Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number OA/17156/2012**
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THE IMMIGRATION ACTS

Heard at Field House
On 4 September 2014

Decision & Reasons promulgated
On 20 January 2015

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

(1) S A H
(2) N H
(3) S H
(Anonymity orders made)

Appellants

and

Entry Clearance Officer,
Nairobi

Respondent

Representation
For the Appellants: Ms. C. Robinson of Counsel instructed by Wilson & Co.
For the Respondent: Mr. I. Jarvis, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decisions of First-tier Tribunal Judge Walters promulgated on 5 June 2014, dismissing each of the Appellants' linked appeal against the Respondent's decisions dated 6 August 2012 to refuse entry clearance as the children of Ms H H E ('the sponsor').

Background

2. The Appellants are nationals of Somalia born on 4 February 2003, 17 May 2004, and 19 March 2006. Applications for entry clearance as the children of the sponsor were made for each Appellant on 10 July 2012.

3. The applications were each refused with reference to paragraph 297(i), (iii), (iv) and (v) of the Immigration Rules. The Third Appellant's application was also refused with reference to paragraph 320(7A). A Notice of Immigration Decision dated 6 August 2012 was issued to each Appellant accordingly.

4. The Appellants appealed to the IAC. The First-tier Tribunal Judge dismissed the Appellants' appeals for reasons set out in his determination.

5. The Appellants sought permission to appeal which was granted by First-tier Tribunal Judge Shimmin on 14 July 2014.

Consideration

6. In dismissing the appeals the First-tier Tribunal Judge found that the Appellants did not satisfy the requirements of paragraph 297 of the Immigration Rules. The Judge also considered paragraph 319R, but found that this did not avail the Appellants (paragraphs 45-47). Further, it was concluded that the appeals were also to be dismissed on human rights ground with reference to Article 8 of the ECHR (paragraphs 49-51 and 53). The Judge did, however, reject the Respondent's case under paragraph 320(7A) in respect of the Third Appellant (paragraphs 42-44).

7. In reaching the conclusion that it had not been "*satisfactorily proved that the Sponsor has had sole responsibility for the children's upbringing*" (paragraph 40) the Judge had regard, amongst other things, to a particular aspect of the birth certificates produced for the Second and Third Appellants. (I pause to note that it is unclear why the Judge has confined his consideration on this issue to only two of the Appellants given that the particular feature is apparent on the face of the birth certificates in respect of each of the Appellants – see Appellants' bundle before the First-tier Tribunal at pages 168-170 – and the matter is raised in each of the Notices of Immigration Decision. Be that as it may, in my judgement, nothing turns on this unnecessarily restricted approach.)

8. The issue is raised in this way in the Notice of Immigration Decision of the Second Appellant (and in similar terms, in the Notices of the other Appellants):

> "*I note that your birth was registered only on 13/04/2011, and says that it was registered by and signed by a parent. Given that your claimed mother was in the UK at that time, and you claim your father went missing in 2005, this casts great doubt over who registered your birth and on what evidential basis it was registered so long after the event....*
>
> *...You have stated that your father has abandoned you but provide no further detail of this. I note that your birth purports to have been registered by a parent and as your mother has not returned to Kenya since 2009 I*

> *consider it only reasonable to presume that it was your father who therefore registered the birth which does not suggest he is missing.*"

9. I pause to note that I do not consider it of any particular significance that the word that appears on the birth certificate is "*Parent*" rather than a signature or a specific name. A birth certificate is no more than a certified copy of an entry in a register: it is the registration documents and/or the register that will contain the actual signature of the informant. The birth certificate will only contain transcriptions of that information and so will not duplicate an actual signature. It seems to me that it is appropriate to infer from the certificates that the original registration documents indicated that the informant held themselves out to be a parent.

10. The Appellants, via the sponsor, have not addressed the issue raised by the Respondent directly. They have not offered a specific explanation for the circumstances in which the registrations of their births appear to have been pursuant to information provided by a parent. It is said that a carer for the children was responsible for the registration of the births, but that the sponsor has now lost contact with that carer who was deported from Kenya. Otherwise the assertion that the Appellants' father has had nothing to do with the children since 2005 is maintained.

11. The First-tier Tribunal Judge dealt with the issue in this way:

> "*Obviously, if the contents of the birth certificate are true, then the carer also took along the Appellants' father, Mr A A H. Either the carer did not tell the Sponsor of this fact, which I find unlikely, or the Sponsor has deliberately concealed the fact that the Appellants' father remains in contact with them. No witness statement has been taken from the carer concerning this matter.*"

12. On appeal the Appellants, through Ms Robinson, place very particular emphasis on the latter sentence – "*No witness statement has been taken from the carer concerning this matter*". It is argued that the Judge erred in not having regard to the fact that it was not possible to obtain such a witness statement.

13. Mr Jarvis acknowledged at the outset of the appeal that the sponsor had stated in her witness statement dated 15 January 2014 that the children's first carer had been deported back to Somalia sometime in 2011 (paragraph 23), although the Judge had made no express finding in this regard. Indeed Mr Jarvis's initial position was that he was minded to concede the issue of error of law on this basis.

