



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

Appeal Number: HU/12392/2017

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 21st February 2019**

**Decision & Reasons
Promulgated
On 5th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

**MS ADAR MOHAMED HUSSEIN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Agata Patyna (Counsel)

For the Respondent: Mr Chris Howells (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Lebaschi, promulgated on 29th August 2018, following a hearing at Columbus House in Newport on 28th July 2018. In the determination, the judge allowed the appeal of the Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Somalia, was born on 15th March 1953, and is a female. She appealed against the decision of the Respondent, dated 30th September 2017, refusing her application for entry clearance to the UK on the basis of her family life with her daughter, Sahra [A].

The Appellant's Claim

3. The Appellant's claim is that she is 65 years of age, has a family life with her sponsoring daughter, which can be described as "exceptional"; has no other family life independent of her daughter; and the Appellant's daughter in the UK cannot relocate to Ethiopia to care for her mother, because she has no right of residence there.

The Judge's Findings

4. The judge observed how the documentary evidence, presented on behalf of the Appellant, was not challenged at the hearing by the Presenting Officer (paragraph 17). The Appellant's sponsoring daughter in the UK, had been brought up by her aunt, who took her away when she was 3 years of age because of the war in Somalia, until much later when the sponsoring daughter overheard the aunt talking to two other women about the circumstances in which the sponsoring daughter had been taken away, such that it was only then that she realised, that she had a mother who was now living in Ethiopia. This is important because "the history of Ms [A]'s relationship with her mother and how they came to be reunited was not challenged" by the Presenting Officer at the hearing (see paragraph 20).
5. This history was that the sponsoring daughter, Ms [A], at the age of 18 years, in 2014, went in search of her mother. After two months of searching she travelled to the border of Ethiopia and found her mother working for a family there who gave her refuge in return for her looking after their animals (paragraph 19). It is this that made the relationship between mother and sponsoring daughter so "exceptional".
6. Thereafter, the sponsoring daughter set about finding ways in which she could provide some security and stability for her mother. She decided it was not safe to take her back to Somalia. She therefore took her to Ethiopia where she found a woman who agreed to look after her mother for regular payment. The sponsoring daughter, Ms [A], sent money on a regular basis for three years thereafter. However, she then discovered that the woman, in whose care the Appellant was staying, was keeping the money for herself, and not spending it on her mother.
7. Ms [A], the daughter, then made further alternative arrangements for the mother to be looked after by somebody else until March 2017. That other person left Ethiopia and that is why the arrangement ended in March 2017. The judge observed that "since that time the Appellant has been

sharing a house with a Somali family in Ethiopia and Ms [A] has been sending money to her, so she could pay for her life and expenses". The judge went on to say that, "I find Ms [A] did what she could in relation to her mother's living arrangements after they were reunited in 2014. I also accept she has been making regular payments to support her mother in Ethiopia" (paragraph 21).

8. In terms of the medical condition of the Appellant, the judge noted that there was a medical certificate from the Hayat Hospital, dated 21st April 2017, and this suggested that the Appellant had Type 2 diabetes (paragraph 23). There was evidence before the judge that the Appellant needs help in looking after herself, but there was no medical evidence to this effect (paragraph 24). The judge also held that there was no objective evidence about the systems of health or social care in Ethiopia before the Tribunal (paragraph 25). There was a medical report from Dr Teklu, but the judge concluded that this report was "of limited assistance" because he had only met the Appellant on two occasions before writing the report (paragraph 25).
9. The appeal was allowed on the basis that "the continued separation of the Appellant from her daughter has a special impact and the circumstances justify a finding that this is an exceptional case". This is because Ms [A] "was separated from her mother at a very young age and for many years she believed her mother had willingly given her into the care of her aunt", and it was only after Ms [A]'s discovery that "she was essentially abducted and had not been told the truth about what happened" that she realised what had happened and this "had a very significant impact on her and resulted in her becoming estranged from the only family she had knowledge of up until that point" (paragraph 29).
10. The appeal was allowed.

Grounds of Application

11. The grounds of application state that the judge had wrongly utilised Article 8 ECHR as a general dispensing power, substituting this power for the Rules, once it was found that the Appellant could not satisfy the Rules. This devalued the public interest in maintaining a fair and just system of immigration control.
12. On 11th December 2018, the Upper Tribunal granted permission to appeal.

