Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10748/2016

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision and Reasons Promulgated**
On 4 December 2018	**On 14 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

[D Z E]
~~**(ANONYMITY ORDER NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Azmi, Counsel, instructed by Coventry Law Centre
For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

11 This is the appellant's appeal against the decision of Judge of the First-tier Tribunal O'Hagan dated 4 August 2017 dismissing the appellant's appeal against the respondent Entry Clearance Officer's decision of October 2016 refusing entry clearance and refusing the appellant's human rights claim.

2 The appellant is a national of Eritrea, and is a minor, aged 15 at the date of hearing on 27 July 2017. The appellant's sister, [ME], is a recognised

refugee in the United Kingdom. On or around 30 December 2015, the appellant made an application, from Ethiopia, to join her in the UK. The application was stated to have been for family reunion under part 11 of the immigration rules relating to asylum. It is relevant to note that the sponsor herself has a minor child, [S], who also made an application for entry clearance at that time.

3 An initial decision was made on 7 April 2016, refusing entry clearance to the appellant on the grounds that the respondent was not satisfied that the appellant was related to the sponsor as claimed. [S]'s application was also refused. The respondent reconsidered both applications in October 2016 (seemingly as a result of fresh applications), resulting in a grant of entry clearance to [S], but the appellant's application was refused again for reasons set out in summary in the Judge's decision at [8]:

(i) as the appellant was the sponsor's brother rather than her child, he was not able to meet the requirements of paragraph 353D(i) of the immigration rules;

(ii) the correct provision under which the application should have been made was paragraph 319X, but the relevant fee had not been paid (although I note that the application was declared invalid);

(iii) the appellant did not meet the requirements within paragraph 319X that the sponsor was able to maintain and accommodate the appellant without recourse to public funds, and that there were serious and compelling family or other considerations making the appellant's exclusion undesirable;

(iv) in relation to consideration under Article 8 of the European Convention on Human Rights, the respondent did not accept that the sponsor had been the appellant's primary carer, or that the appellant's father could not care for him.

4 The appellant's appeal came before the judge, who heard oral evidence from the sponsor. The appeal was dismissed, the judge making the following findings, in summary:

(i) the fact that the sponsor had been recognised as a refugee did not by itself determine her credibility as a witness [24];

(ii) the sponsor was someone who struggled with details such as dates of birth and ages, and no adverse inference would be drawn from the sponsor's inability to give the appellant's date of birth [25];

(iii) it would be unsafe to draw any conclusions about the fact that the sponsor had stated that she had lost contact with a particular sister, and yet that sister's name had recurred as a person signing for consent for DNA samples to be taken [26];

(iv) no adverse inference would be drawn from the fact that the sponsor was unable to provide supporting evidence for her mother's death or her subsequent care for the appellant [27];

(v) the Judge held at [28]:

> "There are elements of the sponsor's evidence to me that does (*sic*) undermine her account. When Mr Birkumshaw asked the sponsor about the appellant's age when her mother died, and the care that she provided, it was clear to me from the evidence that she gave that she had confused her son with the appellant. Her evidence related to a child of one and a half when the appellant would have been about nine at the time. The care she described was appropriate to a child one and a half, but not to a child of nine. The fact that, asked about the appellant, she described her son, a far younger child, is difficult to reconcile with her having cared for the appellant. It may, in fairness, have been a simple misunderstanding. It is however, difficult to understand in the context of her son's application having succeeded, and the sole live issue being her brother's case";

(iv) no satisfactory explanation had been given for why the appellant had left Eritrea for Ethiopia where his care arrangements appeared to be more precarious [29];

(vii) the sponsor's evidence about the care arrangements for the appellant in Ethiopia was incoherent [30];

(viii) the judge accepted that the sponsor was the appellant's brother, but did not accept that the sponsor had made out the other elements of her case [31];

(ix) the judge did not accept the sponsor's account that she was her brother's de facto carer before she left Eritrea [32].

