances, she would have been expected to have sought the assistance of the authorities.

6. The Entry Clearance Officer was therefore not satisfied that the Appellant did not have the support of family or friends and that the Appellant did not continue to reside with the same people who had cared for her over the years. As such, he was not satisfied inter alia, that the Appellant's circumstances were compassionate or compelling enough to warrant the issue of an entry clearance in accordance with the requirements of paragraph 297(i) (f) of the Immigration Rules, as amended.

7. The Entry Clearance Officer had also given careful consideration to the Appellant's rights under Article 8 of the ECHR and concluded that whilst there might be a perceived interference, it would be justified in the interests of maintaining an effective immigration control and thus proportionate and appropriate. There appeared to be nothing preventing the Appellant's Sponsor joining her in Ethiopia, should she wish to do so.

8. The First-tier Judge heard evidence from the Appellant's Sponsor her sister, that together with the Sponsor's written statement was comprehensively taken into account in his consideration of the evidence in its totality and set out over paragraphs 6 to 16 of the Judge's determination.

9. At paragraph 26 of his determination, the Judge was clear that he had carefully considered the evidence relating to the Appellant that included her situation in Ethiopia and her claimed dependency on the Sponsor. Careful account was also taken of the respective parties' submissions.

10. The First-tier Tribunal Judge explained that he was mindful that at the time of the present application, the Appellant was 17 years old and that her earlier application had been made at the time when she was living with

her mother and that it was now asserted that the Appellant's mother was no longer living with the Appellant and had gone missing.

11. He further noted the claim that the Appellant was now living alone, in which regard account was taken of the Sponsor's evidence. It was apparent to the First-tier Tribunal Judge that although the Sponsor was in regular contact with her mother, "*she received no telephone call from her mother or the Appellant advising her that her mother was making a mercy dash to the border, leaving the Appellant alone*".

12. The Judge found for the reasons comprehensively set out at paragraph 29 of his determination, that the Sponsor's explanation for the lack of communication "*namely that she was working and not contactable by phone*", to be implausible. He found it "*improbable that the Sponsor would not have been advised of events before her mother embarked on the journey*". Further, "*it was pertinent that the Sponsor had no confirmation from any source indicating that she had made enquiries about her mother's whereabouts during the period she has been missing*".

13. At paragraph 30 of his determination and having considered the issue of the Appellant's age and circumstances, the Judge did not accept that she had been abandoned by her mother.

14. Further, her claim to be living in accommodation without electricity, water or heating and to be living in destitution or impoverished circumstances at the time the application was made, was not credible. In that regard, it was apparent to the Judge that the Sponsor had been sending sufficient funds; "*to enable her two female relatives to obtain adequate accommodation. I have noted that her mother and sister have mobile phones*".

15. It was observed that "*a post-decision event (had) been described by the Sponsor*" claiming that her sister was attacked by young men and rescued by passers-by. It was observed that no confirmatory evidence in relation to this claim had been provided. In any event, given the Judge's findings with regard to the disappearance of the Appellant's mother, the Judge did not accept that the Appellant had shown that she was at risk from young men in the area around her home.

16. I pause there because as an out-of-country appeal, the First-tier Judge was solely concerned with the evidence before the Entry Clearance Officer as at the date of his decision, save to the extent that post decision evidence might illuminate circumstances pertaining at the date of the decision.

17. Whilst the Judge accepted that the Appellant and Sponsor were sisters as claimed and that there was "*a strong family bond between them even if they had not seen each other for over three years*" and whilst in consequence, he was able to conclude that the Appellant satisfied the requirements of paragraph 297 (iii), (iv) and (v) the fact remained that upon his consideration of the evidence in its totality, the Appellant did not satisfy the requirements of paragraph 297 (i)(f) of the Immigration Rules.

18. Paragraph 297 of the Rules, sets out the requirements to be met by a person seeking indefinite leave to enter the United Kingdom, as the child of a parent, parents or a relative present and settled in the United Kingdom, of which sub paragraph (i) (f) requires that he/she:

> "(i) is seeking leave to enter to accompany or join a .. relative in one of the following circumstances;
>
> (f) (the) relative is present and settled in the United Kingdom or being admitted on the same occasion of the settlement and there are serious, compelling or other considerations which make exclusion of the child undesirable and suitable arrangements had been made to the child's care."

19. It is important to bear in mind, that the requirements of paragraph 297 of the Immigration Rules (as amended) are cumulative and mandatory so that a failure to meet any of the necessary required criteria would thus be fatal to the outcome of the application.

