Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16647/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 15th December 2014	**On 13th January 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

MERON BELAY
(Anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr Mills – Senior Home Office Presenting Officer.
For the Respondent: Mr Kullar, Solicitor, Sultan Lloyd Solicitors.

DETERMINATION AND REASONS

1. This is an appeal by the Entry Clearance Officer against a determination of First-tier Tribunal Judge Obhi promulgated on 20 August 2014, following a hearing at Sheldon Court Birmingham on 4th July 2014, in which the Judge allowed the appeal under the Immigration Rules, although dismissed it on asylum and human rights grounds, against the refusal of an Entry Clearance Officer (ECO) to

grant Meron Belay leave to enter under the Refugee Family Reunion Policy to join Samuel Belay who has been recognised as a refugee in the United Kingdom.

2. The application was refused on 12 June 2013 as the ECO was not satisfied that Meron Belay is biologically related to his sponsor. DNA testing undertaken by Cellmark Diagnostics ruled out such a relationship. It was found that false representations had been made in the application form with regard to the relationship.

3. Having considered the competing arguments and evidence provided the Judge set out her findings from paragraph 18 of the determination. Although the sponsor did not accept the DNA test results the Judge correctly noted there was no evidence of a challenge to them. It was noted the Rules are specific in only providing an opportunity for family members of refugees who are part of the refugee's household to join them. It was found that Meron Belay is not the biological child of the sponsor although thereafter the Judge stated "the question is whether in practical terms the child was a child of the family of the appellant and his wife, and whether he lived as part of the household of the appellant before he came to the United Kingdom in order to seek asylum". The Judge found Meron Belay had been treated as a child of sponsor's family and according was in a similar position to a child who has been adopted by the family even though there was no adoption. The Judge was not satisfied deception had been used in relation to the birth certificate as she was satisfied that the sponsor, at least, believed Meron Belay was his son.

4. In paragraph 21 the Judge made the following findings:

> 21. This is an unusual situation and not one which either party considered, namely whether a child who has been treated as a child of the family of the sponsor can benefit from the family reunion policy. I am satisfied that he can, because the rules refer to a child of the sponsor, which this appellant was because he was a child of the family, although not a biological child of the family (similar possibly to a stepchild) and he did form part of the family unit before the sponsor left to claim asylum. I accept that the sponsor did not form part of that unit himself, but there were reasons for that: he was in prison and he left as soon as he was released. I find that the appellant therefore does meet the requirements of paragraph 352D. I have based my decision entirely on the findings of fact that I have made, namely that the appellant was treated as a child of the family of the sponsor. I am aware and accept that there are cases in which the rules are abused by those who are not related, or children of other family members in which refugee seeks to support their entry into the United Kingdom. However I am satisfied on the evidence that this is not one of those cases.

5. The Judge found it was not necessary to consider whether the decision breached a right to family life as the appeal was allowed under the Rules but stated that if she had considered Article 8 that too would have depended on whether it had been established that there existed a relationship, biological or psychological on the sponsor, as his father, and that the continued separation in circumstances in which sponsor had affectively exercised sole responsibility since his wife death would have amounted to a disproportionate interference in Meron Belay's life.

6. The ECO sought permission to appeal on the basis the Judge had failed to adequately reason her findings, especially in light of the fact that the term 'parent' is defined within the Immigration Rules.

Discussion

7. In Chapter 6 of the Immigration Rules, the definition section, the term 'parent' is defined in the following terms:

> "a parent" includes
>
> (a) the stepfather of a child whose father is dead and the reference to stepfather includes a relationship and rising through the civil partnership;
>
> (b) the stepmother of child whose mother is dead and the reference to stepmother includes a relationship uprising through its partnership and;
>
> (c) the father as well as the mother of an illegitimate child where he is proved to be the father;
>
> (d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised in the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paragraphs 297-303);

8. The Judge found Meron Belay to be in a similar position to a stepchild although to satisfy the requirements relating to step parentage there is a requirement that the biological father is dead or that an adoption or de facto adoption has taken place. The Judge makes no reference to the above provisions no analysis appears within the body of the determination of how the specific requirements can be met. The

finding the definition of a 'parent' could be met based upon the reasons provided by the Judge is a material misdirection in law

9. Although the Judge states that neither party appears to have considered the situation, contrary to their duty to assist the tribunal, the Court of Appeal and Supreme Court have. In relation to de facto adoptive children; in AA (Somalia) v Entry Clearance Officer (Addis Ababa) [2012] EWCA Civ 563 the Court of Appeal considered the proper interpretation of the phrase "child of a parent" under paragraph 352D of the Immigration Rules and whether the definition of "parent" and "adoptive parent" under paragraph 6 and "de facto adoption" under paragraph 309A applied to applications for entry clearance under paragraph 352D. Expert evidence adduced on the Claimant's behalf demonstrated that her relationship with the Sponsor fell within the concept of "Kafala", an informal system of parental responsibility under Shari'a Islamic law akin to adoption. The Judge held that refusal of entry clearance would violate Article 8 ECHR. The Court of Appeal held that there was no proper basis for saying that there could be some notion of adoption applicable to entry clearance applications under paragraph 352D which could operate separately from and outside the meaning given to it for the purposes of the Rules. The interpretation to be applied under paragraph 6 to "adoption" (and "adopted" and "adoptive parent") itself expressly brought into play the requirements of paragraph 309A. Moreover, the requirements under paragraph 352D were cumulative; being a part of the family unit at the relevant time was not in itself enough to give entitlement to entry. It was just one of the six requirements that had to be met. It was to be noted that under requirement (i) of paragraph 352D the requirement that the applicant "is" the child of a parent granted asylum in the UK, not that the applicant was regarded as, or treated as, such a child.

