Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA034192015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st July 2017	**On 03rd August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MISS FOSIYA ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A A Mohamed - Sponsor
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Somalia born on 1st January 1997. The Appellant made application for entry clearance to join her parents in the United Kingdom for settlement. Her application was considered under paragraphs 297 and 320(3) of the Immigration Rules and her application was refused by the Entry Clearance Officer by Notice of Refusal dated 22nd January 2015.

2. The Appellant appealed the Notice of Refusal and that appeal was initially considered by the Entry Clearance Manager. By appeal review dated 19th August 2015 the original decision to refuse entry clearance was maintained.

3. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Ross sitting at Taylor House on 18th October 2016. In a brief decision and reasons dated 21st November 2016 the Appellant's appeal was allowed under the Immigration Rules.

4. On 8th December 2016 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. Those Grounds of Appeal noted that the Appellant was seeking to join the Sponsor, her father, in the UK and to reside with him, his spouse and his seven other children. It was noted that the Appellant resided in a three bedroom property. In terms of meeting the accommodation requirements the Secretary of State contended that the judge had not properly taken into account the number of occupants, the size of the Sponsor's property and the number of rooms it contains in order to establish whether the property would be overcrowded within the definition as set out at Part X of the Housing Act 1985.

5. On 31st May 2017 Judge of the First-tier Tribunal Ransley granted permission to appeal.

6. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal. For the purpose of continuity throughout the appeal process Miss Ali is referred to herein as the Appellant and the Secretary of State as the Respondent albeit that this is an appeal by the Secretary of State. The Secretary of State appears by her Home Office Presenting Officer Mr Duffy. The Appellant is represented by her father and Sponsor Mr Mohamed.

Preliminary Issues

7. Mr Duffy sought to amend the Grounds of Appeal which were given by Judge of the First-tier Tribunal Ransley under Procedure Rule 5(3)(c). I gave due consideration to the application and granted it. The Sponsor was present. I explained the process to him and enquired as to whether he had any comments to make. He did not with regard to the application but did generally with regard to the appeal. I intimated that I would hear from him in due course.

Submissions/Discussion

8. Mr Duffy indicated the First-tier Tribunal Judge had noted that Counsel instructed by the Secretary of State had agreed that Rule 319R was the applicable Rule and he submitted that that manifestly was not, and could not be, the case. He points out that the application was made on 29th December 2014 and therefore Rule 297 was the applicable Rule as identified by the Entry Clearance Officer. I accept this. Mr Ahmed's

concession was wrong in law and should not have been followed by the First-tier Tribunal Judge as the Appellant did not meet the criteria to engage with Rule 319R in the first place. Mr Mohamed indicated he did not understand or follow the Rule but he understood the basis upon which the Notice of Refusal had originally been made by the Entry Clearance Officer. I consequently agreed to the amendment.

Submissions/Discussion

9. Mr Duffy refers to me Part X of the 1985 Housing Act which sets out the definition of overcrowding to include at paragraph 325 the room standard to persons of the opposite sex per room subject to leaving out children under the age of 10 and to the space standard set out at paragraph 326. He points out that there is no reference to this analysis or any reasoned findings regarding it in the decision of the First-tier Tribunal Judge. He points out that this is an Appellant who lives with his wife and seven children and that the judge has failed to give any reasoned reasons for making any findings the accommodation could be reasonable. He submits that given that conclusion which includes an error of law then it is necessary to look at the amended Grounds of Appeal and that the application is one that should be considered under paragraph 297 of the Immigration Rules and that the issues raised in detail by the Entry Clearance Officer as endorsed by the Entry Clearance Manager have not been addressed. Further he points out that the refusal pursuant to paragraph 320(3) that the Appellant had failed to provide a national passport or other documentary evidence establishing her identity and nationality had not been addressed and the Appellant had not engaged with at all the Notice of Refusal letter and that this had not been properly addressed by the judge thus constituting a further error of law.

10. Mr Mohamed pointed out that he had now moved property on 6th February 2017 to his current address at 8 Chester Road, N19. He produced a rental agreement. That agreement did not display any evidence of the size of the accommodation albeit that he indicated that it was sufficient now to house his family to enable him to accommodate his daughter. He made an impassioned plea that her appeal be allowed and thereby that the Secretary of State's appeal be dismissed.

The Law

11. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

12. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's

factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

13. I explained carefully to Mr Mohamed the issues that were outstanding on this appeal. I explained to him the matters of law that needed to be addressed and that the Secretary of State's submissions were that these issues had not been properly addressed by the First-tier Tribunal Judge. I am quite satisfied that the judge has not addressed the appropriate issues. I am equally satisfied that there was an error made by the Secretary of State's legal representative in suggesting that this matter should be dealt with under Rule 319R rather than 297. Mr Mohamed indicates and suggests that the accommodation problem has been addressed by his moving to new accommodation. This I pointed out to Mr Mohamed does not assist. It does not assist for two reasons. Firstly as the move takes place after the date of decision the Tribunal will be limited under this application to address issues that relate at the date of decision. Secondly, even if I were to give due consideration to the documents provided they do not show in any way that the accommodation could now meet the requirements of Part X of the Housing Act 1985.

14. It is not however only with regard to the manner in which the judge has addressed the issue of accommodation where he has erred in law but he has also failed to address maintenance. He has not engaged at all with regard to the maintenance level and he has not given proper or due consideration to the issue of sole responsibility. The only findings which would appear to be unchallenged relate to the decision on paternity.

15. The correct approach therefore is to find that there are, for all the above reasons, material errors of law in the decision of the First-tier Tribunal Judge. I also consider it appropriate to set aside the decision and to remit the matter back for rehearing before the First-tier Tribunal with none of the findings of fact to stand. The reason that I address this rather than to go on and remake the decision today is because of the following reasons

    (i) The Appellant is represented by her Sponsor. There are issues of law here. I accept the difficulty the Sponsor may have in funding such an appeal but he must be advised that he would be far better to

be represented on this matter than to appear in person and to be asked to address issues of law which with the greatest of respect to the Sponsor he has already indicated he does not feel that he is in a position to do.

(ii) Bearing in mind that the manner in which the First-tier Tribunal Judge addressed the issue was under the wrong Immigration Rule, albeit that the judge was led down that route by the Home Office Presenting Officer, it is clear that there has not been a proper or full analysis of an appeal as it should have been presented under the correct Immigration Rule.

16. It is on those bases I consider it appropriate that the matter be remitted for rehearing and I set aside the decision having found material errors of law for the reasons given above and give appropriate directions.

Decision

The decision of the First-tier Tribunal contains material errors of law and is set aside. The appeal is remitted back to the First-tier Tribunal for rehearing and the following directions are to apply.

(1) The appeal is to be reheard remitted to the First-tier Tribunal sitting at Taylor House on the first available date 28 days hence with an estimated length of hearing of two hours before any First-tier Tribunal Judge other than Immigration Judge I Ross.

(2) That there be leave to either party to file at the Tribunal and/or serve on the other party an up-to-date bundle of such subjective and/or objective evidence upon which they seek to rely at least seven days prior to the restored hearing date.

(3) That in the event the Appellant's representative i.e. her Sponsor or on the instruction of such legal representatives that she should seek to instruct through her Sponsor that an interpreter is required to attend the restored hearing then such legal representatives and/or the Sponsor should notify the Tribunal of the language requirement of such an interpreter within seven days of receipt of these directions.

No anonymity direction is made.

Signed Date 27th July 2017

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date 27th July 2017

Deputy Upper Tribunal Judge D N Harris