



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/09082/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 7 January 2015**

**Determination issued
on 12 January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ZAINABU ABDALLA ALI

Appellant

and

ENTRY CLEARANCE OFFICER, KENYA

Respondent

DETERMINATION AND REASONS

1. The ECO refused entry clearance for reasons explained in a decision dated 18 January 2013. The appellant filed grounds of appeal to the First-tier Tribunal. First-tier Tribunal Judge Burns dismissed her appeal for reasons explained in his determination promulgated on 28 May 2014. The appellant filed grounds of appeal to the Upper Tribunal. The ECO filed a response to the grant of permission, dated 22 July 2014. The Upper Tribunal issued a note and directions on 27 October 2014. The case then came before me.
2. The sponsor is Mr A Kiedthy, the appellant's father. There is on file an e-mail from him dated 5 December 2014 asking if he may represent his daughter, because the previous representatives no longer act in the case and for financial reasons he has been unable to arrange other legal representation. He was present on 7 January 2015. Mrs M O'Brien, Senior Home Office Presenting Officer, appeared for the respondent.
3. In the circumstances, I told the sponsor that I would firstly hear the Presenting Officer's response to the Grounds of Appeal, and then give him the opportunity to make his submissions.

4. Mrs O'Brien pointed out that the judge found in favour of the appellant on the requirements of paragraph 297(i) of the Rules. The only outstanding issue in respect of the Rules was the refusal under paragraph 320(7A). She submitted further as follows. The judge correctly took the standard of proof to be the balance of probability, the authority being *Re B (Children)* [2008] UKHL 35, [2009] 1 AC 11. Although the ECO's decision referred to a higher standard, that was an error derived from following an out-of-date decision format. The refusal under paragraph 320(7A) was mandatory, so there was no error in the outcome under the Rules. As to Article 8, the appellant might query the finding at paragraph 44 that family life did not exist. However, the family life had consisted only of some financial support and very intermittent contact, the evidence before the First-tier Tribunal having been of only two visits over the years. The ECO's decision did not interfere with such family life as there was. Father and daughter did not appear ever to have lived together. Family life between appellant and sponsor having been minimal, any error on the point was immaterial. The Article 8 outcome would inevitably be the same, so the determination should stand.
5. The sponsor said that he has always been in contact with his daughter, and has given her full support over the years. He left Tanzania when she was aged 3. She was then living with her mother and not with him, but family circumstances were such that his financial support was needed. He has four children: a daughter aged 21 living in Kenya, the full sister of the appellant; the appellant; a half-sister of the appellant, aged 10, living with her mother in Scotland but not with the sponsor; and another half-sister aged 2½, living with the sponsor. The appellant and her half-siblings in this country have never met. The sponsor has sent contributions to his children in Kenya ever since he came to the UK. He visited in 2003, 2006, 2007, 2011 and 2013. He usually went for about three weeks, spending at least two of those weeks with the appellant, except in 2011 when he was able to spend only two days. He had produced records of school fees paid in the First-tier Tribunal. He had with him a further bundle of receipts for such payments.
6. Regarding the letter from Mr Ben Shapaye, the document questioned in the First-tier Tribunal, the sponsor had written to the Upper Tribunal on 11 December 2014. His letter says that he has been able to obtain confirmation from the Chief Administrator of the Coast Provincial General Hospital in Mombasa that Mr Ben Shapaye works there as a Registered Clinical Officer who is allowed to carry out limited medical procedures. The letter attaches a copy of that confirmation of the Chief Administrator by way of a printout as it was received by e-mail.
7. The attachment is a letter dated 8 December 2014 from Coast Provincial General Hospital, signed by the Chief Administrator. This states that Mr Ben Shapaye is a Registered Clinical Officer working in the Accident and Emergency Department: "Clinical Officers are legally allowed to do limited medical practice and perform certain specified minor surgical procedures. They are NOT allowed to use the title "Doctor" and are not allowed to write medical reports."

