Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04788/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 17th June 2013	**On 26th June 2013**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

RASHAN MANA

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr I Ahmed of Bankfield Heath Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Robson made following a hearing at Bradford on 18th January 2013.

Background

2. The Appellant is a citizen of Eritrea born on 10th December 1995. She applied for entry clearance to come to the UK on 5th November 2011 to join her sister who had been granted refugee status.

3. The judge dismissed the appeal on the grounds that the Appellant could not meet the maintenance requirements of paragraph 319X of the Immigration Rules.

4. There seems to have been some confusion as to what the issues before the judge were. In the original refusal the Entry Clearance Officer stated that he was not satisfied that the Appellant was living alone outside the UK in the most exceptional compassionate circumstances.

5. This of course is not a requirement of paragraph 319X. The relevant requirement is :

> "The relative has limited leave in the UK as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations to which make exclusion of the child undesirable and suitable arrangements have been made for the child's care."

6. The Entry Clearance Officer, in addition to raising the maintenance issue, also said that he was not satisfied that the Appellant and Sponsor were related as claimed nor that there was adequate accommodation available.

7. The judge stated that he dealt with two matters which had been agreed, namely the relationship and accommodation and then wrote as follows

> "Both representatives agreed that the only issue now was the question of finance. I did note the letter from the Eritrean Orthodox Church in Khartoum and also the statement by the Sponsor dated 8th January 2012 wherein she had explained that she had no idea where her and therefore the Appellant's brothers were although she tried to trace them unsuccessfully."

8. The judge said that Article 8 was raised but he noted and recorded the fact that there was insufficient evidence for him to make a decision in that regard.

9. He concluded:

> "I conclude therefore that the Appellant has failed to discharge the obligation on her to be maintained without recourse to public funds and for that reason alone I dismiss the appeal.
>
> I record that I have not addressed the issue of Article 8, a matter to which I refer to above earlier in this determination."

The Grounds of Application

10. The Appellant sought permission to appeal on a number of grounds. Firstly, the judge had erred in law by failing to consider Article 8. Secondly, he had erred by failing to consider the best interests of the child. Thirdly, he had failed to assess whether the UKBA had followed their own policy and/or exercised discretion correctly in accordance with their policy published on the UKBA website.

11. Permission to appeal was granted by Judge Campbell for the reasons stated in the grounds on 10th April 2013.

12. On 23rd April 2013 the Respondent served a reply stating that she did not oppose the application on the basis that the decision not to consider Article 8 would appear to be erroneous.

Consideration of whether there is an Error of Law

13. Manifestly the judge erred in declining to decide one of the grounds pleaded before him. The decision is set aside to that extent.

The Hearing

14. At the commencement of the hearing Mr Ahmed asked the Tribunal to find there had been a concession by the Secretary of State on the previous occasion that there were serious and compelling family or other considerations which made the exclusion of the Appellant undesirable, since the judge had recorded that both representatives had agreed that the only issue was the question of finance. However Mrs Petterson could find no record of such a concession in the Presenting Officer's minute of the hearing and the lack of clarity in this determination does not satisfy me that one was made.

The Sponsor's Evidence

15. The Sponsor adopted her witness statement to stand as her evidence-in-chief. She came to the UK in 2008 and claimed asylum which was granted following interview. Her account of having been detained following her husband's arrest in June 2008 was accepted by the Respondent i.e she was imprisoned for two months and then taken to hospital in August 2008 from where she escaped to the Sudan. She reached Khartoum in September 2008 and left on 30th November 2008.

16. At her screening interview she said that her parents had both died and she had two brothers born in 1989 and 1992 and a sister, the Appellant, born in 1995. In her full interview she said her father died in the war and her mother very soon after him, in 2002. She finished her studies in tenth grade in 2003 because after her mother died she had to look after the children because nobody was there for them. In her statement she said

that she had no idea where her brothers were now. The older of the two boys went to do national service and the other left to find work. She thought that the older one left in 2010 and the younger in 2011.

17. In 2011 the Appellant went to Khartoum and she is now living in a church. There is a letter from the Eritrean Orthodox Church in the bundle which states that the Appellant is an Eritrean refugee and under age living in Khartoum under the providence of the Church of St Michael and Aba Aregwari. The church gives her protection and financially she is supported by the Sponsor who lives in the UK. The Sponsor said that her sister was almost destitute because she did not have proper accommodation with the church and she was not safe.

18. The Sponsor was asked how the Appellant reached Khartoum. She said that her brother-in-law was a merchant and he went to and fro. He found the Appellant in a desperate situation in Eritrea and he took her to the border. He gave her the Sponsor's telephone number and sent her to Khartoum.

19. Under cross-examination she said that her brother-in-law had got the telephone number from a shop which she knew in the Sudan. She had asked people who went to the Sudan to deliver a letter to the shop enquiring about her sister. The shopkeeper delivered it to her brother-in-law because he went there when he went to the Sudan, which was every one or two months.

20. The Sponsor was asked why the brother-in-law had not taken the Appellant to Khartoum rather than leaving her on the border and the Sponsor said that he could not do that because she was crossing illegally. She had asked her brother-in-law to go and see her sister since then but he did not have time. She was also asked about her brothers. She said that she had asked the Red Cross to try to trace them in August 2012 but they had not done so, but she had no evidence of the contact.