10. On appeal in AA Somalia (FC) v Entry Clearance Officer (Addis Ababa) [2013] UKSC 81, 18 December 2013, it was held that paragraph 352D of the Immigration Rules HC 395 (as amended) which provided for the grant of leave to enter to the child of a parent who had been admitted to the UK as a refugee, did not embrace a child for whom a family member had taken parental responsibility under the Islamic procedure known as Kafala, a process of legal guardianship akin to adoption.

11. Even if the relationship between Meron Belay and the sponsor has not been specifically found to be the taking of responsibility under the Kafala procedure, this appears to be similar to the nature of the relationship between them.

12. In relation to the question of whether a policy exists outside the Rules that allows Meron Belay to succeed, in MK(Somalia) and Others v ECO and Others (2008) EWCA Civ 1453 the appellants were seeking to join

an aunt, a refugee from Somalia, in whose household they had lived before their aunt fled to the UK. The Court of Appeal confirmed that there was no free standing policy operating outside the Rules which accrued to the particular advantage of de facto adoptive children who fell outside paragraph 309A. There was no policy outside the Rules which enabled family re-union specifically for children of the family who were not the biological or legally adopted children of the parents and did not fulfill the Immigration Rules on de facto adoptions (e.g. because they did not meet the maintenance requirements). The reference in the Family Re-Union policy to the possibility of other members of the family such as elderly parents being allowed to come to the UK if there are compelling compassionate circumstances did not extend to de facto adoptive children.

13. The Judge therefore materially erred in law in allowing the appeal under the Immigration Rules on the basis that the sponsor of a child treated as a child of the family is entitled to succeed under the refugee family reunion provisions. The determination is set aside.

14. I substitute a decision under the Rules dismissing the appeal on the basis it has not been shown the mandatory requirements of the Rules or terms of any applicable policy can be satisfied on the facts of this case.

15. In relation to the Article 8 element, the Judge dismissed the Article 8 claim whilst at the same time indicating in paragraph 22 that she did not need to consider it. If this element had not been considered it is arguable the Judge should not have dismiss it. If she did consider this ground of appeal she was entitled to dismiss it although the analysis under Article 8 is defective.

16. As this is a refusal of entry clearance the date at which the issues must be considered is the date of decision, which is 12 June 2013. Meron Belay at that date was 25 years of age and not a child and, whatever may have been the arrangements in the past, the sponsor is not his biological parent. It has not been shown that he can succeed under any other provision of the Immigration Rules, for under 317(f) he would need to be a relative. Even if this provision had been established it is necessary to show the accommodation and maintenance requirements can be met of which there was insufficient evidence.

17. As Meron Belay cannot succeed under the Rules it is necessary to consider the matter by reference to domestic and European jurisprudence. There is no need to rehearse the decisions in cases that have been published since July 2012 relating to how such matters are to be assessed, but it is clear that what needs to be established, if the issue is that of proportionality, is that the decision will result in unjustifiably harsh/unreasonable consequences for him

that will make the decision disproportionate as they outweigh the legitimate aim of effective immigration control.

18. The Judges analysis under Article 8 in paragraph 22 is defective as it is based upon a relationship with the sponsor as his father which does not exist and even if since his mother's death his father has exercise sole responsibility Meron Belay is now an adult and has been for some time. If financial requirements cannot be met there is a strong economic argument for finding the decision proportionate as the purpose of the minimum income levels provided for in the Rules is to prevent an individual becoming a burden on the public purse.

19. It has not been established that Meron Belay speaks English to a degree that will enable him to integrate into society in the United Kingdom or that the nature of the relationship between him and the sponsor at this stage is particularly strong or contains any unusual features or elements of dependency, emotional or physical.

20. Having considered the competing interests it is my primary finding that it has not been established at the date of decision that family life recognised by Article 8 continues to exist between the sponsor and Meron Belay.

21. In the alternative, if family life recognised by Article 8 had been proved and the issue was one of proportionality, I would have found that the ECO has discharged the burden of proof to the required standard show that the decision to refuse is proportionate for the reasons set out above. Razgar [2004] UKHL 27 considered.

Decision

22. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

23. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Meron Belay is an adult and no basis for justifying such an order has been made out.

Fee Award.

Note: this is **not** part of the determination.

24. In the light of my decision to re-make the decision in the appeal by dismissing it, I have considered whether to make a fee award (rule

23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reason: The appeal has been dismissed.

Signed…….
Upper Tribunal Judge Hanson
Dated the 9th January 2015