Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04160/2013

THE IMMIGRATION ACTS

Heard at North Shields
on 15th August 2014

Determination Promulgated
On 2nd October 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ELSHADAY TEFERI TS EGAYE
(Anonymity direction not made)

Appellant

and

ENTRY CLEARANCE OFFICER – (NBI\40293)

Respondent

Representation:

For the Appellant: Miss Rasoul instructed by Brar & Co Solicitors
For the Respondent: Mr Dewison – Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Gordon promulgated on 12th November 2013 in which she dismissed the Appellant's appeal against the refusal of an Entry Clearance Officer (ECO) to grant her leave to enter the United Kingdom. The Judge records in paragraph 1 of her determination that there was a dispute between the parties in relation to the nature of the application but that the immigration decision under appeal is the

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refusal dated 8th January 2013 which refers to an application for entry clearance as an adult dependent relative under Appendix FM of the Immigration Rules.

2. For the reasons set out in paragraphs 5 to 11 of the determination the Judge accepted that the appeal was against the refusal of an application as an adult family dependent and not a refugee family reunion application.

3. Having considered the evidence relating to the relationship between the Appellant and her sponsor, and the question of the existence of exceptional circumstances, the Judge concluded in paragraph 23 that the evidence provided is "inconsistent and unreliable". The Judge sets out her assessment of that evidence from paragraph 24 of the determination including that fact she accepts that the Appellant is 23 years of age and female, that a contemporaneous birth certificate exists but was not adduced, that the sponsor and Appellant could have put their relationship beyond doubt by DNA tests but none had been commissioned or undertaken, that the refusal makes it clear that the relationship between the sponsor and the Appellant is challenged, and that the lack of DNA results when taken together with the other evidence casts doubt upon the sponsor's claim to be the Appellant's blood mother. The Judge's findings of fact are be found in paragraph 27 to 30 of the determination and in relation to the application under the Immigration Rules can be summarised as follows:

i. I have not seen a contemporaneous birth certificate or any other reliable identification or other documents dating from the appellant's early childhood evidencing that the sponsor is the appellant's blood mother [27].

ii. I find the appellant has not discharged the burden of proof upon her to show she had lived in Eritrea, that she ever returned to Ethiopia, that she ever lived in a refugee camp and subsequently in Addis Ababa as claimed. In short I find she has not satisfactorily evidenced anything other than that she is an Ethiopian national [27].

iii. I find the sponsor is not the appellant's biological mother and that her husband is not the appellant's biological father. The evidence suggests there might very well be a relationship of some sort between the appellant and sponsor but the appellant has not discharged the burden of proof upon her to the required standard to prove what that relationship is [28].

iv. There are no exceptional compassionate circumstances which would justify granting leave to enter the United Kingdom outside the Immigration Rules. It was not accepted that the appellant has ever suffered the problems ultimately claimed by the sponsor. There are no compassionate circumstances to be considered in this case [28].

v. The issue of accommodation was not addressed at all during the hearing. Neither the nature of the residence or size of the property is addressed. The appellant has not discharged the burden of proof upon her to show she can be accommodated in the UK without recourse to public funds [29].

vi. Appendix FM EC-DR 1.1(d) and E-ECDR 2.3 are not discharged.

4. The Article 8 aspect the claim was considered and dismissed in paragraph 31.

5. Permission to appeal was initially refused by another judge of the First-tier Tribunal but thereafter granted on a renewed application by Upper Tribunal Judge Storey on 18th February 2014.

Error of law

6. In his grant of permission to appeal Judge Storey stated it may be arguable that in finding the appellant and sponsor were not daughter and mother the Judge erred in failing to take account of the sponsor's statement and that it was also arguable that the judge wrongly assessed the evidence relating to the appellant's continued efforts to apply for family reunion from 2009 onwards and failed to consider whether there was an applicable Home Office policy.