14. I indicated that I was not prepared to accept such a concession without a further exploration of the issues. It was not immediately apparent to me that the Judge's reference to the lack of supporting evidence was anything other than an observation of the fact of the absence of such supporting evidence. It was not immediately apparent that the Judge was being "*critical*" (as pleaded at paragraph 15 of the Grounds) in the sense that he had drawn an adverse inference from the very fact of the absence of such evidence.

15. Indeed, having heard submissions and having had regard to all matters in the case I am satisfied that the Judge was doing no more than observing the absence of evidence from the carer which might have been able to explain the circumstances surrounding the registration of the births and the contents of the birth certificates, and was not according adverse weight to the fact of the absence of such evidence in itself. In my judgement the matter is adequately explained at paragraphs 46 and 47 in the context of consideration of rule 319R, where the Judge states:

> *"…The carer who supposedly arranged that the birth certificates be issued has made no witness statement and so the circumstances surrounding the Appellants' father's supposed reappearance are unclear.*
>
> *In view of the general lack of credibility which I found in the Sponsor's evidence, I was unable to exclude the possibility that he may be playing a role in his children's upbringing and making a financial contribution to it."*

16. In my judgement it is sufficiently clear from reading paragraphs 21 and 46 together that the Judge was not treating the failure to obtain a witness statement as in itself a matter from which to draw an adverse inference; rather he was – appropriately and sustainably – identifying that it rendered the position unclear as to how the certificates record on their face that a 'parent' signed the documents informing the registrar of the births, if – as the sponsor maintains – it was not what had happened.

17. Whilst the sponsor's inability to provide clarification is not inevitably an indicator of a lack of credibility, it does not follow that her assertion is to be accepted. The Judge was entitled to take into account the absence of clarification and/or explanation as a significant factor when deciding if the Appellants (via the sponsor) had discharged the burden of proof. In this context it is to be noted that it was not only this aspect of the evidence that the Judge considered adverse to the Appellants' cases, but he also identified other aspects that undermined the sponsor's credibility.

18. The Judge's concerns engendered by the birth certificates was not the only basis upon which he determined that he was not satisfied on the issue of sole responsibility. The Judge also considered the sponsor's claims in respect of financial support – "*The Sponsor's evidence is that she is the sole source of financial support for the Appellants*" (paragraph 22). Amongst other things in this regard he identified problems with the supporting evidence by way of remittance advices – see paragraphs 23-25, and in particular at paragraph 24: "*I could not comprehend how this could be genuine if the Sponsor did not arrive in the UK until 21.9.09. Even if one uses the American system and believes that date might be 1.4.09, that would not be consistent with the Sponsor's date of arrival.*"

19. No challenge is raised against the analysis at paragraphs 23–25 in the grounds in support of the application for permission to appeal, and Ms Robinson had no answer to this analysis to advance before me.

20. Moreover, the Judge clearly, and in my judgement sustainably, made an adverse assessment in respect of the availability of third-party support. The Judge considered that the evidence in this context both undermined

whether such support would be available to the Appellants were they to enter the UK, and considered it undermined the assertions as to the conditions in which the Appellants were said to be living – which in turn informed his evaluation of the extent to which the Appellant was the sole financial provider and the possible continuing involvement of their father in their lives.

21. These matters together, sustainably in my judgement, informed the First-tier Tribunal Judge's conclusion stated at paragraph 40 on the issue of sole responsibility:

> "*In conclusion, I did not find that it has been satisfactorily proved that the Sponsor has had sole responsibility for the children's upbringing. I did not accept that the Appellants' father has deserted them. I found the evidence of the remittance advices highly dubious for the reasons previously stated. I find that it is probable that the Appellants' father continues to play a role in their life and make a financial contribution towards them, otherwise they would not be able to survive.*"

22. In the alternative, the Appellants argue that even if the Judge's conclusion in respect of sole responsibility is sustainable, the Judge in any event erred in his consideration of the issue of "*serious and compelling family or other considerations*" under paragraph 297(i)(f): see Grounds at paragraph 20.

23. I do not accept this submission. The Judge expressly addresses his mind to this issue at paragraph 41, and indicates an adverse conclusion essentially for the same reasons that he rejected the case in respect of sole responsibility. In particular the Judge stated: "*I did not find that I had been given credible evidence as to the conditions the children were living in. If that evidence been true, then third party Sponsors would surely have been called on in order to ameliorate those conditions*". In the context of the overall consideration of the evidence and the Judge's analysis and findings, I consider such a conclusion sustainably open to the Judge, and I detect no error of law.

24. The Appellants also make criticism of the Judge's approach to Article 8 of the ECHR. To some extent the arguments relied upon depend upon sustaining the criticisms in respect of the conclusions under the Rules: see, for example, paragraph 24 of the Grounds. Necessarily this aspect of the challenge must fail in light of my conclusion stated above. Otherwise it is pleaded that the Judge failed to give consideration to the best interests of the Appellants' half sibling who lives in the UK with the sponsor (and whom the Appellants had never met); failed to have regard to the best interests of the Appellants; and failed to consider the current situation in Nairobi for Somali immigrants.