5 The appellant sought permission to appeal on the grounds which argued, in summary, that the judge erred in law in:

(i) incorrectly understanding the factual matrix of the case; the appellant's mother had died when <u>he</u> was about 18 months old; it was accepted that the sponsor's witness statement contained an error at paragraph 2 in that regard, but it was asserted that the remainder of the sponsor's witness statement and oral evidence established that the sponsor cared for the appellant from a very young age (Grounds, paras 1-2);

(ii) failing to take into account the 'crucial explanation' that the appellant had left Eritrea for Ethiopia because no application for entry clearance could be made from Eritrea (Grounds, para 3);

(iii) making inconsistent findings, finding at [30] that the sponsor had been incoherent about the appellant's care arrangements in Ethiopia, but at [38] that it was reasonable to conclude that the appellant's care needs were being met (Grounds, para 6);

(iv) failing to carry out an adequate best interests assessment for the appellant (Grounds, para 7).

6 Permission to appeal was granted by Judge of the First-tier Tribunal Froom on 1 February 2018.

7 I heard submissions from the parties. Mr Azmi adopted his grounds of appeal. In particular, he asserted that the judge had proceeded under a mistake of fact, and referred to the following passage in the judge's decision at [10]:

> "The sponsor told me that the appellant was one and a half years old when her mother died. She described the care that she gave him. I interpose that it was clear to me that the appellant (*sic*) and Mr Burkumshaw were confused. The appellant's statement said that [S], rather than the appellant, was one a half years old when her mother died. The appellant would have been about nine at the time."

8 Mr Azmi accepted, as did the grounds of appeal, that there are had been a drafting error in the sponsor's witness statement so that, at paragraph 2 of that statement, the sponsor intended to refer to the appellant, rather than her own son [S], being one half years old when the sponsor's mother died. This was said to have contributed to the judge's misunderstanding of the case, repeated at [28].

9 Further, in relation to the explanation as to why the appellant left Eritrea for Ethiopia, it was said that the sponsor had given evidence that this was to facilitate the entry clearance application.

10 Mrs Aboni submitted that the judge had directed himself in law appropriately, and made adequate findings in the appeal. The judge was entitled to proceed on the basis that the appellant was about nine years old when the mother of the appellant and sponsor had died; this was a fair reading of paragraph 2 of the sponsor's witness statement, and it was open to the judge to find that the sponsor's oral evidence was discrepant. Further, the judge was entitled to find that the sponsor had been incoherent regarding the care arrangements for the appellant in Ethiopia. The judge had been entitled to hold that the strength of the family life between the appellant and sponsor was not as had been claimed, and had been entitled to dismiss the appeal.

Discussion

11 It is appropriate in this matter to set out certain parts of the sponsor's witness statement:

> "2. My mother died when Suneal was just one and a half. From that age I have always raised him and he is really like a son to me. I am quite a bit older than him. I have always been the mother figure for him and looked after him.
>
> 3. Even when I was married as a 16-year-old I did not go and live with my husband's family as is the custom. [D] was still very young

> and I was his main carer. In time he became the older brother to my son.
>
> ...
>
> 8. My son [S] is missing [D] a lot...
>
> 9. [S] is stranded now. He cannot go back to Eritrea because he left the country illegally and he will be detained and taken forcibly to the Army ...
>
> 10. I am constantly worried and upset about [S]. I think about his welfare all of the time. I don't want him to try and come here illegally..."

12 There are clear tensions within those passages. The judge was entitled to observe the difference between the sponsor's oral evidence, that the appellant was one and a half years old when their mother died, with the content of the sponsor's witness statement, which stated that it was [S] who was one half at that time.

13 Insofar as the appellant asserts that the judge erred in law by proceeding under a mistake of fact, I note that the requirements for such an error to be established are set out in E v SSHD [2004] EWCA Civ 49:

> "66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

14 Those requirements are not satisfied. The alleged error as to whether the sponsor intended to refer to the appellant, or [S], at paragraph 2 of her witness statement is not uncontentious and objectively verifiable. Further, the appellant's representatives appear to accept that an error was made in the preparation of the witness statement.

15 However, I am nonetheless satisfied that the judge erred in law, in failing to have regard to the sponsor's evidence as a whole, and proceeding unfairly. There was clearly something wrong with the sponsor's witness statement. If the sponsor had genuinely intended to refer to her own son, [S], at paragraph 2, there was no apparent reason why she would say that he was 'like a son', as opposed to simply her son; why it was necessary to point out that she was quite a bit older than him (something which would have been obvious had she been talking about her own son); or why she

considered herself to be a 'mother figure' to him rather than simply, mother. The more obvious reading of the paragraph was that the sponsor was here referring to her bother, the appellant, not her own son.

