Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04615/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 March 2015	**On 9 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GIBB

Between

ENTRY CLEARANCE OFFICER, NAIROBI, KENYA

Appellant

and

SARA KESTE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Brocklesby-Weller, Home Office Presenting Officer
For the Respondent: Mr N Stevens, Duncan Lewis & Co Solicitors (Harrow office)

DECISION AND REASONS

1. Although this is an appeal by the Entry Clearance Officer I will refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Eritrea, currently resident in Ethiopia, who was refused entry clearance to join her older brother in the UK (the sponsor). The sponsor is an Eritrean citizen who was recognised as a refugee in the UK in 2009, and obtained indefinite leave to remain in 2014. The

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appellant is an orphan, and dependent on the sponsor and his wife, who joined the sponsor in the UK in 2013.

3. The appeal was allowed by First-tier Tribunal Judge S Aziz, in a decision promulgated on 21 November 2014. The appeal was allowed on Article 8 grounds only.

4. Permission to appeal was granted by First-tier Tribunal Judge McDade on 13 January 2015. The grounds seeking permission to appeal had complained that the judge had not properly applied paragraph 319X of the Immigration Rules; and that there had been failures to resolve material conflicts in the evidence. The judge granting permission to appeal considered the point about the application of paragraph 319X to be arguable, but did not mention the other two grounds.

Submissions

5. At the start of the hearing it was agreed between the parties that all three grounds could be argued. This agreement flowed from the fact that, although they had not been mentioned, the second and third grounds had not been refused permission. Ms Brocklesby-Weller, for the Entry Clearance Officer, indicated at the start that she was not relying on the first ground. Both the person who drafted the grounds, and the judge granting permission, appear to have misunderstood the nature of paragraph 319X of the Immigration Rules (HC 395 as amended). The misunderstanding was understandable, given the drafting, which refers to "the child of a relative". This was taken as meaning that an applicant had to be the biological child of a relative acting as sponsor. In fact, as is clear from paragraph 319X(iii), the Rule only covers children where the sponsoring relative is not the parent of the child. In reality, therefore, the Rule is concerned with children who are applying to join relatives who are refugees in the UK, but not children seeking to join their parents.

6. The submissions were therefore concerned with the remaining two grounds. An issue arose, in the course of discussion, as to whether Mr Stevens, for the appellant, accepted the judge's decision dismissing the appeal under the Immigration Rules. This aspect of the decision turned on the issue of whether a certificate showing that the applicant was free from TB could be considered as relevant to the circumstances at the date of decision. Mr Stevens indicated that a cross-appeal had been given consideration, but had not been pursued on the basis that there would be no difference between success under the Immigration Rules, and under Article 8.

7. In support of the second and third grounds, Ms Brocklesby-Weller submitted that there was a conflict in the judge's decision between the finding that the sponsor had been credible in some respects but not others. The judge had not engaged with the negative aspects when assessing the credibility of other aspects, and there were insufficient

reasons for the positive findings made in view of the judge's findings that the sponsor had not been candid about the nature of his relationship with the appellant in view of the DNA test results. In addition, those results were not properly considered when looking at the previous decision, referred to at paragraph 85 of the decision under appeal. As to ground 3 there was a lack of reasoned findings as to the actual parentage of the appellant. There had been failings in the assessment of the position of Article 8 outside the Rules, and a failure to consider the important public interest point of the protection of the public from TB.

8. Mr Stevens submitted that the second ground in reality boiled down to a complaint that the judge should have made a clear finding as to the parentage of the appellant, but in his submission this would have been pure speculation, and the judge would have fallen into error for that reason. The findings in the decision at paragraphs 85 and 98 amounted to factual findings that the appellant had been part of the sponsor's family unit pre-flight, and that he had taken on parental responsibility for her. Judges were used to making mixed credibility findings. There was sufficient evidence of the appellant's circumstances in Ethiopia. Maintenance had been accepted by the Entry Clearance Officer. As to the third ground, it was submitted that this would only be a significant adverse public interest factor if the appellant actually had TB, and the certificate showed that this was not the case. At paragraph 103 of the decision the judge was entitled to look at the damaging consequences for the appellant of insisting on a further entry clearance application being made, with the resultant delay.

