



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004276
First-tier Tribunal No:
HU/04851/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated:
On the 30 January 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

KMJ
(ANONYMITY ORDER MADE)

Appellant

and

The Entry Clearance Officer

Respondent

Representation:

For the Appellant: Mr M Shahzad, Selva & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant, and any member of her family, is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of her family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Cooper, promulgated on 20 June 2022.
2. Permission to appeal was granted by First-tier Tribunal Judge Elliott on 20 July 2022.

Anonymity

3. An anonymity direction was made previously and is reiterated below because of the appellant's age and health issues.

Background

4. The appellant is a national of Somalia who was aged seventeen at the time of the application she made for family reunion on 13 June 2021. That application was refused on 7 October 2021.
5. The reasons for the refusal of that application were that because the appellant was the sister rather than child of her sponsor, she did not meet the requirements of paragraph 352 of part 11 of the Immigration Rules. There were said to be no exceptional circumstances nor compassionate factors which would justify a grant of leave outside the Rules.

The decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the respondent was not represented. The appellant's sponsor gave evidence and submissions were made on the appellant's behalf by a legal representative. The judge records that it was accepted on behalf of the appellant that the appellant could not meet the provisions of paragraph 352A of the Rules but submitted that the appellant met the provisions of paragraph 319X of the Rules and her circumstances ought to have been considered under the respondent's family reunion policy. The judge noted that the evidence of the sponsor was unchallenged and that she had been found to be a witness of truth by the judge hearing the sponsor's asylum appeal. Nonetheless, the judge found there to be inconsistencies which called into question the credibility of elements of the appellant's claim. The appeal was dismissed on the basis that the appellant's circumstances were not sufficiently compelling, and that the exclusion of the appellant was proportionate.

The grounds of appeal

7. There are three grounds of appeal. The first and second grounds make the same point, that is that the judge took account of immaterial considerations and failed to take account of relevant matters. In the third ground it is argued that there had been a failure to properly assess the Article 8 claim outside the Rules.
8. Permission to appeal was granted on the basis sought with the judge granting permission making the following comment.
 3. The respondent was not represented at the hearing. It appears that the respondent had not taken issue with the authenticity of a medical report or the appellant's father's death certificate. The issue does not appear to have been raised during the appeal

hearing by the appellant or the Judge. However the Judge has made credibility findings without having afforded the appellant or her representatives the opportunity to give evidence or make representations about the documents.

4. In doing so it is arguable that the judge may have fallen into error in unfairly making adverse credibility findings and failing to adhere to the guidelines set out in *Surendran v SSHD* as approved in *MNM v SSHD* (2000) UKIT 00005.
5. It is also arguable that that error infected the Judge's subsequent findings relating to the availability of family and care provision in Somalia.

9. The respondent did not file a Rule 24 response.

The hearing

10. Mr Tufan had not seen either the grounds of appeal or the grant of permission prior to the hearing. I loaned him my paper copies for him to peruse. He indicated that the appeal was opposed. Thereafter, I heard submissions from both representatives which I have considered in reaching my conclusions. At the end of the hearing, I reserved my decision. Mr Shahzad took instructions and, in the event that an error of law was found, he invited me to remit the matter to the First-tier Tribunal. On this issue, Mr Tufan was neutral.

Decision on error of law

11. The First-tier Tribunal judge attached no weight to the medical report said to emanate from the Shakaal Medical Centre in Mogadishu. Several reasons were provided, and the judge commented at [31] that 'the appearance of the report is not consistent with what would generally be expected in a medical report.' The judge further noted that the appellant's date of birth was not mentioned that the phrase 'medical report' appeared twice, and that the report was written on a date when the appellant was in Ethiopia. The judge similarly rejected the reliability of the death certificate relating to the appellant's father [35] owing to concerns with its form and content including the typeface, blurring, absence of a cause of death and a delay in its production. Mr Tufan did not disagree with Mr Shahzad's submission that the Judge did not raise the question of the authenticity of the aforementioned documents during the course of the hearing with either the sponsor or the appellant's representative. Mr Tufan described this as a 'blip' which was of no relevance as the judge was entitled to make such findings.

12. I find that it was an error for the judge not to bring their concerns to the attention of the representative to enable questions to be put to the sponsor or for submissions to be made. This was even more important as this was a case where credibility was not hitherto in issue. Of relevance here are paragraphs 6-8 of what are referred to as the *Surendran* guidelines, which were approved and annexed to the starred decision of *MNM* [2000] UKIAT 00005. To summarise, where the respondent is unrepresented, it is not the function of the judge to raise matters not raised in the decision letter and if matters become apparent during the hearing, these should be raised with the representative and submissions invited. This the judge did not do and as such unfairness ensued. Mr Tufan suggested that this error was immaterial. I reject that submission. This was a case where the judge had accepted the vast majority of the case advanced on the appellant's behalf in relation to the requirements of paragraph 319X (i-viii) inclusive with the

exception of the part of sub-paragraph (ii), which relates to the existence of serious and compelling considerations. On the issue of the appellant's circumstances, the judge accepted that the appellant was a disabled child who required assistance to undertake activities of daily living, that she had mobility problems, communication difficulties and emotional problems [45]. I find that the judge's concerns as to the medical report and the father's death certificate are likely to have adversely affected the judge's overall assessment of the severity of the appellant's medical condition and the assistance which was available to her in Somalia.

13. There is merit in the criticism made as to the judge's findings as set out in the remaining two grounds of appeal. However, the error set out in the first ground suffices to render the decision of the First-tier Tribunal unsafe. The decision of the First-tier Tribunal is, accordingly, set aside.
14. I was minded to retain this appeal in the Upper Tribunal out of concern that remittal to the First-tier Tribunal would delay its consideration. I took into account Mr Shahzad's submission on the point which was made after taking instructions from the sponsor and I was mindful of statement 7 of the Senior President's Practice Statements of 25 September 2012. Taking into consideration the nature and extent of the findings to be made as well as that the appellant has yet to have an adequate consideration of her human rights appeal at the First-tier Tribunal, I reached the conclusion that it would be unfair to deprive her of such consideration.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 3 hours by any judge except First-tier Tribunal Judge R Cooper.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 January 2023