Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18116/2013

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice-Belfast On 1 December 2015

Determination & Reasons Promulgated On 22 December 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MISS RA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR TH EHOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Daley, Solicitor
For the Respondent: Ms M O'Brien, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Eritrea born on 15 August 1998.

2. On 7 June 2013 she applied for entry clearance as the child of a parent granted refugee status. The application was considered with reference to paragraph 352D of HC 395 (as amended). In a decision dated 12 July 2013 the application was refused. The sole basis for the refusal was with reference to paragraph 352D(iv), namely that the Entry Clearance Officer

("ECO") was not satisfied that the appellant was part of the family unit of the sponsor at the time that he left Eritrea in order to seek asylum.

3. The appellant's appeal against that decision came before First-tier Tribunal Judge Boyd on 2 February 2015. He dismissed the appeal, finding that the appellant did not meet the requirements of that aspect of the Rules. He also dismissed the appeal with reference to Article 8 of the ECHR.

The decision of the First-tier Tribunal

4. Judge Boyd heard evidence from the appellant's father, AK. He recorded that the sponsor lived in the UK with his first wife, having come here with her and their then three children. The appellant is the daughter of his marriage to his second wife. The sponsor's evidence was that the relationship with his second wife commenced when he started working away from home. The judge noted that in his witness statement the sponsor said that he saw his first wife at the weekends when he travelled home from work but on Monday to Friday he lived with his second wife in the area where he worked. The sponsor lived like this until he "joined" the national army in 2000.

5. Again from his witness statement, the judge noted that the sponsor divorced the appellant's mother in 2001. He records that the sponsor stated that he last saw the appellant in 2009. This was before he was sentenced to imprisonment in Eritrea which was on 10 February 2010. He found therefore, that it was reasonable to assume that the sponsor had not seen the appellant between early 2009 and his arrest on 10 February 2010.

6. He then went on to conclude that it would appear that the family unit he had with his second wife (the appellant's mother) and the appellant, ended around the year 2000/2001 and from then on "the appellant then became simply his daughter to a former relationship."

7. He concluded that at around that time she ceased to be part of the family unit "by any reasonable definition" of that phrase. He further concluded that the family unit was therefore, in effect his wife and three children with whom he came to the United Kingdom.

8. At [16] he stated that a family unit does not necessarily require all the parties to live together. However, given the fact that the sponsor had not seen the appellant for approximately a year prior to his arrest and the fact that the sponsor had divorced the appellant's mother in 2001, it would appear that around that time he ceased to have two family units and was simply in the situation of having had a daughter (the appellant) from another woman outside of his marriage to his first wife. He accepted that it was conceivable that prior to that time the sponsor did "operate two family units" initially.

9. At [17] the conclusion was that the sponsor's family unit was with his present wife and three children but that he had contact with and access to the appellant, but that the appellant was not part of his family unit. He

stated at [18] that the sponsor had clearly taken his responsiblities in relation to the appellant seriously, including in maintaining her and keeping in contact with her. That however, he concluded was not sufficient to establish that she was part of his family unit at the time he left Eritrea, and that the evidence does not support such a claim.

10. In going on to consider Article 8 of the ECHR it was apparently accepted on behalf of the appellant that she was not able to meet the requirements of the Rules in any other respect.

11. In considering whether there were circumstances under Article 8 which would render the decision of the respondent disproportionate, the judge concluded that there was nothing exceptional about the case. He noted that the appellant is 16 years of age and had lived with her mother until 2012, and is now living outside of Eritrea, being financed by the sponsor. The appellant is able to maintain contact with the sponsor and his family in the United Kingdom. Although the appellant had stated that she is unhappy living where she is, and wishes to live with her father, there is nothing to indicate as claimed that she would suffer psychological problems if she stayed where she was. For about three years she had been living with family friends and being supported by the sponsor. There was no evidence that she is at any risk. There appeared to be no reason why that situation could not continue.

