



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/19717/2019(V)
HU/19258/2019(V)
HU/19263/2019(V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
Remotely by Microsoft Teams
On the 27th May 2021

Decision & Reasons Promulgated
On the 22nd June 2021

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

FATIMA ABDIRAHIM ABUBAKAR SHEIKH
ABUBAKAR ABDIRAHIM ABUBAKAR SHEIKH
AISHA ABDIRAHIM ABUBAKER SHEIKH

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr B Malik instructed by Terence Ray Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Somalia and are siblings. They were born respectively on 4 November 2003, 18 October 2002 and 17 October 2001.
2. On 18 August 2019, each of the appellants made an application for entry clearance under para 297 of the Immigration Rules (HC 395 as amended) to join the sponsor,

Abdirahim Abubakar Sheikey, their father in the United Kingdom. The sponsor had come to the UK in 2004 and had been granted refugee status. He subsequently became a British citizen.

3. The appellants had remained in Somalia after the sponsor came to the UK but left Somalia to live in Yemen in or around 2008–2010. They moved to Malaysia in or around 2016. At the date of the applications, the appellants resided in Malaysia with their mother (the sponsor's wife).
4. In addition to the sponsor living in the UK, the appellants claimed that their brother, Ahmed Abdirahim Abocar, lived in the UK having been granted indefinite leave to remain as a refugee in 2020.
5. On 31 October 2019, the ECO refused each of the appellants' applications for entry clearance under para 297 and under Art 8 of the ECHR. As regards para 297, the ECO was not satisfied that the sponsor had "sole responsibility" for the appellants under para 297(i)(e) or that there were "serious and compelling family or other considerations" which made their exclusion undesirable under para 297(i)(f). Further, the ECO was not satisfied that the appellants met the maintenance requirement in para 297(v) on the basis of the sponsor's income.
6. The appellants appealed to the First-tier Tribunal. In a decision sent on 5 January 2021, Judge Richard Wood dismissed each of the appellants' appeals. Before the judge, the appellants relied both upon the income of the sponsor and also of their claimed brother. Judge Wood accepted that Mr Abocar was, in fact, the appellants' brother and the son of the sponsor and his wife. Nevertheless, the judge was not satisfied that, even taking both their incomes into account, they were sufficient to meet the maintenance requirement in para 297(v). In addition, although accepting that the appellants enjoyed family life with the sponsor in the UK, having regard to all the circumstances including that the maintenance requirement was not met, the judge found that the appellants' exclusion, by the refusal of entry clearance to each of them, was not disproportionate and dismissed the appeals under Art 8 of the ECHR.
7. The appellants sought permission to appeal to the Upper Tribunal. The grounds challenge the judge's adverse finding under Art 8 and, in particular his finding that the appellants could not meet the maintenance requirements of the Rules because the judge had not been referred to, and therefore had not taken into account, the Secretary of State's policy during the COVID-19 crisis that if an individual experienced a loss of income due to Coronavirus up to 31 May 2020, then their employment income for the period immediately before the loss of income would be considered, provided the minimum income requirement was met for at least six months immediately before the date of income was lost,. The grounds contend that as this policy was not drawn to the judge's attention by the respondent there was a procedural irregularity which made the proceedings procedurally unfair and unsustainable applying the approach in BH (policies/information: SoS's duties) Iraq [2020] UKUT 00189 (IAC).

8. On 10 February 2021, the First-tier Tribunal (Judge O'Brien) granted the appellants permission to appeal, in particular on the basis of procedural irregularity following BH.
9. Following directions by the Upper Tribunal, the appeal was listed at the Cardiff Civil Justice Centre for a remote hearing by Microsoft Teams. The appellants were represented by Mr Malik and the respondent by Mr Diwnycz.
10. Having heard Mr Malik's submissions Mr Diwnycz conceded that the judge had erred in law, applying BH, in that he had not been referred to (and therefore applied) the respondent's policy concerning income during the COVID-19 crisis. The point being, of course, that the income of the sponsor (and the appellants' brother in the UK) while not meeting the maintenance Rules as such, as a result of the COVID-19 crisis, should have been considered on the basis of the policy taking into account income in the six month period prior to 31 May 2020.
11. Mr Diwnycz conceded that the judge's decision should be set aside and a *de novo* rehearing take place on remittal to the First-tier Tribunal.
12. Mr Diwnycz accepted, on the invitation of Mr Malik, that the judge's finding that Mr Abocar is the appellants' brother and the son of the sponsor and his wife should be preserved as this finding was wholly unaffected by any legal error.
13. Mr Malik indicated that, with that finding preserved, he did not object to the appeal being remitted to the First-tier Tribunal and he accepted that there needed to be a full-rehearing with evidence given by witnesses, such as the sponsor and appellants' brother living in the UK.
14. I accept Mr Diwnycz's concession that the First-tier Tribunal erred in law through procedural unfairness because the relevant policy concerning the assessment of maintenance during the COVID-19 crisis was not drawn to its attention and applied by the judge. I also accept that the issue of maintenance was an integral part of the assessment, outside the Rules, whether the appellants' exclusion (by the refusal of entry clearance to each of them) was proportionate and that, therefore, none of the judge's findings in that regard can stand. I accept, however, that the judge's finding that Mr Abocar is the appellants' brother and son of the sponsor and his wife should be preserved at the rehearing of the appeal.

Decision

15. For the above reasons, the decision of the First-tier Tribunal to dismiss each of the appellants' appeals involved the making of an error of law. That decision cannot stand and is set aside.
16. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Hone.

17. The only preserved fact is that Mr Abocar is the brother of the appellants and the son of the sponsor and his wife.

Signed

Andrew Grubb

Judge of the Upper Tribunal
3 June 2021