



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-001537

First-tier Tribunal No:
HU/54089/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th December 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

**Riyan Mohamed MAHDI
(ANONYMITY ORDER NOT MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Ms A Kogulathas of Counsel instructed by CNA Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 12 August 2024

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First Tier Tribunal Judge Hill dated 19 January 2024 dismissing the Appellant's appeal against a decision of the Respondent dated 17 February 2023 refusing an application for entry clearance as the child of her British citizen father.
2. The Appellant is a citizen of Somalia born on 10 March 2005. On 10 November 2022 she applied for entry clearance as the child of Mr

Mohammed Mahdi Sharif ('the Sponsor'). The application was refused on 17 February 2023.

3. Material parts of the decision letter setting out the reasons for refusing the application are reproduced at paragraph 7 of the Decision of the First-tier Tribunal. It is not necessary to set out that quotation again here. Suffice to say the Respondent accepted the relationship between the Appellant and Sponsor, but did not accept that the Sponsor had 'sole responsibility' for the Appellant. In particular: it was noted that the Sponsor had been in the UK since 2003; the Respondent was not satisfied that the Appellant's mother had died in 2021 as claimed. An aspect of the reasoning was that it was the decision-maker's view that the Appellant had "*provided no information who has been taking care of you since your mother's [claimed] death*".
4. The application was also refused on the basis of a failure to provide certification that the Appellant did not have active pulmonary TB. However, such a certificate was produced following the appeal hearing, and this ultimately does not appear to have been held against the Appellant in the context of her Article 8 appeal: see Decision of the First-tier Tribunal at paragraphs 13, 15, and 17-18.
5. The Appellant appealed to the IAC.
6. A 'hybrid' hearing - 'in person and by CVP' - was held on 8 January 2024. Both parties were represented. The Sponsor gave oral evidence.
7. The appeal was dismissed for reasons set out in the Decision of Judge Hill dated 19 January 2023.
8. Permission to appeal was refused in the first instance on 7 March 2024 by First-tier Tribunal Judge Lester, but subsequently granted on 10 June 2024 by Upper Tribunal Judge Norton-Taylor.
9. The Respondent has filed a Rule 24 response dated 26 June 2024 resisting the Appellant's challenge to the decision of the First-tier Tribunal.
10. Ms Kogulathas has provided a Skeleton Argument for the 'error of law' hearing dated 5 August 2024.

Consideration of the Challenge

11. The Appellant's Grounds raise two bases of challenge, helpfully labelled in Ms Kogulathas's Skeleton Argument as 'Ground 1: Procedural unfairness' and 'Ground 2: Taking an irrelevant matter into account'. The decision of Judge Norton-Taylor refers to being "*just persuaded to grant permission... primarily on the procedural unfairness ground*", although the scope of the grant was not limited.

Ground 1

12. Ground 1 argues that the Judge relied on reasoning in respect of matters that were not put to the Appellant or Sponsor. Ground 2 argues that the Judge was in error in seemingly requiring more information about the Appellant's siblings in circumstances where the primary issue in contention was whether or not the Appellant's mother was deceased.
13. The focus of the challenge is essentially on paragraphs 33-36 of the Decision of the First-tier Tribunal.
14. In context it is to be noted that these paragraphs come under the sub-heading 'Mother's status'. This section of the Decision follows on from the Judge's finding that the Sponsor was related to the person she said was her mother as claimed (paragraph 29). At paragraph 30 the Judge states that for the reasons to follow she was not satisfied that the Appellant's mother was deceased. Paragraph 31 and 32 address the documentary evidence by way of two death declarations, and supporting witness statements from persons stating that they had attended the Appellant's mother's funeral. Paragraph 33-36 are then in the following terms:

"33. The accounts of the appellant and the sponsor raise a number of questions. It is suggested that the appellant has no-one to live with following the death of her mother, however her mother's purported death was on 2nd February 2021 and on Mr Sharif's account in oral evidence, she lived with an Amina Ali Hassan for approximately a year until shortly before the hearing. I do not have any explanation for where she was living (and with whom) between 2nd February 2021 and late 2022/early-2023 when she moved in with Ms Hassan.

34. Furthermore, the evidence is that the Sponsor has been financially supporting the appellant with bank transfers since 2022. A bank transfer of £200 was sent in January 2022 and then nothing further until 30th October when a further payment of £300 was sent. There have been a number of transfers since December 2022. However, no explanation is provided for how the appellant sustained herself financially between February 2021 and October 2022 when the payments became regular.

