IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03138/2014
OA/03140/2014
OA/03145/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd May 2015	**On 15th June 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MAH **(FIRST APPELLANT)**
ATG **(SECOND APPELLANT)**
MTG **(THIRD APPELLANT)**
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ball of Counsel
For the Respondent: Mr Kandola

DECISION AND REASONS

Introduction

1. The Appellants born on 1st January 1949, 22nd June 2000 and 1st July 1998 are all citizens of Somalia. The first Appellant is the mother of the second and third Appellants.

2. The Appellants had made application for entry clearance to join the Sponsor in the UK who is the son of the first Appellant and brother of the second and third Appellants. The first Appellant's application was under Appendix FM of the Immigration Rules and the application of the second and third Appellants was under paragraph 319X of the Immigration Rules. All three applications have been refused by the Respondent on 11th February 2014. The Appellants had appealed that decision and their appeal was heard by First-tier Tribunal Judge Chowdhury sitting at Hatton Cross on 1st December 2014. He had allowed the appeals of all three Appellants under the Immigration Rules. The Respondent had made application to appeal that decision and permission was granted by First-tier Tribunal Judge Heynes on 20th February 2014. It is said that it was arguable that the judge failed to consider the availability of medical treatment locally for the first Appellant and that error had infected the decisions relating to the children and additionally it was arguable that the judge had erred in applying Section 55 of the 2009 Act for children living overseas.

3. Directions were issued for the matter to come before the Upper Tribunal firstly to decide whether or not an error of law had been made in this case.

4. The matter came before me in accordance with those Directions.

Submissions on Behalf of the Respondent

5. It was submitted that the first Appellant did not meet the terms of E-ECDR.2.5 and her claim failed under that section and it was an error to find that she succeeded. It was further submitted that allowing the children essentially under the terms of Section 55 of the Borders Act was an error as that was relevant only under Article 8 considerations rather than the method in which it had been done by the judge. Further if the first Appellant's decision was flawed and she was in a position to obtain treatment and care that would not disclose any compelling circumstances relating to the children.

Submissions on Behalf of the Appellant

6. It was submitted that the matter of the children and the mother was separate and that the appeals of the children had been allowed and that was not challenged by the Respondent and it was said that the mother's appeal should therefore follow their decision. It was submitted that it was the spirit of Section 55 which was important.

7. At the conclusion of the submissions I reserved my decision to consider matters and I now provide that decision with my reasons.

Decision and Reasons

8. Whilst all three Appellants are citizens of Somalia they were residing together in Ethiopia. The Appellants were aged 63, 16 and 14 years of age respectively now. The Entry Clearance Manager had reviewed the Entry Clearance Officer's refusal on 18th July 2014 and indicated that other than a statement no new evidence had been presented on the Appellants' behalf post the ECO refusal in February 2014.

9. The Respondent had refused the first Appellant's application under Appendix FM by reference to EC-DR.1.1 stating that the first Appellant had not provided evidence required to show that she required long-term personal care to perform everyday tasks or that with practical and financial help from the Sponsor she could not obtain such help. Separately the ECO did not consider there were exceptional circumstances allowing the matter under Article 8 of the ECHR.

10. In respect of the second and third Appellants the ECO had looked at their applications under paragraph 319X of the Immigration Rules. The ECO had found no evidence demonstrating they were related to the Sponsor as claimed, nor that they formed part of the pre-flight family of the Sponsor. It was also stated that they had formed an independent family unit to the Sponsor. Finally and briefly it was refused also under Article 8 ECHR.

11. These were three separate applications under different aspects of the Immigration Rules and with separate features of refusal or concern relating to the first Appellant on the one hand and the second and third Appellants on the other.

12. The ECM had reviewed the refusals on 18th July 2014 noting that but for a statement no new evidence had been submitted since the date of refusal and no concessions were made in respect of the original Grounds of Refusal. As these were out of country appeals the judge was obliged only to consider circumstances appertaining at the date of decision.

13. At paragraph 30 the judge had identified the basis of refusal relating to the first Appellant. The issue in her case was her medical condition and whether she required long-term personal care to perform everyday tasks and secondly even with the practical and financial help of the Sponsor that care was either not available or not affordable.

14. The judge referred to medical evidence and the Sponsor's evidence to conclude that the first Appellant required long-term personal care to perform everyday tasks. No medical evidence had been before the ECO. Medical evidence before the judge consisted essentially of three letters. In summary it noted that in about June 2013 she had a hysterectomy. She was diagnosed in January 2014 as being unable to walk or raise objects and had swollen knee joints, chronic pelvic inflammation disease and it was recommended that she should have management in a higher health institution. The higher health institution thereafter provided a medical summary in February 2014. They noted liver problems and suggested a biopsy and presented various drugs. In November 2014 the Russian Red

Cross in an out-patient certificate diagnosed dementia and said she needed in-patient treatment.

