IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003410
First-tier Tribunal No:
HU/51890/2021
IA/05886/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

HTW
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Not represented
For the Respondent: Mr. P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 29 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge French, (the "Judge"), promulgated on 24 March 2022, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse leave to enter on human rights grounds. The Appellant is a national of Eritrea who applied to join the Sponsor, her aunt who has refugee status in the United Kingdom.

2. Permission to appeal was granted by Tribunal Judge M. L. Brewer on 2 June 2022 as follows:

> "2. The grounds of challenge are not particularised and are poorly drafted. However, for the reasons I set out below I am satisfied that the Judge arguably erred in law in the approach to Article 8 ECHR.
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> 3. First, the Sponsor is a recognised refugee. On the face of the decision, it is unchallenged evidence that (i) the Appellant was legally adopted by the Sponsor in Eritrea and (ii) that prior to the Sponsor's flight from Eritrea, the Appellant resided with the Sponsor in Eritrea. As identified in AH(Article 8, ECO, Rules) Somalia v SSHD [2004] UKIAT 00027 at [14] a material consideration in assessment of Article 8 is the circumstances in which the disruption to family life occurred. The Judge fails to take into account in the proportionality analysis matters identified at (i), (ii) above and the circumstances of disruption to family life in this case, plainly material considerations. This is an arguable error of law.
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> 4. Second, the Judge makes no reference at [17(4)], in the proportionality assessment, to the Sponsor's evidence (see witness statement of Sponsor at [8]) that the Appellant, a minor, cannot return to Eritrea because she left illegally and will be liable to military conscription. The relatives identified by the Judge from responses in the Sponsor's asylum interview resided in Eritrea. The Judge has failed to give consideration or make findings on the Sponsor's evidence identified above in the proportionality analysis. This is an arguable error of law.
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> 5. Third, it is unclear whether the matters identified at [17](4)] concerning other relatives who could care for the Appellant was put to the Sponsor at the appeal hearing. On the face of the decision and my observations at (4) above, it is unclear whether it was put. If these matters were not put to the Sponsor at the hearing, in the light of the adverse findings made on this evidence, any failure to raise these matters with the Sponsor would, arguably give rise to procedural unfairness."

The hearing

3. There was no attendance by or on behalf of the Appellant. The file indicated that notice of the time and place of the hearing had been sent to the Appellant's representatives at the email address notified to the Tribunal. The clerk telephoned the representatives leaving a message but there was no response from them. I considered that it was in the interests of justice to proceed with the hearing in the absence of the Appellant in accordance with rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

4. Mr. Lawson made brief oral submissions and referred to the Rule 24 response. I reserved my decision.

5. Later the same day the Tribunal received an e-mail from the Appellant's representatives which stated that they had received notice of the hearing but had not put the date in the diary. On that basis an adjournment was requested. Having considered this, together with the appeal before me, I remained of the opinion that it was in the interests of justice to proceed to make my decision.

Error of law

6. I have carefully considered the decision, the grounds and the observations made by the judge granting permission to appeal. I have considered (b), (d) and (e) of the grounds of appeal which assert as follows:

> (b) [….] "the IJ failed to undertake a fair assessment of the evidence including the oral evidence of the Sponsor, and has made several assumptions in his findings (paragraph 17) which go against the weight of the evidence. There has been little or no finding on the Sponsor's credibility, however the IJ has found against the Sponsor.
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> (d) The IJ failed to consider and or attach appropriate weight to key evidence enclosed at the date of application and available at the date of hearing, namely evidence of the Appellant's circumstances, this in itself is an error of law.
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> (e) The determination fails to take into account all relevant matters and further lacks any proper and adequate reasoning such that the determination is unsustainable in law."