12. At [22] the judge also stated that the appellant appears to have had very limited contact with the sponsor since around 2000 and had not seen him for six years without any evident adverse effects. At [23] he concluded that the decision would not interfere with her right to family or private life, which could continue as it does at present.

13. He stated that he had to take into account section 117B of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) in terms of the public interest in controlling immigration. He stated that there was insufficient evidence as to how the appellant would be maintained and looked after in the UK or as to her standard of English.

14. He concluded that the status quo could be maintained and the respondent’s decision does not amount to a disproportionate breach of her Article 8 rights.

The Grounds and Submissions

15. The grounds of appeal before the Upper Tribunal, in summary, contend that the First-tier Judge did not take into account that the reason for the sponsor’s separation from the appellant was his forcible recruitment into the army in Eritrea, which pre-dated his divorce from the appellant’s mother in 2001. This is evidenced in his witness statement.

16. It is further argued that the judge erred in his approach to considering the definition of a ‘family unit,’ in effect assuming that the appellant’s ‘nuclear’ family with his first wife and children amounted to a family unit

but his relationship and contact with the appellant did not amount to a family unit.

17. It is further said that the judge had failed to consider information in the screening interview of the sponsor when he claimed asylum, namely that the sponsor gave his last address in Eritrea as being the same address as where the appellant lived. He also stated that his children lived at different addresses in Eritrea.

18. The grounds also take issue with the judge's conclusions in relation to Article 8, for example suggesting that he failed to take into account the best interests of the appellant and wrongly took into account the appellant's English language ability, a matter which under the Immigration Rules would not be relevant. The conclusion that there was insufficient evidence to show how the appellant would be maintained and looked after in the UK is contrary to the judge's finding that the sponsor could continue to support her financially.

19. Mr Daley relied on those grounds in his oral submissions. He explained the background to the appellant's circumstances and separation from the sponsor. It was emphasised that there was no mention in the determination of the sponsor's forced enlistment in the Eritrean army, the judge seemingly concluding at [11] that he had volunteered to join up.

20. Ms O'Brien submitted that the issues were fact-sensitive and in reality the grounds amount to nothing more than a disagreement with the judge's conclusions. It was submitted that he had taken into account the divorce from the appellant's mother in 2001, as well as his conscription into the army, and the frequency of contact between them prior to the sponsor leaving Eritrea. He took into account that the appellant had not seen the sponsor for about a year before his arrest which was in February 2010.

21. The fact that the sponsor had discharged some parental responsibility towards the appellant did not mean that she was part of his family unit, particularly bearing in mind that she lived with her mother and that there was a significant gap in time from when the appellant and the sponsor last met and when he fled Eritrea.

22. There was no credible basis on which to challenge the judge's Article 8 conclusions. Although there was family life between the appellant and the sponsor, she being his daughter, one had to look at the quality of that family life. In this case there was a family life consisting of periods of separation and intermittent contact. The appellant's family life with her mother was really the family unit.

23. So far as the best interests of a child are concerned, it was accepted that those considerations would be taken into account as a matter of policy but best interests do not have primacy in an entry clearance case.

24. In reply on behalf of the appellant it was accepted that there was a distinction to be drawn between entry clearance cases and in-country appeals in terms of best interests considerations, but having regard to the

UN Convention on the Rights of the Child, the appellant's best interests should have been a primary consideration.

My assessment

25. It is not apparent that the judge's assessment of whether the appellant formed part of the sponsor's family unit at the time he left Eritrea depended on any distinction between his having been conscripted into the Eritrean army or having joined as a volunteer. The sponsor's evidence was that he was conscripted, as is apparent from his witness statement dated 26 January 2015.

