IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16734/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd December 2015	**On 6th January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR ABDI AWED ARALE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Pentcheva, Duncan Lewis & Co Solicitors (Harrow Office)
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Somalia who lives in the Netherlands, appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer (ECO) dated 25th July 2013 refusing his application for a family reunion with his Sponsor in the UK. First-tier Tribunal Judge R Cassel dismissed the appeal and the Appellant now appeals to this Tribunal with permission granted by the Upper Tribunal.

2. The background to this appeal is that the Sponsor was granted asylum in the UK in 2007 and was granted indefinite leave to remain on 22nd

February 2012. With his application for entry clearance the Appellant submitted a marriage certificate dated 8th March 2002. The Entry Clearance Officer decided that it was impossible to establish the reliability of the marriage certificate provided in light of the internal disorder in Somalia and, in the absence of additional evidence to authenticate the declared marriage certificate, the ECO was not satisfied that the document was genuine. The ECO also relied on a number of discrepancies between the Sponsor's SEF interview and the Appellant's application form. In their letter of 30th January 2012 the Sponsor's representative said that the Appellant and the Sponsor lived together for five years prior to the Sponsor's departure from Somalia in 2007 but the ECO pointed out that there was no evidence that the couple cohabited for five years in Somalia. The ECO concluded that the Appellant had failed to establish that he had a pre-flight relationship with the Sponsor prior to her application to remain in the UK. The ECO also noted that the Appellant was previously refused an application for leave to remain in the UK outside the Immigration Rules on 19th December 2003 and that he was removed from the UK.

3. At the hearing in the First-tier Tribunal the judge heard evidence from the Sponsor and from another witness. The judge concluded that the Sponsor was an unreliable witness and did not accept her evidence. The judge also considered that the witness, who claimed to have been present at the marriage ceremony between the Appellant and the Sponsor, was not credible. The judge placed little weight on the witness statements of two witnesses who did not attend the hearing. The judge concluded at paragraph 34 that he did not accept that the document referred to as a marriage certificate is authentic and did not find that there was a marriage as required under paragraph 352A of the Immigration Rules and the judge dismissed the appeal under the Rules.

4. The judge went on to consider Article 8 of the ECHR. The judge did not accept that there were compelling circumstances to go outside of the Rules. The judge concluded that the Appellant has little family life with his "wife and child" and, apart from each other, there is no evidence of any other family life [36]. The judge concluded that there was no evidence that the best interests of the child would be jeopardised by being required to leave the UK. He concluded that the child, in company with his mother, can visit his father in the Netherlands where he now resides and is free to return to the UK with his mother. The judge dismissed the appeal on human rights grounds.

Error of Law

5. Three grounds are put forward in the Grounds of Appeal to the Upper Tribunal. The first ground contends that the judge made irrational and perverse findings in that at paragraph 34 the judge found that the couple were not married whereas at paragraph 36 the judge said "the Appellant has little family life with his wife and child".

6. At the hearing before me Ms Pentcheva disputed the suggestion in the Respondent's Rule 24 notice that the reference to "wife and child" at

paragraph 36 was a mere typographical error. She submitted that it is a clear inconsistency of material relevance to the overall findings. She submitted that this inconsistency meant that it is not clear to the Appellant why his appeal was dismissed.

7. Ms Willocks-Briscoe submitted that the word "wife" at paragraph 36 can be read in one of two ways. She submitted that the Sponsor's evidence was that she and the Appellant had lived together as man and wife and that it could be that the judge referred to wife in a sense that it is used in the UK to refer to a partner. She submitted that it does not detract from the meaning of the judge's findings and it perhaps would have been better had the judge used the word "partner" or "alleged wife" but she submitted that one word does not detract from the overall findings. She submitted that the issue for the judge was whether the marriage had taken place before the flight from Somalia and the judge clearly found that the evidence does not show that it did. The judge found that no marriage had taken place at all and she submitted that the judge made clear findings on this matter.

8. I accept that the judge used inconsistent terminology when he referred to the Sponsor as the Appellant's "wife" at paragraph 36. However, I consider that this is not a material error which affects the findings in this case. This is because the judge made very clear findings at paragraphs 29 to 34 that he did not accept that the Appellant and the Sponsor were married at all. The judge was obliged to consider the appeal under Article 8 and did so. In considering the appeal under Article 8 the judge took into account the issue of family life between the Appellant and the Sponsor and it was in this context that he referred to the Sponsor as the Appellant's "wife". Whilst I do not consider that the use of the word "wife" at paragraph 36 is a typographical error I do consider that it is simply an issue of inappropriate terminology and does not affect the meaning of the determination. Had the judge used the word "alleged wife" or "partner" or "mother of the Appellant's child" in paragraph 36 that clearly would have covered the scenario in this situation. The use of the wrong word does not affect the findings in paragraph 36 and is not therefore a material error. Accordingly I reject the first Ground of Appeal.