16 Further, there appear to be two other instances of the sponsor mistakenly referring to [S], rather than the appellant; at paragraphs 9 and 10, in appearing to suggest that [S] was 'stranded' and could not go back to Eritrea; and that she was constantly worried and upset about [S], and thinking about his welfare. However, the judge was already aware that [S] had already been granted entry clearance, and the sponsor describes at her paragraph 8 that [S] was missing [D] (the appellant), and had cried for him many times, and the sponsor stated that she was trying to get a travel document for [S] so that they could go and visit the appellant in Ethiopia. It was thus clear that [S] had already entered the UK. The content of paragraphs 9 and 10 therefore made no sense when referring to [S] being stranded. Although again, this appears to have been sloppy drafting by those acting for the appellant (and the appellant's representatives have far from covered themselves in glory in this matter), it should have set off alarm bells to the judge that there were errors in the sponsor's witness statement.

17 It seems to me that where, at paragraph [10] of the judge's decision, the judge interposed that it was *clear* to him that the 'appellant' (should be sponsor) and Mr Birkumshaw were confused, this interposition was within the narrative of the judge's decision. It is *not* clear to me that the judge actually raised at the hearing any query with the sponsor or Mr Birkumshaw as to whether the sponsor's witness statement was correct.

18 I find that the sponsor's witness statement, read as a whole, would tend to suggest very much more clearly that the sponsor was referring at paragraph 2 to the appellant, and not [S]. The judge appears to have taken the first sentence of the sponsor's witness statement at paragraph 2 at face value, without querying the accuracy of it, and without reading it in the context of the remainder of the paragraph or indeed the remainder of the statement. This represents in my view a failure to take the sponsor's evidence into account as a whole and/or represents a failure to proceed fairly, by failing to put any concerns that the judge had, to the witness.

19 In relation to the appellant's second round, that the judge had failed to take into account of the 'crucial explanation' that the appellant left Eritrea for Ethiopia in order to make an entry clearance application, it is not clear to me where this explanation was given. It is asserted by Mr Azmi that the sponsor gave such evidence, but it is not set out in her witness statement, and there is no advocate's record of oral evidence. I find that he is not made out that the sponsor gave such evidence.

20 However, it is also not clear from the judge's record of evidence at [10]-[17] that any question was actually put to the sponsor on this specific issue. I find that given the significance which the judge has placed on the fact that the appellant's care arrangements appeared to be more

precarious in Ethiopia than an Eritrea, I find that as a matter of procedural fairness, the judge should have ensured that the sponsor had an opportunity to explain why she had organised the appellant's departure from Eritrea to Ethiopia. We are able to anticipate, given the assertion within the grounds of appeal, what the sponsor's evidence would have been; so that the appellant could make an application for entry clearance, which was not possible from Eritrea. That is an explanation which is clearly capable of having weight attached to it. However, the sponsor does not appear to have been afforded the opportunity to give such explanation, not having been asked to provide it. I find that the judge erred procedurally in failing to put an issue of such concern to him, to the relevant witness.

21 My findings above undermine the overall conclusion of the judge at [33] that the sponsor had not been the appellant's de facto carer before she left Eritrea. If, as asserted, the sponsor did care for the appellant since he was one and a half, until the sponsor left, this would represent a much more prolonged period of time for which the sponsor had cared for the appellant, which would be relevant to the assessment of the strength of their family life.

22 I find that the judge's overall decision, that the refusal of entry clearance did not disproportionally interfere with any family life right between the appellant and sponsor, is therefore unsustainable. I therefore set aside the judge's decision. It is not necessary to consider the appellant's remaining grounds.

23 I find that due to the extent of findings of fact which would need to be re-made in this appeal, it is appropriate for this appeal to be remitted to the First-tier Tribunal.

24 In the he-hearing of this appeal, it goes without saying that it important that any witness statements relied upon do not contain any drafting errors.

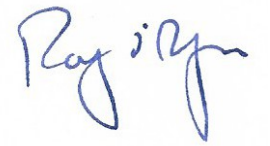
Decision

The judge's decision involved the making of a material error of law.

I set aside the judge's decision.

I remit the appeal to the first-tier tribunal.

Signed: Date: 30.1.19



Deputy Upper Tribunal Judge O'Ryan