



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10135/2015

THE IMMIGRATION ACTS

Heard at: Bradford
On: 6th September 2018

Decisions & Reasons Promulgated
On: 13th September 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Kidus [L]

Appellant

And

Entry Clearance Officer, Pretoria

Respondent

For the Appellant: Mr J. Dingley, Ison Harrison Solicitors
For the Respondent: -

DETERMINATION AND REASONS

1. The Appellant is a national of Eritrea date of birth 22nd June 1998. He appeals with permission the decision of the First-tier Tribunal (Judge R Caswell) to dismiss his human rights appeal.
2. In April 2015 the Appellant, then aged 16, made an application for entry clearance to come to the United Kingdom in order to be with his Sponsor, Mr [L Y] and his family. Mr [Y] is a recognised refugee from Eritrea, and the Appellant made his application under the 'refugee family reunion' provision of the Immigration Rules, asserting that he was a member of Mr [Y]'s 'pre-flight' family. The

Respondent's decision is dated the 5th October 2015. The Respondent noted that DNA evidence proved that Mr [Y] is not the Appellant's biological father; the Appellant had failed to provide a birth certificate and so the Respondent could not be satisfied as to his true age; the Respondent was not satisfied that a *de facto* adoption had taken place, or that the Appellant was otherwise a member of this family.

3. When the matter came before the First-tier Tribunal some two years later¹ Mr [Y] gave oral evidence, explaining the background to his relationship with the Appellant. Of that evidence the Tribunal said this:

"I had the benefit of seeing and hearing the sponsor give evidence. This he did in a measured, careful and dignified way, being careful not to exaggerate or mislead throughout his evidence. There are numerous money transfer receipts showing the sponsor has been supporting the Appellant financially, throughout his time in Ethiopia and after [his wife] [S] and the other children came to the UK. The sponsor gave considerable detail about the Appellant's attitudes, state of mind and way of life in Ethiopia. I am satisfied that the sponsor is a truthful and careful witness, and I accept all his evidence as credible and reliable".

4. The evidence that the Tribunal accepted as factual was as follows:

- i) At the time of the Appellant's birth in June 1998 Mr [Y] was having a relationship with the Appellant's mother, [Z]. At that time they were all living in Eritrea;
- ii) At all material times, until the production of DNA evidence in 2015, Mr [Y] believed the Appellant to be his son;
- iii) The Appellant lived with his mother from the time of his birth in 1998 until she was killed by Ethiopian artillery fire in 2000;
- iv) After his mother's death the Appellant, then aged two, was taken in by members of her family;
- v) In 2002, then aged four, he began to live with the woman believed by all concerned to be his paternal grandmother (Mr [Y]'s mother);
- vi) In 2005, then aged seven, he went to live with the woman believed by all concerned to be his paternal aunt (Mr [Y's]);
- vii) At all times from his birth the Appellant was in regular contact with/lived with members of what was believed to be his paternal family (although not always Mr [Y] himself, since he had been 'continually conscripted' into the Eritrean army and was away from the family home for extended periods of time);
- viii) When Mr [Y] married his wife [S] in 2004 he did so on the understanding that he had responsibilities to the Appellant;

¹ The appeal was lodged in November 2015, but was not listed until September 2017. The reason for the delay is unknown to me, but in the circumstances of the case is obviously to be deeply regretted.

- ix) In 2007, when the Appellant was aged nine, he came to live with Mr [Y], [S] and their three year old daughter [C1];
 - x) [S] treated the Appellant as her son and [C1] grew up believing him to be her elder brother, as did a third child born to the family in 2007 ([C2]);
 - xi) In late 2012 Mr [Y] was arrested by the Eritrean authorities. In January 2013 [S] took the three children to Ethiopia where they all resided together in Adi Harish refugee camp. She gave birth to her fourth child in July of that year ([C3]);
 - xii) In 2014 Mr [Y] escaped Eritrea and fled to the United Kingdom to claim asylum. He was granted refugee status valid until the 31st October 2019;
 - xiii) On the 23rd April 2015 [S] made entry clearance applications for her and the four children to join Mr [Y] in the United Kingdom;
 - xiv) In October 2015 the applications of [S] and the three younger children were granted. The Appellant was refused;
 - xv) The family came to the United Kingdom having lodged an appeal for the Appellant in November 2015. They did so leaving the Appellant in the care of a family friend, and in the belief that his appeal would be quickly resolved in his favour;
 - xvi) The Appellant is not working or studying in Ethiopia. He has nothing useful with which to pass the time, and is fixed upon the idea of reuniting with Mr [Y] and his family. He has no family himself in Ethiopia;
 - xvii) The family have been “devastated” by their separation. The Appellant has been desolate and regularly cries on the phone when he speaks to the family here. Mr [Y] has travelled to Ethiopia to spend time with him and has, since the moment of his arrival, supported the Appellant financially. The Appellant has remained living with a friend of [S], but this friend intends to leave Ethiopia, and only remains there at present in order to stay with the Appellant;
 - xviii) The family here all have limited leave to remain as refugees. [C1], [C2] and [C3] are all attending school. Mr [Y] is in full time employment.
5. From this factual matrix the Tribunal appeared to have little hesitation in finding that there is an Article 8 ‘family life’ between the Appellant and the family members here. Although by the date of the hearing the Appellant was 19, the Tribunal accepted that he continues to be emotionally and financially dependent upon Mr [Y]. The determination proceeds directly from this finding to the following conclusion:

“21. I am not satisfied, however, that refusal of entry clearance would interfere with this family life. The Appellant is now an adult, and can apply to come to the United Kingdom in other capacities, for instance as a student.

In addition, it has not been shown that his father – and indeed the whole family – could not live with the Appellant in Ethiopia, as in fact most of them did before. No adequate evidence has been put before me to support any argument that they could not do this. The sponsor is of course a refugee, but his country of nationality is Eritrea, as is the rest of his family's, not Ethiopia.

22. For all these reasons, the appeal on human rights grounds fails".

6. The Appellant now has permission to appeal against this decision. Although the Respondent provided no 'Rule 24 response', and was not represented before me today², I have proceeded on the assumption that the appeal is opposed.

Discussion and Findings

7. Mr Dingley submitted that it was not rationally open to the Tribunal to conclude that the Respondent's decision does not cause an interference with family life. On the Tribunal's own findings, it plainly did. When the family members all made their applications in April 2015 they did so in the understanding that their composite family life would be continuing together; when [S] and the three younger children travelled to the United Kingdom in October of that year they did so in the belief that the Appellant would very shortly be joining them. The decision to refuse him entry clearance directly 'interfered' with that extant family life, and continues to do so. Further, submitted Mr Dingley, the Tribunal has misdirected itself in that this being an entry clearance appeal the appropriate question was not whether there was an 'interference' but whether the decision betrayed a 'lack of respect' for family life: see for instance ECO (Dhaka) v Shamim Box [2002] UKIAT 02212. The threshold to engage Article 8 is a relatively low one: Boultif v Switzerland (2001) 33 EHRR [at 3940], AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801 [at 28] which in the circumstances was plainly surmounted.
8. I agree. It was a misdirection to look for 'interference' in an entry clearance case but on the facts it was a test that was, curiously, made out. The 'interference' began at the point that the Appellant was refused, but other family members were granted. Further the Tribunal failed to have regard to the fact that the threshold for engaging Article 8 in family life cases is a relatively modest one. Given its own findings about the depth and quality of this family life it was one that was indisputably met. This decision did betray a lack of respect for family life. It is difficult, with respect, to see the relevance of the Tier 4 (Student) Migrant rules to this question. The Appellant seeks settlement with his family on human rights grounds; even if he has the means to do so (which he does not) obtaining a temporary student visa would offer him no solution.

² The Presenting Officer due to appear was taken ill and was unable to attend. Although an application for an adjournment was made, and granted, for another matter in the list, an adjournment was not sought in this case, and I was invited to proceed in the Respondent's absence.

9. Having established this error of law Mr Dingley invited me to set the decision of the First-tier Tribunal aside, lacking as it does any 'in the alternative' proportionality balancing exercise. I can see no alternative but to do so.
10. I remake the decision in the appeal as follows. I base my decision on the facts as found by the First-tier Tribunal, although I record that I did hear very brief evidence, by way of clarification, from Mr [Y], who was accompanied to the hearing with his wife [S] and his daughter [C1].
11. The only ground of appeal is human rights, and the relevant date for my enquiry is the date of hearing. The Appellant can no longer submit that the decision of the ECO is 'not in accordance with the law' although compliance with the relevant immigration rules may inform my decision on proportionality.
12. There is an Article 8 family life between the Appellant and Mr [Y], whom he has always treated as his father, and *vice versa*. I accept that since her marriage in 2004 [S] has always treated the Appellant as her son, a fact evidenced by the fact that when she fled Eritrea after her husband's arrest in 2013, she took him with her and her two biological children. Although there was no evidence directly from [C1] or her younger siblings I see no reason to reject their father's evidence that they have always looked to the Appellant as their elder brother, and he them as his brother and sisters. The Appellant remains wholly dependent on Mr [Y] and despite the fact that he is now technically an adult, he remains an integral part of this family who is to all intents and purposes a 'child' of the sponsor and his wife.
13. For the reasons set out above I accept that the decision does involve a lack of respect for family life and that Article 8 is therefore engaged.
14. The decision is in accordance with the law in the sense that it is within the ECO's lawful powers to make it, and it is taken in pursuit of one of the legitimate aims set out in Article 8(2) of the ECHR, namely protecting the economy.
15. In assessing whether the decision is proportionate I remind myself of the public interest factors set out at section 117B of the Nationality, Immigration and Asylum Act 2002.
16. It is in the public interest to maintain effective immigration control, and this is done primarily by fair and consistent application of the Immigration Rules.
17. It is not in dispute that the Appellant cannot today meet the requirements of the original rule under which he sought entry, paragraph 352D of the Immigration Rules. That is because he can no longer show that he is "under the age of 18" [352D(ii)]. Whilst I bear in mind that he was a minor when he made his application, and at the date of the ECO's decision, I make my Article 8 assessment as of today's date. Nor can he show that he is the "child of a parent who is