25. In respect of the Appellants' half sibling (date of birth 10 May 2010), whilst his existence is noted at paragraph 34 of the sponsor's witness statement of 15 January 2014, and the circumstances of his conception, birth, and whereabouts of his father commented upon in the following paragraphs, no particular evidence was advanced before the First-tier Tribunal as to how his best interests were advanced by granting entry clearance to the Appellants. Nor was any particular reference made to his best interests in

the Appellants' Skeleton Argument dated 8 February 2014 that was before the First-tier Tribunal, or in the Additional Submissions dated 12 May 2014. Indeed in the Skeleton Argument the Article 8 family life that is relied upon is that as between the Appellants and their mother: see paragraph 37.

26. In such circumstances – the absence of any evidence or submission on point - and bearing in mind also that the Judge's sustainable findings were to the effect that the Appellants would not be adequately financially supported in the UK – and therefore implicitly their addition to their half-siblings household would place a strain on the finances of the household inevitably to the detriment of the half-sibling – I am not persuaded that the omission of any express reference to the half-sibling's best interests can found a submission of material error.

27. As regards the Appellants Article 8 rights, the Judge's approach at paragraph 50 does not deny the existence of family life but concludes adversely in respect of proportionality:

> "*Ms Robinson submitted, in her skeleton argument, that I should consider a "freestanding" Article 8 appeal. I did not find that there are any issues that I would have considered under "Proportionality" which have not been considered under the Rules.*"

28. The Judge went on to state at paragraph 51:

> "*Following the case of* ***Gulshan*** ***[2013] UKUT 00640*** *I do not find that there were arguably good grounds for granting leave to enter outside the Rules. Nor did I find that there were compelling circumstances not sufficiently recognised under the Rules.*"

29. Whilst the Judge's reference to **Gulshan** and his finding that there were no 'arguably good grounds' for granting leave to enter outside the Rules could be seen as a consideration and application of the unnecessary 'intermediate step' now disapproved in **MM (Lebanon) [2014] EWCA Civ 985** (paragraph 128), the wording – and more particularly the subsequent wording "*Nor did I find that there were compelling circumstances not sufficiently recognised under the Rules*" – is consistent with the ultimate test which requires identification of other non-standard and particular features of a case that are of a compelling nature if an applicant or appellant failing under the Rules is to succeed under Article 8. When this is coupled with the Judge's findings to the effect that he had not been given a truthful account of the circumstances in which the children were living or the extent of their father's involvement in their lives – in other words a rejection of the premises of the Article 8 case advanced - I do not consider it is open to the Appellants to argue that the Judge materially erred in law.

30. Similarly I do not consider that there is anything of substance in the submission as to the general situation for Somalis in Nairobi. Article 8 cases are highly fact sensitive: the general situation cannot override the specific; on the facts of these cases the Judge was entitled to root his conclusions on Article 8 in his case-specific findings.

31. Accordingly, whilst I recognise that the Judge's approach to Article 8 was brief, and contained no express reference to 'best interests', in the overall context of the appeal I am satisfied that the Judge reached a conclusion that was open to him. In particular it was open to the Judge to conclude that there was nothing in the evidence advanced that he accepted as credible that indicated a refusal under the Rules was nonetheless a disproportionate decision.

32. Accordingly, in all of the circumstances I conclude that there was no material error of law in the decisions of the First-tier Tribunal.

33. For completeness I note the following. The First-tier Tribunal Judge declined to uphold the Respondent's decision in respect of the Third Appellant pursuant to paragraph 320(7A). The Judge identified the basis of this decision at paragraph 42 of his determination, before going on to state: "*Unfortunately the ECO has neglected to include a copy of this birth certificate in the bundle*". I am unclear as to the basis for this observation. The birth certificate of the Third Appellant is indeed in the bundle, and the Judge had regard to it in respect of the issue in respect of the signatory: see paragraph 18 of the determination. It is indeed the case that in the box for gender the word "*male*" appears in contrast to the word "*Male*" which appears on the birth certificate of the Second Appellant – i.e. with a lower case 'm'. There is also some marking immediately before the word "*male*" suggestive of deletion of letters – by inference "*Fe*". In such circumstances the basis of the Respondent's decision is apparent in the relevant evidence was before the First-tier Tribunal. I note that the sponsor has not addressed this issue in her witness statement, but it is addressed in the Appellants' Skeleton Argument before the First-tier Tribunal at paragraphs 30-36 – wherein it is accepted that the birth certificate was altered. The First-tier Tribunal Judge has not engaged with those submissions because he considered (erroneously) that the relevant document was not before him. Because this was not a live issue before me, I did not hear submissions on it. Accordingly, I make no finding in respect of it. I merely raise it as an observation that in the event that this case were to go any further, it might in due course be a matter that requires consideration.

Notice of Decision

34. The decisions of the First-tier Tribunal Judge contained no material error of law and stand.

35. The Appellants' appeals are each dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 17 January 2015

Anonymity Order

Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.