Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/04307/2019
HU/04309/2019

THE IMMIGRATION ACTS

Heard at Birmingham CJC
Parties appeared remotely by Microsoft Teams
On 6th July 2021

Decision & Reasons Promulgated
On 26th July 2021

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MM (1)
MKD (2)
(Anonymity Direction Made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Smith, instructed by Paragon Law
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

Anonymity

An anonymity direction was made by the First-tier Tribunal ("FtT"). As the appellants are minors it is appropriate that a direction is made. Unless and until a Tribunal or Court directs otherwise, the appellants are granted anonymity. No report of these

proceedings shall directly or indirectly identify them or any member of their family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

1. The hearing before me on 6th July 2021 took the form of a remote hearing using Microsoft Teams. Neither party objected. I sat at the Birmingham Civil Justice Centre. The sponsor, who I shall refer to as SK, joined the hearing remotely. In proceeding with a remote hearing I was satisfied: no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied the parties have been able to participate fully in the proceedings.

2. The appellants are both nationals of Eritrea. The first appellant was born on 1st January 2012 and is now nine years old. The second appellant was born on 1st October 2002 and is now eighteen years old. They are sisters. On 7th November 2018, they applied for entry clearance for settlement under the 'Family Reunion' provisions set out in Part 11 of the Immigration Rules. The seek to join their brother, SK, in the United Kingdom. SK arrived in the UK on or about 15th March 2017. Their applications were refused for reasons set out in two separate decisions dated 18th January 2019. The respondent noted there is no evidence contained within the application to demonstrate the appellants formed part of the 'pre-flight family' of SK, or that they have ever met SK in person. The respondent noted SK fled Eritrea in November 2014 due to military roundups. The respondent was unable to ascertain who had looked after the appellants after SK left in 2014.

3. The appellants appealed the respondent's decisions, and the decisions were reviewed by an Entry Clearance Manager ("ECM") on 6th June 2019. The ECM

noted no supporting documents were submitted with the appeal. The ECM was satisfied that the original decisions were correct and lawful.

4. The appellants appeals were dismissed by First-tier Tribunal Judge Lodge for reasons set out in his decision promulgated on 22nd November 2019. The appellants grounds of appeal are set out in a Grounds of Appeal settled by Dr Chelvan and dated 18th December 2019. There is one ground of appeal. The appellants claim Judge Lodge erred in making findings of fact in respect of matters that had not been raised by the respondent and were not put to SK when he gave evidence. The appellants refer to the decision of the Court of Appeal in Maheshwaran [2002] EWCA Civ 173 to support the claim that a failure to put to a litigant a point which will count against them, results in material unfairness. The appellants claim SK was not given any opportunity to address concerns regarding his evidence and the decision of Judge Lodge is vitiated by procedural unfairness. Permission to appeal was granted by First-tier Tribunal Judge Swaney on 10th April 2020.

The decision of First-tier Tribunal Judge Lodge

5. SK was called to give evidence before the First-tier Tribunal. As set out at paragraph [7] of the decision, SK adopted his witness statements dated 31st October 2019 *(at page 1 to 7 of the appellants bundle)*, 26th October 2018 *(at page 145 to 149 of the appellants bundle)* and 22nd June 2019 *(at pages 158 to 168 of the appellants bundle)*. His oral evidence is summarised at paragraphs [8] to [12]. The Judge's findings and conclusions are set out at paragraphs [13] to [40] of the decision.

6. Judge Lodge found, at [13], that the appellants cannot meet the requirements of the Immigration Rules. Ms Smith, quite properly in my judgment, accepts that the appellants cannot meet the requirements for Family Reunion set out in Part 11 of the Immigration Rules. They gain no assistance from paragraph 352D of the Immigration Rules because they are not seeking leave to enter to join a parent who currently has refugee status. At paragraph [16], Judge Lodge summarised the appellants case in the following way:

> "… The appellants case is that the sponsor left Eritrea in 2014. His father died when he was one and a half years of age. His mother left Eritrea in 2013 to go and work in Saudi Arabia. The appellants were kidnapped in March 2018 "while travelling to a nearby village". They were released in South Sudan and sent to a woman named Byenesh (who used to live in their village) who had relocated to Kampala in Uganda. Fellow Eritreans in Juba sent them by bus to meet Byenesh and at the present time, they are in Kampala."