9. Ms Brocklesby-Weller, in response, submitted that the process of looking forwards to the consequences of insisting on another application did not fit comfortably with Article 8's focus on the date of decision; that there could be no near miss; that Article 8 was not a general dispensing power; and that a fresh application remained possible.

Decision

10. I have decided that the two remaining grounds have not been made out, and it has not been established that there was a material error of law in the judge's decision.

11. The second ground was concerned with two issues. The first was whether the judge's reasons for the positive findings were adequate in view of the negative credibility findings about the nature of the relationship. On this point I accept, in broad terms, the submission made by Mr Stevens. It will often be the case that judges will accept part of the evidence being put forward by or on behalf of an appellant, but will have reasons to reject other parts of the evidence. That is the judge's task, and this aspect of the second ground appears to me in reality to amount to a complaint about a matter of weight. This properly falls within the factual realm. It appears reasonably clear to me that it was open to the judge to make both

the positive and negative findings, and it is not arguable that the reasoning for the positive findings was inadequate. The complaint is that the judge should have given greater weight to the negative aspects, and this should have led to the judge rejecting a greater portion of the evidence, but that was a matter for the judge to decide on all of the evidence, and does not amount to a legal error.

12. The second aspect of the second ground challenging the judge’s decision was concerned with whether the judge should have made a finding as to the appellant's parentage. On this point I accept the submission made that this would have been speculative. This was a difficult issue, and it appears to me that the judge dealt with it well. The judge noted at paragraph 80 that the DNA evidence established that the appellant and sponsor were related, as required by the Rule. The DNA evidence showed that the appellant and the sponsor were not full siblings, as they had believed, but were half siblings, although other close relationships were also possible. The judge went on, at paragraph 85, to look at the actual relationships between the appellant, the sponsor, and his wife. These findings appear to me to be well reasoned, and to have been open to the judge on the evidence. The DNA result did raise a number of possibilities, but I accept that it would have been speculative to make findings as to what had occurred in the past. The findings about the actual nature of the relationships, and in particular the appellant's dependency on the sponsor and his wife, and their formation of a family unit, were the findings that counted in establishing the actual circumstances of the child at the date of decision.

13. The third ground challenged the overall Article 8 reasoning. Some of the points of concern raised in the written grounds were not pursued at the hearing. The main point that was pursued was connected to the TB certificate. This was partly in connection to the fact that it emerged that this issue was the only one that led to the appeal being dismissed under the Immigration Rules, rather than being allowed under the Rules.

14. It does not appear to me to be arguable that the judge erred in law in considering the consequences for the appellant, and her best interests as a child, if the appeal were to be dismissed. In entry clearance Article 8 is concerned with a positive obligation, and although the assessment is concerned with the date of decision, the decision maker at that date inevitably has to look forward to a certain extent at what the consequences of refusal would be for any family or private life rights that are engaged. In this case, there were sustainable and well reasoned findings that the appellant was a child who was separated from her two closest relatives, who were in effect her guardians, and that she was isolated in a refugee camp in a foreign country. The suggestion that she should stay longer in that situation merely because the certificate showing that she was free of TB had been obtained late is not an attractive one. The issue becomes one not of any genuine public interest about protecting the UK from TB, but instead merely an adherence to form rather than

substance in the process of entry clearance applications. I cannot see that the judge's approach to Article 8, in effect deciding, in the light of the best interests of the child, that it was disproportionate to insist on a further application arising from the certificate issue alone, can be said to involve any legal error for looking forward.

15. The additional point that was discussed, namely that it would have been open to the judge to regard the TB certificate as showing what the circumstances were at the date of decision, on the basis that if the appellant was clear of TB shortly after the decision, then she must have been clear of TB at the date of decision, is one, as I have said, that was not pursued.

16. It was not suggested by either side that there was any need for anonymity in this appeal. Despite the fact the fact that the appellant is a child I therefore make no such order. The judge made a fee award. This has not been challenged and, along with the decision, it therefore remains undisturbed.

Notice of Decision

17. The appeal by the Entry Clearance Officer is dismissed.

18. The decision of the First-tier Tribunal allowing the appeal on Article 8 grounds remains undisturbed.

Signed Date **1 April 2015**

Deputy Upper Tribunal Judge Gibb