Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/08002/2015
OA/08005/2015
OA/08006/2015

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 19th December 2017	**On 14th March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MASTER FHY
MASTER HHY
MISS NHY
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Ms H Aboni, Home Office Presenting Officer
For the Respondent: Ms. L Santamera, Counsel instructed by Hersi & Co Solicitors

DECISION AND REASONS

1. The appellant before me, is the Secretary of State for the Home Department. However, for ease of reference, in the course of this decision I shall adopt the parties' status as it was before the First-tier Tribunal. I shall in this decision, refer to FHY (*born 27.04.08*), HHY (*born 0.0.11*), and NHY (*born 10.11.03*), as the appellants and the Secretary of State as the respondent.

2. The appellants are all citizens of Somalia. They are two brothers and a sister. They each applied for entry clearance to join their father, FY, and settle in the UK. Their applications were refused on 21st January 2015. The respondent concluded that the appellants had submitted no evidence of their identity and submitted no evidence of their relationship with their sponsor. Each of the appellants had claimed to be a child of their sponsor. The respondent noted that the appellants had failed to provide evidence of the relationship between the appellants and their sponsor by way of documents indicative of the claimed relationship. The respondent also noted that the sponsor travelled to the UK in 2005 to be reunited with his mother, as her dependent. At that time, there was no mention of the appellants being the sponsor's children. The respondent also considered the appellants account of their mother having been kidnapped in 2014, and their having lived with a cousin since that time. The respondent noted that the appellants had provided no evidence to substantiate the kidnapping and that there had been a delay between the kidnapping and the making of the application. The respondent concluded that the appellants were being cared for in their country of origin by their cousin.

3. The appellants appealed to the F*t*T. Shortly after lodging at the appeal, under cover of a letter dated 19 June 2015, the appellants representatives provided the Entry Clearance Manager with a DNA report as confirmation of the relationship between the appellants and the sponsor. The matter was reviewed by the Entry Clearance Manager, who stated in a decision to maintain the refusals as follows:

> *"In the grounds of appeal it was asserted that the sponsor and appellants were related as claimed. In support of this they provided DNA tests from DNA Legal which is part of the DNA Worldwide group, confirming the appellants were the children of the sponsor. However I note that DNA Legal is not on the GOV.UK website as an approved paternity testing provider.*
>
> *…*
>
> *I have noted that the grounds drew attention to the solicitor's letter from Hersi & Co Solicitor's which stated that the appellants' mothers had been kidnapped. They reiterated*

this and also that the subsequent search for her had resulted in the delay in the applications being made. However these claims are not corroborated by the evidence provided.

I have noted that the grounds advance the point that the ECO has been unfair and unreasonable by refusing the appellants. However given the serious concerns as to whether the appellants were related to the sponsor as claimed as well as that the claim about their mother is unsubstantiated, then I am satisfied that the ECO was entitled too and correct in arriving at the decision they did. Furthermore, I am not satisfied on the balance of probabilities that the grounds of appeal and evidence provided have dispelled these concerns.

Given the above, I maintain the decisions to refuse entry clearance.

4. The appeals were heard by F*t*T Judge J Macdonald on 28th March 2017. The appeals were allowed for the reasons set out in a decision promulgated on 7th April 2017.

The decision of the F*t*T Judge

5. A summary of the background to the appeal is set out at paragraphs [1] to [20] of the decision of the F*t*T Judge. The Judge heard evidence from the appellants father that is set out at paragraphs [26] to [35] of the decision. The Judge sets out, at paragraph [40], the requirements of paragraph 297 of the Immigration Rules.

6. The F*t*T Judge noted that contrary to what was said by the Entry Clearance Manager, the DNA report relied upon by the appellants is from an approved Company and the Judge, at [41], accepted the DNA report as evidence of the relationship between the appellants and their father.

7. The Judge turned to consider the appellants account of the kidnapping of their mother. The Judge found at [44], that the appellants inability to obtain corroborating evidence is understandable. Having had the benefit of hearing

evidence from the sponsor, he found that the evidence of the sponsor that his wife has been abducted is credible, and was accepted.

