



IN THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004163

First-tier Tribunal No:  
HU/60644/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:  
On 16<sup>th</sup> of April 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

**MISGANA BEREKAT NEAMAN**

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr A J Bradley, Solicitor, Glasgow

For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

Heard at Edinburgh on 3 April 2024

DECISION AND REASONS

1. The appellant, then aged 15, applied on 20 October 2021 for entry clearance under family reunion provisions in the immigration rules.
2. The respondent refused that application by a decision dated 9 December 2022 (p 495/643 of the bundle provided by the appellant to the UT).
3. The reasons in the respondent's decision, in summary, are: ...

The appellant claims to be the half-sister of the sponsor, but the rules under which she applied allowed only for a spouse, partner or child under 18 of a sponsor.

There was DNA evidence of a relationship, but “the evidence supporting those who provided their DNA is not clear”.

Outside the rules, and with reference to article 8, the evidence did not go beyond normal ties between siblings, and did not constitute family life for article 8 purposes.

Refusal of entry clearance was not disproportionate.

The best interests of the appellant, as a child, did not require her entry.

There were no exceptional circumstances or compassionate factors.

4. FtT Judge Prudham dismissed the appellant’s appeal by a decision dated 6 June 2023. He found at [17] “many inconsistencies and discrepancies in the sponsor’s evidence”, such that he gave it “little weight”; at [23], was not satisfied that the sponsor is the “*de facto* parent” of the appellant, and found article 8 not to be “engaged”; and at [25 -31], having applied section 117B of the 2002 Act, held that the respondent’s decision was not disproportionate.

5. These are the grounds of appeal to the UT: ...

2. When the case called before Judge Prudham the FTT judge appeared to concentrate on matters that were not within the terms of the refusal letter.

3. At paragraph 22 the FTTJ disputes the living situation of the Appellant. As part of the evidence in the instant case the sponsor had provided a statement. In the statement the sponsor had indicated that since the time of the original application the living situation of the Appellant had changed. At the time of the application the Appellant had been living in Sudan with a Ms Gebrehiwet who had been a neighbour of the family in Eritrea. By the time of the appeal Ms Gebrehiwet had relocated to Uganda with her own family leaving the Appellant behind in Sudan. This matter was not raised by the Respondent. Notwithstanding the IJ stepped into the arena when he made findings disputing this. Reference is made to the case of *XS Serbia and Montenegro* which states that immigration judges hearing a case are not supposed to enter into the arena. Judges should not provide their own reasons for refusing cases over and above those provided by the Home Office (Respondent). By doing so in this case the FTTJ has erred in law.

4. Further to this if this matter was to form a material part of the IJ’s determination then the sponsor should have been given fair notice of the same. The FTTJ should have do so by seeking clarification from the sponsor regarding the whereabouts of Ms Gebrehiwet and the appellant’s present circumstances.

5. At paragraph 23 the IJ notes that he does not consider that article 8 ECHR is engaged by the refusal. This is contrary to the decision of the Respondent who raises Article 8 issues within the RFL. In any event the FTTJ does address art. 8 in his 10 determination. It is submitted that there is an error in law in the FTTJ’s findings. At paragraph 28 the IJ notes that the Appellant was aged 15 at the date of the application. He notes that the appellant is in education in Sudan. The FTTJ has failed to consider the ongoing humanitarian crisis in Sudan and whether or not the appellant’s education would have been disrupted or impacted by a civil war. In evidence the Sponsor had indicated that the Appellant was leaving home. The IJ has erred in law by failing to consider the circumstances of a lone female minor living in Sudan and how her characteristics may make her vulnerable to danger including destitution, abuse, assault or rape.

6. At paragraph 29 the IJ notes that in terms of the *Razgar* proportionality test, in favour of the appellant, is that entry clearance would remove her from a conflict zone in Sudan. He goes on to note that she would also be reunited with her half-brother. Despite noting these points the FTTJ suggests that the Respondent should be allowed to maintain effective immigration control as it is in the public interest. It is submitted that the FTTJ has erred in law with regards to the test of proportionality. He has failed to consider the dire humanitarian situation in Sudan. He appears to suggest that the Appellant can continue leading a normal life in those circumstances. Reference is made to recent reports on the country situation in Sudan. This includes articles from Voice of Africa News available at ... which indicates that the death toll from the civil war has exceeded over 600 with more than 5,000 others being injured in the fighting and conflict.

7. It is submitted that the FTTJ has also erred in law by failing to adequately consider the Article 8 rights of the sponsor living in the UK. At paragraph 30 the IJ suggests that the sponsor has been able to establish his life in the UK and find employment. He suggests that to this extent the sponsor has been able to integrate into the UK even in the absence of the appellant. In his evidence however the sponsor had advised the tribunal regarding his ongoing mental and physical health difficulties brought on in part by the refusal of Entry Clearance for his sister. This included a written statement and medical evidence demonstrating that the sponsor had been signed off work for over 2 months due to stress.

8. It is further submitted that the determination of the immigration judge is inadequately reasoned. The Respondent did not question the credibility of the witness in their RFRL. It is submitted that an impartial informed observer may well come to the conclusion that the hearing was not free of apparent bias. Questions may be raised as to the impartiality of the proceedings. It is not being suggested that the immigration judge was in fact biased. It is merely being suggested that his actions give the appearance of bias on this basis.