7. Having summarised the claim, Judge Lodge went on to consider the claim made. At paragraph [18] of his decision Judge Lodge refers to a lack of evidence to support the claim that the appellant's father passed away. However, he states; "*I am prepared to accept that this is the case and I will consider the appellant's case on the basis that their father is not on the scene*".

8. He then turned to consider the claims made regarding the appellants' mother. The appellants claim that she left them in 2013. At paragraph [19], Judge Lodge refers to the evidence before the Tribunal as to when SK last had contact with his mother, and the respective ages of the appellants and SK at that time. Judge Lodge said, at [19]:

> "… On the face of it, it is extraordinary that a mother would leave such young children. She did not leave them in the care of relatives but left them to look after themselves; there was some input once a week from an aunt (presumably a sister of the mother)"

9. At paragraph [20], Judge Lodge referred to the claim that the appellant's mother went to Saudi Arabia to work. He noted there was no evidence or even a suggestion that she ever sent any money back for the care of her children. He also referred to the claim that the appellants mother had to leave Eritrea because she had been raped. He found, at [21], that it is hard to believe that her own family would, in the circumstances, ostracise her. He noted the appellants mother appears to have had the fortitude and courage to take the matter to court, although it was not clear what the outcome of any proceedings was. At paragraph [22], Judge Lodge said it is odd that the first appellant's father is named on her birth certificate, noting also that SK describes in his evidence, how the first appellant's father had visited her on two or three occasions after her mother left for Saudi Arabia. That is plainly a reference to the evidence set out in paragraph [10] of the witness

statement of SK dated 31st October 2019. At paragraph [24] of his decision, Judge Lodge refers to the evidence set out at paragraph [4] of the witness statement of SK dated 26th October 2018, noting the claim that once a week, a maternal aunt would come from Mendefera, to help SK look after his sisters. At paragraph [25], Judge Lodge said that none of the clams made by the appellants has a ring of truth about it. He rejected the claim that the appellants mother would have left the children by themselves with the minimal input of an adult who lived some distance away.

10. At paragraph [26], Judge Lodge considers the claim made by SK that he did not have a good relationship with his paternal uncles. He contrasted that claim made in the witness statement, against the claim made by SK in his own asylum interview that his paternal uncle had paid $7000 to help him escape Eritrea, and his claim in his witness statement, of the $100 per month sent by his uncle when SK was in Khartoum.

11. At paragraphs [27] to [35], Judge Lodge considered the account relied upon regarding the last time the appellants and SK spoke to their mother, and SK's decision to leave Eritrea himself. He also considered the appellants account of their kidnap and how they were subsequently released in South Sudan and found their way to Kampala, Uganda. Judge Lodge accepted the appellants are in Uganda, but said, at [36], that he was satisfied that the whole story of how they got there, is concocted. He was not satisfied the appellants have established, on balance, that they do not have the support of their mother and indeed their wider family. He said; "their account is implausible from beginning to end". At paragraph [37], Judge Lodge refers to the effort and resources that have been put into assisting the appellants with their applications for entry clearance. At paragraphs [38] an [39] he concluded:

> "38. I am satisfied the appellants have not established that they are not in contact with their mother and with other family members. They are safe in Uganda. I have no reliable evidence that that is not the case. I am not satisfied it is not in their best interests to remain in Uganda. I have no evidence that they are not fit and healthy. I have not been provided with any medical evidence to contradict that.

> 39. I cannot see that it is in their best interests to come to the UK, even if their brother is in the UK, to be placed into care. The sponsor is not in a position to look after them. He is in care himself. There is a letter from a social worker, Miss Shepherd which advances the sponsor's case that he be reunited with his sisters. On my findings however he did not have a key role in caring for his siblings, his sisters were not kidnapped, and it has not been established his mother is not playing a role in their lives. I am not prepared to find that it is his best interests to have them with him.

