Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10023/2014
OA/10028/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2016	**On 18 July 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

YIDIDYA NIGSSE KINFE (FIRST APPELLANT)
SOFONIAS NIGSSE KINFE (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Ms O Taiwo, Counsel instructed by UK Law
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against the decision of an Entry

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Clearance Officer to refuse them entry clearance for the purposes of settlement as the children under the age of 18 of Ms Behray Kemal, a recognised refugee from Eritrea. The children are Ethiopian nationals, having Ethiopian nationality by virtue of their father being Ethiopian. Their case before the First-tier Tribunal was that in the year 2000 they were living with their mother in Ethiopia most of the time, but that they also stayed from time to time with their father (who was separated from their mother) and their grandmother. Thus they were not with their mother when she was forcibly removed from Ethiopia to Eritrea in the year 2000. The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellants require anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 19 May 2016 First-tier Tribunal Judge Simpson granted the appellants permission to appeal for the following reasons:

    1. The appellants seek permission to appeal against a decision of the First-tier Tribunal (Judge Lang) who, in a decision promulgated on 18 December 2015, dismissed the appellant's appeal against the ECO's decision to refuse entry clearance under Paragraph 352D as the dependent children of their sponsor mother.

    2. The appellants' grounds are that the Judge:

        (a) failed to asses the applicant's evidence and failed to make findings on fundamental aspects of their claim;

        (b) expressly failed to read the SEF, which was a crucial document;

        (c) materially erred in her assessment of sub-paragraph 352D(iii);

        (d) failed to take corroborative evidence into account and failed to give any or any adequate reasons why that evidence was not considered;

        (e) failed to properly consider article 8 issues.

    3. It is not clear from the decision why the Judge disregarded the evidence relating to the sponsor's contact with her children between 2005 and 2012, this being the corroborative evidence referred to in (d) above. Moreover, it is arguable that the Judge's comment in [26] as to whether the sponsor retained parental responsibility has not been explained. It is also arguable that the Judge has erred in her interpretation of 'independent family unit'.

    4. The grounds disclose an arguable material error of law.

Decision of the First-tier Tribunal

3. The Entry Clearance Officer in Nairobi disputed that the appellants met inter alia the following requirements of paragraph 352D:

(iii) he is not leading an independent life, he is unmarried and is not a civil partner, and has not formed an independent family unit;

(iv) was part of a family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum.

4. The judge's findings on these questions were contained in paragraphs [26] to [29] of her subsequent decision, which I reproduce verbatim below.

26. I have nothing to suggest that between 2000 and 2010 the sponsor remained involved in her children's lives. I accept that until 2005 she may have been precluded from doing so but once she was in Greece contact would not have been difficult and the sponsor's statement is unclear and confusing as to whether contact did take place. The appellant remained in the care of her grandmother from 2000 until the date of the application. It is the grandmother who had responsibility for the appellant, provided the home and was the appellant's guardian. There is nothing to suggest that the sponsor retained parental responsibility and everything to suggest that the appellant was in a separate and independent family unit which continued after the sponsor was able to make contact.

27. There is a statement from the grandmother and a statement from a Children Rights Protection Support and Care Service core process co-ordinator at pages 143-144 and 237-239 that the grandmother is destitute and unwell. The statement was requested on the 19th May 2014 and forwarded with the letter from the appellant's lawyers on 29th May 2014 after an initial refusal to grant leave to enter the UK (page 151). I do not know whether this destitution is new or a reflection of life as it has been for many years. There are no details relating to the illness or to how this impacts on the life of the appellant and the grandmother's ability of care. It is however clear that the appellant continues to live with her grandmother, who continues to be her guardian and with whom she has lived for all but the first fourteen to fifteen months of her life. I conclude that the appellant has formed an independent family unit with her grandmother and sibling in Ethiopia of which the sponsor forms no substantial part. Her part being limited to telephone calls and Face Book contact since 2012 and some limited and recent financial help.

