Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16304/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 June 2014	**On 23rd July 2014**
Oral determination given following the hearing	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER, NBI

Appellant

and

SESEN TESFALIDET

Respondent

Representation:

For the Appellant: Mr P Deller, Home Office Presenting Officer
For the Respondent: Mr A Cooray, Barnes Harrild & Dyer Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision made by First-tier Tribunal Judge Majid in a determination promulgated on 1 April 2014

following a hearing at Taylor House on 19 March 2014. For ease of reference I shall throughout this determination refer to the Entry Clearance Officer who was the original respondent as "the Entry Clearance Officer" and to Miss Tesfalidet who was the original appellant as "the claimant".

2. The claimant is a citizen of Eritrea who was born on 11 January 1995 and she applied for entry clearance to settle in the United Kingdom with her uncle, Mr Habton Uqbu Tekle, who has indefinite leave to remain having been accepted as a refugee. This application was refused by the Entry Clearance Officer on 20 July 2012 and the refusal letter was sent to the claimant on 25 July 2012. It is said in the refusal letter that the Entry Clearance Officer considered the application under paragraphs 252B, 297, 309A, 310 and 316A of the Immigration Rules and reasons were given why the Entry Clearance Officer considered that the claimant did not satisfy the requirements of any these Rules. The Entry Clearance Officer also considered the application as a "de facto adoption" but considered that the claimant had failed to provide satisfactory evidence that she met the requirements to be granted entry clearance on this basis. The Entry Clearance Officer was also not satisfied that the maintenance or accommodation provisions under any of the Rules were satisfied.

3. It is also stated within the refusal letter that the Entry Clearance Officer considered whether or not the claimant might be entitled to be granted permission to enter pursuant to her rights under Article 8 of the ECHR but was not satisfied that the claimant had established that there was family life as defined in Article 8 and considered that even if there was, the interference which would follow from a refusal of the application was proportionate to the legitimate purpose of effective immigration control (which is necessary for the economic wellbeing of the country). The claimant appealed against this decision and as already noted above, her appeal was considered by First-tier Tribunal Judge Majid at a hearing before him at Taylor House on 19 March 2014. His determination in which he allowed the claimant's appeal was promulgated on 1 April 2014.

4. The Entry Clearance Officer has appealed against the judge's decision on a number of grounds. It is said first, that the judge failed to set out the relevant issues and give any or any adequate reasons for his finding that the claimant "merits the benefit of the Immigration Rules". The Entry Clearance Officer's submissions are put in bald terms as follows:

> "A Tribunal must give reasons for its decision; these reasons must be intelligible such that a litigant or other interested persons can see how the result has been reached."

5. Reliance is placed on a judgment of the Court of Appeal in *R v Immigration Appeal Tribunal ex parte Khan* [1983] QB 790, where Lord Lane CJ said as follows at page 794:

> "The important matter which must be borne in mind by Tribunals in the present type of circumstances is that it must be apparent from what they state by way of reasons first of all that they have considered the point which is at issue between the parties and they should indicate the evidence on which they had come to their conclusions. When one gets a decision of a Tribunal ... which either fails to set out the issues which the Tribunal is determining either directly or by inference, or fails either directly or by inference to set out the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this court and in normal circumstances would result in the decision of the Tribunal being quashed. The reason is this. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the Tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in others it may not."

6. With regard to this ground of appeal, it is argued on behalf of the Entry Clearance Officer as follows:

> "The judge failed to set out the issues which fell to be determined. He failed to state which were the relevant paragraphs of the Rule. He failed to set out why he found, contrary to the respondent's case, that the appellant satisfied the Rules."

7. The second ground which is very much a secondary ground, is that the judge failed to give any or any adequate reasons for his finding that the Entry Clearance Officer's decision failed properly to apply Section 55 BCIA 2009 (which is the provision dealing with the best interests of a child) and that the "best interests of the child are that the appellant ... leaves no doubt in my mind that this appeal should be allowed".

8. It is submitted that the judge failed to explain what if any factual findings he made, failed to consider the claimant's current situation in Eritrea and failed to apply any facts found to any assessment of where the claimant's interests lay.

9. It is further submitted that the judge failed to weigh the child claimant's best interests with the other factors in this case. The point is made that not only did the judge fail to consider "whether there existed an arguable case for leave to be granted outside the Rules on account of compelling circumstances not sufficiently recognised by the Immigration Rules" (as per *Nagre* [2013] EWHC 720) but also even relying on pre-existing jurisprudence it is not clear that he followed "the stepwise analysis derived from *Razgar* [2004] UKHL 11". It is noted that there is "no reasoning supporting the implicit conclusion that Article 8 was engaged, or that the decision was disproportionate".

The Hearing

10. Before me on behalf of the Entry Clearance Officer, Mr Deller submitted robustly that he would say that the determination was "clueless" because "it does not engage in any way with any Immigration Rule it is supposed to be considering" such that it was "impossible to glean any relevant circumstances in this case" except first, that the sponsor had refugee status and secondly, the claimant was an orphan. There was no proper consideration of Article 8 on any proper reasons basis. The determination did not even begin satisfactorily to determine this appeal and could not possibly stand as a satisfactory determination.