20. The Appellant successfully sought permission to appeal the Judge's decision, having submitted, that notwithstanding that Article 8 was raised specifically as a ground of appeal before the First-tier Judge, he failed to mention or consider it at all and thus materially erred in law. Further, that the Judge's factual findings were inadequately reasoned.

21. In that latter regard, it was pointed out, that the Judge in finding it to be not plausible that the Appellant had lost contact with her mother, had made a crucial finding, because it bore on his consideration of whether the Appellant was living alone in the most exceptional, compelling circumstances and whether she was wholly or mainly dependent on the Sponsor.

22. It was submitted that the only reason that the Judge had given for disbelieving this part of the Appellant's account was improbability and that this was not an "*appropriate, safe or sustainable reason for rejecting an account that is given by someone who is fleeing persecution, a matter which (was) clear from the Appellant's minority clan status and Somali origin*".

23. Prior to the hearing before me and by letter dated 11 March 2015, the Respondent filed with the Tribunal her Rule 24 response, submitting that the First-tier Judge directed himself properly and gave adequate reasons for rejecting the Appellant's claim to be living alone at paragraphs 29 and 30 of his determination.

24. Thus the appeal came before me on 22 April 2015, when my first task was to decide whether or not the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

25. Having heard the parties' submissions I reserved my decision.

Assessment

26. In the course of the parties' submissions I had drawn to their attention the following cases:

    - Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC);
    - Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC).

27. The head note in Shizad states as follows:

> "*(1) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the Judge*.
>
> *(2) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the Judge draws from the primary data were not reasonably open to him or her."*

28. The head note in Budhathoki states:

> "*It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail and issue raised in the case. This leaves the Judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however necessary for Judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost*."

29. I should add in that latter regard that the judgment in that case was given by Mr Justice Haddon-Cave who sitting as an Upper Tribunal Judge also decided in VHR (unmeritorious grounds) Jamaica [2014] UKUT 00367 (IAC) as follows:

> "*Appeals should not be mounted on the basis of a litany of forensic criticisms of particular findings of the First-tier Tribunal, whilst ignoring the basic legal test which the Appellant has to meet*".

30. Notwithstanding the eloquent submissions made by Mr Ball on the Appellant's behalf, I am satisfied on a careful reading of the Judge's determination, that he did indeed identify and resolve key conflicts in the evidence and explained in clear and brief terms his reasons. It cannot be said in such circumstances that the Appellant could not understand why she had lost.

31. Further, insofar as the Judge's consideration of the Appellant's immigration appeal was concerned, there has been no misdirection of law. Indeed the Judge at paragraph 24 of his determination correctly recognised that the burden of proof was on the Appellant to the requisite standard. Further,

that he was required to consider "*the circumstances appertaining at the time of the decision to refuse*".

32. As to the submission that the only reason the Judge gave for disbelieving the Appellant's account was improbability and that this was neither safe, appropriate or sustainable, I have considered the guidance in SR (Iran) [2007] EWCA Civ 460 where although I recognise that this discussion is in the contest of an immigration appeal, it is clear that what Sedley LJ had to say in referring to *"this field"* at paragraph 9 did not restrict the applicability of his comments at paragraphs 9 and 10 below to those errors alone. Sedley LJ had this inter alia to say:

> "9. The law does not demand, at least in this field, that each finding of fact, whatever its degree of certainty or uncertainty, be fitted into a single matrix of risk. The fact-finder's task is, to the extent made possible by the evidence, to find facts, and some facts are more certain than others. It would have been as unjust to the Appellant to treat as mere possibilities things which, on the AIT's findings, were highly likely as it would have been to the Respondent to treat possibilities of hardship as probabilities.
>
> 10. The critical adjudicative task is to assemble these findings into an evaluation which answers the question posed by law. In asylum and human rights claims, that is the question of real risk and it is at the point of decision and not sooner that it arises."

33. It was Mr Ball's submission that there was no logical connection between the serious nature of the events (namely a serious emergency that caused the Appellant's mother to rush off to deal with it) and the fact that the Sponsor said in evidence that she was working and did not have her telephone switched on. He submitted that the seriousness of an incident did not increase the likelihood that someone might have their phone off. Thus it was not just the lack of connection that was the problem but the reference by the Judge to implausibility that Mr Ball maintained was not *"the appropriate yardstick"*. A similar criticism applied to the Judge's finding that it was improbable that the Sponsor would not have been advised of events before her mother embarked on her journey.

34. Mr Ball cited HK [2006] EWCA Civ 1037 but in so doing failed to appreciate that this was a case that was primarily concerned with a Judge's approach to credibility in terms of asylum cases.

