..

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/03805/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22 August 2013	**On 28th October 2013**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ZELEKASH GEBRE WOLDETSADIK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – ADDIS ABABA

Respondent

Representation:

For the Appellant: Mrs Mesfin (Sponsor)
For the Respondent: Ms Martin (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Ethiopia born in 1940. She appealed against a decision of the Entry Clearance Officer, Addis Ababa on 7 January 2013 to refuse to grant entry clearance as a visitor under paragraph 41 of the Immigration Rules.

2. The decision was refused on two grounds. First the Appellant had not provided evidence that the Sponsor is her daughter. As such the ECO was not satisfied that the intention was to visit a close family relative (paragraph 41 (i)). Second, the ECO was not satisfied that the Appellant's financial circumstances were as claimed. In particular her claimed income

was not apparent on her bank statement. Also the balance was much lower until two cash deposits were lodged just before the application, the origins of which were unclear. As a consequence of not being satisfied about the Appellant's economic circumstances the ECO considered that the Appellant would not leave the UK at the end of the proposed visit (paragraph 41 (ii)).

3. Mrs Woldetsadik appealed. In the grounds of appeal in respect of the relationship she stated that there was no birth certificate for the Sponsor as one was not issued and there was no legal requirement to apply for one; there was a statutory declaration in lieu of a birth certificate; also family photographs were enclosed. In addition, she and the Sponsor were willing to provide DNA evidence to prove the relationship.

4. As for the financial circumstances, the Appellant runs a taxi business for which a title certificate had been provided and owns property from which she gets rental income; documentation in respect of both had been submitted including tax documentation.

5. As for the origins of the cash deposits, as a self-employed person with interests in a taxi business and rental property and with "regular income from these sources … she deposits and withdraws large amounts of money whenever required". She has sufficient income and leads a comfortable and settled life with her family and extended family and family friends in Ethiopia.

6. The appeal was heard at Hatton Cross on 29 May 2013. It was dismissed by Judge of the First-tier Tribunal Kainth. In respect of the claimed relationship the judge concluded that the Appellant had not established such. She had not commissioned a DNA report. Also, although there was no enforcement of registration of births such did not mean that births cannot be registered. Photographs did not advance the case.

7. As for her financial circumstances, the judge did not believe her explanation, when asked at the hearing about the deposits, that the banking industry in Ethiopia is such that making regular deposits or withdrawals is difficult and that account holders are in the hands of the bank in that regard.

8. The judge also did not believe the Appellant who, when questioned about tax calculations, said that that was for the government to decide.

9. The Appellant sought permission to appeal which was granted by a judge on 17 July 2013 who stated:

> *"2. The grounds assert that at paragraph 17 of the determination notwithstanding the fact that the Sponsor had signed a statutory declaration indicating that the Appellant was her biological mother, the Sponsor having accepted that she had been aware that the claimed relationship with the Appellant was in issue had, knowing of this fact, had not commissioned a DNA report. It is asserted that the Appellant discharged the burden of proof in*

showing the relationship with her Sponsor. They had agreed to take a DNA test as indicated in the Visa Application Form. It is argued therefore that the Entry Clearance Officer could have arranged a DNA test for the Appellant and the Sponsor, something which the Appellant could not have undertaken because it would not have been acceptable by the Entry Clearance Officer. The Appellant relies on IDI Chapter 8 Section 5A in support of that contention. The Appellant also relies on the UKBA Guidance for Staff on General Visitors' Version 8.0 which gives specific instructions to UKBA staff on assessing evidence as to claimed relationships.

3. *It is asserted that the Respondent did not follow its own guidance, something which was not considered by the Immigration Judge.*

4. *It is further asserted that the judge failed to give proper and full consideration to the evidence as to the Appellant's claimed income.*

5. *It is clear that the determination has been prepared in some detail. However reading the refusal of entry clearance there does not appear to be any reference to the Immigration Directorate Instruction or the VAF 2.2 Entry Clearance Guidance in respect of Family Visitors. The Respondent has not indicated that such matters were considered and the appropriate steps taken to comply with the requirements of the guidance. This is a matter that was not picked up on by the judge at the hearing of the appeal. This is a matter that does warrant further consideration.*

6. *As arguable errors of law have been identified permission to appeal is granted. This however by no means guarantees a different outcome to the final decision."*

10. At the error of law hearing before me the Sponsor had nothing to add to the grounds. She agreed that the issues raised therein about failure by the ECO to refer to the entry clearance guidance in respect of the relationship had not been a matter raised before the First-tier Judge.

11. In reply Ms Martin said that the judge could not be faulted for failing to deal with issues which were not put before him. It was also wrong to assert that had the Appellant commissioned a DNA report by herself the ECO would not have accepted the report. The requirement was that it had to be Cellmark who were commissioned.

12. As for the issues raised about the judge's conclusions on maintenance, these merely amounted to a disagreement with the judge's findings.

