



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004098
UI-2023-004099
First-tier Tribunal No:
HU/60104/2022
HU/60105/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

YAFET AMINE WELDU
SINODA AMINE WELDU
(no anonymity order made)

Appellants

and

ENTRY CLEARANCE OFFICER - Sheffield

Respondent

Representation:

For the Appellant: Mr Rashid of Counsel

For the Respondent: Miss Rixom a Senior Home Office Presenting Officer by "Teams" link

Heard at Phoenix House (Bradford) on 22 November 2023

DECISION AND REASONS

1. The Appellants were born on 10 December 2003 and 21 November 2005 respectively. They are citizens of Eritrea currently residing in Uganda. They applied on 27 May 2022 for entry clearance as family members to join their brother Meron Amine Weldo. The applications were refused on 7 December 2022. The appeals were dismissed by First-tier Tribunal Judge Caswell in a decision promulgated on 15 July 2023.

Permission to appeal

2. Permission was granted by Judge Landes on 2 September 2023 who stated:

"2...The judge found that Article 8 was not engaged on the basis that the appellants were now adults [34]. They are not both adults. It is right that the judge also

considered proportionality in the alternative but when doing so she relied on findings she had made on the basis that both appellants were adults.”

The First-tier Tribunal decision

3. Judge Caswell made the following findings relevant to this hearing:

“25. At the start of the hearing, Ms Khan conceded that the Appellants do not meet the strict requirements of the Rules, and indicated that the appeal would be argued on general Article 8 grounds...”

30. I accept that the sponsor is earning in the region of £2500 net per month, as the documents before me clearly show. I accept his oral evidence that his rent is paid inclusive of bills, and I do not find that the absence of many documents connecting him with this address is significant, in the circumstances. Further, I accept his evidence in his statement that he intends to obtain a larger home if his brothers are allowed to join him. I accept that he would be able to afford to do so, given his level of earnings. I accept that he has been supporting his family in Uganda since around October 2020, when he became able to, and that he would have some funds available to support them with, if they came to the UK. Ms Khan has asked me to find that the Appellants could work in the UK (it having been argued by Mr Aniето that they could work in Uganda), and I accept that there is force in the argument...

32. The Appellants are now adults, however. It is argued by Ms Khan that they are not living an independent life, since they have the Appellant’s wife living with them. However, given their ages, and given that she is also a relatively young adult, I cannot find that she is now needed to “help” them, as the sponsor has stated in oral evidence. I accept that this may well have been the case when they left their country, since at that time they were both minors, but with the passage of time they have become adults, and I am not satisfied that they are dependent on the sponsor's wife now in any meaningful sense. I accept that, as asylum seekers, they are not able to work in Uganda. However, the sponsor has been supporting them, and his wife, from the UK with money transfers, and I find this can continue. He is able to visit them. He can keep in contact with them. There is the presumably the potential for them to be granted refugee status in Uganda at some stage, although I accept there is an absence of evidence before me either way on this point...

34. The sponsor last saw the Appellants in 2015, on the evidence before me. Given the position that they are now adults, I am not satisfied that there are greater than normal ties between them and the sponsor. I accept that he financially supports them, but am not satisfied that this is sufficient, on the facts of this case, to establish greater than normal ties. Therefore Article 8 family life is not engaged in this case.

35. Alternatively, if there are greater than normal family ties, and Article 8 is engaged, I have to have regard to all the matters in section 117B above, when considering proportionality. I note that the Appellants could probably be supported financially, and in due course support themselves, in the UK, although there is no evidence before me that they speak English. However, on my findings above, I conclude that the Respondent has shown that any interference with family life caused by the refusal of entry clearance is lawful, justified and proportionate, given the strong public interest in the protection of the social and economic interests of the UK, through the maintenance of fair and effective immigration control.”

The Appellants’ grounds seeking permission to appeal

4. The grounds assert that:

“2. Yamin Amine Weldu (DOB:10.12.03) is now 19 years old and was 18 at the time the application was submitted.

3. Sinoda Amine Weldu (DOB :21.11.05) is 17 years old, and was 16 at the time the application was submitted...”

9. The Learned Judge stated at paragraph 32:

“It is argued by Ms Khan that they are not living an independent life, since they have the Appellant’s wife living with them. However, given their ages, and given that she is also a relatively young adult, I cannot find that she is now needed to “help” them, as the sponsor has stated in oral evidence. I accept that this may well have been the case when they left their country, since at that time they were both minors, but with the passage of time they have become adults, and I am not satisfied that they are dependent on the sponsor's wife now in any meaningful sense.”