9. The second ground contends that the judge erred in failing to give adequate reasons for his finding that there was little family life between the Appellant and the Sponsor and her child. Ms Pentcheva submitted that there was significant documentation before the First-tier Tribunal Judge. She submitted that pages 21 to 85 and 105 of the Appellant's bundle before the First-tier Tribunal contained evidence of telephone contact, email contact and a money transfer document. She submitted that the judge did not engage with this evidence and she submitted that the judge focused too much on credibility which detracted from the main issue to be determined. She submitted that the judge had not adequately reasoned his decision that there was little family life in this case.

10. In relation to this matter Ms Willocks-Briscoe submitted that the finding made by the judge must be considered in the light of the circumstances.

She submitted that the history of this case is that, after just a few months of living together, the Appellant and the Sponsor have spent the majority of their time separately. She submitted that the only evidence of contact was some telephone calls and visits but nothing else. She submitted that the judge had not ignored family life but in light of the history and circumstances the judge found that there was little family life. In any event she submitted that the judge went on to consider proportionality, so he did consider the balance of family life in light of the circumstances in light of the other factors. Whilst she accepted that the judge did not specifically refer to the evidence in relation to telephone calls and emails and the one remittance she submitted that this does not detract from the assessment at paragraph 36. She submitted that the Appellant has not demonstrated that there would have been a material difference if the judge had referred to all the evidence. She submitted that there was no overbearing emphasis on credibility in relation to the assessment under Article 8. She submitted that the judge did consider credibility in the context of the Rules but went on to consider Article 8 at paragraphs 35 to 37 and did not make reference to credibility in that context.

11. I have considered the judge's approach to Article 8. The judge set out the proper approach at paragraph 35 and considered Article 8 at paragraphs 36 and 37. The judge did not consider there was no family life. Had he done so he would have stopped his assessment at that point. The judge considered the circumstances overall, considered the evidence before him including the credibility assessment made in relation to the marriage and the credibility of the Sponsor and of the witness and the background and nature of this relationship. I am satisfied that, in the context of the relationship and the evidence before him, it was open to the judge to make the finding that the Appellant and the Sponsor have little family life.

12. The judge considered all relevant matters at paragraphs 36 and 37 and I do not accept that the judge made any error of law in relation to the finding about family life or the overall assessment of Article 8.

13. The third Ground of Appeal put forward on behalf of the Appellant is that it is contended that the judge made a material misdirection of law in relation to the consideration of the best interests of the child.

14. At the hearing before me Ms Pentcheva submitted that the judge considered the best interests of the child at paragraph 37 but that the wording used indicates that the judge considered this matter erroneously. At paragraph 37 the judge said:

> "It follows that in relation to my assessment of the relationship I accept the interests of the child are a primary consideration and that there may be circumstances where regard has to be aid to the best interest of the child. But this is generally where there are reasons to believe that the child's welfare may be jeopardised by being required to leave the United Kingdom. There is no such evidence in this case. The child, in company with his mother can visit his father in the Netherlands where he now resides and is free to return with his mother."

15. I asked Ms Pentcheva whether there was evidence before the judge in relation to the best interests of the child in this case. She accepted that there was no reference in the witness statement to the child. She accepted that the record of the oral evidence set out by the judge in the determination was silent in relation to the issue of the best interests of the child. However, she submitted that the judge was aware that the effect of this decision would be to keep the child separated from his father.

16. Ms Willocks-Briscoe submitted that as there was no reference in the witness statement to the child and no reference in the oral evidence to the child the judge was entitled to deal with the matter as he did at paragraph 37. She submitted that, even though the judge referred to the general situation, he still went on to consider that the child in this case child can visit his father in the Netherlands and return to the UK with his mother. The judge therefore concluded that contact between the father and son can continue. In these circumstances the child's best interests must be to be with the primary carer, who is the mother, and that will not change as a result of this decision and she submitted that there was nothing untoward in relation to the judge's consideration of this issue.

17. It is clear from the papers before me and the First-tier Tribunal's decision that there was little evidence before the judge in relation to the child. There was no dispute in relation to the paternity of the child. However, it is very difficult for a judge to make a decision in relation to Section 55 in a vacuum. The judge's conclusions that the child can continue to visit his father as he previously has done were in the circumstances completely open to him on the basis of the evidence before him. I am satisfied that the judge made no error in relation to his consideration of the best interests of the child.

18. I am satisfied that the judge reached findings open to him on the evidence in relation to the Immigration Rules and in relation to Article 8 and that the judge carried out a proper Article 8 assessment on the basis of the evidence before him.

Notice of Decision

The decision of the First-tier Tribunal discloses no material error of law. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date: 4th January 2016

Deputy Upper Tribunal Judge Grimes