IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001967

First-tier Tribunal No: HU/53717/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

7th November 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

FANUIEL BEREKET ARAYA
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms E. Gunn, counsel, instructed by Bureau for Migrant Advice and Policy
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 17 October 2023

DECISION AND REASONS

Introduction

1. The Appellant is an Eritrean refugee in Uganda. His elder brother is an Eritrean refugee in the UK. The Appellant applied to join his brother in the UK in accordance with paragraph 319X of the Immigration Rules and Article 8 ECHR. That application was refused by the Respondent. The Appellant appealed to the First-tier Tribunal ("the FTT"). By a decision dated 18 February 2023, the FTT dismissed his appeal ("the FTT Decision"). He now appeals the FTT Decision to this Tribunal.

2. The FTT did not make an order anonymising the Appellant's identity. Ms Gunn did not ask me to make one and there would appear to be no good reason to do so, given the importance of the open justice principle.

3. Both the Respondent, in her decision, and the FTT in the FTT Decision, considered and applied paragraph 319X of the Immigration Rules. That paragraph has been deleted from the Immigration Rules. However, given that no issue was raised about this by either party, I have proceeded on the assumption that they were correct to treat that as the operative paragraph of the Rules.

The FTT Decision

4. After setting out the background, the burden and standard of proof and an overview of what happened, including many of the arguments made, at the hearing, the FTT turned to its conclusions at paras. 19-27. Although the issue was whether the decision breached the Appellant's Article 8 rights, as is now normal, the FTT started by considering whether the Appellant met the requirements of the Immigration Rules and then turned to Article 8 outside of the Rules.

5. Under the relevant rule, paragraph 319X, there were two matters in dispute, namely whether (i) there were serious and compelling family and other considerations which make exclusion of the child undesirable" and (ii) whether the Appellant was leading an independent life. As to these, the FTT concluded as follows:

> "19. The first question is: whether there are "serious and compelling family and other considerations which make exclusion of the child undesirable"? Miss Gunn argued that as the whereabouts of the appellant and the sponsor's parents was unknown, as the appellant has received financial support from his brother and is, effectively, estranged from his other siblings, this was a compelling case for the appellant to be re-united with the sponsor in the UK.
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> 20. The sponsor has been making payments to Uganda, where the appellant has been staying for at least the last three years. These have been via Western Union and other modern means of transfer. The documents are disparate and many documents are of recent origin. It is not possible to get a clear picture of the full extent of the financial support and it would have been helpful to have had a tabular analysis of these payments. It is impossible to establish from these documents the extent to which the appellant is dependent on the sponsor. It would be necessary to look at all the appellant's circumstances including his outgoings and total financial commitments before a conclusion could be reached. For example, it is not possible to establish what proportion of his essential needs have been met by the sponsor as opposed to Yohannes Aras. However, I find that there has been a level of financial support from the sponsor to the appellant but I also find that the financial support is no more than one would anticipate between siblings where one is in a better financial position than the other.
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> 21. I also find that the appellant has to some extent been dependent on the help from others but in the case of that support I am also unable to form a conclusion as to the extent of this dependence on the evidence provided.
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> 22. It has not been established on the evidence that the appellant, now an adult, would be unable to gain employment in Uganda in the future. He does have refugee status there and I am not aware on the evidence of any

requirement that he should leave Uganda in the future. There is no evidence that he will be required to return to Eritrea. He is a young man in apparently good health who has been in that country for three years. The appellant has been secure in Uganda. He was already 17 at the date of the application and is now an independent adult living in that country. I note that his application for entry clearance was only 5 weeks or so before his 18th birthday. In the absence of any evidence from him and in the light of the evidence from the sponsor which I have summarised above, I find that the appellant is living an independent life in Uganda for the purposes of paragraph 319 X (v) of the Immigration Rules which would prevent him qualifying for entry clearance under that rule.

23. I do not accept the sponsor's oral evidence that Yohannes Aron has now left Uganda to come to the UK. Nor am I satisfied as to his removal from Uganda. His witness statement was dated 5th December 2022 and at that time he expressed a desire to travel to a safe third country. Whilst that might have been his desire, I am not satisfied it has in fact occurred. I note that Miss Gunn's skeleton argument was dated 14th December 2022 and that at that time she asserted that he was still living in Uganda. There is no evidence of his admission to the UK. Had Mr Aron arrived in the UK one would expect to see an updated witness statement or he could have attended to give oral evidence to this effect. Therefore, the appellant has failed to show that he is no longer cared for by Yohannes Aron.

24. In the circumstances I find no serious and compelling family and other considerations which would make the exclusion of the appellant from the UK undesirable."