13. In considering this matter paragraph 3 of the grounds claims that it was up to the ECO to arrange a DNA test. The Appellant was happy to comply. However, had she done so of her own accord it would not have been

accepted by the ECO. The Appellant mentioned IDI Chapter 8, Section 5A. It was not produced before me nor, as indicated, was the First-tier Judge referred to it. Mrs Mesfin, the Sponsor, accepted Ms Martin's submission that as long as a DNA report is commissioned from Cellmark such a report will be accepted by an ECO from an applicant. I see no reason in the circumstances to doubt that.

14. In any event I find merit in Ms Martin's submission that it is unfair to criticise a judge for failing to deal with an issue which was not put before him. I do not consider such to be a **Robinson** obvious (per **R v SSHD ex. p. Robinson [1997] 3 WLR 1161**) point with the result the judge did not err in not dealing with it.

15. The same applies to paragraph 5 of the grounds which refers to VAT2.2 of the Entry Clearance Guidance VAT02 Visiting Family, which states that "where sponsorship documents have been submitted and the ECO has reason and or grounds to doubt the relationship, a phone call should be made to the Sponsor in the UK and clarification sought". It is said, no doubt accurately, that no such call was made. Again however, I do not consider that such was a **Robinson** obvious point such that the judge, having not been referred to it, erred in failing to deal with it.

16. Paragraph 4 of the grounds refers to yet different guidance viz UKBA Guidance for UKBA Staff on General Visitors Version 8.0 ext pages 26 & 27 which states "You must not seek documentary evidence of a claimed relationship unless there are strong grounds to doubt it, for example, a disparity in age that makes the relationship biologically unlikely".

17. This extract was before the judge (at P23) of the appeal bundle lodged on 20 May 2013. The problem is that it is stated to be valid from 6 April 2013. The date of decision in the Appellant's case was 7 January 2013. I do not see it to be an error of law for the judge not to have taken heed of guidance which was not in effect at the date of the application and decision.

18. The judge noted that the relationship was in issue. He found that a statutory declaration asserting that the relationship was as claimed and that photographs showing both the Sponsor and Appellant did not satisfy the burden of establishing the family relationship. Further, that while an article produced by the Appellant stated that "… Ethiopia has no system that enforces registration of births …" the extract did not state that births cannot be registered with the appropriate authorities.

19. The judge was entitled on the evidence before him to find that the Appellant had not established the claimed relationship.

20. It is appropriate to point out that having concluded that the relationship was not one within the permitted class or description set out in the Immigration Appeals (Family Visitor) Regulations 2012, the ECO would have been entitled to restrict the Appellant's right of appeal (*per* s88A of the Nationality, Immigration and Asylum Act 2002). However he went on to consider the application in respect of the Appellant's intentions under

paragraph 41. Even if the judge was wrong to find that the family relationship had not been established, the Appellant still had to satisfy 41 (i) and (ii).

21. In that regard turning to consider the Appellant's economic circumstances the grounds (at paragraphs 8 to 10) state, in summary, that as she said in her witness statement she was self-employed and deposited and withdrew large amounts of money as and when necessary. Also, she has provided documentary evidence in support of her claim to have a business and to have rental income. Further, she has a family and relatives in Ethiopia. The judge, she claimed, had failed to take account of all the relevant evidence.

22. The judge in his determination considered the claim by the ECO that the Appellant did not provide evidence to explain the origin of two bank deposits made just before the application. He noted that the claimed income to the deposits did not correlate. He also noted the explanation, repeated in the grounds, that she worked in a business which dealt in cash and it was normal to deposit or withdraw large amounts when convenient.

23. The judge noted, however, a conflict between that evidence and her oral evidence. At the hearing she said banks "decide whether or not to take deposits or to allow withdrawals" [12]. She "… does not deposit or withdraw regularly because it depends upon how obliging the bank is" [13]. The judge was entitled to take account of the contradiction and to find the explanation given at the hearing that "the banking industry in Ethiopia is such that making regular deposits or even withdrawals is difficult and that account holders are in the hands of their bank with respect to such transactions" [21] to be not credible.

24. The judge also considered answers to questions at the hearing about tax calculations. He noted that the tax certificate did not state what the Appellant's income was.

25. The Sponsor at the hearing before Judge Kainth said that the "government decides how much tax is to be paid and one has no alternative but to pay the amount that they ask for" [14].

26. The judge did not find the explanation credible, stating (at[22]) "In order for tax to be calculated, there must be evidence in connection with derived income. It is not plausible for a tax office to simply pull out of thin air what they expect an individual to pay by tax without knowing information concerning their income".

27. On the evidence before him the judge was entitled to find the contents of the tax document unreliable. He was entitled on the evidence not to be satisfied that the economic circumstances of the Appellant in Ethiopia were as claimed and that such cast doubt on her intention in seeking to come to the UK and whether she would leave (paragraph 41 (i) and (ii)).

28. The comments in the grounds simply amount to a disagreement with the judge's findings.

29. In conclusion, I see no material error of law in the judge's determination.

Decision

The First-tier Tribunal Judge's decision dismissing the appeal under the Immigration Rules shows no material error of law and that decision shall stand.

Signed Date 28th October 2013

Upper Tribunal Judge Conway