11. So far as error of law was concerned, all the reasons which are advanced from time to time in support of an argument that a determination contains an error of law were there; lack of reasons, lack of engagement with the evidence and lack of identification of the relevant statutory framework. It was imagined**,** although one cannot tell this from the determination, from which it is not clear what were the disputed matters between the parties. It is impossible to note from this determination what they were and manifestly this determination was hopelessly inadequate.

12. On behalf of the claimant, Mr Cooray very sensibly and entirely properly did not even seek to persuade this Tribunal that this determination was sustainable. The best he thought he could say was that the judge had seen the witnesses but even this was not apparent from the determination. This was particularly unfortunate because this appeal turned almost entirely on the credibility of the witnesses given the lack of documentary evidence.

Discussion

13. It is beyond argument in this case that this is a hopelessly inadequate determination and apologies are due to the sponsor in this case who is now going to be put to yet further inconvenience by having to attend at yet another court in order that the appeal can be properly determined. It is trite law that, as the then Lord Chief Justice Lord Lane stated as long ago in 1983 in *Khan* which is relied upon in the grounds, it is incumbent on a judge to ensure that when he or she writes a determination it is apparent from the reasons given that the judge had considered properly the matters which are in issue between the parties and indicates the evidence on which the judge has come to his or her conclusions.

14. It is not acceptable for a judge in a case before the First-tier Tribunal merely to say, as this judge does at paragraph 9 of his determination, that "I reminded myself of the judgment of Henry J in *ex parte Gondolia* [1991] ImmAR 519" to the effect that "it is not incumbent upon me to isolate every single piece of evidence and indicate whether I have found it relevant to the issues". Nor is it appropriate for a judge to continue by

stating that “there is no obligation in law upon me to refer to each and every piece of evidence and it therefore does not follow that because I have not referred to specific facts, they have not been taken into account by me”.

15. While it is certainly correct that a judge need not refer to each and every piece of evidence, he is obliged to refer to those pieces of evidence which are material to his decision. One of the many weaknesses or failings of this determination is that the judge does not refer to any evidence at all.

16. Furthermore, he does not refer even to which particular Rules are relevant to this appeal. What he says at paragraph 3 is that

> “I put on record that in considering this appeal I shall bear in mind the legal provisions of the relevant paragraphs of the Immigration Rules ... [which] are detailed but I have borne every provision of these paragraphs in mind meticulously during the assessment of the appellant's case.”

17. It is quite impossible to glean from this determination whether or not any and if so which provisions of the paragraphs have been properly taken into account. The judge also states that he is “also taking into account the new changes in the Immigration Rules brought into force on 9 July 2012 which have radically changed the application of the European Convention on Human Rights” but again it is quite impossible to say what changes these are and why it is that even taking into account these changes, this claimant is entitled to succeed under the provisos of the ECHR.

18. Effectively all the judge says does not go beyond saying that he has considered all the arguments, taken into account the relevant provisions of the Immigration Rules and the ECHR and having given consideration to all that believes that the appeal should succeed. Clearly with regard to the “best interests” of “the young appellant” while setting out the judgment of the House of Lords in *ZH (Tanzania),* to the effect that the interests of the child are a primary consideration, it is not at all clear from this determination that he has considered properly all the other matters set out in *ZH (Tanzania)*.

19. The conclusion that is reached at paragraph 20 that

> “in view of my deliberations in the preceding paragraphs and having taken into account all of the oral and documentary evidence as well as the submissions at my disposal, cognisant of the fact that the burden of proof is on the appellant and the standard of proof is the balance of probabilities, I am persuaded that the appellant merits the benefits of the Immigration Rules ... as well as the provision of the ECHR”

is clearly unsustainable.

20. In my judgement, it is apparent from this determination that the judge has failed to engage with the issues in this appeal (or even demonstrate that he knows what they are). There is no analysis of the evidence. There is no analysis of what the issues are as between the parties and there are no findings of fact to justify his conclusions that the claimant's appeal should be allowed. It is a wholly unsatisfactory determination such that it is impossible for any impartial observer reading the determination to understand what is the basis of the decision. Clearly the decision must be set aside and the determination must be remade.

21. I have regard to paragraph 7 of the Practice Statements of the President in which it is made clear that although on the finding of an error of law the normal approach to determining appeals would be that the Upper Tribunal would remake the decision, an appeal might nonetheless be remitted to the First-tier Tribunal where either the effect of the error "has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal" or "the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal".

22. In this case it is abundantly clear that the claimant's case has not been "properly considered" by the First-tier Tribunal because in order for the case to be properly considered it was necessary for the judge to set out what the issues were, what arguments had been advanced and what findings of fact he made. It is also clear that because there has been no judicial fact finding beyond the fact that the sponsor has been found to be a refugee and the judge considered that the claimant was an orphan, all the facts are now going to have to be found. In these circumstances this appeal must be remitted to the First-tier Tribunal so that another judge (not Judge Majid) can now do what Judge Majid ought to have done in the first place, which is to hear this appeal, determine what the issues are between the parties and make appropriate findings of fact with regard to these issues.

23. I accordingly make this order.

Decision

I set aside the determination of the First-tier Tribunal Judge Majid as containing a material error of law and direct that the appeal be remitted to the First-tier Tribunal sitting at Taylor House to be determined by any judge other than Judge Majid.

Signed: Date: 21 July 2014

Upper Tribunal Judge Craig