IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004092

First-tier Tribunal No: HU/07531/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

23rd November 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAIDAT WELDETATIOS
(no anonymity order)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Heard at Edinburgh on 15 November 2023

For the Appellant: Mr S Winter, Advocate, instructed by Ali & Co, Solicitors
For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Eritrea, living in Egypt. She applied to enter the UK to live with her adult daughter and grandchildren. She accepted that she did not meet the requirements of the immigration rules for family reunion, and argued her case under article 8 of the ECHR, outside the rules. FtT Judge MacKenzie dismissed her appeal by a decision promulgated on 10 November 2021.

2. The appellant sought permission to appeal to the UT on one ground, "proportionality", developed as points (i) – (iv).

3. FtT Judge Dempster granted permission on 30 December 2021: …

> The single ground … is that the judge erred in finding that refusal of the appellant's claim did not amount to a disproportionate interference with her Article 8 rights, in particular that the judge failed to have proper regard to the absence of effective support from her community in Egypt and further failed to have regard to her health problems and the need for support because of those difficulties.
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> I have carefully considered this ground and in particular the judge's findings that the appellant's health care needs could continue to be met by support in the community, set out at paragraph 40 of the decision. It is arguable that the judge has failed to provide adequate reasons explaining the finding that the appellant could safely live and independently attend to her own personal needs in the light of medical and country evidence before the Tribunal that Eritrean refugees in Egypt are more vulnerable than those of other nationalities.

4. On 18 February 2022 the SSHD responded to the grant of permission:

> 3. The FTTJ found at paragraph [35] of the FTT determination, that the Appellant has a family life connection to the United Kingdom that is interfered with by the decision under review. The fact the FTTJ found the Appellant has family life connection does not mean the FTTJ has accepted the relationship the Appellant has with her family members goes above and beyond normal emotional ties.
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> 4. At [37] of the FTT determination the FTTJ refers to the Appellant's application for asylum in Egypt has not yet been determined. When you read paragraph [37] of the FTT determination as a whole, the FTTJ has drawn the conclusion that nothing about the Appellant's current living arrangements including the fact her asylum application is outstanding amounts to an exceptional circumstance. The FTTJ has considered the fact the Appellant's asylum claim is outstanding.
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> 5. The grounds at paragraph (1)(iii) refer to none of the witnesses indicated that they were able to provide day to day care for the appellant. The FTTJ at [40] of the FTT determination states that: "the evidence does not suggest that the Appellant is unable to access necessary medical care or that she cannot safely live and independently attend to her own personal needs."
>
> 6. The grounds are a mere disagreement with the proportionality assessment made by the FTTJ. The FTTJ has given detailed and adequate reasons as to why the decision to refuse the Appellant entry clearance is not disproportionate. The respondent's position is that there is no material error of law and the decision of the FTT should be upheld.

5. The appellant has supplied a skeleton argument: …

> 2. …. the appellant identifies the following issues as arising:
>
> (i) whether the grounds, individually or taken together either in parts or in total, demonstrate a material error of law;
> (ii) if there is a material error of law whether the matter should be remitted to the First Tier Tribunal ("FTT") or whether there should be a re-make in the UT.
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> 3. In terms of issue 1 the appellant maintains her grounds of appeal. In response to the Rule 24 response the appellant's position is as follows:

(i) in terms of paragraph 3 of the Rule 24 response, reading paragraph 35 of the FTT's decision in a sensible manner the FTT was finding that there was family life. If there was no family life the FTT did not need go on to look at proportionality. The proportionality findings are not made in the alternative ie it is not stated by the FTT that if it is wrong in finding there is no family life, it would have refused the appeal on proportionality;

(ii) in terms of paragraph 4 of the Rule 24 response, although the FTT refers to the outstanding claim, there is a lacuna in the FTT's reasoning. In particular, as per the grounds, the informed reader is left in real and substantial doubt as to how that delay factors into the proportionality assessment;

(iii) in terms of paragraph 5 of the Rule 24 response, the quotation relied upon is vitiated by material legal error;

(iv) in terms of paragraph 6 of the Rule 24 response, the grounds demonstrate material error of law. The reasons are vitiated by material legal error.

4. If there is a material error of law, it appears the issue would be one of proportionality. Although on one view that is a narrow issue, the appellant will be seeking to produce updated evidence in relation to that. It is envisaged that the Home Office may wish to cross-examine on that evidence. In that regard this case may be better suited for a remittal to the FTT.

6. The Judge did not deal as explicitly as she might have done with the issue whether the appellant had family life with her adult daughter and her grandchildren not merely in the broad sense of ordinary language, but in terms of article 8, outside the paradigm of spouses, parents and minor children (the case law is readily referenced via *MacDonald's Immigration Law and Practice*, current edition, at 7.87). Mr Diwyncz maintained the position in the rule 24 response that the Judge did not make such a finding. However, I prefer the reading advanced by Mr Winter. If the Judge had found there not to be family life falling within article 8, that would substantially have been the end of the appellant's case. She did not frame her further conclusions as an alternative.

7. At the end of [37], the Judge said, "It is clear from the appellant's own evidence that there are other family members who have been able to assist her in the past".

8. If the Judge meant some historic assistance, that, on all the statements before her, must have been very distant. Mr Winter showed that there had been no evidence of any family assistance, other than from the sponsor, relevant to her circumstances at the time of the hearing, or in the future.

9. Mr Diwyncz acknowledged that the Judge went wrong on this matter.

10. Mr Winter referred to the evidence of the appellant's contact with neighbours. Mr Diwyncz acknowledged that any support disclosed was negligible. The Judge's reference at [37] appears to be a reasonable reflection of the evidence. However, Mr Winter submitted that the finding at [40] of "support in the community" went beyond that. I find it marginal whether there was any error on this matter.

11. There is another slip at the end of [42]. The *appellant's* best interests were not a primary consideration in this case. The Judge must have meant to refer to the best interests of her grandchildren.

12. The error at [37] clearly played a part in the overall assessment. It is not a point which must have led to another outcome, but it is such that the decision cannot safely survive its excision, so it is **set aside**.

13. The appellant seeks to update her evidence. Parties agreed that the case should be **remitted to the FtT** for a fresh hearing before another Judge.

14. The FtT's finding on family life is not preserved as unchallengeable. The appellant may advance it as a starting point, but the issue falls to be resolved on the evidence.

15. I make no directions for the further hearing, but parties may wish to consider the framework of the rules for refugee family reunion; relevant policies of the respondent; and part 5A of the 2002 Act.

16. The FtT made an anonymity order, which is discharged. Parties agreed there is no justification for departure from the ordinary rule of open justice.

Hugh Macleman
Judge of the Upper Tribunal, Immigration and Asylum Chamber
15 November 2023