Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14842/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 3 October 2019	**On 16 October 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

R B A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S McTaggart, instructed by RP Crawford & Co Solicitors
For the Respondent: Mr A McVeety, Senior Presenting Officer

DECISION AND REASONS

1. I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellant and other parties to these proceedings. Any breach may lead to contempt proceedings.

2. The appellant, a citizen of Somalia born in 2002, has been granted permission to appeal the decision of First-tier Tribunal Judge Doyle who dismissed her appeal

against a refusal of entry clearance for family reunion under paragraph 319X of HC 395 on 10 October 2018 for reasons given in his decision dated 26 February 2019.

3. The judge heard evidence from the appellant's sister (the sponsor) who sponsored the application. He noted the claim that their parents had died (her father in 2006 and her mother in 2014). The appellant's sister had been recognised as a refugee in the United Kingdom and her husband, with whom she had been living in Ethiopia, had been granted leave to enter. It was conceded that the maintenance and accommodation requirements of paragraph 319X could not be met, but it was argued that the effect of the Secretary of State's decision was that the appellant would be abandoned as a vulnerable child living alone in Ethiopia.

4. The judge's findings included reference to the sponsor's circumstances in the United Kingdom where she relies on benefits as well as income based employment and support allowance. He observed that the appellant's stepmother continues to live in Somalia, her father having had two wives. The concession that the appellant could not meet the finance and accommodation requirements of the Rules was in the context of the sponsor having three children, with whom she lives in a two-bedroom property.

5. After setting out the provisions of paragraph 319X, the judge continued at [10(d)] of his decision:

> "10(d) The sponsor relies on benefits. She receives income-based employment and support allowance. From her small income she sends money to the appellant for the appellant's maintenance. The appellant and her brother-in-law live in rented accommodation in Addis Ababa. They have one room in a multiple occupancy house. There is a shared kitchen and shared bathroom there."

6. After directing himself as to authorities on paragraph 352D of the Immigration Rules the judge concluded at [11(g)]:

> "11(g) To meet the requirements of paragraph 309A of the rules the appellant would have to establish that the sponsor lived with them for at least 12 months immediately before the application. The application was submitted in July 2017. The sponsor and the appellant have been apart since August 2015. The sponsor left Somalia in October 2015 and arrived in the UK on 30 October 2015. The appellant cannot fall within the definition of "child" for the purposes of the immigration rules."

7. In relation to Article 8 the judge observed at [16]:

> "16. Article 8 family life exists because the appellant and sponsor are siblings and the appellant is only 16 years of age. Having made that finding, I run [sic] into some difficulty because of the lack of evidence of the quality of their family life. There is evidence that the appellant and sponsor are in regular contact. There is evidence that the appellant receives money each month from the sponsor. There is a bond of affection between the appellant and sponsor. On the evidence placed before me, that is the extent of the family life."

8. And further at [17] to [19] the judge observed:

> "17. The appellant has lived with her brother in law since December 2016. As a matter of choice, he is coming to join his wife and children in the UK. He might leave the appellant alone in Ethiopia, but the weight of reliable evidence tells me that she lives in a house with other members of her clan, and that there are community self-help groups willing to help the appellant in Ethiopia. The appellant's medical conditions are managed by oral medication. The appellant establishes that she suffers from (inter alia) epilepsy, but no reliable evidence is produced of the extent or the effect of the symptoms of her illnesses. I am asked to find that the appellant cannot care for herself independently, but there is no reliable evidence from which I can make that finding. The appellant described herself as a refugee in Ethiopia; it is not argued that she is in a precarious position there.
>
> 18. The appellant has accommodation and maintenance in Ethiopia. She has access to the medical care that she needs in Ethiopia. Although the appellant and sponsor emphasise the loss of their parents, the transcript of the sponsors asylum interview indicates that the appellant's father had two wives. One was the appellant's late mother. The other is the appellant's stepmother who remains in Somalia. It was that same stepmother who arranged and funded the sponsor's flight to the UK. That admincle of evidence tells me that there is help and support available to the appellant from her stepmother.
>
> 19. The appellant cannot speak English and is not financially independent. It is already conceded that there is not adequate maintenance and accommodation for the appellant in the UK. S117B of the 2002 Act tells me that immigration control is in the public interest. There are more s117B factors mitigating against the appellant than in her favour."

9. After directing himself in relation to *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 88 (IAC) the judge observed at [21]:

> "21. The appellant is in her mid-teens. She has accommodation and maintenance. She lives amongst her own clan. The respondent's decision does not change the way that family life has been exercised since October 2015. That family life can continue to be enjoyed is [sic] in the same way. The sponsor can continue to send money for the appellant's maintenance. The sponsor can visit the appellant in Ethiopia, as she did in February 2017."

