Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15362/2019**

THE IMMIGRATION ACTS

Heard at Bradford Via (MS Teams)	**Decision & Reasons Promulgated**
On the 8th September 2021	**On the 13th October 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

EYOBID MUSSIE ANDE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Hasan
For the Respondent: Mr Tan, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a male citizen of Eritrea who was born in 2001. He appealed to the First-tier Tribunal against a decision of the Entry Clearance Officer dated 31 July 2019 refusing his application for entry clearance for settlement as the child of a British citizen, Muse Ande (hereafter 'the sponsor'). The First-tier Tribunal, in a decision promulgated on 29 January 2021, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are five grounds of appeal. First, the appellant claims that the judge erred by finding that there was 'scant evidence' of the sponsor providing financial support to the appellant in the period after the sponsor left the army and subsequently left Eritrea [decision, 56]. The appellant claims that extensive documentary evidence of support and involvement of the sponsor in the life of the appellant had been submitted in support of the application to the Entry Clearance Officer and that this evidence remained with the Entry Clearance Officer in Pretoria. This evidence had been considered by the Entry Clearance Officer who had referred to it in the refusal decision. The appellant claims that it was unfair for the judge to ignore evidence of which the respondent had been aware and to have determined the appeal without examining that evidence.

3. I find that this ground is without merit. First, 18 months elapsed between the refusal of the application and the First-tier Tribunal hearing. The appellant has not explained why he took no steps during that period to arrange for the documents in question to be sent to the United Kingdom or copied and emailed. I am aware that the documents may remain in the possession of the respondent but, given that they were of relevance only to the arguments advanced before the First-tier Tribunal by the appellant and not to the case advanced by the respondent, it was for the appellant to seek to obtain them. Absent any request for the return or copying of the documents, there was no obligation on the respondent to take action to advance the appellant's case in the appeal. Secondly, given that the appellant considered that the documents were crucial to his case, it is surprising that the appellant did not apply to adjourn the First-tier Tribunal hearing so that the documents might be obtained. The judge did not err by proceeding in the absence of an adjournment application or by determining the appeal on the evidence actually before her. She was not required to second guess the possible relevance of evidence which she had never seen.

4. Ground 2 complains that the judge failed to take proper account of the Entry Clearance Officer's failure to consider the best interests of the appellant. This ground also lacks merit. First, the judge has, in my opinion, adequately explained why the absence of any express consideration of best interests in the refusal decision was not material [61]. The judge noted that section 55 of the Borders Citizenship and Immigration Act 2009 strictly applies to children resident in the United Kingdom but that applications concerning children overseas should be considered in the 'spirit' of the statutory requirement. It was open to the judge to find that the Entry Clearance Officer, whilst not referring specifically to best interests, had made a decision incorporating the 'spirit' of section 55. Moreover, the 'spirit of the duty' to consider best interests had been addressed directly by the Entry Clearance Manager (ECM) in his/her review, as the judge notes at [62]. The appellant's submission that the judge perpetrated a procedural unfairness by referring to that review without giving the appellant's counsel the opportunity to comment on it is without merit; the ECM review was before both parties and the appellant should have prepared his case by reference to all the evidence.

5. The appellant also complains that the judge considered only whether the appellant was in need of 'protection' thereby ignoring the wider matter of best interests and

general welfare which the 'spirit' of section 55 necessarily entails. The judge indeed finds at [62] that the appellant does not require 'protection' but that finding should be considered in the context of the case authority which the judge cites in the previous paragraph, namely *T (s.55 BCIA 2009 – entry clearance) Jamaica* [2011] UKUT 00483(IAC). At [23], the Upper Tribunal held:

> We do not accept that the request in paragraph 2.34 of the statutory guidance to have regard to the spirit of s.55 means that the present decision is "not in accordance with the law". We observe:
>
> a. The statutory duty to take measures to safeguard welfare does not arise, and the guidance itself cannot extend the duty to overseas cases.
>
> b. The reference to "the spirit of s.55" is too vague as to the subject of a separate common law duty to take a particular course when assessing the case.
>
> **c. "The spirit of s.55" would apply where the ECO had reason to suspect that the child was in need of protection, and it appears from the decision letter that the ECO did not conclude that was the case.**
>
> d. Whether the ECO was right or wrong to reach that conclusion depends on a resolution of disputed issues of fact rather than a remittal back to the ECO for compliance with an unspecific policy that neither imposes a duty nor directs a particular response to this application. [my emphasis]

6. By referring to the appellant's need for protection, the judge was clearly seeking to apply the guidance of *T*. It was not an error of law for her to do so.

7. Ground 3 asserts that the judge irrationally reached the finding that there was little evidence of the claimed deep relationship between the sponsor and the appellant or evidence of the sponsor having taken decisions affecting the life of the appellant.

8. This ground is also without merit. First, there is no reason at all to suppose that the judge ignored explanations given by the sponsor as to why he had travelled to Sudan to visit the appellant only after the decision of the Entry Clearance Officer. The judge was not required to make specific reference to each and every item of evidence which she considered in reaching particular findings of fact. Secondly, the judge was entitled to reject internet messages purportedly evidencing the close relationship of the sponsor and the appellant because these had not been translated into English. She was not required, as counsel submitted, to attach any weight to English phrases in text messages which were otherwise in a foreign language. Having regard to the evidence to which the judge was able to give weight, it was manifestly open to her to conclude that the sponsor had not shown that he supported the appellant financially or emotionally to any significant extent. The high threshold of perversity does not come close to being met in this instance.

9. Ground 4 is, in essence, nothing more than a disagreement with findings available to the judge on the evidence, as regards the absence, as found by the judge, of any serious and compelling reason for granting the appellant entry clearance arising from

his having fled Eritrea as a child. Likewise, Ground 5 fails to establish that the judge erred in law by finding that there was no family life between the sponsor and the appellant which requires the protection of Article 8 ECHR. Given her previous legally sound findings on the nature of the relationship between the sponsor and the (now adult) appellant, that conclusion was wholly logical and based firmly on the evidence.

10. For the reasons I have given above, I find that the decision of the First-tier Tribunal is not flawed by legal error such that I should set it aside. Accordingly, this appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Signed Date 14 September 2021
Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.