35. There are a number of further aspects to the accounts of the appellant and sponsor which are undermining of their credibility. The appellant mentions a number of siblings but says nothing more about them. I consider the lack of detail of her family circumstances to be striking. In addition, I note that despite her mother's purported death in February 2021 and the lack of any suitable family members to support her, the appellant's application was not made until November 2022. Taken together with the lack of detail about where she lived and how she supported herself throughout 2021 and 2022 I am left with the impression that I have been given less than a full picture of the appellant's circumstances.

36. Having considered all of the evidence before me, in the round, I find that I am not satisfied as to the truthfulness of the appellant's account and that of her father. For the reasons given above, their difficulties are not overcome by the death declarations and witness statements. I therefore find that I am not satisfied that Ms Abdi died in February 2021 as stated. The appellant is unable to meet the requirements of the rules on this point. As I have already stated, nor does she meet the rules in respect of the TB certificate which was not provided at the time of the application."

15. The substance of Ground 1 is pleaded in both the application for permission submitted to the First-tier Tribunal and the renewed application to the Upper Tribunal.

(i) The Ground is summarised in the first pleading in these terms:

"in deciding that the Appellant and Sponsor's evidence on death of the Appellant's mother, the FtT Judge made adverse credibility findings against the Appellant and Sponsor that these being put to Sponsor or Appellant and without them having been relied on by the respondent in its Refusal Letters; it was therefore unfair to rely on this reasoning."

(ii) This passage is repeated at paragraph 16 of the renewed grounds.

(iii) Similarly the renewed grounds plead

"5. The FTT Judge mentions that there was lack of explanation from the Appellant and Sponsor as to who supported her between 2021 and 2022.

6. This issue was only raised in the determination and not prior to that. This should have been raised in the refusal letter of it was material to the question regarding the death of the mother. It was not raised in the refusal letter."

(iv) Further to this, it was pleaded that such matters had not been raised in cross-examination. In consequence the renewed Grounds plead

"It is procedurally unfair for the Judge to raise questions, in the determination after the hearing, that were suited for cross-examination" (paragraph 9).

16. The Skeleton Argument before me emphasises that the Grounds state: *"The sponsor was not asked who supported the appellant from 2021 and 2022"; "The Judge made adverse credibility findings against the sponsor without these being put to him"; and "The Sponsor was not questioned about the lack of information regarding the Appellant's siblings and the Judge did not raise this is an issue herself".*

17. In granting permission to appeal Judge Norton-Taylor observed that *"where procedural unfairness is alleged as a ground of challenge, some form of evidence of what took place at the hearing should be provided with the application for permission... [or] there should be an explanation*

as to why such evidence was not available at that time, with a view to providing it subsequently". In the absence of any such evidence Judge Norton-Taylor issued Directions. It was also directed that the Respondent should provide a clear indication in the Rule 24 response as to whether any factual assertions made on behalf of the Appellant were accepted or not.

18. In response to the Directions the Appellant has filed a statement from her advocate before the First-tier Tribunal. The following passages in the statement are particularly pertinent:

"The main issue was the status of the appellant's mother. Despite having defined the issues of the appeal, for completely unknown reasons counsel for the respondent asked questions about accommodation" (paragraph 7).

"During the hearing the Respondent's counsel never asked the Sponsor / father (Mohamed Mahdi Sharif), any questions concerning the death of mother, nor the circumstances of the appellant or any of the issues which caused the judge to dismiss the appeal. He only asked him questions about his accommodation" (paragraph 9).

"No questions were put to the witness during the hearing regarding the death of the mother of the Appellant" (paragraph 10).

19. The Respondent's Rule 24 response acknowledges the Directions of Judge Norton-Taylor, and references the Appellant's advocate's witness statement. Although, it does not in terms state a position of acceptance or dispute, the reality is that there is no dispute regarding the advocate's statement. Attached to the Rule 24 response is the Respondent's counsel's hearing minute. There is nothing in the hearing minute that contradicts the Appellant's advocate's statement; it is acknowledged that questions were asked in respect of accommodation, and these are explained on the basis that it was a line of challenge to the Sponsor's credibility. Before me Mr Melvin did not seek to dispute the advocate's statement.
20. In my judgement the Grounds of Appeal are misconceived in a significant regard. Contrary to paragraph 6 of the renewed grounds - which pleads that the issue of who supported the Appellant between 2021 and 2022 was only raised in the First-tier Tribunal's Decision and not prior to that - it is plain that the question of who had supported the Appellant between 2021 and 2022 was raised by the Respondent prior to the hearing.
21. In the first instance it was raised in the decision letter: *"As previously stated, it's been said that you have no other close relatives to care for you and you provided no information who has been taking care of you since your mother's death"*. In circumstances where it was then concluded by the decision-maker that it was not accepted that the Appellant's mother's circumstances were as claimed, it is readily apparent that the reasoning of the respondent was to the effect that in the absence of any evidence of anybody else looking after the Appellant it was likely that she was still