35. He also referred to Y [2006] EWHC 1223 (Admin), but failed to mention that in that case it was also said that a decision-maker was entitled to regard an account as incredible by drawing on his own commonsense and his ability to identify as a practical and informed person what was and what was not plausible. I find that this was precisely the exercise with which the First-tier Judge in the present case, engaged.

36. As correctly identified by the Judge in the present case, the onus and burden of proof was upon the Appellant and I am reminded that in MM [2005] UKIAT 0019, Mr Justice Ouseley, then the President of the IAC, held

that the fact that there might be an alternative explanation for matters that a Judge found inherently improbable did not demonstrate that negative credibility findings were legally erroneous. It was for the Appellant to provide the explanation.

37. In Malaba [2006] EWCA Civ 820 it was pointed out that in assessing the adequacy of a fact-finding exercise, an Appellate Tribunal expected findings to be adequately reasoned and that such reasoning on the part of the Judge not only told the losing party why he/she had lost but might also be able to demonstrate that he/she had adequately and conscientiously addressed the issue of factors that had arisen. Again, I find that is precisely the approach taken by the Judge in this case as is apparent from a reading of his determination.

38. In that regard I would agree with Mr Kandola, who submitted that in terms of the Judge's use of "*improbability*" in his findings, and mindful of the guidance in Y (above) and HK (above), it was apparent from those cases that it was not impermissible to use improbability, though not permissible to use UK standards as to reasonableness, in terms of what would happen in the United Kingdom. However on the facts as found in the present case, the Judge was entitled to take account of the fact that contacting close relatives about a drastic change of circumstances where both parties had the benefit of a mobile telephone and yet failing to contact each other, was both open to him on the evidence and could not be regarded as reasoning that applied a purely UK cultural standard. The Judge was entitled to take a global assessment taking into account the failure of the Appellant's mother to contact the Sponsor and as to the surrounding circumstances.

39. It was also Mr Ball's submission that there was no evidence upon which the Judge found that he considered that the amount of money provided by the Sponsor to her mother and the Appellant would have been sufficient to provide them with adequate accommodation as Somalis in Ethiopia. He submitted that the Judge could not take judicial notice of what he considered to be monthly rent in Addis Ababa.

40. I am unpersuaded by that submission. It was common ground that the Appellant and her mother had accommodation in Ethiopia and in that regard received a monthly remittance from her daughter, the Sponsor. I make the further observation that as the Sponsor did not say in evidence that the money that she sent to her mother was not enough, it was open to the First-tier Tribunal Judge to conclude that the money was to provide for adequate accommodation.

41. There was no evidence before the First-tier Tribunal Judge, that the Appellant's mother was working in Ethiopia but there was evidence that both the Sponsor and her mother had the benefit of mobile phones and no evidence that either phone had failed. As I pointed out to Mr Ball, whilst it might have been the case that the Sponsor as a nurse worked twelve hour shifts, this could not possibly mean that at all times the Sponsor and

mother were unable to speak to each other on their respective mobile phones at other hours of the day or night and further bearing in mind the time difference between the United Kingdom and Ethiopia.

42. I find therefore that it was properly open to the Judge to conclude over paragraphs 29 and 30 of his determination that the Sponsor's explanation for the lack of communication, namely that she was working and not contactable by phone, was implausible, not least in light of the serious nature of the claimed events that further supported his conclusion that the Appellant and her mother were not living in destitution or impoverished circumstances at the time the application was made.

43. I would further point out that it is not sufficient for an Appellant to say that she does not agree with a Judge's findings and wishes to challenge the factual decision which has been reached. It is apparent to me that the First-tier Tribunal Judge was clear as to what he thought of each aspect of the evidence and at what level of certainty, and only at paragraphs 33 and 34 of his determination, did he draw together all of these findings and reach his conclusion in accordance with precisely the approach as set out by Sedley LJ in SR (Iran) (above).

44. I find therefore upon a reading of the determination as a whole that it cannot even arguably be said that the Judge failed to take relevant material into account or that his decision was perverse or irrational in the Wednesbury sense.

45. I now address the Appellant's assertion that the Judge's failure to deal specifically with the issue of Article 8 of the ECHR that was raised in the original grounds of appeal, constituted a material error of law. For this purpose I begin by observing that it was in a letter from the Appellant's solicitors to the British Embassy in Addis Ababa dated 20 January 2014 that the issue of Article 8 was first raised on behalf of the Appellant but solely in generalised and formulaic terms in which a list of case law references were cited but where no attempt was made to demonstrate as to how the cases relied upon were relevant to the particular circumstances of the Appellant or dealt in any meaningful way with the Respondent's decision.

