



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/11645/2013
OA/11648/2013
OA/11651/2013
OA/11656/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 2 October 2014**

**Determination Promulgated
On 21 January 2015**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

**MRS FADUMO HUSSEIN HIRSI
MISS FARHIA ABDI MOHAMED AWALE
MISS FALIS ABDI MOHAMED AWALE
MISS FAHIMA ABDI MOHAMED AWALE**

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Ms C Bexson of Counsel instructed by Hersi & Co Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Kamara dismissing these appeals under the Immigration Rules and under Article 8.

- 2) The appellants are all nationals of Somalia. They are the wife and three daughters of the sponsor, Mr Abdi Mohamed Awale, who is a British citizen. The appellants appealed to the First-tier Tribunal against refusals of entry clearance by the respondent. Entry clearance was refused because the respondent was satisfied neither that the appellants were related to the sponsor as claimed nor that the relevant financial requirements were met.
- 3) The Judge of the First-tier Tribunal accepted that the first appellant and sponsor were validly married. The judge found also that the sponsor was employed as he had claimed to be and that his previous employers were also as he had claimed. The judge nevertheless found that the documents submitted with the application for the purpose of proving earnings did not comply with Appendix FM-SE.
- 4) Although the question of accommodation was not raised in the refusal decision the judge was not satisfied that accommodation was available for the appellants and found that the sponsor had dishonestly concealed the lack of available accommodation.
- 5) In relation to Article 8, the judge accepted that the sponsor's earnings exceeded the amount required under the Immigration Rules but found that the sponsor had given false evidence about his accommodation, as well as failing to submit the specified evidence in support of his employment. The judge did not accept that there were compelling circumstances which justified consideration of the appeal under Article 8 outside the Immigration Rules.
- 6) The grounds of appeal attached to the application for permission to appeal were lengthy and Ms Bexson helpfully summarised them for me, noting that permission to appeal had been granted on all issues. The first issue was presented under the heading of procedural unfairness. It was submitted that the issue of the adequacy of accommodation was not raised in the respondent's refusal decision. The judge was wrong to raise an alleged anomaly in relation to the evidence relating to accommodation at the start of the hearing. As a result of this the sponsor perceived that the judge was against the appellants. Reliance was placed on the case of Oyono [2002] UKIT 02034. The judge's approach to accommodation at the start of the hearing and the adverse finding made in respect of this coloured the rest of the determination and the judge did not believe anything further from the sponsor.
- 7) Ms Bexson further submitted that the alleged anomaly in respect of the evidence of accommodation raised by the judge had been rectified by a letter from the landlord. This showed that the arrangements made by the sponsor to accommodate the appellants were legitimate. It was permissible for the judge to pursue issues arising from the evidence, even though these were not in the refusal decision, but the judge could not do so in a manner which was unfair.

- 8) The second issue raised in the application for permission to appeal was whether the judge had taken into account post-decision evidence in relation to accommodation. The refusal decisions were dated 15 April 2013. In June 2013 the sponsor entered into an arrangement with the landlord for the sub-letting of the accommodation for the appellants until such time as the appeal was concluded. The judge took into account this evidence, which post-dated the decision, and this was unfair.
- 9) The third main issue arose in relation to the proportionality exercise in respect of the sponsor's children. The judge did not make any finding to the effect that there was no family life between the children and the sponsor. There was a presumption of family life between children and their parents and an assessment of proportionality was required. There was an obligation on the Tribunal to consider whether family life could reasonably be continued in another country, which in this case would be either Ethiopia or Somalia. The judge failed to consider the reasonableness of the sponsor returning to Ethiopia where his family reside.
- 10) Continuing from this the fourth issue was the question of the best interests of the children. The judge failed to have regard to this as a relevant issue and this was a material error.
- 11) Ms Bexson concluded that on each of these issues the determination was flawed and should be set aside. She asked for a remittal to the First-tier Tribunal for a rehearing.
- 12) On behalf of the respondent, Mr Walker acknowledged that the adequacy of accommodation had not been challenged in the refusal decision. One of the main issues was the inadequate evidence of the sponsor's employment and earnings. The judge found that the appellant and the sponsor were validly married, although the Entry Clearance Officer had no evidence of a valid marriage.
- 13) Mr Walker further acknowledged that there was a covering letter with the application form in relation to accommodation that was not in the respondent's bundle before the First-tier Tribunal. This was a letter of 5 February 2013, which was referred to at paragraph 7.13 of the application form for the first appellant.
- 14) I had before me a rule 24 notice, dated 29 August 2014, submitted on behalf of the respondent. This takes issue with the extension of time for the application for permission to appeal. This point was addressed, however, by the judge in granting permission to appeal and there is no reason not to accept the judge's decision. The rule 24 notice further states that in terms of RM (Kwok On Tong: HC395 paragraph 320) India [2006] UKAIT 00039 the judge was entitled to dismiss the appeal on the grounds that the decision was not in accordance with the Immigration Rules unless satisfied that all the requirements of the Rules were met. In terms of this decision it was open to the judge to raise issues of concern and to put the appellant on notice of this at the start of the hearing.

