



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

Appeal Numbers:
UI-2021-001614 / HU/07906/2020
UI-2021-001615 / HU/07914/2020
UI-2021-001616 / HU/07919/2020
UI-2021-001617 / HU/08535/2020
UI-2021-001618 / HU/08538/2020

THE IMMIGRATION ACTS

**Heard at Field House
On 9 May 2022**

**Decision & Reasons Promulgated
On 28 July 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

**(1) MKT
(2) YZB
(3) SMK
(4) MMK
(5) BMK**

(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellants: Mr Ell, of counsel, instructed by Paragon Law
For the Respondent: Ms Everett, Senior Presenting Officer

DECISION AND REASONS

1. This decision is in short form because the outcome was agreed by the parties.
2. The appellants appeal, with permission granted by First-tier Tribunal Judge Singer, against First-tier Tribunal Judge Obhi's decision to dismiss

their appeals against the respondent's refusal of their human rights claims.

Background

3. The appellants are Eritrean nationals who live in Ethiopia. The first and second appellants are husband and wife. The third, fourth and fifth appellants are their children, aged between 14 and 9. By an application which was made online on 16 September 2020, the appellants sought entry clearance to join a recognised refugee in the UK. The sponsor is SM, an Eritrean national who was born on 5 January 2002. She is the daughter of the first and second appellants and the sister of the third, fourth and fifth appellants. SM was recognised to be a victim of trafficking in April 2019. In the same month, she was recognised as a refugee.
4. The appellants' applications were supported by a good deal of documentary evidence and by a letter from their current solicitors. The letter accepted that the appellants did not fall within Part 11 of the Immigration Rules but submitted that the applications should succeed outside the Immigration Rules for a range of reasons. Uppermost amongst those reasons was the fact that the sponsor remained (at that stage) an unaccompanied child refugee who suffered from mental health problems which were made worse by her knowledge of the conditions in which the appellants lived in Ethiopia. It was submitted that the best interests of the children and the importance of family reunion clearly militated in favour of the appellants' admission to the UK.
5. The respondent refused the applications on 16 September 2020. She did not accept that the appellants were dependent on the sponsor financially. Nor did she accept that the appellants would be adequately accommodated or maintained in the UK. It was not accepted that the appellants met the requirements of paragraphs 319X(vi) and (vii) of the Immigration Rules for those reasons. Nor did the respondent accept that the appellants' ongoing exclusion from the United Kingdom would be in breach of Article 8 ECHR.

The Appeals to the First-tier Tribunal

6. The appellants appealed and their appeals were heard by the judge, sitting in Nottingham, on 23 September 2021. The appellants were represented by Mr Ell, as they were before me. The respondent was represented by a Presenting Officer (not Ms Everett). The judge heard oral evidence from the sponsor and submissions from the advocates before reserving her decision.
7. In her reserved decision, the judge noted Mr Ell's concession that the appellants were unable to meet the Immigration Rules because the sponsor was reliant on public funds: [19]. She therefore considered the appeals on Article 8 ECHR grounds from [20] onwards. She noted the sponsor's circumstances; the trauma she had experienced; the concern she felt for the appellants; and the opinion of those responsible for the sponsor, which was that she was in poor mental health and would benefit from family reunion: [21]-[24].

8. The judge accepted that there was a family life between the appellants and the sponsor: [26]. The judge considered the best interests of the child appellants at [27] and noted the absence of detailed information regarding the sponsor's mental health at [28]. She noted similarities with the decision in AT & Anor [2018] UKUT 227 and she proceeded on the basis that she had 'a limited discretion to the Tribunal to exercise a departure from the Rules'. She therefore stated that she was to undertake a balancing exercise in which she had taken 'all the above factors into account'. The final two paragraphs of the judge's decision were as follows:

[33] I have considered all the circumstances presented to me in this case by the appellant, and I have considered the public interest set out in Section 117B of the Nationality Immigration and Asylum Act 2002, namely that the maintenance of immigration control is in the public interest, that it is in the economic interests of the country for individuals to not be a burden on taxpayers. Based on that information I find that on the information presently before me, the public interest outweighs the individual rights of the appellants and the Sponsor.

[34] Accordingly, I am satisfied that the decision of the respondent is proportionate. I also note that the additional time that the evidence suggests the appellant needed to assist the family has passed since the date of the application, in that the decision of the respondent was not made until October 2019 and the appeal hearing did not take place until January 2020.

The Appeal to the Upper Tribunal

9. There are four grounds of appeal. The first is that the judge took irrelevant matters into account in what she said at [34], as the matters described in the final sentence of that paragraph related to another appeal. Ground one also contended that [33] was generic. Ground two was that the judge erred in seeking to compare the appellants' circumstances to those of the appellants in AT & Anor, rather than undertaking a reasoned proportionality assessment. Ground three was that the judge had failed to take material matters into account in assessing the best interests of the child appellants. Ground four was that the judge failed to take material matters into account in considering the circumstances of the sponsor in the UK, and particularly her mental health.
10. Judge Singer considered each of the grounds to be arguable, although he identified the first and third grounds as being particularly so.
11. At the outset of the hearing before me, Ms Everett accepted on behalf of the respondent that the judge had fallen into legal error for the reasons given in the grounds. She had been 'wrestling', she said, with the materiality of those errors and had been in difficulty because she had only recently had sight of the appellant's bundle. Having seen Mr Ell's copy of the bundle before the FtT, Ms Everett was prepared to accept that the errors in the judge's decision were material to the

outcome. She agreed with Mr Ells that the proper course, in those circumstances, was for the appeal to be remitted to the FtT for rehearing de novo.

