



**Upper Tribunal**

**(Immigration and Asylum Chamber) Appeal Number: EA/00916/2019(P)**

**EA/00918/2019(P)**

**THE IMMIGRATION ACTS**

**Decided under rule 34 (P)**

**On 17 September 2020**

**Decision & Reasons Promulgated**

**On 22 September 2020**

**Before**

**UPPER TRIBUNAL JUDGE KEKIĆ**

**Between**

**HINDA MOHAMED ALI**

**ADEN ALI DIRIE**

**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**For the ENTRY CLEARANCE OFFICER**

Respondent

**Representation (by way of written submissions)**

**For the appellant: No submissions received**

**For the respondent: Mr C Avery, Senior Home Office Presenting Officer**

## **DECISION AND REASONS**

### **Background**

1. This appeal comes before me following the grant of permission to appeal to the appellants by First-tier Tribunal Judge Keane on 20 April 2020 against the determination of First-tier Tribunal Judge Thapar, promulgated on 30 October 2019 following a hearing at Birmingham on 30 September 2019.
2. The appellants are Somali nationals and the wife and father of the sponsor, Mr Ali, a citizen of Norway. They appeal against the respondent's decision of 24 January 2019 to refuse their applications for entry permits to join the sponsor under reg. 7 and reg. 8(3) of the EEA Regulations 2016.
3. The respondent refused the application in respect of the first appellant (who married the sponsor on 29 October 2018 in Ethiopia) because it was considered that the marriage was one of convenience. The application of the second appellant was refused, although it was accepted that he was the sponsor's father, because the respondent was not satisfied that he was wholly or mainly financially dependent upon the sponsor nor that his essential living needs were being met by the sponsor.
4. The appeal came before Judge Thapar who heard oral evidence from the sponsor, considered the documentary evidence but concluded that the marriage was not genuine and was one of convenience. In respect of the second appellant, the judge found that there was no evidence to show that the funds sent to him were being used and that the mere fact that funds were sent was not sufficient to demonstrate dependency. Accordingly, the appeals were dismissed.
5. The appellants sought permission to appeal. This was granted by the First-tier Tribunal although the view was expressed that the grounds largely amounted to a disagreement with the judge's findings and an attempt to reargue the appeal. However, it was considered that the judge had arguably failed to consider the sponsor's oral evidence at the hearing and also, although not raised in the grounds, the Robinson obvious point of whether the correct burden of proof had been considered and applied with respect to the respondent's allegation that the marriage was one of convenience.

### **Covid-19 crisis : preliminary matters**

6. The appeal would then have normally been listed for hearing but due to the pandemic this could not be done and instead directions were

issued on 10 July 2020 inviting the parties to make submissions on the decision being made on the papers and on the error of law issue.

7. The respondent replied on 20 July 2020. No response has been received from the appellants who although overseas are represented by a UK law firm to whom the directions were sent. I now consider whether it is appropriate to determine the matter without an oral hearing.
8. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).
9. I have had regard to the submissions and the evidence before me before. I take the view that a full account of the facts are set out in those papers, that the arguments for and against the appellants have been clearly set out and that the issues to be decided are straightforward. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. The appellants have been given the opportunity to present any objections to a paper determination but have not done so. In all the circumstances I am satisfied that I am able to fairly and justly deal with this matter without an oral hearing and proceed to do so.

### **Submissions**

10. The appellants have not complied with directions. I am satisfied that these were properly served by the Upper Tribunal on their legal representatives. I also note that the respondent's submissions were served on the appellants' representatives and so they have had two opportunities to reply. The representatives have not notified the Tribunal at any stage that they are no longer acting for the appellants.

11. The respondent in submissions of 20 July 2020 does not oppose the appellants' application for permission and accepts that the judge did not consider whether the respondent had discharged the initial burden with respect to the marriage. It is also accepted that there is a lack of clarity with respect to the findings on dependency. The Tribunal is invited to set aside the decision and to list the case for a re-hearing.

### **Discussion and conclusions**

12. I have considered the evidence, the determination, the grounds for permission and the respondent's submissions.
13. The judge referred to the burden and standard of proof at paragraph 8. I cannot speculate on whether the judge made use of a standard paragraph or whether he overlooked that in a case such as this where the respondent had made allegations of a sham marriage, the burden was on her to make out that claim. Whatever the reason, that has not been acknowledged by the judge at paragraph 8 or anywhere else in his determination. Although he raises several valid concerns about the evidence regarding the marriage and the relationship, his omission to recognise that the burden lies with the respondent and to then focus on whether that burden has been discharged is fatal to his decision on the first appellant's appeal. The complaints made in the appellants' grounds with respect to the first appellant are, as Judge Keane observes, largely disagreements with the evidence. It is indeed surprising that irrelevant matters are relied upon and the glaring error has been overlooked by the representatives.
14. With respect to the second appellant, the grounds maintain that at the hearing the Presenting Officer conceded that he had been supported by the sponsor. No contemporaneous notes from the representatives have been adduced to support this contention and the judge's Record of Proceedings shows that it was only accepted that there was a level of financial support provided by the sponsor. It was *not* accepted that the second appellant's essential living needs were being met or that he was financially dependent upon the sponsor (confirmed also at paragraph 15 of the determination).
15. Nevertheless, the sponsor's oral evidence on support does not appear to have been taken into account and there is lack of reasoning as to the findings on the documentary evidence. For example, no clear reason is given for why the letter from Dahabshill Transfer Services was rejected as evidence of the transfer of funds from 2014 (at 18) simply because there was a separate receipt from 2018. It is also unclear why the judge was not satisfied that the funds sent to Ethiopia were not genuinely received by the appellants (at 19) or that the funds were used by them (at 21).

16. For these reasons, I find that the judge's decision contains errors of law and cannot stand. It is set aside in its entirety. Neither party has sought to preserve any findings and the matter is thus remitted for a *de novo* hearing to the First-tier Tribunal.

**Decision**

17. The decision of the First-tier Tribunal contains errors of law and it is set aside. A fresh decision shall be made by another judge of the First-tier Tribunal.

**Anonymity**

18. No request has been made at any time for an anonymity order and I see no reason to make one.

**Directions**

19. Further directions for the hearing shall be issued by the relevant Tribunal in due course.

Signed

R. Kekić

Upper Tribunal Judge

Date: 17 September 2020