10. She again reiterates this at Paragraph 34

“The sponsor last saw the Appellants in 2015, on the evidence before me. Given the position that they are now adults.”

11. The appellant Mr Yafet had only turned 18 years old, six months earlier at the time of the application. Despite the Judge’s findings, Mr Sinoda, remains a child. The Learned Judge went on to determine the appellants’ independency but concedes that they can be financially dependent on the sponsor as they have no permission to work currently in Uganda.

12. This financial dependency is not deemed to be greater than normal ties, despite the background evidence to the case and the acceptance that they were living in a country as asylum seekers, without permission to work, with their sister in law and no other relatives since 2015 when they were only 12 and 10 respectively.

13. In all of the circumstances of the case, the learned Judge’s finding in respect of the issue of whether Article 8 Family Life is engaged was against the weight of the evidence.

14. The learned judge went on to alternatively find in paragraph 35, that even if Article 8 is engaged, the decision was proportionate, despite conceding that the appellants could support themselves in the UK. The Learned Judge failed to properly to apply *Razghar* [2004] UKHL 27.

15. It is submitted that the Judge has erred in her finding that both appellants were now adults.

16. As such the Immigration Judge has erred in law in that she has not adequately considered the subjective and objective evidence before the tribunal.”

The submissions

5. There was no rule 24 notice.

6. Miss Rixom submitted that the mistake regarding the 2nd Appellant’s age was not material. The Judge noted the *Razgar* [2004] UKHL 27 test at [13], and the s55 Borders, Citizenship and Immigration Act 2009 consideration at [14]. The Judge noted the passage of time since they left Eritrea, the lack of reliance on their Sponsor’s wife then, the absence of evidence of the ability to be granted refugee status in Uganda, and that reliance on their Sponsor can continue at [32]. The Judge noted the concession that the Immigration Rules were not met, and reliance was placed only on Article 8. Even if the Judge had treated the 2nd Appellant as a minor, the Judge had dealt sufficiently with Article 8. The Judge was entitled to find that family life had not been established at [34], and in any event considers the alternative if it had been established at [35]. The 2nd Appellant was 16 years and 6 months old at the date of application and 17 years and 8 months old at the date of hearing. The Judge was not assessing a 12 year old child. He was almost an adult.

7. Mr Rashid submitted that the mistake of fact relating to the 2nd Appellant being an adult is material. The relevant Immigration Rule is at [319X]. The assessment could not have been considered without looking at the Immigration Rules. Mere reference to s55 of the Borders, Citizenship and

Immigration Act 2009 is not sufficient. There is no such thing as being “nearly an adult”. The evidence regarding the position when they left Eritrea is of historic relevance. It is not for the Judge to speculate as to whether refugee status may be granted in Uganda. The Judge considered proportionality on the basis that both Appellants were adults which they were not. Had the Judge considered the 2nd Appellant as a child, the outcome could have been different for the 1st Appellant given Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39. It is not recorded on what basis the concession that the Immigration Rules were not met was made. That would also have led to a concession that Article 8 was not met. It may not have been just on the basis of “serious and compelling circumstances” as there were also issues regarding finance and accommodation.

8. Miss Rixom responded that it was very clear in the reasons for refusal letter what the requirements of the Immigration Rules are. The concession related to both Appellants. The findings in [24] which states that the “Respondent claims there are no exceptional circumstances in this case, and that there is no breach of Article 8 rights” must be read in light of the reasons for refusal letter.

Discussion

9. Paragraph 319X of the Immigration Rules states that;

“The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that:

(i) the applicant is seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee ...; and:

(ii) the relative has limited leave in the United Kingdom as a refugee ... and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child’s care; and

(iii) the relative is not the parent of the child who is seeking leave to enter or remain in the United Kingdom; and

(iv) the applicant is under the age of 18; and

(v) the applicant is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(vi) (a) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join in the UK without recourse to public funds and in accommodation which the relative in the UK owns or occupies exclusively; or

(b) there are exceptional circumstances (as defined in paragraph 319XAA); and

(vii) (a) the applicant can, and will, be maintained adequately by the relative in the UK without recourse to public funds; or

(b) there are exceptional circumstances (as defined in paragraph 319XAA); and

(viii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, holds valid leave to remain in this or another capacity.

10. Paragraph 319XAA of the Immigration Rules states that;

“Where the requirements of paragraph 319X (vi)(b) or (vii)(b) apply, the decision-maker must consider, on the basis of the information provided by the applicant,

whether there are exceptional circumstances which may justify a grant of leave to enter or remain, for the same duration as the sponsor ("leave in line").