8. At paragraph [45], the Judge notes that the decisions under appeal were made on 21st January 2015 before the changes to appeal rights set out in the Immigration Act 2014 came fully into force. The Judge notes "*I can therefore decide this appeal on the basis that the immigration rules have been wrongly applied.*".

9. The Judge found that the sponsor is present and settled in the United Kingdom and has had sole responsibility for the appellants upbringing, so that the requirement at paragraph 297(e) of the rules is met. In reaching that decision, the Judge states at [46];

> *The documentary evidence produced shows that the sponsor makes regular payments in support of his children and rings them almost every day to provide them with advice and support. The children are now aged almost 8 years and 11 months, nine years and 11 months, and 13 years and five months respectively. Based upon the evidence contained within the documents produced to me and the oral and written evidence of the sponsor, I find that the sponsor as the parent of the appellants has sole responsibility for their upbringing following the abduction of their mother in April 2014."*

The appeal before me

10. The respondent advances one ground of appeal. That is, the judge failed to give adequate reasons for his finding on a material matter. It is said that in reaching the decision that the appellants mother had been kidnapped and the sponsor had sole responsibility for the appellant, the Judge has (a) given inadequate reasons for his finding that the appellants mother had been kidnapped; (b) did not consider the eighth month delay between the abduction of the appellants mother and the making of the application for settlement and (c) failed to consider whether the major decisions concerning the appellants, were at the time of the respondents decision, being made by their cousin, with whom they were living.

11. Permission to appeal was granted by FtT Judge Hollingworth on 8th November 2017. The matter comes before me to consider whether the decision of the F*t*T involved the making of a material error of law, and if so, to remake the decision.

12. Mrs Aboni adopts the respondent's grounds of appeal and submits that the key issue in this appeal is whether it was open to the Judge to find that at the date of the respondent's decision, the appellants father had sole responsibility for the appellants upbringing as required by paragraph 297(e) of the immigration rules. She submits that the Judge has failed to consider how the appellants were being looked after at the date of the respondent's decision to refuse the application for settlement. She submits that in an appeal against a refusal of entry clearance, the key date is the date of the decision of the entry clearance officer, and the appeal should have been determined by the Judge by reference to the situation as it was, at that time.

13. In reply, Ms Santamera submits that the Judge was entitled to consider the circumstances as they were at the date of the hearing of the appeal. She submits that the appellant's cousin, with whom they were living, was only taking a care-taking role for the children and it was their father that had sole responsibility for his children's upbringing. She submits that the Judge must have accepted that the appellants cousin had moved to Norway, and that the respondent's appeal amounts to a mere disagreement with the findings that were properly open to the Judge.

Discussion

14. The decisions of the respondent that were under appeal before the F*t*T were the decisions to refuse entry clearance for settlement dated 21st January 2015. The Immigration Act 2014 ("the 2014 Act") fundamentally changed the system granting rights of appeal. Section 15 of the 2014 Act repealed and replaced the key relevant sections, 82, 83, 83A and 84 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The relevant savings provision, operate such that from 6th April

2015, the new regime applies for all persons who apply for entry clearance, on or after that date. The F*t*T Judge here, correctly noted that the decisions under appeal were made on 21st January 2015 before the changes to appeal rights set out in the Immigration Act 2014 came fully into force. The prospective grounds of challenge must fall within one of the listed grounds of appeal in s84 of the 2002 Act. These include: the decision is not in accordance with the Immigration Rules. It was therefore open to the Judge to decide the appeal on the basis that the immigration rules have been wrongly applied.

15. On appeal, the relevant date in entry clearance cases is the date of refusal; s85(5) of the 2002 Act. It is now well established that any material change in circumstance or evidence not reasonably foreseeable after the date of refusal, should not be taken into account. The F*t*T Judge was entitled to look at circumstances/evidence after the date of decision, only if it related to circumstances before or at the time of decision.

