



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/03144/2014
OA/03137/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 6th July 2015

Decision & Reasons Promulgated
On 20th July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Nairobi

Appellant

and

Master Abdallah Ahmed Ali
Master Abdul Kadir Ahmed Ali
(no anonymity direction made)

Respondents

Representation:

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr Westmaas, Counsel instructed by City Legal Partnership

DECISION AND REASONS

1. The Respondents are both nationals of Somalia currently resident in Ethiopia. They are brothers who are now aged 15 and 14 respectively. On the 30th January 2015 the First-tier Tribunal (Judge R Sullivan) allowed their linked appeals against decisions to refuse them entry clearance to the UK with a view to settlement as the children of a person present and settled in the UK. The Entry Clearance Officer now has permission to appeal against the decision of the First-tier Tribunal¹.

¹ Permission was granted on the 19th March 2015 by First-tier Tribunal PJM Hollingworth

2. The boys had made applications to come to live in the UK with a Mr Ahmed Ali Hassan, whom they claimed to be their father. The applications were refused on the 4th February 2014 with reference to paragraph 297 of the Immigration Rules. The ECO considered there to be insufficient evidence to establish that the relationship was as claimed. Nor was it accepted that their mother had died in 2001, or that their claimed father had had sole responsibility for their upbringing. In a review dated 22nd April 2014 these decisions were maintained, and so the matter proceeded to the First-tier Tribunal.
3. The First-tier Tribunal was satisfied, on the evidence before it², that the Respondents are the biological sons of Mr Ahmed Ali Hassan. There is no challenge to that finding. It was further accepted and found as fact that their own mother had died in 2001; that finding is expressly accepted in the grounds of appeal. The First-tier Tribunal had heard and accepted evidence that Mr Ahmed Ali Hassan was a polygamist who had been married four times, with at least three of these marriages subsisting concurrently. The Respondents are the sons of his first wife, Mrs Nasro Yusuf Mahamud. When Ahmed Ali Hassan came to the UK in 2005 to live with his third wife, he had left his sons with his second wife, Mrs Bisharo Omar Hassan. She has been referred to throughout the appeals as their “stepmother”. The reason that he now seeks to bring them to the UK was because she is ill treating them and will not look after them properly. They are running away and living on the streets. Having heard all of that evidence the Tribunal allowed the appeals with reference to paragraph 297(i)(d) of the Rules:

“one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead”.

The determination does not go on to address whether the Respondents met the requirements of any alternative provision.

4. The Entry Clearance Officer now has permission to appeal on the ground that the Respondents cannot meet the requirements of sub-section 297(i)(a) because they have a ‘parent’ who is alive and well in Ethiopia, namely their “step-mother” Mrs Bisharo Omar Hassan. In paragraph 6 of the Rules the term “parent” is defined to include “step-parent”.
5. Mr Westmaas defended the decision. He pointed out that ECO had never raised the issue about Mrs Bisharo Omar Hassan being a “step-mother” and that this was a new point. The “step-mother” defined at paragraph 6 of the rules as a “parent” is operating in a completely different cultural context. Mrs Bisharo Omar Hassan is not a “step-mother” as we would understand it.

² This included a DNA report by Cellmark Diagnostics

My Findings

6. The relevant chronology is as follows:

- 1996 Sponsor marries wife #1, the mother of the Respondents Nasro Yusuf Mahamud
- 1997 Sponsor marries wife #2, Bisharo Omar Hassan
- 1999 First Respondent born
- 2000 Second Respondent born
- 2001 Sponsor marries wife #3
Wife #1, mother of Respondents, killed in mortar fire in Mogadishu
- 2003 Sponsor marries wife #4
- 2004 whole family move to Ethiopia
- 2005 Sponsor and wife #3 (who is a British citizen) come to live in the UK

Children of wife #1 (the Respondents), wife #2 and wife #4 all remain in Ethiopia in the household of wife #2. Sponsor supports them from the UK.

