



**Upper Tier Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers: HU/13315/2015
& HU/13317/2015

THE IMMIGRATION ACTS

Heard at Field House

On 1 April 2019

**Decision and Reasons
Promulgated
On 4 April 2019**

Before

Deputy Upper Tribunal Judge Pickup

Between

**M M Y
F M Y**

[Anonymity direction made]

and

Secretary of State for the Home Department

Appellants

Respondent

Representation:

For the appellants: Ms E Rutherford, instructed by TRP Solicitors

For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are sisters and citizens of Eritrea with dates of birth of 21.9.98 and 19.7.00, respectively. They presently live in Uganda.
2. This is their appeal against the decision of First-tier Tribunal Judge Asjad promulgated 13.6.17, dismissing their linked appeals against the decisions

of the Secretary of State, dated 10.11.15, to refuse their application for entry clearance to settle with their mother and sponsor in the UK.

3. First-tier Tribunal Judge Peart refused permission to appeal on 28.11.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Kebede granted permission to appeal on 9.5.18.

Error of Law

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.
5. The applications were refused following consideration of paragraph 297 of the Immigration Rules and the requirement of sole responsibility for the appellants' upbringing. The Entry Clearance Officer was not satisfied that the sponsor had sole responsibility for the appellants, relying on the previous appeal decision of Judge Birk to that effect. Neither was the Entry Clearance Officer satisfied that there were any serious and compelling family or other considerations making exclusion of the appellants undesirable.
6. Judge Asjad also relied on the decision of Judge Birk and a large part of the decision is given over to setting out the Devaseelan principles. At [8] Judge Asjad took Judge Birk's decision as the starting point and observed at [9] that the issue in the two appeal is the same, namely sole responsibility. However, the way in which Judge Assad's decision is drafted it appears that consideration was given only to the more recent evidence referenced at [10] rather than considering the issue in the light of the evidence as a whole.
7. What the grounds specifically complain of is that Judge Asjad clearly erred at [20] in stating that he could not take post decision evidence into account when the amendments to s85(4) of the 2002 provide that the judge may take such evidence into account. The evidence in question was the assertion that Mr [W], with whom the two appellants previously lived, left Uganda for Canada in 2016, by which time the elder appellant had turned 18.
8. The Rule 24 reply, dated 25.7.18, suggests that error as to what evidence the judge could consider was immaterial to the outcome of the appeal, as the judge would also have to take into account that as the elder appellant had turned 18 she was able to take on responsibility for her younger sister. However, it is not clear that these issues were canvassed at the appeal hearing.
9. I reject Ms Rutherford's submission that, having found that the appellants failed to demonstrate that the sponsor had sole responsibility for them, it was incumbent on the judge to make a finding as to with whom the sponsor shared responsibility. It does not necessarily follow. The burden

was on the appellants to demonstrate the sponsor had sole responsibility for them and once the judge found that was not made out on the balance of probabilities it was not necessary to go further and consider if someone else shared responsibility, and if so, who.

10. However, the judge having accepted that the sponsor had visited the appellants in Uganda on three occasions and that the sponsor was financially supporting them, I find that the failure to take into account the departure of Mr [W] was a material error of law in that it was clearly relevant to the overall picture of the appellants' circumstances and the issue of sole responsibility. I do not accept the submission that because one of the appellants had reached the age of 18 the matter of Mr [W]'s absence was not material. These issues are interlinked and required a careful assessment.
11. In the circumstances, I find an error of law in the decision of Judge Asjad such as to require it to be set aside and the issued determined afresh in the First-tier Tribunal.
12. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.
13. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

Decision

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

15. The appeal is remitted to the First-tier Tribunal sitting at Birmingham;
16. The appeal is to be decided afresh with no findings of fact preserved;
17. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Asjad and Judge Peart;
18. An interpreter in Tigrinya will be required.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Direction Regarding Anonymity

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

Note: this is not part of the determination.

I make no fee award.

Reasons: the outcome of the appeal remains to be decided.

Signed

DMW Pickup

Deputy Upper Tribunal Judge Pickup

Dated