12. I agreed with the advocates that the judge had fallen into material error and that the proper course, given the extent of the fact-finding required, was for the appeal to be remitted to the FtT for rehearing afresh. My reasons for that conclusion are as follows.

Analysis

13. The structure of the judge's decision is reasonably clear and I have sought to explain it above. She logically considered the appellants' difficulties under the Immigration Rules and she sought to consider what was said about their circumstances in Ethiopia and the sponsor's circumstances in the UK. In doing so, she sought to identify those matters which militated in favour of their admission to the UK. In the final two paragraphs of the decision, the judge sought to balance those considerations against the matters which militated in favour of the appellants' continued exclusion from the UK. In each aspect of that analysis, however, the judge fell into error.
14. It is apparent that the judge fell into error as contended in ground one. The final sentence of the decision, which I have reproduced in full above, bears no relation to the appellants' case. As I have recorded above, the respondents' decisions in these cases were made in September 2020 and not in October 2019. It appears to be the case that at least this sentence was copied and pasted from another decision. As Mr Ell submitted in his grounds of appeal, such a lack of care in such an important section of the decision is indicative of a lack of anxious scrutiny on the part of the judge.
15. Paragraph [33] of the judge's decision does nothing to allay that concern and is understandably described as 'generic' in Mr Ell's grounds. Plainly, the most significant considerations on the respondent's side of the proportionality 'balance sheet' in a case such as this are the maintenance of an orderly immigration control and the defence of public funds. There was little consideration of the former and no consideration of the latter in the judge's decision. Ground one is made out.
16. Ground two is also made out for the reasons I have set out above. The judge took account of AT & Anor as a template or precedent and undertook a comparison of the facts of this case with the facts in that one. That was not the correct approach in law and what was required was a balance sheet evaluation of the proportionality of the respondent's decision. Given the inadequacies of [33] and [34], no such evaluation took place.
17. Grounds three and four may be taken together, since they both contend that the judge overlooked material matters in evaluating the circumstances of the family. That contention is clearly made out. The judge seemingly accepted what was said about the minor appellants' circumstances in Ethiopia but left those circumstances out of account in assessing their best interests. And she was aware of what was said

about the sponsor's mental health problems but she failed to consider the ongoing impact of the family's separation on the sponsor's mental health. These matters had been identified as important to the appellants' claims at the time that their initial applications were made and it was important for the judge to demonstrate by her reasoning that she had considered and weighed not only what was said but also the evidence in support of it.

18. In common with Ms Everett, I initially entertained some doubt as to whether the errors into which the judge certainly fell can properly be said to be material to the outcome in that case. That is because, on any view, the admission of the appellants to the United Kingdom is likely to represent a significant burden to the public purse. The sponsor is unable to accommodate them in the property she currently occupies and she is, as the ECO observed, entirely dependent on public funds. That is not a criticism, it is a statement of fact.
19. In the event of the appellants' admission to the United Kingdom, a new and sizeable family property would have to be paid for by the state, and public funds would also be needed for their indefinite support. It is doubtful, to my mind, that the severity of the consequences of the appellants' exclusion from the United Kingdom might suffice to outweigh the obvious public interest in that course. As Ms Everett realised shortly before the hearing, however, there is some evidence in this case that the appellants' ongoing exclusion from the UK and their presence in Ethiopia is detrimental to them and to the sponsor. What is required is a careful balancing of these competing considerations, with the benefit of up-to-date evidence. I am unable to say for myself that the outcome of any such balancing exercise is a foregone conclusion and Ms Everett did not seek to suggest that it was. Applying the approach in IA (Somalia) v SSHD [2007] EWCA Civ 323, therefore, I am unable to conclude that the judge would inevitably have come to the same conclusion were it not for the errors into which she fell.
20. In the circumstances, I shall set aside the judge's decision and order that the appeal be reheard afresh by the First-tier Tribunal.
21. I note that I was not invited by either advocate to preserve any of the First-tier Tribunal's findings of fact. In the absence of such a submission, I will not preserve any findings although I do observe that the finding of a family life existing between sponsor and appellants was an unsurprising one, given the family circumstances before she fled to the UK and the constant contact and support which is said to have existed ever since.

Notice of Decision

The decision of the FtT involved the making of errors on points of law. That decision is set aside, and the appeals are remitted to the FtT to be heard afresh by a judge other than Judge Obhi.

Order Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellants and any member of their *family* are granted anonymity. No-one shall publish or reveal any information, including the names or address of the appellants, likely to lead members of the public to identify the appellants or the sponsor. Failure to comply with this order could amount to a contempt of court.

I have continued this order, which was first made by the First-tier Tribunal, because I was not invited to discharge it and because the sponsor is a recognised refugee. Given the presumption in favour of open justice, however, the parties should be in a position to address the next judge on the need for the order.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2022