26. At [11], in rehearsing the sponsor's evidence, he noted that in his witness statement he said that he saw his first wife at the weekends when he travelled home from work but on Monday to Friday he lived with his second wife in the area where he worked and that he lived like this "until he joined the National Army in 2000." The judge was plainly aware of the fact that the arrangement that he had with his then two families was interrupted by his joining the army. The fact that the judge did not refer to conscription or forced recruitment seems to me to be immaterial. The judge plainly concluded that it was 'force of circumstances' which ended the arrangement that the sponsor had with his two families.

27. Accordingly, I am not satisfied that there is any merit in the suggestion that the judge erred in law in failing to take into account that separation between him and the appellant was not by choice but as a result of forced recruitment into the Eritrean army.

28. Further grounds point out that the sponsor's forced recruitment was accepted by the respondent as part of his claim for asylum, which itself was accepted. However, I am not satisfied that the judge did overlook the sponsor's national service. What the judge did was to make an assessment of the extent to which the evidence supported the claim that the appellant formed part of the sponsor's family unit when he left Eritrea to seek asylum.

29. Although the judge did not cite the decision in *BM and AL (352D(iv); meaning of "family unit") Colombia* [2007] UKAIT 00055 he did recognise that a family unit does not necessarily require all the parties to live together (see [16]). There is no merit in the contention that the First-tier Judge considered that the sponsor's 'nuclear' family meets the definition of family unit yet his situation with the appellant did not. At [16] the judge expressly stated that it is conceivable that the appellant did operate two family units at one time initially. The judge adopted a fact-specific approach to the circumstances of the appellant's claim and to the sponsor's family arrangements at the time when he was in Eritrea and when he left.

30. The third ground of appeal on behalf of the appellant argues that the judge failed to consider evidence in the sponsor's screening interview

dated 11 October 2010, at the time when he claimed asylum. At [16] the judge referred to the screening interview at question 6.4 where the sponsor stated that the appellant was living with her mother in Eritrea, as well as referring to the sponsor's four other children, three of whom travelled with him to the UK with their mother. It is argued that it was unreasonable for the judge to conclude on the basis of that answer that the appellant was not part of the sponsor's family unit at that time.

31. In fact, the judge did not come to that conclusion solely on the basis of that aspect of the screening interview. He said that the conclusion that the appellant ceased to have two family units after his divorce from the appellant's mother in 2001 was "consistent" with that answer in the interview. He was entitled to come to that view.

32. The grounds refer to other aspects of the screening interview which it is contended the judge failed to take into account. An incomplete copy of the screening interview is in the appellant's bundle that was before the First-tier Tribunal at pages 42-43. The references in the grounds to question 10 and the "Additional Information Box" are in fact at the start of the asylum interview, starting at page 44 of the bundle.

33. Reliance is placed on question 10 whereby the sponsor gave his last address in Eritrea as Kilowle, Mendefra. The grounds state that the appellant gave his last address in Kilowle "where he lived with the Appellant." In fact, the answer to question 10 does not say that he lived there with the appellant, although the screening interview itself at 6.4 does refer to the appellant as living at "Klewilie." It may well be that this is different spellings for the same place. The grounds also refer to what is stated in the additional information box at the start of the asylum interview as follows "[one] thing I want to say – children lived at different address in Eritrea Maichot, Asmara." The implication of these pieces of information in the interview would seem to be argued to be that the appellant's last address was with the appellant and that his children (the appellant and his children from his first marriage) lived at different addresses, supporting the claim that he had two family units.

34. It is true that the judge did not refer to these answers of the preliminary stages of the asylum interview. On the other hand, contrary to what the appellant says in his witness statement about having split his holiday period when in the army between the appellant and his family with his first wife, at 6.1 of the screening interview the appellant said that "when on leave stayed [with] wife's parents" giving an address in "Asmera." That is consistent with what he said in answer to question 10 of the asylum interview about where his children from his first wife lived.

35. Even if it could be said that the judge ought to have referred to these further aspects of the screening and asylum interviews, I cannot see that his failure to have done so could have affected the outcome of the appeal in circumstances where the answers do not point unequivocally to the contention argued for by and on behalf of the appellant. That is aside from a consideration of the judge's assessment of the evidence overall.