Discussion

- 15) I accept that in terms of the decision referred to by the respondent the judge was entitled to raise an additional matter of concern at the start of the hearing. If the judge did this, however, procedural fairness required that the parties had adequate notice of the additional case to be answered.
- 16) The Judge of the First-tier Tribunal records at paragraph 8 of the determination that counsel for the appellant, who was not the counsel who appeared before the Upper Tribunal, indicated after taking instructions that she was willing to proceed and that she would address the judge's concerns by way of additional questions addressed to the sponsor. The judge however did not record these questions and answers in the determination before proceeding to make a finding against the sponsor alleging that he had dishonestly concealed the lack of available accommodation at the time of the application. It is now submitted on behalf of the appellants that this finding ran contrary to documentary evidence which was submitted with the application form in relation to accommodation but which was not forwarded by the respondent to the Tribunal with the respondent's bundle because the respondent regarded the accommodation issue as satisfied.
- 17) The Judge of the First-tier Tribunal cannot have known, of course, what was in the additional documentation submitted to the respondent if that documentation was not included in the respondent's bundle. I note that at paragraphs 7.13-7.14 of the first appellant's application form there is a reference to a covering letter in relation to accommodation. The judge ought therefore to have been aware that there was further evidence on this matter before the respondent.
- 18) I do not consider that the Judge of the First-tier Tribunal was necessarily wrong to raise at the start of the hearing concerns about accommodation which appeared to the judge to arise from the documentary evidence before the Tribunal. Similarly, the Judge of the First-tier Tribunal was in principle entitled to rely on a submission by counsel for the appellant that she was willing to proceed, notwithstanding that this new issue had been raised. The question of fairness depends, however, not just on observing the initial formalities but also on giving a party an adequate opportunity in practical terms to present his or her case. This would include taking account of whether there is already available relevant evidence relating to the new issue which is not before the judge, or whether there is evidence likely to be available which the parties would have adduced had they known the issue would arise. Notwithstanding that counsel had agreed to proceed, if the judge observed, or should have observed, as the evidence unfolded that the appellants had not had an adequate opportunity to prepare in respect of the new issue then it was unfair for the judge to proceed further.
- 19) Where the judge went wrong was in making an adverse credibility finding against the sponsor in relation to accommodation without giving the

appellants an adequate opportunity to address the issue, particularly when documentary evidence which had been provided to the respondent was not before the Tribunal. The judge's adverse finding appears to have been based largely on the fact that the sponsor was not living in the proposed accommodation for the family but was living in one room in a shared house. The sponsor made no secret of this at the hearing. He claimed that he had sub-let the accommodation for the family. The judge did not accept the sponsor's evidence in relation to this. The judge pointed out that in his witness statement (which was not before the Upper Tribunal) the sponsor stated that he resided in the accommodation arranged for the family. This may or may not have been correct at the time the witness statement was signed but it does not follow from this that the sponsor "dishonestly concealed the fact that the only accommodation available at the time of the application was one room in a shared house at a different address", as found by the judge. This is particularly so when there was known to be documentary evidence relating to accommodation which was before the respondent but was not before the Tribunal. In these circumstances I do not consider that the appellants were afforded a fair hearing in relation, in particular, to the issue of accommodation. Accordingly the judge's findings cannot stand.

- 20) Given the significance of this adverse credibility finding to the other findings made by the judge, this matter will in itself lead to the decision being set aside. I am satisfied, however, that the judge made further errors in relation to Article 8 on the following issues, in particular. The judge found that there were no compelling circumstances which required consideration of Article 8 outside the Rules, having regard to the decision in Gulshan (Article 8 - new rules - correct approach) [2013] UKUT 640. The judge went on to refer in passing to the decision of the Court of Appeal in MM (Lebanon) [2014] EWCA Civ 985 but made no reference to the further light cast on the consideration of Article 8 outside the Rules by that decision.
- 21) In relation to Article 8 the judge's reasoning was weak. The judge concluded that there were no compelling circumstances for considering Article 8 outside the Rules but one of the principal reasons for this was that the sponsor had, in the view of the judge, given "a false account of his accommodation". As already stated, this finding cannot stand. Furthermore, the judge failed to have any regard to the best interests of the children, although apparently accepting that they are the children of the first appellant and the sponsor. In conclusion, the judge's reasoning in relation to Article 8 is inadequate and the judge failed to have regard to a relevant consideration, namely the best interests of the children.
- 22) Having decided that the judge's decision should be set aside, the question arose as to whether the appeal should be remitted to the First-tier Tribunal and, if so, whether any findings should be preserved. It was pointed out that the judge made a positive finding in respect of the marriage between the sponsor and first appellant. Mr Walker, however, drew attention to an apparent lack of reasoning to support his finding. Yet again, it appears

the judge's reasoning seems inadequate to the point of error, although this issue was not included in the rule 24 notice submitted on behalf of the respondent. Nevertheless, my view is that the findings of fact which require to be made are such that it is appropriate to remit the appeal to the First-tier Tribunal, in terms of Practice Statement 7.2(b) and that no findings made by the First-tier Tribunal should be preserved.

- 23) It should be further noted that the documentary evidence provided on behalf of the appellant for the purpose of the hearing before the First-tier Tribunal is no longer with the appeal files. Accordingly a duplicate copy of this evidence will have to be lodged no later than 7 days prior to the remitted hearing before the First-tier Tribunal. According to Mr Walker the appellant's bundle was still with the respondent's file and this evidence does not require to be served again on the respondent. Additional evidence may be lodged provided such evidence appertains to circumstances at the time of the decision appealed against, in terms of section 85A of the 2002 Act.

Conclusions

- 24) The decision of the First-tier Tribunal discloses errors on points of law such that it is set aside. The appeal is remitted to the First-tier Tribunal to be remade.

Anonymity

- 25) The First-tier Tribunal did not make an order for anonymity. I was not addressed on this and no order is made at this stage.

Signed

Date **2 October 2014**

Judge of the Upper Tribunal