Submissions

21. Mrs Pettersen accepted that the Appellant and Sponsor were related as claimed and that the focus of this Tribunal’s determination would be on the circumstances as they were as at the date of decision. There was no documentary evidence from the Red Cross as to the whereabouts of the Sponsor's brothers and in any event she had not tried to trace them until August 2012, sometime after they had abandoned the Appellant. It was not credible that she had been left in the manner described and not credible that the brother-in-law would not visit her in Khartoum. The Appellant had sought to exaggerate the difficulty of her circumstances.

22. She accepted that there may have been family life between the Appellant and Sponsor when the Sponsor left Eritrea but reminded me that the Sponsor was not in fact the Appellant's mother and there were other siblings available to look after her. It was proportionate for her to be

refused since she could not meet the requirements of the Rules and the family's circumstances were unclear.

23. Mr Ahmed submitted that the assessment of this case must be made through the prism of the Respondent's acceptance that the Sponsor had given a credible account of the events which led to her leaving Eritrea i.e an unexpected arrest which had spilt the family.

24. The Sponsor had looked after the Appellant as her daughter between 2002 and 2008. She had no choice but to leave her behind. There was no reason why the Appellant should be required to live with her brothers when the family bond was between the Appellant and the Sponsor. He asked me to accept that the Sponsor had given credible evidence in respect of the separation of the brothers from the Appellant.

25. Finally, the decision was not in accordance with Home Office policy as stated on their website:

> "Under the Immigration Rules only your pre-existing family (husband, wife, civil partner or unmarried/same sex partner plus any children under 18 who form part of the family unit when you fled to seek asylum) can apply to enter the UK under the family reunion programme. However we may allow family reunion for other family members if there are compassionate reasons why their case should be considered outside the Immigration Rules."

Findings and Conclusions

26. As Mrs Pettersen accepted, at the time that the Sponsor left Eritrea there was family life between her and her younger sister. The Sponsor's evidence when she came to the UK was accepted as credible by the Respondent. It was her evidence that from 2002 until she herself left Eritrea, the Sponsor looked after the Appellant as her mother. For those formative years i.e. between 7 and 13, the Appellant would have looked on her older sister as her parent. Their relationship was severed, not because any choice on the Sponsor's part but because on the accepted facts she was detained, imprisoned and had to flee persecution from Eritrea. Since then the Sponsor has assumed financial responsibility for the Appellant's welfare. According to the church in Khartoum, the Sponsor sends money to her there. She produced money transfers which were accepted by the previous judge as evidence of her financial support to her sister.

27. There was and remains family life in this case between the Appellant and Sponsor.

28. The refusal of entry clearance is undoubtedly an interference with that family life but lawful because it has been found that the Appellant is not in a position to meet the requirements of the Immigration Rules.

29. I turn to the question of proportionality. As at the date of decision the Appellant was a child and her best interests have therefore to be

considered first. I do not accept that the evidence today has been wholly credible in respect of what contact the Appellant has with other members of her family. The Sponsor has not produced any evidence of her attempts to contact them though the Red Cross, and it may well be that the Appellant has some contact with them, although there is no reason to believe that her brothers are in the Sudan, since they were last heard of in Eritrea. I also find it highly likely that the Appellant is in touch with the Sponsor's brother-in-law who was responsible for taking her to Khartoum.

30. Section 55 of the UK Borders Act 2009 only applies to children within the UK. In Mundeba (Section 55 and paragraph 297(1F)) [2013] UKUT 00088 the Tribunal held:

> "Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on The Rights of The Child. An entry clearance decision for the admission of a child under 18 is 'an action concerning children ... undertaken by .. administrative authorities' and so by Article 3 'the best interests of the child shall be a primary consideration."

31. The broader duty explains why the Secretary of State's IDI invites entry clearance officers to consider the statutory guidance issued under Section 55. The Tribunal said that the focus needs to be on the circumstances of the child in the light of his or her age, social background and developmental history. As a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor. Change in the place of residence where a child has grown up for a number of years, when socially aware, is important.

32. In this case the Appellant's natural parents have died but the Sponsor acted as her mother since the age of 7, looking after her until she was 13 and thereafter providing for her financially. At the date of decision the Appellant was still a child, 17 years old, without any guardian in Sudan. Her situation in Khartoum appears precarious in that she is described by the church which is looking after her as an "under age refugee" and being at risk.

33. This is not a case where the Appellant would be removed from the place where she has grown up. As at the date of decision she had only been in Khartoum for a number of months. She will undoubtedly have made some friends whilst there and I am not persuaded that she has no contact with the Sponsor's brother-in-law and possibly has some means of contacting her brothers. However her clear best interests are to be reunited with her sister who has been akin to a mother to her since she was 7 years old. There are no countervailing factors here, for example nothing in this family history which indicates a lack of compliance with immigration control.

34. The question of whether the Appellant's appeal ought to be allowed as not in accordance with the law as a consequence of UKBA not following its own policy in relation to family reunion for other family members in compassionate circumstances was not explored during this hearing. No reference was made to the policy by the Entry Clearance Officer, perhaps unsurprisingly because he did not accept that the relationship was as claimed. The fact that the policy exists and would appear to cover situations such as this where there is a stranded child lends weight to the argument that the refusal of entry clearance would be disproportionate.

Decision

35. The decision of the judge is set aside and is remade as follows. The Appellant's appeal is dismissed under the Immigration Rules. It is allowed with respect to Article 8.

Signed Date

Upper Tribunal Judge Taylor