Where the applicant is a child under the age of 18 years who is seeking to join a relative with refugee status ..., relevant factors when considering whether there are exceptional circumstances include:

- (a) they have no parent with them; and
- (b) they have no family other than in the UK that could reasonably be expected to support them; and
- (c) there is an existing, genuine family relationship between them and the UK based relative; and
- (d) they are dependent on the UK based relative.

In the event of a refusal of leave to enter or remain if the decision maker is not satisfied there are exceptional circumstances, consideration will also be given to whether refusal of the application would be a breach of Article 8 ECHR."

11. The refusal letter states apart from the relationship issue which has now been determined in the Appellants' favour, the other matters of concern to the Respondent;

"I am not satisfied that you have adequately demonstrated that there are serious and compelling family or other considerations which make your exclusion undesirable and your application is refused under Paragraph 319X(ii) of the Immigration Rules.

You have not provided evidence which shows that you will be adequately accommodated by the person you are seeking to join without further recourse to public funds. You have not provided any evidence of your intended accommodation in the UK. There is no evidence that the accommodation is suitable for the intended number of persons, ages and genders who would be living there, nor that you have permission from the landlord to reside there.

I therefore refuse your application under paragraph 319X(vi) of the Immigration Rules.

You have not provided evidence which shows that you can and will be maintained adequately by the relative you are seeking to join, without further recourse to public funds."

12. Judge Caswell summarised the Respondent's submission in relation to the issues before me as follows;

20. In relation to the other aspects of the Rules, the Respondent argues that, as at the date of application, Yafet did not meet the requirements of the Rules as an adult dependent relative, since he does not need long term care, and Sinoda did not meet the requirements for a child, since there were not serious and compelling family or other reasons why he should be allowed to join the sponsor in the UK.

21. The Respondent also argues that the requirements for maintenance and accommodation are not met in this case.

22. In addition, the Respondent relies on the fact that both Appellants are now adults. It is argued that they can support themselves, and live independently, in Uganda. The sponsor can continue to support them financially from the UK, as needed, and he can visit them regularly, and otherwise continue to communicate with them through social media and phone calls...

24. The Respondent claims there are no exceptional circumstances in this case, and that there is no breach of Article 8 rights."

13. I am satisfied that there were multiple issues relating to the Immigration Rules as to why the 2nd Appellant's claim was refused by the Respondent. It did not just relate to whether "there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care" but also whether he

“can, and will, be accommodated adequately or ...maintained adequately by the relative in the UK without recourse to public funds”. It is not clear on what basis the concession regarding the Immigration Rules not being met was made. Nor does [30] of the decision directly address the accommodation and maintenance issues. The only further reference to these issues is in [35] when dealing with proportionality where the Judge said “I note that the Appellants could probably be supported financially, and in due course support themselves, in the UK, although there is no evidence before me that they speak English”. That does not equate to an acceptance that the accommodation and maintenance issues identified in the refusal letter were found in the 2nd Appellant’s favour.

14. I do not accept that the 2nd Appellant is to be treated as “nearly an adult”. He either is or is not an adult. At the date of the application he was 16 ½. There is no consideration, following the abandonment by them they were infants, that they may have a closer family relationship with their Sponsor than adult siblings may have. This infects the findings in [32] and [34] of the importance of the relationships with the Sponsor and his wife.
15. I am therefore satisfied that the factual error in relation to the 2nd Appellant’s age was a material error of law. Whilst the Judge noted the Razgar test at [13], and the s55 consideration at [14], I do not accept that the Article 8 assessment was adequate at [34] as that was based on him being an adult. Nor was it adequate in [35] as that was not based on him being a minor, but on having “greater than normal family ties”.
16. I am satisfied that had the Judge considered the 2nd Appellant as a child, the outcome could have been different for the 1st Appellant given Beoku-Betts as there was no consideration to how their relationship growing up as children without their parents may have led to them having greater bonds than children growing up with their parents may have had.
17. I am therefore satisfied that the Judge made a material error of law in relation to both Appellants.
18. Having so found, in relation to the further conduct of the appeal, bearing in mind the guidance in AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512, and Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) I am satisfied that remittal to the First-tier Tribunal is appropriate given the nature of the issue for re-determination.

Notice of Decision

19. The Judge made a material error of law. The decision of the First-tier Tribunal is set aside.
20. The appeal is to be remitted to the First-tier Tribunal for a de novo hearing not before Judge Caswell.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 November 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.