



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/07527/2012
OA/07528/2012

THE IMMIGRATION ACTS

Heard at Field House
On 30 October 2013

Determination Promulgated
On 26 November 2013

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

MR ADAN MOHAMED GAMADID
MR AHMED ABDIRAHMAN FARAH
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr K Norton, Presenting Officer
For the Respondents: Ms G Loughran of Counsel

DETERMINATION AND REASONS

1. In this determination the parties are hereafter referred to as they were before the First-tier Tribunal so that Mr Gamadid and Mr Farah are known as the appellants and the Entry Clearance Officer Nairobi is referred to as the respondent.

2. The appellants appealed the respondent's decisions made on 21 March 2012 under paragraph 319V of HC 395 to refuse them leave to enter the United Kingdom as the dependent relatives of a person with leave to remain here as a refugee.
3. The judge hearing the appeals dismissed both appeals under the Immigration Rules but allowed them on human rights grounds. The respondent sought permission to appeal and in granting that permission the judge doing so stated at paragraph 2 that the grounds for permission contend that the judge erred in his Article 8 assessment as follows:
 - (1) by materially misdirecting himself in law, essentially in that he "had no regard at all to the relevant sections of the Immigration Rules" thus rendering his decision "incomplete and also unsustainable as it failed to consider a key element in the assessment of this case"; and
 - (2) by failing to give reasons or adequate reasons for findings on material matters, namely

"why it would be in their sister's best interests to live in accommodation with them that is not suitable for so many people and why it would benefit her to live in conditions where the family will struggle to maintain everyone without further recourse to public funds"

and furthermore why it was disproportionate in those circumstances to prevent the appellants' entry.
4. The judge granting permission found no arguable merit in ground 1 given that it was common ground that the appellants could not succeed under the "Article 8 sections" of the Rules and given that the judge evidently gave weight to that at paragraph 29 of the determination. However, it was found arguable that the judge's proportionality assessment was inadequately reasoned in all the circumstances. The judge granting permission ventured to add the observation with reference to paragraph 30 of the determination that the Article 8 proportionality balancing exercise remains a hard edged legal assessment and not simply an exercise in sympathy or compassion.

The arguments before me

5. In oral submissions Mr Norton stated that the facts were correctly identified by the judge but were not exceptional or even rare. The Immigration Rules are now a complete code, subject to the proportionality test and it is unclear from the determination why the judge found the balance to be so firmly in favour of the appellants.
6. Miss Loughran submitted that it is clear from **MF (Nigeria) [2013] EWCA Civ 1192** that there is still a two-stage test involved. The First-tier Judge reasoned why the appellants could not meet the relevant paragraph in the Immigration Rules and went on to consider the second stage. The task that the judge had to undertake is clearly set out in paragraph 29 of the determination and conclusions were reached in

paragraph 30. The judge did not focus on the compassionate circumstances to base his decision. Where the judge referred to compassionate circumstances was in relation to his findings of fact under paragraph 319 of the Rules. The judge gave adequate reasons why he concluded as he did and identified the public interest involved.

7. In Mr Norton's final submissions he said that the appeal had to be looked at with a certain degree of pragmatism. There was no suitable accommodation. The appellants would be relying on third party support.

Decision

8. The appellants are citizens of Somalia. The first appellant was born on 31 December 1992. The date of birth of the second appellant is given as 1 January 1990. The sponsor suffered persecution in Somalia and fled to the United Kingdom in 2006, claimed asylum, and was granted refugee status on 18 May 2011 following a successful appeal. When the sponsor came to the United Kingdom she left behind her husband, her daughter and the two appellants. All the family members moved to a refugee camp on the Kenya/Somalia border and later to Nairobi. Contact was re-established between the sponsor and her family. All applied for leave to enter the United Kingdom and all of the applications were refused initially by the respondent. However, following the lodgement of the appeals the respondent reconsidered the applications and withdrew the decisions in respect of the sponsor's husband and daughter who arrived in the United Kingdom on 27 December 2012 leaving the appellants behind in Kenya. The refusal decisions in respect of the appellants were maintained.
9. The determination of the First-tier Tribunal Judge is balanced and fully reasoned. The judge found that the second-named appellant is severely disabled having fallen victim to poliomyelitis at the age of 9 and has since then suffered paralysis from the waist down. The first appellant is his carer and there is little doubt from the description given by the judge that they are living in extremely basic accommodation in Nairobi. The judge found at paragraph 14 that the appellants are to be regarded as living alone, having considered the case of **KC and Others [2007] EWCA Civ 327**. Their circumstances in Kenya are such as led him to the view that those circumstances are most compassionate. If the appellants were to meet the requirements of the Rules then they needed to show that there was adequate maintenance and accommodation available without recourse to public funds. Having heard the evidence the judge found that the proposals with regard to both matters did not bear the hallmarks of practicality and concluded that the appellants failed to establish to the relevant standard of proof that they could be adequately maintained and accommodated in the United Kingdom without recourse to public funds.
10. The remainder of the determination deals in some depth with the Article 8 position of the appellants and their family members who are now all in the United Kingdom. The judge's reasoning for finding that it would be disproportionate to refuse the

appellants entry clearance to the United Kingdom is set out in paragraph 29 of the determination. He acknowledges that there is a balance to be struck and that there is a public interest to be served by not allowing the appellants to enter. That interest in part relates to the maintenance of a fair and firm system of immigration control and the judge acknowledges that the appellants do not meet the requirements of the Immigration Rules. He further acknowledges that the second appellant's disability would undoubtedly incur significant extra expense for the National Health Service and other agencies and there is no reasonable prospect that those expenses could be recouped.

11. His conclusions concerning accommodation and maintenance strongly suggest that if the appellants are allowed to come to the United Kingdom there would be additional recourse to public funds also. Nevertheless taking the circumstances of the appellants and the other members of the family in the round he is of the view that they are of such a compassionate nature as to outweigh the public interest that would be served by their continued exclusion. The respondent argues with the judge's conclusions and reasons for coming to them but on the particular facts of the case the judge was entitled to conclude as he did and no error has been displayed such that the determination should be set aside.
12. As I announced at the hearing the decision of the First-tier Tribunal Judge stands, namely that both appeals are allowed on human rights grounds.
13. No application for an anonymity direction was made and for the reasons as set out in paragraph 1 of the determination I see no good reason to make an anonymity direction now.

Signed

Date

Upper Tribunal Judge Pinkerton