6. In relation to Article 8 ECHR outside of the Rules, the FTT held as follows:

"25. Turning to the application under article 8 of the ECHR outside the Immigration Rules, the respondent is under a positive duty to promote family life where possible. I take into account the respondent is satisfied that there are adequate arrangements in place for the appellant's reception in the UK and that the appellant will not have to seek recourse to public funds whilst here. However, the respondent is entitled to insist on [sic] that immigration requirements are complied with. The appellant and sponsor have maintained a close relationship remotely and the sponsor can continue the financial support that has been given to date. The operation of an effective system of immigration control is in the public interest according to section 117 B of the 2002 Act. Although the appellant satisfies the financial requirements and is able to show that he would be adequately accommodated by the sponsor without recourse to public funds, article 8 is not designed as a means to bypass the Immigration Rules. The need to strengthen their family life in the UK is outweighed by the public interest in ensuring compliance with the Immigration Rules which includes considering the appellant's ability to speak English and to be able to integrate. The respondent would be entitled to take into account the fact that the appellant is unlikely to speak English as a first language and, as I have observed, has never been to this country. He will undoubtedly face a challenge in adapting to life in the UK.

26. The section 55 duty has been referred to in Miss Gunn's skeleton argument. Whilst section 55 did not technically apply to the application, it is appropriate to consider the welfare of a child where he is not yet an adult at the time of the application. It is right that the IDI guidance suggests that

> section 55 should be considered. She has also drawn my attention to the case of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC). However, that case, which involved a different immigration rule than that under consideration here, concerned whether it was in the best interests of the child to live with his parents. Here the appellant was not a young child at the date of his application as he was already 17. He is now an adult. In my judgment he is leading an independent life in Uganda and may well have opportunities to gain employment there is an adult.
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> 27. In the circumstances the appellant has failed to discharge the burden which rests on him of showing that the respondent's decision was contrary to her obligations under the ECHR so as to be contrary to section 6 of the Human Rights Act 1998."

Appeal to the Upper Tribunal

7. The Appellant sought permission to appeal on three grounds, namely:

   a. Ground 1: The FTT erred in fact in finding in para. 22 that there was an "absence of any evidence" from the Appellant;

   b. Ground 2: The FTT failed to consider or provide reasons for rejection submissions related to the issue of serious and compelling family considerations.

   c. Ground 3: The FTT failed to consider material factors relevant to Article 8 ECHR.

8. Permission to appeal was initially refused by the FTT, but was granted by Upper Tribunal Judge Pitt in a decision dated 28 June 2023. Judge Pitt considered that all grounds were arguable.

9. There was no rule 24 response from the Respondent.

10. At the hearing, Ms Gunn expanded upon her grounds in concise oral submissions. Ms Ahmed opposed the appeal on behalf of the Respondent. I am grateful to them both for their assistance in relation to the issues I have to decide.

11. That is the basis on which the appeal came before me to determine whether the FTT Decision involved the making of a material error of law.

Ground 1

12. There is no dispute that there was a witness statement from the Appellant in the Appellant's Supplementary Bundle before the FTT and that this constituted evidence. Ms Ahmed submitted however that this ground was based on a misunderstanding of para. 22 of the FTT Decision. Her submission was effectively that the reference to "any evidence" had to be read as "any oral evidence".

13. I cannot accept that. If the FTT had intended to mean oral evidence, it would in my view have said so, particularly as to say that there was an "absence of any evidence" was incorrect. I therefore accept Ms Gunn's submission that the FTT erred in finding that there was no evidence from the Appellant.

14. The real question under this ground however is whether it could have made any difference. The Appellant's statement is short in the extreme extending to 13, mostly single-sentence, paragraphs. As to the question of independence (to which para. 22 of the FTT Decision related), Ms Gunn relied on para. 10 of the statement which states simply "I am currently being taken care of by Yohannes Aron until I am able to join my brother in the UK." I am unable to conclude that this single sentence (or indeed the statement as a whole) could have made any conceivable difference to the FTT's conclusion on whether the Appellant was leading an independent life. That is because, first, the FTT was already well aware that the Appellant had been being looked after by Mr Aron. It was referred to by the Appellant's brother in his witness statement and is recorded by the FTT in para. 8. Second, the evidence relied on is wholly lacking in any detail or specificity as to the sort of support Mr Aron was providing or the sort of dependence, if any, that the Appellant had on him.

15. While the FTT erred in overlooking the Appellant's statement, I am satisfied that this error was immaterial. This ground is accordingly rejected.

Ground 2

16. By Ground 2, the Appellant submitted that there were submissions made to the FTT that were not taken into account, namely that (a) since fleeing Eritrea in 2020 the appellant has been reliant on adults outside of his family unit for his care; and (b) that the Appellant's best interests would be served by permitting him to reunite with his brother in the UK.

17. As to the first of these submissions, at para. 21, the FTT stated "I also find that the appellant has to some extent been dependent on the help from others [i.e. other than his brother] but in the case of that support I am also unable to form a conclusion as to the extent of this dependence on the evidence provided." This submission in my view was taken into account by the FTT.