The appeal before me

12. Before me, Ms Smith submits that at paragraphs [19] to [37] of his decision, Judge Lodge makes adverse findings based upon matters that were not raised by the respondent in the decisions refusing the applications for entry clearance or raised by the Presenting Officer or the Judge at the hearing of the appeals. She submits the sponsor was given no opportunity to address any concerns the Judge had, and that had those concerns been raised, they could have been addressed.

13. Ms Smith submits that at paragraph [19], Judge Lodge considered it to be extraordinary that the appellant's mother would leave such young children to look after themselves, with some limited input, once a week from an aunt. She submits the respondent had not claimed that it was extraordinary that the appellant's mother would leave such young children. She refers to the statement of SK dated 24th June 2021, who states, at paragraphs [6] and [7], that he cannot recall whether he was asked about that during the hearing, but if he had been asked, he would have provided the explanation set out regarding the circumstances that the family found itself in, and the fact that children are often left alone in African countries.

14. Similarly, Ms Smith submits that at paragraph [22], the Judge concluded that it seems that MM's father accepted some responsibility for her. She submits this too, was an issue that had not been raised by the respondent. She refers to the statement of SK dated 24th June 2021. He states, at paragraph [8] that he cannot recall whether he was asked to explain what role MM's father had in her day-to-day life , although he recalls telling his representative after the hearing that MM's father accepted MM as his daughter , but he wasn't looking after her or being responsible for her.

15. Ms Smith submits that at paragraph [26], Judge Lodge considered the evidence of SK set out in his witness statement that he did not have a good relationship with his parental uncles. In his statement dated 24th June 2021, SK explains, at paragraph [10], that he was not asked about his uncles, and so he did not elaborate. He states the paternal uncle who helped him escape Eritrea used to live in Juba and had lost his job so that he had to leave Juba and go to Ethiopia. That is why the appellants could not be supported by him and MKD had to beg on the streets.

16. Ms Smith also referred to paragraph [27] of the decision of Judge Lodge, in which he considered the evidence regarding a field owned by the appellant's mother. In his statement dated 24th June 2021, SK explains, at paragraph [11], that he was not asked about what had happened to the land, but if he had been asked he would have explained that there was no one there to grow crops, once their mother left, and once she had left, the land was given to someone they knew. Although they initially received ¼ share of the money made from crops grown, after SK fled Eritrea the government took the land, and it was given to other people who could plough the land and work on it properly.

17. Ms Smith submits that the majority of the reasons given by Judge Lodge concern aspects of the appellant's account that were not thought to be in issue or matters that SK was not given any opportunity to clarify during the course of the hearing. She referred me to the statement made by SK dated 24th June 2021 in which he identifies the matters that were not put to him and the explanations that he would have been able to provide. Ms Smith submits the entire premise of the application for entry clearance was 'family reunion' and Judge Lodge was required to consider whether the appellants have established a family life with SK. She submits there was much that could be said by the sponsor to address the concerns the Judge had, but he was not given an opportunity to address those concerns giving rise to procedural unfairness.

18. In reply, Mrs Aboni submits Judge Lodge properly directed himself and there was no procedural unfairness. It is common ground between the parties that the

appellants cannot meet the immigration rules. Mrs Aboni submits Judge Lodge properly engaged with the evidence given by SK in the various witness statements that he adopted, and Judge Lodge provides perfectly proper and adequate reasons for concluding that much of the account lacks credibility. She submits Judge Lodge gave adequate reasons for the conclusion that the appellants have failed to establish that they are not in contact with their mother and other family members. She submits it was open to Judge Lodge to find that the appellants are safe in Uganda and that it is in their best interests to remain in Uganda.