36. At [13] the judge referred to the sponsor's evidence that the last time he saw the appellant was in 2009, and that this was before his imprisonment which was on 10 February 2010. The judge therefore concluded that the sponsor had not seen the appellant between early 2009 and his arrest on 10 February 2010. He then referred at [16] to the sponsor's divorce from the appellant's mother in 2001.

37. In the circumstances, the judge was entitled to conclude that the family unit that he had with his second wife and the appellant ended around the year 2000/2001, the sponsor not having seen the appellant for approximately a year prior to his arrest and taking into account that he divorced his second wife in 2001.

38. The judge accepted that the sponsor had carried on taking responsibility for the appellant, in terms of maintaining her and keeping contact with her, but concluded that the evidence did not establish that she was part of his family unit at the time he left Eritrea. The judge made a distinction between the appellant having had contact or access to the appellant and her having been part of his family unit, as distinct from the family unit the appellant had with his first wife and then three children.

39. This was a fact-sensitive enquiry in relation to which the judge reached conclusions that were open to him, taking into account the various features of the evidence.

40. As regards the judge's conclusions in relation to Article 8 of the ECHR, in the light of my conclusions as to there being no error of law in the judge's assessment of the circumstances in which the appellant and sponsor were separated, likewise the complaint in this respect insofar as it impacts on Article 8, has no merit. The judge did not conclude that the disruption to family life between the appellant and the sponsor was as a result of the sponsor having to flee the country to claim asylum. The judge concluded that the appellant was not part of his family unit in any event.

41. The judge noted that there was no dispute but that the appellant was not able to meet the requirements of the Article 8 Immigration Rules. He therefore went on to consider whether there was "anything exceptional" about the case. He did not conclude that the appellant would be able to continue family life "through electronic communications." The judge merely took into account that the appellant had the ability to maintain contact with the sponsor and his family in the UK.

42. Although the judge did not expressly state that he had had regard to the appellant's best interests, it is apparent that he did. He referred to the fact that the appellant lived with her mother until 2012 and is now living outside Eritrea and that the appellant is financing her. He noted that the appellant says that she is unhappy living where she is and wants to live with her father in the UK. He concluded however, that the claim that she would encounter psychological problems if she stayed where she was was not supported by any evidence. He referred at [22] to the appellant having lived with family friends, being supported by the sponsor. He

concluded that there was no evidence that she was at any risk and found that there was no reason why the present living arrangements could not continue. He noted that there was no evidence that there were any adverse effects on the appellant for not having seen the sponsor for about six years.

43. The determination would have been better for an explicit reference to "best interests", but the judge's reasoning shows that he took those best interests into account.

44. There is merit in the contention that the judge was wrong to take into account s.117B of the 2002 Act in terms of there being insufficient evidence as to the appellant's English language ability, that not being a matter under the Rules that she would have to establish. Similarly, the conclusion that there is insufficient evidence as to how she would be maintained and looked after in the UK is inconsistent with the judge's conclusion that the sponsor could continue financially to support her.

45. Nevertheless, the judge took into account the public interest and the appellant's present living arrangements which did not reveal any risk to her or anything other than the understandable desire to live in the UK with her father. A relevant factor in the proportionality assessment is the extent to which the appellant could meet the requirements of the Immigration Rules, it having been accepted that she was not able to do so.

46. I am satisfied that the judge's assessment of proportionality is free from an error of law. He was entitled to conclude that the respondent's decision would not amount to a disproportionate interference with the appellant's family life with the sponsor.

47. In conclusion therefore, I am not satisfied that there is any error of law in any respect in the judge's decision. The decision to dismiss the appeal under the Immigration Rules and under Article 8 of the ECHR therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision of the First-tier Tribunal to dismiss the appeal therefore stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 17/12/15