15. The evidence and circumstances at the date of decision i.e. the first two letters did not necessarily reveal a need for long-term personal care. The last letter diagnosing dementia, which may have suggested long-term care needed (although that letter is very short and absent to clear evidence) postdated the date and circumstances at the date of decision.

16. At paragraph 33 the judge referred to the Russian Red Cross letter to find the first Appellant needed in-patient treatment. He also referred to the first Appellant deteriorating and "requiring better evaluation and management in a higher health institution as soon as possible". The implication from paragraph 13 is that the judge viewed that that was something that had not been done. He certainly made no reference to the letter of February 2014 which is from a "higher clinic" and written by a consultant gastroenterologist-heptologist which does not refer to in-patient treatment but merely to "further care and follow-up". It seems the judge may have overlooked such significant evidence and in so doing misled himself as to the need for the first Appellant to be fully admitted into hospital. However even if it was reasonable for him to conclude that she required long-term personal care he did not consider, significantly, whether such would be available with the practical or financial help from the Sponsor. There was evidence before the judge suggesting medical care and medicines were available as evidenced from the contents of the first two letters. There was evidence the Sponsor supported the first Appellant financially and there had been employment either in the past or currently of a carer in Ethiopia. Those factors, if considered, may have led a judge to conclude that with practical and financial assistance from the Sponsor in the UK the first Appellant could receive long-term care and support in Ethiopia if it was concluded there was a sufficiency of medical evidence to demonstrate that that was needed. However the judge did not consider that significant aspect of E-ELDR.2.5 but simply concluded at paragraph 33 that if she was admitted to hospital then the second and third Appellants would be left without their primary carer and that would be a breach of Section 55 of the Borders Act 2009.

17. It was an error for the judge not to consider an essential part of E-ECDR.2.5 in relation to the first Appellant particularly in circumstances where there was evidence that could have led to a conclusion one way or the other. Secondly it was an error to refer to Section 55 in respect of the second and third Appellants who were not children within the UK which is the function of Section 55. There were therefore material errors of law made in consideration of the first Appellant's case.

18. For the sake of completeness the judge was entitled to conclude that there would be adequate accommodation and maintenance available for the reasons he provided at paragraphs 34 to 35.

19. In respect of the second and third Appellants the judge was entitled to conclude they were related to the Sponsor as claimed as demonstrated by DNA evidence. Whilst that evidence was not available to the ECO, the fact they were related was a circumstance existing at the date of decision. He was also correct to identify the relevant Rule being paragraph 319(y) and 298(1)(d). He found serious and compelling family or other considerations present because "They have undergone a tremendous amount of suffering and continue to suffer. I find that there are serious and compelling factors such that they should not be forced to live apart from their mother". There was no further consideration of the second and third Appellants' case.

20. It seems clear that the judge's conclusions relating to the children's suffering was based on the Sponsor's evidence as to the care they had to provide to their mother. There appears on the face of it no other evidence to support that conclusion. The judge had already concluded that the mother required long-term in-patient care and in paragraph 39 found that the second and third Appellants should not be forced to live apart from their mother. Unfortunately the judge's view on the second and third Appellant's cases may already have been decided and coloured by the decision that he had taken at paragraph 33 where he said "I find that it would be in breach of Section 55 to propose that the first Appellant is hospitalised in Ethiopia and her young children left to emotionally and practically bring themselves up". As indicated above it was somewhat tenuous to conclude on the evidence that the first Appellant would be hospitalised for more than merely a short-term, secondly there had been no examination of potential support and help which rendered the presumption the children would be left to bring themselves up inadequate and finally as noted above it was an error of law to place those Appellants and essentially the decision upon those Appellants within the terms of Section 55 of the Borders Act 2009.

21. Although it was submitted that the Respondent had not challenged the decision in relation to the second and third Appellants the application for permission made reference to the judge's finding under Section 55 in relation to her children and the permission for granting appeal also stated that it was arguably an error of law for the judge to have applied Section 55 to children overseas.

22. In summary I find that for the reasons provided there were material errors of law made by the judge in consideration of the appeals of all three Appellants.

Decision

23. An error of law was made by the judge such that the decision of the First-tier Tribunal should be set aside and remitted to the First-tier Tribunal for a *de novo* hearing.

24. Anonymity direction is made.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DIRECTIONS

(1) This matter is remitted to the First-tier Tribunal for a *de novo* hearing.

(2) The parties shall serve on the Tribunal and the other party not later than 21 days after these directions were sent:

(a) An index and paginated bundle containing all documentary evidence upon which it is intended to rely at the forthcoming hearing, pursuant to Rule 15(2a).

(b) The parties not required to re-serve any documentary evidence that has been previously filed with the First-tier Tribunal but an index of all material to be relied upon including that previously filed shall be served not later than 21 days after these directions.

(c) No interpreter will be booked for the forthcoming hearing unless a party makes a specific written request to the Tribunal for an interpreter specifying the language and any dialect and the reasons for making the request not later than seven days after these directions were sent.

Signed Date

Deputy Upper Tribunal Judge Lever