currently a refugee" [352D(i)]. Although I accept without hesitation that in Article 8 terms there is a substantive parental relationship, Mr [Y] is unable to meet the definition of 'parent' set out at paragraph 6 of the Immigration Rules. The remaining requirements of the rule are met: the Appellant was part of the pre-flight family of the refugee, he is not leading an independent life and would not, as far as I am aware, face exclusion by virtue of Article 1F of the Refugee Convention. It was not submitted before me that the Appellant could succeed under any other provision in the Rules. This is therefore a matter that weighs against him in the balancing exercise.

18. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society. I have no evidence to indicate that the Appellant can speak any English. This is therefore a matter that weighs against him in the balancing exercise.
19. It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such person are not a burden on taxpayers, and are better able to integrate into society. As a 'child' of this family the Appellant remains wholly financially dependent upon his sponsor Mr [Y]. I have been given no indication that he would be financially independent in the foreseeable future. This is therefore a matter that weighs against him in the balancing exercise.
20. Sub-sections 117B(4)-(6) have no application to the Appellant.
21. These are the factors that weigh in the ECOs favour as he submits that it is necessary and proportionate to continue to refuse entry to the Appellant.
22. The factors that support the proposition that this decision is *disproportionate* are as follows.
23. There is a continuing family life at stake. The Appellant, his 'father', 'mother' and 'siblings' have all been deeply distressed by their dislocation. The Appellant and his family are all refugees, and but for a biological fact – for which neither he nor Mr [Y] can be blamed – the Appellant would have qualified for leave to enter under paragraph 352D at the same time as his siblings. That this biological fact has weighed so heavily in this case is contrary to the scope, intention and meaning of 'family life' under Article 8. The United Kingdom's obligations under that article are concerned with the protection of substantive – not necessarily biological or formal – relationships, and that is what we have here.
24. The effect of the refusal is to present the family with a painful choice. They could continue to live apart from each other, with minimal prospects of meaningful

contact in the future. Or, the family here could leave their now settled existences – their home, security, their education or work – and return to life in an Ethiopian refugee camp. Even assuming that the Ethiopian authorities would permit them entry, this is a high, and I find disproportionate, price to expect them to pay for family unity. The reality is that this family will not return to the insecurity of existence in a refugee camp. Mr [Y] will not sacrifice the well-being of the 3 children currently in the United Kingdom, and nor should he be expected to do so. The Appellant will therefore face living on his own. Mr [Y] has explained his very real concerns for the Appellant’s mental health, particularly since the family with whom he is currently lodging are ready to leave Ethiopia. Mr [Y] is distressed and extremely worried at the prospect of the Appellant facing life alone in Ethiopia, a country in which he has no ties and few prospects. He does not know how the Appellant will cope, either practically or emotionally. The family here, in particular the children, continue to be distraught by a separation from their brother that they cannot really understand. The impact of this decision is therefore severe, profound, and I find, unjustifiably harsh.

25. I have borne in mind the public interest at all points in my deliberations. I find that to some extent the concerns expressed in s117 are mitigated by the fact that the Appellant is young and from a supportive family. He may not speak English today, but as a young person it can be hoped that he will quickly learn: I note in this regard the instructive example of his siblings, none of whom spoke any English when they arrived but all of whom now flourish in full time education (when I heard from [C1] at the hearing it was difficult to detect that she only arrived in this country in October 2015). I note that the Sponsor and his wife are both in employment and are supporting their family – including the Appellant in Ethiopia. Although there can be no guarantee that they will not from time to time need support from the state, I have taken note of the submission that this is a hardworking and law abiding family who have at all times sought to comply with the law and immigration control. I fully expect the Appellant to do the same.

Decision

26. The decision of the First-tier Tribunal contains errors of law such that the decision is set aside. I remake the decision in the appeal as follows:

“the appeal is allowed on human rights grounds”.

27. There is no order for anonymity.

Upper Tribunal Judge Bruce
6th September 2018