28. The respondent has argued that the appellant was not part of the family unit of the sponsor at the time that the sponsor left the country of her habitual residence as required by paragraph 352D (iv) of the Immigration Rules. I do not accept this. The respondent has based this on the use of "residence" in the statement of 3rd December 2012 paragraph 4. However in the preceding paragraph the sponsor makes clear that the children "lived" with their grandmother once or twice a month and their father lived with his mother. In cross-examination the sponsor talked about the children being with their grandmother once or twice a week and confirmed again that their father lived with his mother. While there is an obvious discrepancy in the amount of time the children were not with the sponsor it is clear that they did not live

with their father but spent time with the grandmother (with whom their father lived) while being based with the sponsor.

29. I do not find that that the appellant has met the requirements of paragraph 352D, all of which need to be met and for the reasons set out above 352D (iii) has not been met

The Rule 24 Response

5. On 14 June 2016 a member of the Specialist Appeals Team settled the Rule 24 response opposing the appeal. In summary, it was submitted that the Judge of the First-tier Tribunal directed herself appropriately. She had given anxious and careful scrutiny to all the evidence, and it was clear from paragraph [25] that the claimed corroborative evidence of contact was not deemed to be sufficient by the judge. She found that the sponsor gave no indication exactly when contact started or its frequency and the earliest phone call or Facebook evidence was from 2012. She found the sponsor's evidence about communication was difficult to understand and unspecific. The grounds had no merit, and were merely a disagreement to the adverse outcome of the appeal without identifying any arguable material error of law.

Discussion

6. There is no merit in some of the grounds. As is recorded in paragraph 3 of her decision, the judge raised with the parties at the outset of the hearing the fact that large parts of the SEF at pages 52 to 90 in bundle two were unreadable. Ms Taiwo, who appeared on behalf of the appellants before Judge Lang, confirmed that she intended to rely on the SEF only to confirm the sponsor's status as a refugee and the fact that the appellants were her children. This was not disputed by the Presenting Officer, and accordingly both representatives were content to proceed without further reference to the SEF.

7. Ms Taiwo was also unable to persuade me there was any merit in the claim that the judge had disregarded evidence relating to the sponsor's contact with her children between 2005 and 2012. The judge gave adequate reasons at paragraph [25] for explaining why she rejected the sponsor's evidence that she had re-established contact with her children in 2005.

8. However, Mr Avery conceded that the judge had erred in her interpretation of what constituted an independent family unit for the purposes of paragraph 352D(iii) of the Rules. It was his understanding that in order to fall foul of 352D(iii) the appellants would have to have formed an independent family unit themselves, rather than being in a family unit separate from the UK sponsor in which they were dependent on another responsible adult, such as in this case the grandmother or (as asserted by the Entry Clearance Officer) the children's father.

9. Neither Ms Taiwo nor Mr Avery was able to direct me to any authority on the point, and I noted the judge had taken her cue from the line of

reasoning pursued by the Entry Clearance Officer in the refusal decision. However, the consequence of the judge's interpretation would be that no children of refugees who were being looked after by other family members would be able to qualify for refugee family reunion under the Rules, which would be a surprising outcome. So I accept Mr Avery's concession, and find that the judge has erred in law in her application of paragraph 352D(iii).

10. Although not canvassed in oral argument before me, I am also troubled by the judge's application of paragraph 352D(iv). While it was clearly open to her to find that the appellants were part of the family unit of their mother at the time that she left the country of her habitual residence, the judge did not engage with the other element of sub-paragraph (iv) which is that the purpose of leaving the country of habitual residence must be "in order to seek asylum". The sponsor did not leave Ethiopia to seek asylum: she was forcibly removed from Ethiopia to Eritrea.

11. In the circumstances, the judge's decision under the Rules and also on an Article 8 claim outside the Rules is unsafe, and the decision requires to be remade in its entirety. In view of the extent of the fact-finding that will be involved, this is an appropriate case for remittal to the First-tier Tribunal for a de novo hearing. Both representatives were in agreement with this proposed course of action.

Notice of Decision

12. The decision of the First-tier Tribunal contained an error of law, such that it must be set aside and remade.

Directions

13. **This appeal is remitted to the First-tier Tribunal at Taylor House for a de novo hearing before any judge, apart from Judge Lang.**

Signed Date **18 July 2016**

Deputy Upper Tribunal Judge Monson