7. Before the Upper Tribunal Miss Rasoul stated that an application had been made on the basis of family reunion but the Applicant was told that a fee had to be paid. The compassionate and compelling circumstances said to exist are that the Appellant forms part of a family group and that Judge Gordon erred in failing to consider the evidence made available. It was accepted that the issue of the nature of the application was not ignored as paragraphs 5 to 11 of the determination demonstrates.

8. It is not disputed that the Appellant made an application for leave to enter the United Kingdom for the purposes of family reunion and within her evidence is a copy of a letter from her representatives to the Visa Application Centre in Addis Ababa, dated 4th February 2009, asking the Visa Officer to consider an application for entry to the United Kingdom for the purposes of family reunion following the grant of refugee status to their client. Earlier correspondence disclosed and dated 15th January 2009 includes a letter from the representatives to the sponsor following a consultation in which she asked for assistance in enabling her husband who lives in Italy and her daughter living in Sudan to enter the United Kingdom for the purposes of family reunion.

9. Further correspondence from David Gray Solicitors, dated 8th April 2011 and addressed to a local Member of Parliament, refers to the sponsor who is stated to be a refugee from Eritrea who has made an application for her daughter to be

able to enter the United Kingdom under the principles of family reunion. The letter states that the ECO is refusing to accept the reunion application without charging a fee of £1,814 which is the adult dependent relative fee and asking the MP to write a letter in support.

10. At pages 11 to 18 of the Appellant's appeal bundle is a copy of the application for United Kingdom Entry Clearance -Settlement - Family Reunion - Other Dependent Relative. It is stated this is the application that was made. This is the only application form Miss Rasoul is aware of. At page 188 of the bundle is a printout of the Visa Application Fees and Guidance for Ethiopia, and at page 19 confirmation of an appointment on Monday, 17th December 2012 at the Visa Application Office in Addis Ababa, although the refusal does not show whether the Appellant attended the appointment or not.

11. It was accepted by Miss Rasoul that the Rules are relevant but that the Appellant cannot satisfy the Rules as she was overage at the time although it is stated the ECO should have considered the relevant policy to be found at page 187 of the appeal bundle which was also before Judge Gordon. That policy is the Family Reunion for Asylum Seekers Family, the final paragraph of which on page 187 states:

> "Under the Immigration Rules, only your pre-existing family (husband, wife, civil partner or unmarried/same-sex partner, plus any children under 18 who formed 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"

12. The content of the policy indicates a discretionary element which it was submitted the decision did not show had been exercised. In this regard the Tribunal were referred to HK (Discrimination – refugees' family policy) Somalia [2006] UKAIT 00021 and specifically paragraphs 9 and 10, although to make sense of paragraph 9 it is necessary to consider paragraph 8:

> 8. Mr Mukherjee also referred us to the comments of Collins J in Hamfi at paragraph 53, where he points out that the hurdle in the policy is not necessarily as high as that in the Immigration Rules, for there is in the policy no requirement that the "compassionate circumstances" be "most exceptional", although they do have to be "compelling". He said that the Appellant's position is similar to that recognised by the Immigration Appeal Tribunal in AH (Somalia) [2004] UKIAT 00027 in that there were circumstances which could be regarded as compelling which the Respondent had not properly examined. He submitted that the appeal should be allowed in the same way as it was in AH, so that the Respondent could look properly at the circumstances in question.

> 9. As we remarked at the hearing, it is very difficult indeed to see that those submissions have any force in this case. On the face of the explanatory statement, this is clearly not a case where the Secretary of State did not have regard to the questions posed by the policy to which reference has been made. On the contrary, he specifically investigated the circumstances and reached the conclusion that they were not sufficient to merit the grant of entry clearance in this case. Nothing more could be required.
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> 10. (For the avoidance of doubt, we note that the word "compelling" as used in the policy is a term of art: it does not imply that the circumstances so described are such as to compel the grant of entry clearance. If it did, there would obviously be no scope for the exercise of discretion once "compelling compassionate circumstances" (whether with or without a comma after the first word) were detected. The wording of the policy and the procedure under it, and the wording of the explanatory statement makes it clear that the word is intended to indicate that the circumstances are such as to compel compassion rather than to compel entry clearance.)