Submissions

13. At the hearing before me on 21st February 2019, Mr Howells, appearing on behalf of the Respondent Secretary of State, argued that the Appellant had not produced evidence of long term medical care needs. The judge allowed the Appellant's appeal "outside the Immigration Rules" on the basis that this was an "exceptional" case. However, in doing so, the judge did not consider the proportionality balancing exercise, because this

required a consideration of the Section 117B public interest in favour of immigration control.

14. Second, this was of added importance, given that the judge had observed that the Appellant did not speak English, and despite the fact that the judge observed that “there is a real possibility, given her age, she will require potential significant levels of healthcare and thus become a burden on UK taxpayers” (paragraph 27).
15. For her part, Ms Patyna submitted that the judge had not ignored the Section 117B considerations at all. But the fact remained, she submitted, that the relationship was absolutely crucial to the finding of family life in this case. The judge did refer to all the factors. Consideration was given to Section 117B, as it was to the Immigration Rules, and so there could be no error of law. Long established authority, such as in the case of **Marcx v Belgium**, established that there would be “interference” in family life, if it is not allowed to develop normally.
16. In reply, Mr Howells submitted that, although the judge had considered the Section 117B factors at paragraph 27 of the determination, when alluding to the fact that the Appellant did not speak English, and would potentially require significant levels of healthcare, this was not factored into the findings of fact eventually made at paragraph 29 of the determination.

No Error of Law

17. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows. The facts of this case are uncontested. When the sponsoring daughter was a young child, her aunt clandestinely took her away from the Appellant, because of the strife in Somalia, moving together to Ethiopia, and then eventually settling in the UK. The sponsoring daughter had always been led to believe that her mother had given up on her, and only found out the truth in 2009. At that stage, the sponsoring daughter immediately embarked upon a search for her mother and eventually found her living on the border with Ethiopia in 2014. She has since then been supporting her mother both financially and emotionally. None of this is in contention.
18. The Secretary of State challenges the decision of the judge on the basis that Article 8 ECHR was used as a “general dispensing power” once it had been found that the Appellant could not succeed under the Immigration Rules. In putting such an argument, one must be careful not to imply that just because an appeal fails under the Immigration Rules, it is bound also to fall under freestanding Article 8 jurisprudence, because with regard to the latter, there has to be a proportionality assessment carried out.
19. In this case, the judge’s finding that family life existed between the Appellant and her sponsoring daughter in the UK, is unchallenged. The

judge applied the principles in **Kugathas [2003] EWCA Civ 31**, in that the relationship between the two adults was one of dependency that involved more than normal emotional ties. That decision is set out at paragraph 26 of the determination.

20. Thereafter, the judge presented a structured approach to the determination of the issues before him. It is true, as Mr Howells submits, that the Section 117B considerations were set out at paragraph 27. However, after that the judge went on to say that “the remaining issues to be considered are whether the decision is necessary and proportionate” and in that regard made reference to the well-known decision in **Huang [2007] UKHL 11**, even observing that decisions taken in the pursuit of lawful operation of immigration control will be proportionate in the majority of cases (paragraph 28).
21. The crux of the decision, however, then fell to be made at paragraph 29, where the judge observed that “it is necessary to be sensitive to the facts of this case”. Given the unchallenged factual background to the family life between the Appellant and her sponsoring daughter, the judge concluded that “the continued separation of the Appellant from her daughter has a special impact” on both of them. As far as the sponsoring daughter was concerned, “she has done all she can to support her mother from a long distance, but this has been challenging and Ms [A] clearly finds the continued separation from the Appellant very difficult”.
22. It is on this basis that the judge concludes that the circumstances here are “exceptional”. It is also on this basis that the judge concludes that the two of them, between them, “are effectively the only family each other has” (paragraph 29). It would have been otherwise if the judge had neglected to mention the Appellant’s inability to speak English and to support herself.
23. But these public interest considerations were expressly mentioned. It was then concluded that the Respondent Secretary of State had accepted that the financial requirements under the Rules were satisfied. The judge himself was satisfied that the Appellant’s daughter had the means to provide for the Appellant.
24. Consideration was properly given to the fact that the Appellant was likely to require healthcare in the future. However, given the “exceptional” nature of the facts, the judge concluded that the appeal fell to be allowed. In terms of the well established Rule in **R (Iran) [1985]**, there is nothing here to suggest that the decision is “perverse” or “irrational”, and the decision stands.

Notice of Decision

25. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

26. No anonymity direction is made.

27. The appeal of the Secretary of State is refused.

Signed

Date

Deputy Upper Tribunal Judge Juss

3rd April 2019