Before concluding in [22]:

> "22. S.117B of the 2002 Act tells me that immigration control is in the public interest. There is insufficient reliable evidence before me of factors weighing against the public interest. Insofar as there may be article 8 family life between the sponsor and the appellant, I must give greater weight to the public interest in immigration control. Having done so I find that the decision is not a proportionate breach of the right to respect for family life."

10. The grounds of challenge include argument that the judge had failed to have regard to the best interests of the child and had irrationally reached conclusions regarding the support that the appellant would receive once her brother-in-law left. The judge had misdirected himself in relation to the balancing exercise.

11. In granting permission to appeal Judge Scott-Baker considered it arguable the judge had failed to have regard to the best interests of the appellant.

12. After hearing submissions from Mr McTaggart, Mr McVeety conceded error by the judge with particular reference to the medical evidence that was before him regarding the appellant's state of health. That evidence takes the form of a report from St Michael Clinic in Addis Ababa in which the findings are as follows:

> "She presented with complaints of headache, loss of sleep, syncopal attack, shortness of breath, and abnormal movement of her body of long time duration. The headache is unilateral and is preceded by an aura and sensation of nausea. She has chronic type of abnormal movement (seizur) [sic]. It is followed by loss of consciousness and incontinence of urine and biting of her tongue. She is diagnosed to have Migrain, headaches, Epilepsy, IHD (Ischemic heart disease) and Syncopal attack, was on a follow-up and was taking Isosorbiddinitrate 25 mg P.O. daily, Ergotamine tab 2 daily, Phenobarbitone 100 mg P.O. daily, Diclofenac tabs PRN and Multi-vitamin tablets TID from April 25, 2017 till June 15, 2017 but showed no improvement. She is advised to continue her medication regularly, and have follow up every month in the medical centre. She needs MRI examination of the brain as well."

13. The basis of Mr McVeety's understandable concession was a failure by the judge to deal adequately with this medical evidence and to consider its impact on the appellant's best interests. It is difficult to tie the judge's conclusion that the appellant is able to manage her health difficulties by oral medication with the report from the physician Dr Teklu at St Michael's Clinic which identifies the absence of improvement in the appellant's health despite a regime of medication between April 25 and June 15 2017. It is clear that the appellant's medical condition is more serious than that identified by the judge.

14. Returning to the grounds of challenge, the extent of the best interests considerations can be found in [21] of the judge's decision. In effect the judge appeared to be saying that those best interests lay in the appellant remaining in Addis Ababa. It is also difficult to reconcile that conclusion, if it is correct, with the force of the medical evidence. A further concern arising out of the best interests consideration relates to the judge's approach to family life between the sponsor and the appellant. The characteristics and dynamic of that relationship are fully described in paragraph 16 and are strong indicators of family life. Nevertheless, in [22] when applying section 117B of the 2002 Act the judge simply observed that there "may" be Article 8 family life.

15. I am satisfied the judge materially erred by failing to take proper account of material evidence in reaching his findings and a failure to come to a consistent finding in respect of family life. Whilst I consider that those errors fall short of the irrationality

challenge raised in the second ground, I am nevertheless satisfied as to their materiality and that the decision is required to be set aside as a consequence.

16. The third ground relates to error by the judge in indicating that he must give greater weight to the public interest of immigration control. Although my initial view was that this may have been an error of expression, in the light of the other factors which I have identified above, in my judgment the judge took a wrong approach to the proportionality exercise on application of the aspects of Part 5A of the 2002 Act.

17. As to the disposal of this case, Mr McVeety recognises the force of the medical evidence and the need for the appellant to be adequately cared for. This feeds into her best interests and where they lie. In my judgment those best interests properly lie in being with the sponsor in the United Kingdom. Taking those interests as a primary consideration and in the light of the unchallenged medical evidence and the unchallenged finding by the judge of family life with the sponsor coupled with vague and uncertain evidence as to the support and accommodation that the appellant would be able to turn to within her clan, I am satisfied that interference with family life would be disproportionate to the public interest in maintaining immigration control.

18. Mr McVeety explained that as this was an entry clearance case he was unable to concede the appeal (but with commendable candour confirmed that he could informally do so). I am satisfied that Mr McVeety was correct in his approach not only as to error but also his stance in connection with the substance of this appeal which I allow on Article 8 grounds.

Signed Date 11 October 2019

UTJ Dawson
Upper Tribunal Judge Dawson