18. As to the second of these submissions, it seems to me that the FTT did in substance also consider this. Paragraphs 22-23, set out above, contains a detailed consideration of the Appellant's circumstances, in so far as they were able to ascertained, in Uganda. In Mundeba, on which the Appellant had relied, it was made clear that the focus of the best interests assessment needs to be on the circumstances of the child in the light of his or her age, social background and developmental history (see para. 37). There was nothing to suggest any developmental difficulties, and the fact that the Appellant was just shy of his 18th birthday at the date of his application, his employability and good health were all taken into account. Indeed, these were central to the FTT's analysis. Given that, even to the extent that the FTT did fail to take account of this submission, it also was not material for that reason.

19. I would also note that for the Appellant to have succeeded under the Rules, he had to succeed on this appeal under both of Grounds 1 and 2, which relate to separate necessary elements of paragraph 319X. Having failed on ground 1, it follows that ground 2 is academic for that reason also.

20. Ground 2 accordingly fails.

Ground 3

21. By this ground the Appellant submits that the FTT failed to consider and/or provide reasons for rejecting a number of submissions said to derive from the decision of "the Court of Appeal in MM (Lebanon) v SSHD [2017] UKSC 10 at §41". These were:

> "i. There is a positive obligation on the State to promote normal family ties to develop and if the appeal is not allowed family life would continue in its current state of disarray given the Sponsor nor the Appellant can return to live in Eritrea (i.e., insurmountable obstacles to returning to live in that country exist and the family's traumatic history and the context of upheaval must be borne in mind and render exclusion undesirable);
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> i. [sic] The Sponsor has been residing in the United Kingdom for a significant period – having been resident for over eight years, arriving in August 2014;
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> ii. The relationship exceeds the level of ties envisaged in Kugathas v SSHD [2003] EWCA Civ 31 such that family life rights fall to be protected. Moreover, Arden LJ in Kugathas [at 22] stresses that the factual context and family history will be relevant to assessing present ties and the weight to be attached to them: "Those facts [of being a refugee] are, to say the least, life changing experiences and part of the context within which this case must be decided";
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> iii. That the Sponsor and Appellant's history is significant is likewise underscored by Ouseley J in AH(Somalia) [2004] UKAIT 00027, §14 in which he stressed that the reasons behind the separation of a family affect the view that can be taken of the present disruption and ties: 'It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up.';
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> iv. There are no factors of immigration control or public order weighing in favour of exclusion;
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> v. The Sponsor does not have any right to reside in Uganda, such that it is submitted that family life could not be effectively carried on in that country. In any event, applying the approach in AH(Somalia) [2004] UKAIT 00027, it is not necessary for the Appellant to prove that family life would be impossible in that third country: §34;
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> vi. All these factors taken together establish 'compelling circumstances' that are sufficient to justify admission and refusal constitutes an unjustified and disproportionate interference with the Appellant's right to family and private life."

22. I would note, as a preliminary point, that this reference is to a decision of the Supreme Court, not the Court of Appeal. I initially assumed that the points relied on would be contained in para. 41 of the Supreme Court's judgment, that being the more authoritative source, and that the reference to the Court of Appeal was a typo. However, on discovering that in fact the propositions are not contained therein, I went to Court of Appeal's judgment in both MM (Lebanon) [2014] EWCA Civ 985 and SS (Congo) [2015] EWCA Civ 387, which was joined to MM in the Supreme Court. Para. 41 in neither judgment of the Court of Appeal contains the said propositions either. None of the propositions are, in themselves, particularly controversial, but it is unhelpful for the reference to be unclear as to which court

is being referred to and then for the paragraph cited not to contain the propositions on which reliance is placed.

23. In any event, it is well established that it is not necessary for a court or tribunal to deal expressly with every point raised by an advocate. Rather a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. See to this effect Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413 at [46] (Males LJ). I consider that the FTT has said enough to show that care has been taken and that the evidence (and, I would add, the submissions) as a whole has been properly considered. The FTT has in paras.25-26 considered the state's positive obligation, but, in summary, concluded that the Appellant's circumstances were not sufficiently compelling to require the grant of entry clearance outside of the immigration rules, which is sufficient.

24. In any event, taking each of the points raised in turn:

    a. the state's positive obligation is referred to expressly at the start of para. 25;

    b. The FTT was plainly aware of the length that the Appellant's brother had been in the UK: see para. 3;

    c. The FTT appears to have proceeded on the basis that the Appellant had his brother had Kugathas family life;

    d. The Appellant and his brother's history was not disputed and formed the backdrop to the entire appeal. It is to my mind inconceivable that it was not taken into account;

    e. It is incorrect that there were no factors of immigration control; the Appellant did not meet the requirements of the Immigration Rules. The FTT took this into account; and

    f. The FTT noted that the Appellant and his brother had maintained a close relationship by remote means, which is predicated on the Appellant's brother not being able (whether by reason of a lack of leave to remain or otherwise) to travel to Uganda.

25. For these reasons I do not consider that the FTT erred in law in the way alleged. Ground 3 is accordingly rejected.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

Paul Skinner

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

29 October 2023