16. The Judge accepted the DNA evidence. The Judge found, at [41], that the appellants are the two sons and one daughter of the sponsor. It was plainly open to the Judge to accept that the relationship between the appellants and their father has been established. Although the DNA report came after the respondent's decision of 21st January 2015, it had been considered by the Entry Clearance Manager, and in any event, the evidence relates to the facts as at the time of decision.

17. The Judge also found, at [44]:

> *"..Having had the benefit of hearing evidence from the sponsor and taking into account the background information about Somalia I find the appellant's claim that his wife has been abducted be credible and believable and I accept it. It is further supported by the fact that the sponsor visits the appellants when he can in Addis Ababa, he telephones them almost on a daily basis and remits funds for their support."*

18. The Judge found that the requirement at paragraph 297(e) of the Immigration Rules is met. In deciding whether the appellants have established that their father has had sole responsibility for their upbringing since the abduction of their mother, it is far from clear whether the Judge had in mind the position as it was at the date of the respondent's decision. The Judge states at [46], that "*..The documentary evidence produced shows that the sponsor makes regular payments in support of his children and rings them almost every day to provide them with advice and support..*". It is not entirely clear whether the Judge was referring to the position as it was at the date of refusal, or the date of the hearing before him. I have carefully considered the evidence that was to be found at pages [70] to [107] of the appellant's bundle. The majority of that evidence post-dates the decision. The only evidence that pre-dates the respondent's decision of 21st January 2015 is evidence of money transfers made by the appellants father to MAA on 3rd December 2014 ($400), 9th December 2014 ($150), 19th December 2014 ($2,000), 20th December 2014 ($250), and 3rd January 2015 ($400).

19. In January 2015, it appears the appellants were being looked after by a cousin. The Judge notes, at [34], that the cousin moved to Norway in July 2016. That plainly post-dates the respondent's decision and was a material change in circumstance, not reasonably foreseeable at the date of the refusal. The Judge does not make any findings as to the care being provided to the appellants by their cousin, in January 2015.

20. I remind myself of the observations made by Mr. Justice Haddon-Cave in **Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC);**

> *It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.*

21. I have also had regard to the decision of the Upper Tribunal in **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 IAC** where it was stated in the head note that:

> "*Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, those reasons need not be extensive if the decision makes sense, having regard to the material accepted by the judge.*"

22. Although a Judge is not required to rehearse every detail or issue raised in a case, in my judgement, the issue as to how the appellants were being cared for in January 2015, and the role that their cousin and father played in their lives at that time, required much clearer analysis and consideration. Although not expressly set out as a finding, one cannot help but get the impression that the Judge was persuaded that the appellants cousin, who the appellants had previously lived with, left for Norway in 2016 and that their father has since assumed sole responsibility for their upbringing.

23. Having carefully considered the decision of the F*t*T Judge, I am not satisfied that a Tribunal properly directing itself to the facts and circumstances as they were at the date of the respondent's decision, would reach the same conclusion, and the error of law is therefore material to the outcome of the appeal. It follows that in my judgment, the decision of the F*t*T discloses a material error of law and should be set aside.

24. As to disposal, I have decided that it is appropriate to remit this appeal back to the F*t*T for hearing afresh, having taken into account paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In light of the nature of the error of law, the extent of any judicial fact-finding necessary will be extensive.

25. The Judge of the F*t*T was satisfied that the relationship between the appellants and their father, that is supported by DNA evidence, is as they claim. The finding that the appellants are the children of Mr FY is preserved.

26. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

27. The appeal is allowed. The decision of F*t*T Judge MacDonald promulgated on 7th April 2017 is set aside, and I remit the matter for a de novo hearing in the First-tier Tribunal with the finding that the appellants are the children of Mr FY, preserved.

Signed Date 28th February 2018

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

28. The F*t*T Judge made no fee award.

Signed Date 28th February 2018

Deputy Upper Tribunal Judge Mandalia