Discussion

19. The focus of the respondent's decisions was whether the appellants met the requirements for leave to enter under paragraph 352D of the Immigration Rules. The respondent noted at the outset that the appellants have applied to join their brother, SK, and so it was obvious from the outset that the applications could not succeed under paragraph 352D because the applicants are not the children of a parent who has been granted refugee status in the United Kingdom. Nevertheless, the respondent concluded that she was not satisfied that the appellants *"were part of the family unit of the person granted asylum at the time that the person granted asylum left the country of her (sic) habitual residence in order to seek leave as required by paragraph 352D(iv)"*. The respondent went on to conclude that there is no breach of Article 8 because in this case, any interference is justified for the purpose of maintaining an effective immigration control and is proportionate.

20. I have been provided with a witness statement from counsel that represented the appellants at the hearing before the First-tier Tribunal. She confirms that her contemporaneous record of the proceedings has been exhibited in redacted form, to a statement provided by Ms Melanie Vasselin dated 18th December 2019. I have also been provided with a statement made by Ms Melanie Vasselin, a Senior Caseworker at Paragon Law exhibiting a copy of the notes she received from counsel following the hearing before the First-tier Tribunal. She also exhibits a redacted copy of notes that she took during a telephone conversation with SK on

18th December 2019 with the assistance of an interpreter. Finally, I have in the papers before me a statement dated 24th June 2021 signed by SK in which he addresses the adverse conclusions reached by Judge Lodge.

21. For the sake of completeness, I also record that I have carefully read the three witness statements of SK that he adopted before the First-tier Tribunal. The first is dated 22nd June 2017 and pre-dates the applications for entry clearance made by the appellants. That statement sets out the background to the claim for international protection made by SK, his journey to the UK and the reasons he claims he is unable to return to Eritrea. The second statement is dated 26th October 2018 and was made in support of the appellant's application for entry clearance. The third is dated 31st October 2019 and is a response to the respondent's decisions to refuse the applications for entry clearance. At paragraphs [3] to [6] of that statement SK addresses the respondent's claim that there is no evidence that the appellants formed part of the same 'pre-flight family' as him, and that they had never met him in person. At paragraphs [7] to [11], SK addresses the respondent's concern that there is no evidence as to where his biological father is, and how the name of her father came to be on the birth certificate of MM. At paragraph [10] of his statement, SK refers to MM's father and recalls that he came to see MM two or three times after their mother left. He states, MM's father would only come to see MM briefly and he did not really spend time with her or take responsibility for her. At paragraph [14], SK explains the lack of evidence to establish that they lived together as a family. He also explains the role that he played in the appellants lives after their mother left. At paragraphs [16] to [37], SK describes the background to the claim that the appellants were kidnapped and abandoned in South Sudan, their journey to Kampala, the contact they maintain, and the appellants' current circumstances in Uganda.

22. I acknowledge that fairness is an essential component of the judicial process and that procedural fairness is an essential attribute of the judicial function. It is now well established that an individual has the right to prior notice of the case against

them and an effective opportunity to make representations before a decision is made. The respondent's decisions are incoherent, but it is clear the respondent had concerns about the appellants claims regarding their care since 2013, and the role played by their parents and their extended family.

23. The assessment of an Article 8 claim such as this is always a highly fact sensitive task. Judge Lodge was required to consider a number of factors. They include, whether the account is internally consistent and consistent with any other relevant information, and whether the account is plausible. The ingredients of the story, and the story as a whole, have to be considered by reference to the evidence available to the Tribunal. Judge Lodge was required to resolve what had happened in the past, and whether the decision to refuse entry clearance would be in breach of Article 8. A Judge of the First-tier Tribunal must act on all the relevant evidence before the Tribunal.

24. The appellants are not assisted by the decision of the Court of Appeal in Maheshwaran v SSHD. The Court of Appeal held that where an individual asserts a fact before the Tribunal which the SSHD did not challenge and the Judge did not raise with the individual any doubts as to the truthfulness of his assertion, the Judge was not obliged to accept the assertion as proved. Lord Justice Schiemann said:

> "3. Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given.

