Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/16780/2013
OA/16784/2013
OA/16792/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 May 2015

Decision & Reasons Promulgated
On 15 June 2015

Before

THE HON. MRS JUSTICE McGOWAN
Sitting as a Judge of the Upper Tribunal
UPPER TRIBUNAL JUDGE PERKINS

Between

ENTRY CLEARANCE OFFICER-NAIROBI

Appellant

and

1 A A A
2 A B A
3 A D A
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: Mr A Bandegani Counsel instructed by North Kensington Law Centre

DECISION AND REASONS

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1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondents. Breach of this order can be punished as a contempt of court. We make this order because two of the respondents are young children.

2. The respondents to this appeal, who I will call "the claimants", are Somalis. They are part of a family. The first appellant is the father of the other two appellants who are twins born in June 2010 and so are now aged nearly 5 years. They made an application for entry clearance to join their sponsor who is respectively the wife and mother of the claimants and the application was properly refused under the Rules because the application had been framed as an application for family reunion as a refugee family when the claimants are not qualified for admission in that capacity because the sponsor in the United Kingdom is not a refugee. Rather she is permitted to remain in the United Kingdom as a person who is a family member of a refugee. That does not entitle her relatives to join her under the Family Refugee Reunion provisions.

3. This history was all accepted before the First-tier Tribunal. The case was argued on grounds relying on Article 8 of the European Convention on Human Rights and was resolved in favour of the claimants by the First-tier Tribunal Judge.

4. We have to say that we have considerable sympathy for the First-tier Tribunal Judge who, whether or not she expressed it, was plainly moved by circumstances which are compelling and are concerning in this case. A material point is that the sponsor, who is, if we might respectfully observe, a very young woman to be the mother of three children, entered the United Kingdom when she pregnant and left behind young twins. She entered the United Kingdom to join her mother. The First-tier Tribunal Judge was clearly anxious to preserve or create family unity, if that were possible. That intention is wholly consistent with a decision maker's obligations under section 55 of the Borders, Citizenship and Immigration Act 2009 and is essentially a desirable thing to achieve but what is desirable is not always possible because other factors have to be considered.

5. The First-tier Tribunal Judge was criticised for not paying more attention to the scheme of the Rules but we find that criticism a little puzzling. I hope it is not going to be suggested that the Tribunal Judges should follow the example of the Secretary of State and give copious reasons about why certain Rules do not apply when nobody thought that they did. It was clear that this is not a case that could be allowed under the Rules except insofar as the Rules encapsulate Article 8 of the European Convention on Human Rights and so permit a case to be allowed exceptionally. The First-tier Tribunal Judge dealt with the appeal by reference to the Convention and established jurisprudence.

6. Consideration of the Rules raised two considerations.

7. The first was that the sponsor's status is precarious and the rules do not generally provide for a person to join someone whose status is precarious. In some circumstances this would be a very compelling reason for refusing anyone

permission to enter. We are not sure that that is a particularly powerful reason on the facts of this case. Typically a person with unsettled status in the United Kingdom will be a student with leave to enter for a temporary purpose and is in no position to think about promoting family life.

8. The facts are different here. We have indicated that this application concerns a divided family. There was evidence to suggest that it was not possible for the family to reunite in Kenya or in Somalia. There was evidence that the first appellant had gone to Somalia to work and friends had been shot there. It does not necessarily follow from that that there is no possibility the family ever established themselves in Somalia but it is certainly a reason to be extremely cautious. Similarly there is evidence that conditions for refugees in Kenya are very difficult and there was some evidence that there was no proper documentation for the appellants to be in Kenya and so, by implication, there is no legal basis for her joining them there.

9. The second is that the public interest is against their being admitted in the present circumstances.

10. We find the requirements of Section 117B of the Nationality, Immigration and Asylum Act 2002 to be particularly telling. Section 117A obliges a decision maker to have regard to 117B and section 117B provides that is in the public interest that those who seek to enter or remain in the United Kingdom are able to speak English and are financially independent.

11. The First-tier Tribunal Judge has not considered this properly or at all. Certainly there is reference in the Decision to the earnings of the sponsor in the United Kingdom. They show considerable diligence on the sponsor's part. As far as we know she is a young person without any particularly useful qualifications. She has responsibility for a small child and for her own mother whose own health is such that she is entitled to a carer's allowance. Nevertheless, she still manages to earn something in the order of £600 to £700 per month and a considerable portion of her income is forwarded to her family in Kenya. She appears to us to be an enterprising and diligent woman and we respect that.

12. The fact remains that she does not earn nearly enough to support her family. We have regard to the sort of sums that would be necessary if the application were brought under Appendix FM. We are not told the precise sums but we think that the claimant's wife would need an income of £18,300 for her husband and £2,600 for each of the children. She does not earn anywhere near to that sum.

13. We find the First-tier Tribunal, although having clear regard to some of the provisions of Section 117B, really lost sight of the specific requirement to have regard to the need for people entering the United Kingdom not to be a burden on the taxpayer.

14. We find it clear that if the claimants were admitted their presence would create a financial burden on the taxpayer because they do not have access to sufficient money meet their needs.

15. It was argued before us that the First-tier Tribunal's failure to consider this could not have made any difference. It could. The contention that it is not a determinative consideration is right and we recognise that. It is no more than a factor to consider but it is an important factor and it has to be considered. We do not accept for a moment that the fact that the financial provisions were not considered is immaterial.

16. It will be recognised that there are circumstances here that do instil compassion and concern but that is not enough to say the case is established on Article 8 grounds. We find that the First-tier Tribunal erred by not considering expressly the provisions of 117B(3) of the 2002 Act. It is an error that we must correct.

17. We recognise that family reunion is a desirable goal, that union in Kenya may not be possible at all and that union in Somalia is probably unrealistic unless and until conditions there improve. The best interests of the minor claimants almost certainly lie in their joining their mother in the United Kingdom and their father entering with them.

18. However we also find that, although there are compassionate issues in this appeal, the public interest in them being financially independent so outweighs the desirability of the family living together that we must conclude that they have failed to show that they have a right to enter the United Kingdom.

19. We do note that the First-tier Tribunal allowed the appeal on the premise that the sponsor would have been recognised as a refugee. We find that this does not add anything useful to the appellants' cases. The fact is that the sponsor is not a refugee. She did not introduce herself as a refugee when she arrived. We do not know what would have happened if she had said that she was a refugee. The fact is she did not and we must deal with the facts as they are, not as they might have been if events had taken a different course.

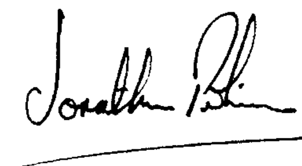
20. It follows therefore that although we understand the sympathetic reasons for the First-tier Tribunal making the decision that it did it erred in law.

21. We correct that error and when we correct that error we have to substitute a decision saying that the claimants' appeal against the Entry Clearance Officer's decision is dismissed.

<u>Decision</u>

Entry Clearance Officer's appeal allowed. We set aside the decision of the First-tier Tribunal and substitute a decision dismissing the claimant's appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 4 June 2015