7. Paragraph 297 provides that a child can be admitted to the UK for settlement in one of the following circumstances:

- (a) both parents are present and settled in the United Kingdom; or
- (b) both parents are being admitted on the same occasion for settlement; or
- (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
- (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
- (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
- (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care;

8. Paragraph 6 of the Immigration Rules defines the term parent to include:
- (a) the stepfather of a child whose father is dead and the reference to stepfather includes a relationship arising through civil partnership;
 - (b) the stepmother of a child whose mother is dead and the reference to stepmother includes a relationship arising through civil partnership and;
 - (c) the father as well as the mother of an illegitimate child where he is proved to be the father;
 - (d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under paragraphs 297-303);
 - (e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child.
9. In closing submissions Mr Clarke accepted that the Rules had to be read in a purposive way and that where possible they should be interpreted as compliant with Article 8, and indeed s55 of the Borders, Citizenship and Immigration Act 2009: Laurent wa Mundebe (s.55 and para 297(i)(f)) [2013] UKUT 000888 (IAC). Nevertheless it remained the ECO's position that Bisharo Omar Hassan was the boys' stepmother as a matter of law. He submitted that she was validly married to their father under the law of Somalia and that the marriage was therefore considered legal in the UK, albeit not one that could be relied upon to gain entry under the Immigration Rules. Furthermore she is actually looking after them.
10. There are three reasons why this argument cannot, in my view succeed.
11. The first is that the ECO has produced no evidence at all to support Mr Clarke's bald assertion that the marriage between the Sponsor and Mrs Bisharo Omar Hassan would be considered "legally valid" in Somalia. Although polygamy has been practised over the years in Somalia I have been shown no evidence to establish that this second customary marriage was contracted in accordance with the civil code of Somalia. In *Islamic Family Law: A Global Resource Book* ed. An-Na'im, Abdullahi A. (London, 2002) it states that polygamy is permitted but that the husband must seek the written permission of the District Court before the marriage is contracted:

“the court’s authorization requires ascertainment of one of the following conditions: sterility of the wife of which the husband was not aware at the time of marriage, attested by a panel of doctors; incurable chronic or contagious illness of the wife, certified by a doctor; the wife’s sentencing to more than two years in prison; the wife’s unjustified absence from the matrimonial home for more than one year; or the existence of social necessity”

This short extract serves to illustrate the kind of hurdles that would need to be surmounted before the Sponsor’s second, third or indeed fourth marriages could be considered valid. In the absence of evidence I am not prepared to infer from customary practice that Bisharo Omar Hassan is, as a matter of *law*, the Respondents’ stepmother.

12. The second difficulty is that the evidence indicated that Mrs Bisharo Omar Hassan was *not* in fact looking after the Respondents. That was the whole point of them making these applications. The grounds complain that there was “no evidence” to support this “unsubstantiated allegation”, but in fact there was. The Judge had heard live evidence from the sponsor, which he had accepted in its entirety. The Sponsor expressed fear and concern about the welfare of his sons, stating that he was receiving “continuous” reports from friends and neighbours about the problems they were having, including the denial of accommodation and food by Mrs Hassan. This had been confirmed in writing by two different sets out neighbours of the Respondents in Ethiopia who had confirmed their concern that the children were being neglected.
13. The third is that the relationship between these boys and their father’s second wife is not one of “step-parent” as we would understand it. It is apparent from the admittedly non-exhaustive list at paragraph 6 of the Rules that polygamous relationships have not been included. One can imagine the consequences for the Rules if they were. It may be the case that in some families the relationship enjoyed by a child with his father’s second, third or fourth wife in a polygamous union is akin to that of a parent. That is not however the case here. If the relationship is not, in substance, a parental one, then it cannot properly be relied upon to defeat an otherwise meritorious application under the Rules.
14. For those reasons I dismiss this appeal. The decision of the First-tier Tribunal does not contain an error of law. I add for the sake of completeness that given the nature of the evidence accepted by the First-tier Tribunal the appeals could also have been allowed under paragraph 297(i)(f).

Decisions

15. The determination of the First-tier Tribunal does not contain an error of law and it is upheld.

16. I was not asked to make a direction for anonymity and on the facts I see no reason to make one.

Deputy Upper Tribunal Judge Bruce
14th July 2015

Fees

These appeals have been allowed, but largely on evidence that was not available to the ECO at the date of decision. The ECO did not have the benefit of the DNA evidence or the Sponsor' live testimony. For that reasons I make no fee award.

Deputy Upper Tribunal Judge Bruce
14th July 2015