> 4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance — perhaps arising out of a post hearing decision of the higher courts — requires it. However, such cases will be rare.
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> 5.. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds.
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> 6. The requirements of fairness are very much conditioned by the facts of each case. This has been stressed in innumerable decisions …"

25. I have carefully considered the evidence set out in the witness statements that I have before me, and in my judgment the decision of First-tier Tribunal Judge Lodge is not vitiated by procedural unfairness. I do not accept the criticisms made by Ms Smith, or set out in the statement of SK. Upon a careful reading of the decision, it is in my judgment clear that at paragraphs [16] to [37] of his decision, Judge Lodge was engaging with, and addressing the account of events set out by SK in his witness statements. There is no duty on a Judge to consider the evidence piece by piece or line by line, and as Ms Smith acknowledges, it was not incumbent upon the Judge to raise all the concerns that he had about the appellants account of events. Ms Smith submits that had Judge Lodge raised concerns, counsel would have had the opportunity of drawing the Judge's attention to particular parts of the evidence that was before the FtT. It is clear in my judgement that in reaching his decision, Judge Lodge carefully considered the evidence that was before the Tribunal. It is in my judgment clear that Judge Lodge considered the evidence and reached his conclusions on the probable actuality of the alleged events, by evaluating all the

evidence as a whole. A Tribunal Judge is not under any duty to inform the parties of his/her provisional view or conclusions. A party must be taken to know that the Tribunal is concerned with the issues raised in the appeal and a judge is not required to explain to the parties whether or not they are inclined to decide an issue one way or another. Here, the issue was whether the decision to refuse the applications for entry clearance were in breach of the Article 8 rights of the appellants and SK. It was, in the end, for the appellants to establish their claim.

26. Judge Lodge properly engaged with the evidence set out in the witness statements of SK and he was not bound to accept the explanations given in the statements. In Y –v- SSHD [2006] EWCA Civ 1223, Keene LJ referred to the authorities and confirmed that a Judge should be cautious before finding an account to be inherently incredible, because there is a considerable risk that they will be over influenced by their own views on what is or is not plausible, and those views will have inevitably been influenced by their own background in this country and by the customs and ways of our own society. However, he went on to say, at [26];

> "None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be…"

27. I have had regard to the witness statement made by Melanie Vasselin. She has exhibited her note of a telephone conversation she had with SK on 18th December 2019 some five weeks after the hearing of the appeal. I accept she seeks the appellant's views regarding the adverse findings made and during that conversation, she sought to obtain instructions upon the adverse findings made. In the end, the Judge was required to determine the appeal upon the evidence before him.

28. The appellants representatives were plainly aware of the issues in the appeal and of the information the Tribunal was likely to expect, bearing in mind the respondent had expressed some concern regarding the care of the appellants following the departure of SK in 2014. The appellants bore the burden of proof. I am not satisfied

that anything that is now said in the statement of SK dated 24th June 2021 would have made a material difference to the outcome of this appeal. The grounds of appeal and the statements now relied upon, ignore the internal discrepancies identified by Judge Lodge.

29. As to the Tribunal's assessment of the evidence, the Court of Appeal in Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, at [114] to [115] (per Lewison LJ), provided the following guidance;

(i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

(ii) The trial is not a dress rehearsal. It is the first and last night of the show;

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

(vi) Thus even it were possible to duplicate the role of the trial judge, it cannot in practice be done.

30. I am quite satisfied that Judge Lodge properly considered the evidence before the Tribunal without any procedural unfairness. In my judgment it was open to him to conclude that the appellants have failed to establish that they are not in contact with their mother and with other family members for the reasons he gave. It was equally open to him to conclude that their best interests are to remain in Uganda for the reasons given in the decision.

31. At the hearing before me, Ms Smith submits Judge Lodge was required to consider whether the appellants have established a family life with SK but failed to do so. She acknowledges however that that was not a ground of appeal advanced by the appellants.

32. It follows, that I dismiss the appeal.

DECISION

33. The appeals are dismissed

Signed *V. Mandalia* Date: 8th July 2021

Upper Tribunal Judge Mandalia