Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16073/2017**

THE IMMIGRATION ACTS

Heard at Field House
On 5 April 2019

Decision & Reasons Promulgated
On 10 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

TIRHAS [K]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - Pretoria

Respondent

Representation:
For the Appellant: Mr M Afzal of Global Migration Services
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Anthony promulgated on 12 November 2018, which dismissed the Appellant's appeal.

Background

3. The Appellant is an Eritrean national who was born on 24 December 2000. The Appellant applied for entry clearance to join her brother, who has been granted refugee status in the UK. On 25 October 2017 the respondent refused the Appellant's application.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Anthony ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged and on 19 December 2018 Judge O'Callaghan granted permission to appeal stating *inter alia*

> "2. The grounds assert that the Judge erred in failing to give proper weight to relevant evidence, to apply the standard of proof when considering the evidence in the round and failed to undertake the required proportionality exercise under article 8.
>
> 3. I remind myself that the hurdle as to "arguable" is a low one. The matter of weight to give to evidence is one that is a matter for a Judge. Though the Judge took care to consider the evidence before the Tribunal, it is arguable that inadequate consideration was given to the accepted facts that the appellant travel to Ethiopia with her sister-in-law and remains living in this country as a minor. No express finding is made as to whether she is temporarily cared for and how such care is arranged/paid for. Such findings may well influence any decision made upon remittances and dependency which form part of the proportionality assessment.
>
> 4. I grant permission on all grounds."

The Hearing

6. For the appellant, Mr Afzal moved the grounds of appeal. He told me that it is still accepted that the appellant cannot meet the immigration rules, but it is argued the appellant should succeed on article 8 ECHR grounds outside the rules. He told me that the Judge gave inadequate consideration to the fact that the appellant is a minor. He took me to [15] of the decision and told me that there the Judge ignored evidence that was before the tribunal. He told me that the Judge did not take account of evidence of contact between the appellant and sponsor, nor did he deal

with the evidence provided by the sponsor's wife. He told me that the decision contains no assessment of the credibility of the witnesses. He told me that the Judge's proportionality assessment is inadequate and urged me to set the decision aside and remit this case to the First-tier Tribunal.

7. For the respondent, Mr Walker referred me to the respondent's rule 24 response which says that the Judge's job was hampered by vague and inconsistent evidence, but Mr Walker conceded that Mr Afzal makes valid criticisms of the Judge's findings and the grant of permission to appeal focuses correctly on the lack of findings of fact about the appellant's current circumstances. He told me that the decision is tainted by an inadequacy of fact finding and asked to remit this case to the First-tier Tribunal to be heard of new.

Analysis

8. The appellant is the sister of the sponsor. The sponsor has been granted refugee status in the UK. The appellant accepts that she cannot meet the requirements of paragraph 352D of the immigration rules. The respondent accepts that the appellant was born on 20/12/2000 and, at the date of the respondent's decision, was in the care of a guardian in Ethiopia. In the decision notice the respondent says that there are other categories of entry clearance applications which the appellant can pursue.

9. The appellant's bundle contains statements from the sponsor and the sponsor's wife, together with evidence of the sponsor's visits to Ethiopia to spend time with the appellant in 2017 & 2018, evidence of post-decision communication between the sponsor and the appellant, and evidence of travel between the UK & Ethiopia by the appellant & some of his friends.

10. Between [16] and [22] the Judge considers the evidence of communication and financial contribution, but the Judge does not make adequate findings of fact. He summarises the evidence and then rejects the evidence, but the Judge does not properly explain why he rejects the evidence. At [23] and [24] the Judge provides a superficial consideration of the relationship between the appellant and sponsor and does not factor into his consideration the appellant's circumstances in Ethiopia nor does he weigh the impact of the loss of the appellant's mother in 2009.

11. In Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) the Tribunal said that a review of the jurisprudence discloses that there is no general proposition that Article 8 can never be engaged when the family life it is sought to establish is between adult siblings living together. Rather than applying a blanket rule with regard to adult children, each case should be analysed on its own facts, to decide whether or not

family life exists, within the meaning of Article 8(1). Whilst some generalisations are possible, each case is fact-sensitive.