6. On 27 September 2023 FtT Judge Dixon granted permission:

... I consider the grounds to be arguable for the reasons stated therein with the exception of the second point made at paragraph 8 (apparent bias) which is plainly not arguable ...

7. There is no rule 24 response on file from the respondent.

8. Mr Diwnycz, helpfully, provided a copy of the record kept by the presenting officer in the FtT.

9. The grounds and submissions for the appellant were somewhat muddled in suggesting that the state of crisis and civil war in Sudan, and consideration of the appellant's best interests as a child, might entitle her to succeed, without more (which they cannot); but as clarified in course of submissions, representatives agreed that the main issues between them are:-

(i) whether [17 - 22] of the tribunal's decision takes the appellant unfairly by surprise on points adverse to the credibility of the sponsor's oral evidence, and of the rest of the evidence, which were not advanced by the respondent in the refusal letter or in submissions;

(ii) whether that error, if established, undermines the finding at [23] that the appellant is not the “*de facto parent*” of the appellant, and article 8 was not engaged; and

(iii) whether that error, if established, undermines the alternative finding at [24 – 31] that the outcome is proportionate.

10. Further to (i), Mr Bradley submitted that the Judge’s points on how a ransom had been paid, and on whether Ms Gebrehiwet, who had lived with the appellant, might really have moved to Uganda, leaving her alone, were not foreshadowed in the refusal letter or in the respondent’s submissions, and should not have been founded upon without giving the appellant the opportunity to respond. He submitted that the adverse view taken by the Judge could not be extricated from his conclusions on (ii) and (iii), and the case should be remitted.
11. Mr Diwyncz acknowledged, fairly, that the refusal letter and record of submissions do not raise many of the points taken by the Judge, but he contended that there was “no more than a hint of unfairness”, and nothing to undermine the finding that there was no family life for article 8 purposes between the appellant and the sponsor, or the alternative finding on proportionality.
12. I reserved my decision.
13. Mr Bradley did not identify the case mentioned vaguely in the grounds as “*XS Serbia and Montenegro*”, with no citation provided.
14. It would have been helpful to refer to *HA & TD v SSHD* [2010] CSIH 28.
15. The opinion of the Court was delivered by Lord Reed (as he then was) on when tribunal judges are entitled to base their conclusions upon matters not raised in course of the hearing, based on a survey of the case law, including these points (summary limited to those applying when both sides were represented):- at [4], fairness is essentially an intuitive judgement to be reached in all the circumstances of the case; [5], Judges to ponder their decisions, but to “cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given”; [7-8], unfair, “ordinarily at least”, to base a decision on an issue not raised by the parties without giving the opportunity to comment; [10-13], no obligation to raise with parties insufficiency of evidence, point out inconsistencies, or provide a list of concerns, if they had a fair chance to make their case; and [15], “a procedural impropriety may not vitiate a decision if it is apparent that no prejudice was suffered”.
16. Whether the tribunal may have taken an appellant unfairly by surprise on new points is a fine and circumstantial question.
17. The submissions in the FtT challenged the reliability of the purported death certificate of the appellant’s mother, a point upheld at [21] of the decision. Beyond that, there was force in the complaint of lack of notice.

18. The Judge went into detail at [18] about there being an entry stamp to show that Ms G had entered Uganda, noting evidence which appeared to contradict the appellant having to leave their shared address. He returned to the matter in further detail at [22], declining to accept that Ms Gebrehiwet had moved permanently. He was not satisfied that he had a reliable account of the appellant's living arrangements.
19. This strong line contradicts the submission by the Presenting Officer in the FtT, which was that Ms Gebrehiwet "had left Sudan, however ensured there were adequate living arrangements for the appellant".
20. The Judge's point is within reason; but it is not one which the appellant, through her representative, having heard the respondent's case, might have thought she had to meet.
21. The scepticism expressed about how an alleged ransom was paid goes to a matter which should be, to a large extent, within the sponsor's knowledge, on which he might reasonably have been questioned at the hearing, and which might not be beyond sensible explanation; but the matter was allowed to pass.
22. The Judge should not have embarked on what might effectively have been a cross-examination, but he might have raised his potential concern, and left it to the appellant, through her representative, to decide whether and how to address it further in evidence or submissions.
23. Those matters were prominent in reaching the conclusion that the sponsor's evidence contained "many inconsistencies and discrepancies" and deserved "little weight".
24. Even a hint of unfairness may be too much. The respondent accepted that a hint was there.
25. The decision crosses the line from due judicial reticence into development of the tribunal's own theories of the case, which is the point where the opportunity to comment should have been given.
26. The adverse overall credibility finding cannot safely be extracted from the conclusion on whether family life exists, or on proportionality.
27. Mr Bardley advanced a fourth point, whether the Judge adequately considered the article 8 rights of the sponsor, but there is no need to resolve that.
28. The decision of the FtT is set aside, other than as a record of the hearing. The case is remitted for a fresh hearing before another Judge.

Hugh Macleman

Judge of the Upper Tribunal, Immigration and Asylum Chamber

4 April 2024