7. The Judge's findings are set out from [15] to [17]. At [17(4)] he states:

> "(4) As has been mentioned above the key issue in this case is whether I should conclude that a refusal of this application would be a breach of the Appellant's rights to a family life under Article 8 of the ECHR. I note that the Appellant has lived for 11 years in Eritrea and for nearly 3 years in Ethiopia. She was settled at a school in Ethiopia. She was accustomed to the language and customs in those countries. She had never visited the UK. Although she had lived in the same household as the Sponsor between March 2014 and September 2015 (i.e a period of 18 months), the Appellant had spent no time in physical company with the Sponsor for 6 and a half years since September 2015. I could not conclude that the Appellant's best interests were best served by leaving behind everything she had ever known and coming to the UK where she knew no one except the Sponsor and she was unfamiliar with the customs and where she would be unable to communicate using her first language. Even I accept that the Appellant can no longer reside with her current carer, I am satisfied that there are other family members with whom she could live, including returning to live her grandmother, or with her uncle or the 7 siblings that the Sponsor had in Eritrea. The effect of the refusal of this application would not interfere with Appellant's family life. If she remained in Ethiopia or Eritrea she could have continued contact with a number of family members, and could continue to speak to the Sponsor through modern methods of communication. In addition the Sponsor was at liberty to visit the Appellant."

8. As stated in the grounds, there was no finding made that the Sponsor's evidence could not be relied on or that she was not a credible witness. There was evidence in her witness statement dated 3 March 2021 of the Appellant's circumstances which the Judge has not considered. In this witness statement the Sponsor said that the Appellant was "unable to return to Eritrea as she left the country illegally, furthermore she is of military age and would be forced to undertake her military service". There is no reference to this evidence by the Judge, which is clearly relevant to a consideration of the Appellant's circumstances.

9. At [5(a)] the Judge summarised this statement, but made no reference to this evidence. I asked Mr. Lawson at the hearing for submissions on the issue of the Sponsor's evidence. He stated that, as the Judge had referred to her witness statement at [5], it was likely that he had considered it. However I find that this

submission is not made out given that there is no reference by the Judge to the salient evidence from that witness statement.

10. The Judge found at [17] that the Appellant could live with other family members, but then listed people in Eritrea. Given the evidence before him, the Appellant could not return to live with relatives in Eritrea. I find that the Judge has failed to give consideration to the evidence before him. I find that this is a material error of law.

11. In relation to these relatives, at [16] the Judge commented that "many of the most important details had been omitted from the Appellant's case as it was presented to me." It is not clear what he means by this. He then referred to a difference in evidence regarding the number of the Sponsor's family members residing in Eritrea. He states that he "was given no explanation of what had occurred to the Sponsor's 7 siblings in Eritrea or why they were unable to look after the Appellant". Putting aside the issue of the Appellant not being able to return to Eritrea, there is no evidence that the Sponsor was asked about what had happened to her seven siblings.

12. The Judge set out the Sponsor's oral evidence from [8] to [11]. [At [10] under the heading "Judicial Questions" he stated that he had asked her "what family the Appellant had in Ethiopia or Eritrea and she answered that she had 2 cousins in Eritrea." There is no record of either the HOPO or the Judge asking the Sponsor specifically about her siblings. I find that to make findings without having put these matters to the Sponsor is procedurally unfair.

13. As referred to by Judge Brewer in the grant of permission, I further find that there was no or inadequate consideration of the circumstances in which the Appellant and Sponsor were separated which is relevant to the consideration of family life. The Respondent accepted that the Appellant and Sponsor were related as claimed. There was no suggestion that the Sponsor had not legally adopted the Appellant in the circumstances described. The Judge found that the Appellant and Sponsor had not spent time together for six and a half years but gave no consideration as to why this was. At [16] he finds it "implausible that if the Sponsor were close to the Appellant that she had never travelled to see her in Ethiopia." At [7] of her statement dated 14 March 2022 the Sponsor explained why she had not been to visit the Appellant, but there is no consideration of this evidence, or any explanation as to why the Judge gives this evidence no weight. I find that this is a further example of the Judge failing to consider the evidence before him, which goes directly to his consideration of family life and the proportionality of the Respondent's decision.

14. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
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> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their*

case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."

15. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). Given that there was procedural unfairness in that findings were made without matters being put to the Sponsor, and given the extent of fact finding necessary in order to remake the decision, I consider it appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

1. The decision of the First-tier Tribunal involves the making of material errors of law.

2. I set the decision aside. No findings are preserved.

3. The appeal is remitted to the First-tier Tribunal to be reheard de novo.

4. The appeal is not to be listed before Judge French.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
6 July 2023