being cared for by her mother. It is also to be recalled that it was a fundamental feature of the refusal that it was not accepted that the Sponsor had sole responsibility.

22. The matter was made yet clearer in the Respondent's Review.
23. The Respondent's Review is dated 5 October 2023, and was uploaded to the Tribunal's digital platform on that date - from which point the Appellant through her representatives would have had access to it. The following passages in the Review are particularly pertinent to the issues before me:
 - (i) *"27. The R notes the A claims their mother died on 02 February 2021, however, the A did not apply to join her father until 10 November 2022, which is nearly 2 years later. If the A's mother is deceased as claimed and the A had no one to look after her, it is not clear why the A did not apply to join her father for c.21 months. Considering this, the R is not satisfied that the circumstances are as claimed."*
 - (ii) *"34. The R notes the A claims their mother is deceased and that they have no close relatives to take care of them in Somalia. As detailed in counter schedule 13, the R is not satisfied that the A's only remaining parent is the sponsor, and it is not clear who the A has been living with/in the care of for the 2 years between the date of death of the A's mother and the A's application to join their father."*
24. It is manifestly clear that the issue of the Appellant's circumstances were in dispute between the parties ahead of the hearing, and that the Respondent considered that in the absence of clarity the claim that the Appellant's mother's had died was not established.
25. This was ultimately the position adopted by Judge Hill.
26. I do not accept that the Appellant did not have an opportunity of addressing this issue in broad terms - for example by the Sponsor providing a supplementary witness statement subsequent to service of the Respondent's Review, or him being prompted to offer more information in examination-in-chief.
27. Be that as it may, in her Skeleton Argument Ms Kogulathas addresses the reliance in the Rule 24 response on the Respondent's Review by referring to jurisprudence in respect of cross-examination of witnesses.
28. For completeness I note in this context and generally that in respect of the matters listed at paragraph 4(i)-(vi) of the Skeleton Argument by way of summarising the Judge's reasons for dismissing the appeal, Ms Kogulathas accepted that all of them were in substance raised in the Respondent's decision and/or Review except that at paragraph 4(v) - *"The Appellant mentioned a number of siblings but says nothing more about them. There was a lack of detail about the family circumstances"* -

referencing paragraph 35 of the Decision. (See similarly paragraph 9 of the Skeleton.)

29. My attention was directed to the case of **Abdi and others v Entry Clearance Officer [2023] EWCA Civ 1455**, which itself made reference to the Supreme Court case of **TUI UK Ltd v Griffiths [2023] UKSC 48**. Paragraph 33 of **Abdi** states:

“The recent decision of the Supreme Court in TUI UK Ltd v Griffiths [2023] UKSC 48 re-emphasises the principle that fairness generally requires that if the evidence of a witness is to be rejected, it should be challenged at the hearing so as to give them an opportunity to address the challenge; and that that is a matter of fairness to the witness as well as fairness to the parties, and necessary for the integrity of the court process in enabling the tribunal to reach a sound conclusion: see especially at [42]-[43], [55], and [70]. The rule is subject to certain exceptions and is to be applied flexibly in the circumstances of any individual case in application of the criterion of the overall fairness of the trial ([61]-[69] and [70(vii) and (viii)].”

