UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: OA/16987/2013**
OA/16984/2013

THE IMMIGRATION ACTS

Heard at: Field House
On: 31 July 2014
Prepared: 11 August 2014

Determination Promulgated
On:12 August 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MRS HODAN AHMED ABDI (1)
MISS HAMDA HUSSEIN (2)
NO ANONYMITY DIRECTION MADE

Appellant

and

THE ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation

For the Appellants: **Mr O Agbaje-Williams, solicitor (C&A Solicitors)**
For the Respondent: **Mr C Avery, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The appellants are mother and daughter, born on 1st December 1984 and 1st June 2006. They are nationals of Somalia. They appealed against the respondent's decisions dated 30th July 2013 and 22nd January 2014 to refuse to grant them entry clearance to come to the UK as the wife and daughter respectively of Mr Mahmud Hussein Jama (the sponsor) who now has indefinite leave to remain in the UK.

2. Their appeals were dismissed by First-tier Tribunal Judge Malins in a determination promulgated on 25th April 2014 that "by a wide margin" it was clear on the figures given to the respondent and from the sponsor's own figures that his

income fell substantially short, probably by nearly £7,000, of the income required to be shown. When his second child is born, the gap to be bridged would be even wider. She found that the arrival of the two appellants in the UK would lead swiftly to recourse to public funds in the form of housing benefit, working tax credit and child tax credit.

3. Accordingly, the appellants failed to meet the financial requirements. The Judge was however satisfied as to the subsistence and genuineness of the marriage.

4. On 6th June 2014, First-tier Tribunal Judge Simpson granted the appellants permission to appeal. It had been contended that the Judge failed to make a clear finding on the marriage certificate; that having found that her sponsor had been a settled person in the UK since January 2011, the Judge failed to apply paragraph A280 to the minor appellant's application or to consider her application under paragraph 297, where only "adequate maintenance and accommodation" requirements apply. In addition, the Judge failed to apply the decision of **MM and Others v SSHD** to the first appellant's application: That decision has now been reversed by the Court of Appeal and the financial requirements in the rules have been upheld.

5. It is also contended that the Judge failed to follow the decisions of **ZH (Tanzania)** and **LD (Zimbabwe)** or to apply the requirements of s.55 of the 2009 Act when dealing with the best interests of the child.

6. Judge Simpson without any analysis decided that although these applications were made after 9th July 2012, given that the child is the sponsor's daughter and given that her application was made after he obtained a settled status in January 2011, paragraph A280 applies so that the minor appellant's decision ought to have been considered under paragraph 297. Accordingly, it was arguable that the sponsor did not need to show an income of £22,400 but only £18,600.

The background to the appeal

7. The sponsor came to the UK in August 2005 and claimed asylum, which was refused. He did not leave the UK and on 16th February 2011 was granted indefinite leave to remain under the Legacy scheme on the basis of five and a half years' residence in the UK.

8. He had married the first appellant on 11th January 2005 in Ethiopia and has one child, the second appellant, born in Somalia. She was pregnant with a second child.

9. The appellants made their applications for visas on 18th May 2013. They stated that they would live with the sponsor in a property that he rents in Enfield. The first

appellant claimed to be exempt from the English language test as there was no centre in her home town.

10. The respondent refused their applications on 29th July 2013 as he was not satisfied that the marriage certificate was genuine, or that their relationship was genuine and subsisting. No determination had been made on the question of the main income requirement to be met under the relevant immigration rules.

11. On 22nd January 2014, the respondent issued a revised refusal of entry clearance. The veracity of the marriage certificate was rejected on the basis of a document verification report. Further, the respondent was not satisfied that theirs was a genuine and subsisting relationship. Nor was there evidence that the second appellant was the daughter of the sponsor.

12. The sponsor had been unable to satisfy the income requirement showing £22,400 per annum. He had two jobs and the second employment only commenced two months before the date of the application and thus he could not adequately make up the financial deficit of the first employment under the provisions of the rules.

13. A DNA report was obtained showing that the second appellant was the child of the first appellant and the sponsor.

14. The Judge found that the sponsor did come here in 2006 to make a better life. He left behind two wives. The second was newly pregnant with their child, who is now the second appellant. He was only able to see his child for the first time when she was six years old after he obtained indefinite leave to remain. As noted, the Judge found that they were in a subsisting relationship.

15. She found that insofar as the marriage certificate is concerned, any finding of the veracity of the document is difficult in view of the general situation regarding record keeping and societal structures in Somalia and Ethiopia. In any event the matter is academic as the sponsor could have sponsored the appellant as an unmarried partner if the relationship met certain criteria.