12. It is the sponsor's position that he is the oldest surviving male in the family and that he fulfils a quasi-parental role to the appellant. It is the appellant's position that she is in the temporary care of a neighbour and has no other family members in Ethiopia. The sponsor and the appellant are Eritrean nationals, yet the appellant lives in Ethiopia. The Judge's decision is devoid of consideration of the appellant's circumstances in Ethiopia. The Judge says nothing of the security of the appellant's right to reside in Ethiopia. The Judge's findings at [24] and [25] are inadequately reasoned. The accepted facts are that the appellant travelled to Ethiopia with her sister-in-law and, at the date of application, is alone in Ethiopia as a minor. Those accepted facts do not feature in the Judge's proportionality assessment.

13. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

14. Because the fact-finding exercise is incomplete & because the decision contains no meaningful analysis of relevant evidence lead for the appellant, the decision is tainted by material errors of law. I set it aside.

15. There was an inadequacy of fact finding in the First-tier Tribunal, but there is sufficient material available to allow me to substitute my own decision.

My Findings of Fact

16. The appellant is an Eritrean national, born on [~] 2000. She is the sister of [BB] (the sponsor) who was born on [~] 1985. The sponsor entered the UK in 2015 and was granted refugee status on 14 June 2016.

17. In January 2016 the sponsor contacted his wife in Eritrea and asked his wife to travel to Ethiopia with the appellant and his two brothers. The appellant and the sponsor's wife successfully crossed from Eritrea to Ethiopia, but on the journey to Ethiopia the appellant's two brothers were detained by the authorities.

18. On 14 August 2017, the appellant and the sponsor's wife submitted applications (from Ethiopia) for entry clearance to join the sponsor in the UK. The sponsor's wife's application was successful. The appellant's

application was refused in a decision dated 25 October 2017. It is against that decision that the appellant appeals.

19. The appellant is not the child of a parent who has been granted refugee status in the UK and so cannot meet the requirements of the immigration rules.

20. After the grant of entry clearance in October 2017, the sponsor's wife left Ethiopia and was reunited with the sponsor in the UK. Before the sponsor's wife left Ethiopia, she persuaded a neighbour to care for the appellant, who at that time was only 16 years of age. The sponsor started to send funds to Ethiopia for the appellant's maintenance. The neighbour to whom the appellant was entrusted was waiting for entry clearance to join her husband in Germany. In November 2017 the neighbour who was caring for the appellant contacted the sponsor to say that she was leaving Ethiopia and could no longer care for the appellant.

21. On 23 December 2016 the sponsor travel to Ethiopia where he remained until 16 January 2017. Whilst there, he found a female adult (known to the appellant) who agreed to look after the appellant. Before leaving Ethiopia, he placed that person in funds for the maintenance of the appellant.

22. In March 2018 the sponsor was telephoned by the lady who was caring for the appellant and was told that she would no longer care for the appellant because she was leaving Ethiopia. On 6 April 2018 the sponsor returned to Ethiopia. He stayed there until 19 May 2018 while he made arrangements for a third suitable adult female to care for the appellant. It is in that person's care that the appellant remains.

23. The sponsor continues to send funds to Ethiopia for the appellant's maintenance. He relies on friends and relatives travelling to and from Ethiopia to deliver the funds to the lady who cares for the appellant. The appellant and sponsor speak daily and text message each other regularly. The appellant has no other family members in Ethiopia. The appellant's mother died in 2009. Neither the appellant nor the sponsor know where their remaining siblings are.

24. After the loss of their parents in 2009, the sponsor assumed responsibility for the appellant and for his two other brothers. Before the sponsor fled to the UK he lived in the same house as his wife and the appellant. He fulfilled a parental role to the appellant, which he still accepts.

The Immigration Rules

25. Because of the degree of relationship between the appellant and the sponsor (they are siblings) the appellant cannot meet the requirements of the immigration rules.

Article 8 ECHR

26. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60 it was made clear that (even in a deportation case) the Rules are not a complete code. Lord Reed at paragraphs 47 to 50 endorsed the structured approach to proportionality (to be found in Razgar) and said "what has now become the established method of analysis can therefore continue to be followed…"

27. In Agyarko [2017] UKSC 11**,** Lord Reed (when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8) made clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. There is no suggestion of any threshold to be overcome before proportionality can be fully considered.