30. This prompted discussion in respect of the exceptions explored at paragraph 60 of **TUI**:

“In his discussion of the point Floyd LJ quoted the obligation to cross-examine set out in the 19th edition of Phipson (2018) and referred to Browne v Dunn and Markem. Floyd LJ recognised that the rule is an important one, but, like the Board in Chen v Ng (which appears not to have been cited to the Court of Appeal), he did not consider it to be an inflexible one. In his discussion in paras 63-69 he made six points. First, where, to save time, it is proposed not to cross-examine two witnesses on the same or similar subject matter it was good practice to raise the matter with the judge and obtain his or her directions to ensure fairness. (That suggestion is not relevant to this appeal). Secondly, the purpose of the rule is not only for the benefit of the witness but is to ensure the overall fairness of the proceedings for the parties. Thirdly, the rule applies with particular force where a witness gives evidence of fact of which the witness has knowledge, and it is proposed to invite the court to disbelieve that evidence. Fairness to the witness and to the parties demands that the witness be given the opportunity to respond to the challenge. Fourthly, it was not appropriate to apply the rule rigidly in every situation. Where, as in the case in question, there had been an opportunity to respond to the other side’s case through several rounds of expert evidence which made the position taken by each side’s experts clear, the potential for unfairness to the witness was much reduced. Fifthly, not every part of the evidence of a witness to fact needs to be challenged head-on that it is untrue or simply misguided; the test was fairness; see Various Claimants v Giambrone & Law [2015] EWHC 1946, para 21 per Foskett J. Sixthly, the question for the appellate court is “whether the decision not to cross-examine has led to unfairness to the extent that the judge’s decision on the relevant issue is thereby undermined”

(para 69). In that case, there had been no unfairness to the expert witness or the party adducing his evidence as the witness had had the opportunity to respond to the case made against his position."

31. In my judgement the fourth and sixth matters are particularly germane to the issues that arise before me. The circumstance of a witness not necessarily requiring to be directly cross-examined if he has had sufficient opportunity to respond to criticism of his evidence was further highlighted at paragraph 67:

"Sixthly, as occurred in Edwards Lifesciences, an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify his or her report. For example, if an expert faces focused questions in the written CPR Pt 35.6 questions of the opposing party and fails to answer them satisfactorily, a court may conclude that the expert has been given a sufficient opportunity to explain the report which negates the need for further challenge on cross-examination."

32. For completeness I note that my attention was also directed to paragraph 4 of the 'Surendran' guidelines. However, I did not find much assistance in this in circumstances where the guidelines are particular to cases where one party is not represented.
33. It seems to me that in general terms it is undesirable if a representative for the Respondent has not been cross-examined on matters that are clearly in dispute. However, a failure to cross-examine in circumstances where an issue has been raised ahead of the hearing with clarity, and a witness has had an opportunity to address it - whether by way of a further statement or in examination-in-chief - will not in and of itself inevitably render any adverse decision by the Tribunal in error of law. Similarly, notwithstanding that the evidence stage of a hearing before the Tribunal is essentially adversarial in nature, it be better practice for the supervising Judge to at least enquire of, or otherwise prompt, the representatives to explore contentious matters. However, again a failure so to do was not inevitably amount to an error of law.
34. On balance I find that it was not incumbent upon the Respondent's representative to cross-examine the Sponsor in respect of the contentious matters raised in the decision and the Review. It was open to the Respondent's representative to, in effect, invite the Tribunal to conclude that the Appellant had not answered the concerns of the Respondent adequately by way of any written evidence or evidence-in-chief, and thereby had not discharged the burden of proof; such a submission need not rely upon cross-examination. In turn, in my judgement, there was nothing in legal error in the approach of the Judge in not pursuing such matters herself, or prompting the Appellant's advocate to question further the Sponsor, or prompting the Respondent's representative to follow any particular line of cross-examination - at least so far as those matters expressly put in issue in the decision and Review.

35. However, there remains the issue of the circumstances of the Appellant's siblings. Contrary to the substance of Ground 2 as articulated in the initial grounds, the position of the Appellant's siblings are not irrelevant to a consideration of the key issue of whether or not the Appellant's mother was deceased. The *modus vivendi* of the siblings was potentially very relevant to an evaluation of the circumstances of the Appellant including whether or not her mother had died. But this was not a matter specifically raised in either the decision or the Review – and it appears to be common ground before me that it was not a matter explored at the hearing.
36. It may well be that the Judge would have reached the same decision in the appeal irrespective of any issue regarding the siblings. However it is readily apparent that the Judge's concern in respect of the absence of any details about the siblings beyond their existence was a matter taken into account in the overall conclusion: see paragraph 35.
37. On this very limited basis I am persuaded that there was a material error of law.
38. Although the error is narrow, it is not possible to unravel it from the other aspects of the reasoning. In the circumstances the Decision of the First-tier Tribunal must be set aside and the decision in the appeal remade before the First-tier Tribunal with all issues at large.

Notice of Decision

39. The decision of the First-tier Tribunal contains a material error of law and is set aside.
40. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Hill with all issues at large.

I. Lewis
Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)
18 December 2024