46. More particularly, the original grounds of appeal made only the barest of reference to Article 8 by stating that the Entry Clearance Officer's decision was "*unlawful because it was incompatible with the Appellant's rights under Article 8 of the Human Rights Act 1998 and the European Convention on Human Rights*". Thus, no attempt was made within those barest of grounds to engage in Article 8 terms with the Appellant's particular circumstances. Those grounds I observe, added the words "*further grounds may follow*" but as such they failed to disclose a ground of appeal.

47. At the outset of the hearing before me, I asked Mr Ball (whom I was aware did not represent the Appellant before the First-tier Tribunal Judge)

whether the Article 8 issue was specifically raised before him at that hearing. Mr Ball informed me that he was not aware whether or not it was so raised. He maintained however that "*the single reference to Article 8 in the original grounds was enough to raise it as an issue*". He further maintained that it was "*Robinson obvious*" on the basis of the facts as presented. Whilst there was common ground between myself and the parties that in terms of Article 8 the Judge erred in law in failing to consider it within his determination (indeed s.86(2) of the 2002 Act requires in mandatory terms that the Tribunal must determine any matter raised as a ground of appeal) the fact remains that this issue was not particularised to the Judge as to the nature of the claim and therefore there cannot have been a material error. There is nothing in the determination to suggest that this matter was specifically raised by the Appellant's representative before the Judge and it is not an appropriate challenge to a First-tier Judge's finding to seek to raise issues that were not specifically put before him at the hearing and barely raised in the grounds of appeal and thus after the appeal has been heard.

48. Further, and more particularly, given the Judge's sustainable finding that the Appellant was not alone in Ethiopia, it would follow that she continued to have family life there with her mother.

49. However, it is contended on behalf of the Appellant, that it was a breach of the Appellant's claimed family life with her sister to refuse her entry clearance and that it was thus disproportionate, notwithstanding that the Appellant was found not to meet the relevant terms of paragraph 297 of the Immigration Rules, such that she was found to be, not living alone and had family life with her mother and was not destitute. It was submitted that she should nevertheless have been given entry clearance to live with her sister in the United Kingdom. As Mr Kandola rightly submitted, that could not be made out and was simply not material and that thus "*such a claim would have been hopeless"*.

50. I would add that if the claim was intended to amount to an interference with the right to promote and develop family life, the fact was and is, that the Appellant was very nearly an adult at the time of her application and had been living apart from her adult sibling for many years. In that regard, I am mindful of the guidance in Advic v the United Kingdom, (Application No.00025525/94) in which the Commission pointed out that the protection of Article 8 did not cover links between adult siblings who had been living apart for long periods of time and they noted in the case of Advic when the applicant made his application for an entry clearance his only close relative in the United Kingdom was his brother from whom the applicant had been separated since 1975. In such circumstances the Commission considered that it had not been shown that there existed sufficient links between the applicant and his relatives residing in the United Kingdom to give rise to protection of Article 8. It follows that there was no breach of the applicant's right to respect for his private and family life within the meaning of Article 8 on the part of the United Kingdom.

51. Thus, in the present case, while the Appellant fell to be assessed as an individual under the age of 18 and therefore a minor, it would have had to have been borne in mind that would only have just been the case. As a consequence of the decision under appeal, there would have been an engagement of rights protected by Article 8 given that it appeared the Appellant had been separated from her Sponsor sister for many years. It is thus difficult to see how the decision under appeal could have interfered with the Appellant's Article 8 rights and in circumstances where since the Appellant appealed for entry clearance was refused, she was now in the same position as she was before making the application.

52. I would further observe that where a claimant fails to establish a substantive right to enter the United Kingdom under the Immigration Rules she would have to put forward evidence of a private/family life of such significance so as to show that refusal of such entry clearance would be disproportionate.

53. It is apparent, given the findings of the Judge in the present case in terms of the Appellant's immigration appeal, that the claim under Article 8, even if it had been considered, would have been bound to fail.

54. In conclusion I find this is not a case where the First-tier Tribunal Judge's reasoning in terms of the Appellant's immigration appeal were such that the Tribunal were unable to understand the thought processes he employed in reaching his decision. (See R (Iran) [2005] EWCA Civ 982).

55. I find that in that regard the First-tier Tribunal Judge properly identified and recorded the matters that he considered to be critical to his decision on the material issues raised before him in this appeal.

Decision

56. The making of the previous decision involved the making of no error on a point of law such as to be material to the outcome and I order that it shall stand.

57. No anonymity direction is made.

Signed Date 29 April 2015

Upper Tribunal Judge Goldstein