13. It was submitted the ECO failed to understand the nature of the application as evidenced by the dispute regarding the payment of a fee and, as a result, did not consider the correct policy.

14. In relation to the adults dependent relative route, it was conceded that the Appellant could not satisfied the requirements of the Rules and the issue was whether the decision relating to the policy was in accordance with the law bearing in mind it was legitimate expectation that it would be considered and applied by the ECO.

15. In relation to Article 8 ECHR, it was stated there was no mention of the May 2008 statement although it is accepted there was no DNA evidence before the Judge. It was submitted the Judge failed to consider the MPs letter and the history of the application and a rational consideration of the evidence will show that the Appellant was the daughter of her sponsor in the United Kingdom.

16. It was put to Miss Rasoul during the course of the hearing that in light of the absence of the DNA evidence and the fact the Judge considered all the material made available, and applied the correct legal standard, that this was in effect a weight challenge dressed up as a rationality challenge, which was not accepted.

17. Miss Rasoul also sought to raise an additional ground-based on an error of fact but this had not been formally pleaded and so there was no grant of permission to proceed on this basis made by a judge of the First-tier Tribunal which is a mandatory requirement within the Rules before the Upper Tribunal is able to consider whether permission should be granted on a renewed application. Permission to proceed on this basis was refused.

18. The actual terms of the decision under challenge refers to the claim that the Appellant is related to the sponsor and her husband but that in the claimed

father's visa application in 2009, whilst providing a similar name for his daughter, he provided a completely different date of birth casting doubt over the claimed relationship. It was therefore clear to the Appellant as early as January 2013 that the relationship between the Appellant and her alleged parents was not accepted and was in dispute. This is relevant for even if the application was for family reunion, to be a qualifying member under those provisions the applicant child of the refugee must be under the age of 18, not leading an independent life, is not marriage and is not in a civil partnership, has not formed an independent family unit, unless the same child over the age of 18 can succeed under the terms of the policy.

19. It is a fundamental element of this claim that a key issue, whether the Appellant is related to her sponsor or not in the manner alleged, is true. The Judge raised the lack of DNA evidence with the sponsor in court and records the reply which the Judge found to lack credibility. It is not disputed that the DNA evidence was not obtained until after the decision had been made. It is arguably, however, not a legal error for a Judge to have made a decision in accordance with the available evidence, even if the party against whom that decision has been made then obtains evidence dealing with the weakness in the case identified by the Judge, such that the determination should be set aside on the basis of that material which did not exist at the date of the hearing.

20. A reading of the determination clearly shows the Judge considered all the evidence she was asked to consider with the required degree of care, that of anxious scrutiny. I do not accept the assertion the Judge failed to consider relevant aspects of the evidence has been proved. The Judge also heard oral evidence and having had the benefit of doing so, and having assessed the arguments appropriately, concluded that the claim lacked credibility. The Judge accepted the Appellant was related to the sponsor "in some way" on the evidence but not as parent and child as alleged. The Judge considered the existence of compassionate and/or exceptional circumstances but found on the basis of the evidence that no such circumstances had been proved to exist. The ECO specifically stated that consideration had been given to rights under Article 8 ECHR although it was said not to have been established that there was family life recognised by Article 8 and so there was no breach of that article although, in the alternative, if family life had been established it was accepted the decision was proportionate. It is also clear that the ECO considered whether there were any compassionate circumstances warranting consideration outside the Immigration Rules but found no satisfactory evidence of any compassionate circumstances or particular problems being experienced such as health or social issues had been presented. It was not accepted that the Appellant was in need of particular supervision or care. This is clearly indicative of an awareness and consideration of a discretionary element which was not found to be established on the facts.

21. I find no material legal error material to the decision to dismiss the appeal proved. It was accepted that a fresh application could be made and if material is now available to support such an application it appears on the facts and in law that is the most appropriate way for the Appellant to proceed.

Decision

22. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

23. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 25th September 2014