28. I have to determine the following separate questions:

(i) Does family life, private life, home or correspondence exist within the meaning of Article 8

(ii) If so, has the right to respect for this been interfered with

(iii) If so, was the interference in accordance with the law

(iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and

(v) If so, is the interference proportionate to the pursuit of the legitimate aim?

29. Section 117B of the 2002 Act tells me that immigration control is in the public interest. In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that an appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of his fluency in English, or the strength of his financial resources. In Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) it was held that the public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.

30. To succeed, the appellant has to establish that family life within the meaning of article 8 exists between the appellant and sponsor. It is argued that there is more than mere emotional ties and that there is a relationship of dependency between the sponsor and the appellant.

31. In Kugathas v SSHD (2003) INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real

committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In PT (Sri Lanka) v Entry Clearance Officer, Chennai [2016] EWCA Civ 612 it was held that some tribunals appeared to have read Kugathas v SSHD (2003) INLR 170 as establishing a rebuttable presumption against any relationship between an adult child and his parents or siblings being sufficient to engage Article 8. That was not correct. Kugathas required a fact-sensitive approach, and should be understood in the light of the subsequent case law summarised in Ghising (family life – adults – Gurkha policy) [2012] UKUT 160 (IAC) and Singh [2015] EWCA Civ 630. There was no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8 nor was there any requirement of exceptionality. It all depended on the facts. The love and affection between an adult and his parents or siblings would not of itself justify a finding of a family life. There had to be something more.

32. Is beyond dispute that the appellant and sponsor are siblings. It is beyond dispute that at the date of decision the appellant was a minor. The unchallenged evidence is that the appellant lived with the sponsor from 2009 until 2015, and during that period the sponsor looked after the appellant as if he were a parent. The weight of reliable evidence indicates sponsor married his wife in 2014 and even after marriage the appellant remained part of the sponsor's household.

33. On the facts as I find them to be, the sponsor has travelled to Ethiopia three times to make arrangements for the appellant's care, accommodation and maintenance. On the facts as I find them to be, the appellant and sponsor are in daily contact. On the facts as I find them to be, there are more than just emotional ties between the appellant and the sponsor. Since 2009 the appellant has been dependent upon the sponsor. On those facts, I find that article 8 family life exists between the appellant and sponsor.

34. The central reason for the respondent's decision is that the appellant did not pay a fee for the application (because it is an application for family reunion) and the appellant could apply for entry clearance in other categories in which a fee is payable.

35. The impact of the respondent's decision is that the appellant's circumstances are uncertain. At the date of decision, she was a 17-year-old, single, female, without family support, in Ethiopia. She was a young girl living outside her country of nationality and dependent upon the sponsor. The respondent's decision creates frightening uncertainty for the appellant and sponsor and interferes with family life. I weigh those considerations against the public interest in immigration control and the respondent's desire to collect an application fee.

36. In Chengjie Miao v SSHD 2006 EWCA Civ 75 the Court of Appeal noted that the onus lies upon the Respondent to show that the

interference or lack of respect is "*necessary in a democratic society*" for one of the stated interests. As the Court of Appeal said at paragraph 12 of the determination "*To do this the State must show not only that the proposed step is lawful but that it is sufficiently important to justify limiting a basic right; that it is sensibly directed to that objective; and that it does not impair the right more than is necessary. The last of these criteria commonly requires an appraisal of the relative importance of the State's objective and the impact of the measure on the individual. When you have answered such questions you have struck the balance".*

37. I find that the respondent relies solely on a statutory presumption. Against that statutory presumption I weigh the quality of family life which the appellant enjoys, The facts and circumstances of this case raise exceptional circumstances which indicate that preventing the appellant from reunification with the brother who provides her, and has provided for her for the last 10 years, would be unjustifiably harsh. On those facts, I find that the respondent's decision is a disproportionate interference with the appellant's article 8 rights.

38. Wh  only come to the conclusion that the l is outweighed by the impact that th appellant. I find that this appeal s

CONCLUSION

39. The decision of the First-tier Tribunal promulgated on 12 November 2018 is tainted by a material error of law. I set it aside.

40. I substitute my own decision.

41. The appeal is allowed on article 8 ECHR grounds.

Signed Date 8 April 2019
Deputy Upper Tribunal Judge Doyle