16. With regard to the "financial regulations applicable in the immigration rules" she rejected the 'credibility' of the sponsor's claimed income, finding that he must earn substantially below the £22,400 that the appellants needed to show to comply with the relevant requirements.

17. In the event, she found that the sponsor's income fell substantially short of the income required in order to sponsor the arrival in the UK of the appellants.

Submissions

18. At the hearing on the 31st July 2014 Mr Agbaje-Williams submitted that the Judge erred in failing to note that paragraph A280 of the Rules applies to the second appellant's appeal so that where an application is being made by a child whose parent is settled in the UK under paragraph 297, the additional requirements of Appendix FM do not apply.

19. He submitted that at no point did the Judge consider the transitional provisions at paragraph A280. If that had been done it would have been clear that the child had applied in her own right and had to be considered as such under paragraph 297 rather than Appendix FM. Her father had been settled two years before. She stated that she is travelling unaccompanied and is applying as a child of a parent settled in the UK.

20. Mr Agbaje-Williams referred to pages 160 and 161 of the respondent's bundle where the child is said to have stated that she is travelling unaccompanied. However, at page 160 it is simply stated on behalf of the second appellant that she is continuously asking her mother when they are going to her father. I note that at page 152, the appellant has put a cross next to "financial requirement" that is required to be met. The income is stated to be at least £22,400 a year.

21. She has also ticked the box relating to the basis upon which she is going to the UK. She stated that she is going to the UK as the child of a parent who is applying for entry clearance as a partner, or the child who is applying to join their parent who is already in the UK and has been granted limited leave as partner granted under the Immigration Rules in force on 9th July 2012.

22. Mr Agbaje-Williams submitted that given the facts set out in the application and by Judge Malins, the second appellant was not applying or seeking limited leave as a dependant of a parent or parents given limited leave. He submitted that under paragraph 297 the child "gets settlement immediately."

23. Unlike a child applicant, no spouse who applies for settlement is granted settlement in the UK immediately. Where the mother or spouse succeeds under the rules, she is always granted limited leave for 30 months to start with. To suggest that the child applying at the same time, travelling unaccompanied, must be considered under paragraph 301, as is contended by the respondent in the rule 24 response, rather than paragraph 297, would be wrong. That would mean that paragraph 297 is 'otiose, contrary to the intention of the Secretary of State in providing paragraph A280 for applications made after 9th July 2012 by a child'.

24. Had the Judge considered and applied paragraph A280 and then paragraph 297, as the maintenance and accommodation requirements had been met on the evidence before her, even for two adults and the second appellant, their appeals would not have been dismissed, and in the worst case scenario the second appellant's appeal

would have been allowed. The Tribunal should therefore allow the appellants' appeals, "or at worst appellant Hamada Hussein's appeal."

25. Further, the Judge failed to apply **ZH (Tanzania)** or to consider the "then case of **MM and Others v SSHD**". The best interests of the child are a primary consideration. Her application succeeds under paragraph 297 of the rules as her father was settled in 2011 and he had both the income and accommodation to ensure her application succeeded under that paragraph. To suggest that as her mother can only ever be granted limited leave of 30 months under Appendix FM, that the second appellant must only succeed via Rule 201, would be wrong in law and not in the child's best interests. That is in part because under paragraph 301, the child would only get limited leave which is not in her best interests whereas under paragraph 297, she gets indefinite leave.

26. The best interests of the child cannot be safeguarded or promoted by seeking to make the appellant make two applications, one under 301 plus Appendix FM and a later one under paragraph 298 where she can only succeed if her mother also gets settlement or dies so that the father has sole responsibility. The child's best interests are accordingly served by applying Rule 297 to her appeal (paragraph 15 of the skeleton argument).

27. Mr Agbaje-Williams accepted in his oral submissions that the only evidence was that the sponsor earned about £13,000. The child should nevertheless succeed and he relied on Article 8 in respect of the mother's claim.

28. On behalf of the respondent, Mr Avery submitted that the whole argument was based on a false premise. The contention was that the second appellant's application should have been treated as an application under 297 having regard to the transitional provisions.

29. He submitted however that it has not been explained how she manages to come within it. Paragraph 297 sets out the requirements to be met by a person seeking indefinite leave to enter the UK as the child of a parent, parents or a relative present and settled or being admitted for settlement in the UK. The first set of requirements relates to a child seeking leave to enter or accompany or join a parent, parents or a relative in the UK in one of the circumstances set out in paragraph (a) to (f) of paragraph (i).