8. The sponsor said that this confirmed that Mr Ben Shapaye did exist and did work in the hospital. He had been unable to obtain such confirmation earlier because the previous Chief Administrator had been sacked and he had to wait until another took over. In the document relied upon in the First-tier Tribunal the author styled himself "Doctor Ben", but it should be taken into account that the use of language and of formal titles are not as strictly observed in a country such as Kenya. Individuals might refer to or call themselves "Doctors" even if not fully or formally qualified. The original letter was obtained by the sponsor through his sister. He insisted that it was genuine, and that the judge went wrong in finding it to be false. He wished his daughter to come to the UK, which would be a much better place for her.
9. In response Mrs O'Brien said that the letter now tendered was not admissible to show error of law in the First-tier Tribunal, and in any event it did not add significantly to the information which was before that Tribunal, which was entitled to conclude as it did.
10. I reserved my determination.
11. I make all possible allowance for the poor presentation of the appellant's case in the First-tier Tribunal and for the lack of legal representation in the Upper Tribunal.
12. The first ground of appeal is that the judge failed to apply the correct standard of proof, which was above the balance of probability.
13. The grounds cite *J v SSHD* [2012] SLT 162, where the Inner House relied on authorities predating *Re B (Children)*, in particular on *RP (Proof of forgery) Nigeria* [2006] UKAIT 86. The Court does not appear to have been referred to *Re B (Children)*, and gave no consideration to whether a Tribunal should apply a different standard when sitting in Scotland. Since *Re B (Children)* a Tribunal sitting in England and Wales should direct itself that there is only one civil standard of proof and that is the balance of probability (Lord Hoffman at paragraph 13, Baroness Hale of Richmond at paragraph 70). It would be impossible for decision makers and especially for ECO's to vary the standard according to whether any appeal against their decision might eventually come before a Tribunal sitting north or south of the border.
14. Whether the First-tier Tribunal (Immigration and Asylum Chamber), a United Kingdom Tribunal, when sitting in Scotland should apply a different standard of proof is a question upon which I am reluctant to opine without fully developed submissions. However, I tend to the view that the standard of proof does not vary by where that Tribunal sits. In the present case there is a significant further consideration. I do not think the judge can be said to have gone wrong when he applied exactly the standard of proof which the appellant invited him to apply, and which may well be the correct standard.
15. The second ground of appeal criticises the adverse credibility finding regarding the sponsor. Paragraph 10 of the grounds says that the FTT gave no reasons.

16. Difficulties the judge had with the oral and documentary evidence run together. It is conceivable that another judge might have found the sponsor to be a more reliable witness, and even that another judge might have found the document to be genuine in spite of its obvious shortcomings, bearing in mind the different standards to be expected in a third world country. However, it cannot be said that the determination does not give reasons. At paragraph 41 the judge notes that the appellant and sponsor sat back regarding the issue of the challenged document of which they were on notice. He found that the sponsor's explanations were unconvincing and contradicted those resulting from enquiries made by the High Commission. The judge had the advantage of hearing the sponsor's evidence and found him "too quick to answer a question with another question, or to ignore the question put, and to seek to answer a question not put". The judge's conclusions, based on the oral as well as the documentary evidence, should not be lightly interfered with. I find that the conclusion reached was open to the judge, that intelligible reasons are given, and that they are legally adequate to explain to the appellant why the evidence was found to fall short on the balance of probability.
17. The third ground is that paragraph 320(7A) of the Rules is itself unfair. As Counsel for the appellant acknowledged at the stage when she had the advantage of representation this sets a very high target, aiming to show that the Secretary of State has gone beyond her powers by creating a Rule which is contrary to fairness and to natural justice. I am unable on the basis of this undeveloped ground of appeal to arrive at such a far-reaching finding.
18. As to Article 8, the judge may have gone too far by finding that family life did not exist. However, for the reasons given by the Presenting Officer the outcome based on proportionality outwith the Rules was not at all likely have been any different. The decision does not interfere with such limited family life as there has been almost throughout the appellant's childhood, up to the date of the adverse decision, made shortly before she became an adult. If the appellant were to remove from Kenya to the UK she would be leaving her mother and older sister with whom she has spent all her life to live with the sponsor whom she has seen only for short periods at intervals of several years. It could not realistically be said that the outcome is a disproportionate interference with the family life interests of either the appellant or the sponsor.
19. The determination of the First-tier Tribunal shall stand. No anonymity direction has been requested or made.



9 January 2015
Upper Tribunal Judge Macleman