30. Paragraph 297(i)(a) refers to both parents being present and settled in the UK. That does not apply, nor does sub paragraph (b) apply as both parents are not being admitted on the same occasion for settlement. Paragraph (c) does not apply as although one parent is present and settled in the UK, the other is not being admitted on the same occasion for settlement.

31. Nor does sub paragraph (d) apply as the other parent is not dead. Nor does sub paragraph (e) apply as the parent present and settled in the UK has not had sole responsibility for the child's upbringing. Nor are there any serious or compelling family or other considerations which makes the child's exclusion undesirable.

32. He submitted that paragraph 301 of the rules apply to her situation as her father is not seeking settlement. Accordingly she cannot meet the requirements under the rules. She would thus not have been admitted under paragraph 297 and accordingly FM applies.

33. He submitted that the decision in **MM** in the Court of Appeal has found that the immigration rules are 'reasonable'.

34. There is nothing, moreover, to suggest that this is a case in which it would be appropriate to go outside the rules for Article 8 purposes as there are no compelling or exceptional circumstances that apply. This is a standard entry clearance application.

35. Insofar as s.55 is concerned, the child is being looked after by her mother. There are no compelling circumstances why her application should be treated outside the rules.

Assessment

36. It was submitted on behalf of the appellants that the issue for the First-tier Tribunal Judge had been whether the second appellant's appeal should have been decided under Appendix FM of the Immigration Rules. It is contended that if she should have been allowed to enter the UK for settlement pursuant to paragraph 297 of the rules, her mother's appeal would also have been allowed under Article 8.

37. It is accepted that the mother's application was properly considered under Appendix FM and that the financial requirements cannot be met.

38. The submission is that the Judge failed to note that paragraph A280 of the rules applied to the second appellant's appeal. That is because it provides that where an application is made by a child whose parent is settled in the UK under paragraph 297 the additional requirements of Appendix FM do not apply. The contention is that the second appellant had applied in her own right and had to be considered as such under paragraph 297.

39. I have had regard to the provisions of paragraph 297. The requirements to be met by a person seeking indefinite leave to enter the UK as the child of a parent present and settled or being admitted for settlement in the UK are set out in paragraph 297(i)(a) to (f), to which I have already referred.

40. I am satisfied that none of the potentially applicable factual scenarios set out in paragraph 297 (i)(a) to (f) applies to the second appellant. I accordingly agree with the submission of Mr Avery that the argument on behalf of the appellants is based on a false set of premises.

41. Accordingly, the income requirement under Appendix FM would still apply to the second appellant as she is seeking to enter the UK at the same time that her mother seeks limited leave with a view to settlement as set out at paragraph 301 of the rules.

42. Paragraph 301 does not fall within any of the paragraphs referred to in A280. Accordingly, the income requirements under paragraph FM still apply.

43. I have had regard to the findings and conclusions of the First-tier Tribunal Judge relating to the financial requirements. Based on the available information there was no satisfactory evidence that in the 12 months prior to the application, the sponsor had received the level of income required to meet the financial requirements.

44. It is evident that the First-tier Tribunal Judge did not separately consider the issue raised under s.55 as a primary consideration. There was only a fleeting reference to Article 8 in the grounds of appeal, amongst others such as Articles 12 and 14 and the related protocols.

45. Mr Agbaje Williams also relied on the authority as it then was in **MM [2013] EWHC 1900** as read with **Gulshan [2013] UKUT 640**. That is because the child's best interests fall to be determined under paragraph 297, and there were and are good reasons for granting leave outside the rules pursuant to Article 8.

46. However, given that paragraph 297 does not apply to the second appellant, I find that it has not been shown that there are compelling reasons for Article 8 purposes to consider the appeals pursuant to Article 8. **MM and Others**, as noted, has been reversed and the financial requirements have been upheld.

47. These appellants' applications are similar to other appellants seeking entry clearance under FM of the rules.

48. Moreover, pending the outcome of a further application under the rules, the sponsor, who has visited Ethiopia to see the appellants on two occasions since

obtaining indefinite leave to remain, both in 2012 and 2013, has the opportunity of visiting them there again. Although there is no evidence as to how long it would take for a decision to be made after the submission of an application, I note that the respondent gave a decision at the end of July 2013 following the applications made on 18th May 2013.

49. I accordingly find that although the Judge erred in failing to consider the s.55 best interests of the child and Article 8, this did not in the circumstances constitute a material error.

Decision

50. The decision of the First-tier Tribunal Judge did not involve the making of any material errors of law. It shall consequently stand.

Signed Date 11/8/2014

C R Mailer
Deputy Upper Tribunal Judge