Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07071/2017

THE IMMIGRATION ACTS

Heard at Field House

On 13th February 2018

Decision & Reasons Promulgated
On 6th March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MR ASA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Elliott-Kelly instructed by J D Spicer Zeb Solicitors
For the Respondent: Ms A Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Somalia, entered the UK on 4th January 2017 and claimed asylum on 23rd January 2017. He appealed to the First-tier Tribunal against the decision of the Secretary of State of 14th July 2017 to refuse his application for asylum and for leave to remain on the basis of his rights under the European Convention on Human Rights. First-tier Tribunal Judge Geraint Jones QC dismissed the appeal in a decision promulgated on 11th September 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Ford on 15th November 2017.

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2. First-tier Tribunal Judge Ford decided that there was no error in relation to the Judge's assessment of paternity on the basis of the birth certificates or in relation to the ground challenging the judge's findings as to the credibility of the Appellant's claims in relation to threats from Al-Shabaab in 2014. Accordingly, at the hearing before me Ms Elliott-Kelly accepted that there were two remaining issues arising from the grounds. These were the contention that the judge erred in his assessment of family life and Article 8 and that he erred in relation to the assessment of the background country conditions.

3. The background to this appeal is that the Appellant claimed to have encountered difficulties with Al-Shabaab in Somalia and to have left Somalia in 2012 for Kenya and returned to Somalia in 2014 and claims that he was threatened by Al-Shabaab. The judge did not accept the core elements of the appellant's account. There is no longer a challenge to that part of the decision.

4. The Appellant claims that he married his wife in 2003 in Kenya. It appears that at some stage she came to the UK although it is not clear the basis on which she entered or remained in the UK. The Appellant claims that he returned to Somalia in 2008 and stayed until 2012. The Appellant and his wife claimed to have four children together. The eldest child is a daughter who was born on 9th April 2007 and is a Somali national with indefinite leave to remain in the UK. She suffers from health conditions including cerebral palsy. It is claimed that the couple have a son who was born on 27th July 2008 who is also a Somali national with indefinite leave to remain in the UK. The couple also claim to have two children born in the UK on 1st January 2013 and 17th May 2015 both sons and both British citizens.

5. In considering the family life aspect of the appeal the First-tier Tribunal Judge found at paragraph 39

> "I find as a fact that the Appellant's qualitative family life with his wife (and any children) has been minimal, given the history of comings and goings for each of them, which has not always coincided. Quantitatively I find that there has been no or no significant family life between them since the Appellant's wife procured settlement in this country. If married, there is family life de jure, but I am satisfied that de facto it has been minimal."

6. The judge went on to consider Section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The judge noted that the Respondent did not accept the Appellant's alleged paternity of any of the four children. The judge examined the circumstances of the location of the Appellant and his wife at various times. Although he took into account that the birth certificates in relation to the younger children name the Appellant as the father he considered that this was a matter of self-report and was capable of it being entirely self-serving. In the circumstances the judge concluded that it would not be proper to find paternity proved in respect of any of the four children [43]. The judge went on to consider proportionality concluding that the Secretary of State's decision to remove the Appellant is proportionate concluding that there is no impediment to the Appellant's

wife choosing to reside with him in Mogadishu and that the fact that she had indicated that she does not wish to return there with him "speaks volumes concerning the quality of any alleged family life between them and or speaks volumes to the lack of any true husband/wife relationship."[43].

7. In her submissions Ms Brocklesby-Weller accepted that, in the assessment of proportionality, the judge had failed to consider the best interests of the children and had failed to assess the evidence in relation to the health condition of the eldest child. Accordingly she accepted that the appeal turned on the findings in paragraph 39 where the judge found that there was no family life in this case. This is because, if that finding was sound, then the judge had no need to consider any proportionality assessment and therefore any errors made thereafter are not material. I agree with this approach.

8. The main thrust of Ms Elliott-Kelley's submissions is that the finding at paragraph 39 that there is no or minimal family life into error because of the judge's failure to consider the documentary evidence before him supporting the assertion that the family have lived together since the Appellant came to the UK. In her submission the judge failed to consider the evidence that the Appellant and his wife have formed a family unit in the UK and had failed to consider the evidence at pages 21 to 47 of the Appellant's First-tier Tribunal bundle from the school, the Somali Bravenese Welfare Association, the CAF review of 9th March 2017 and the review of the eldest child's special educational needs statement. Ms Brocklesby-Weller accepted that the evidence is capable of being read either way. I do note that the special educational needs statement report of 24th April 2017 does not appear to refer to the Appellant. However the letter from the school of 20th April 2017 highlights the help the Appellant provides for the child care and his emotional support to his wife. The letter of 16th March 2017 entitled CAF review refers to the assistance provided by the Appellant in living at the family home.

9. In her submissions Ms Elliott-Kelly referred to the decision in **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship" (IJR) [2016] UKUT 0031 (IAC)** where the Tribunal said:

> "42. Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental responsibility" in law for there to exist a "parental relationship," although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child.

> 43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers" are not *per se* "parents." A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship."
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> 44. If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life <u>as the child's parents</u> as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent."

10. Ms Elliott-Kelly submitted that the judge failed to consider whether there was a *de facto* parental relationship and/or family unit in this case. Whilst she reiterated that Appellant's case that he is in fact the father of the children (and advised that DNA evidence has now been obtained), she submitted that the judge's error here was failing to consider the documentary evidence in order to establish whether there is a de facto family life in this case. In her submission the judge focussed on the biological relationship to the exclusion of the other evidence.

11. I have considered the decision carefully and the judge has made no reference to the documentary evidence about the role played by the Appellant in the family's life before concluding that the *de facto* family life "has been minimal". The judge may well have reached that same conclusion having considered the documentary evidence. However I cannot be certain that he would have done so. In these circumstances I consider that the finding that there was minimal family life in this case failed to take account of relevant material evidence. That finding cannot therefore be sustained.

12. I also note that in considering Section 117B(6) the judge decided that there is no genuine and subsisting parental relationship because of the judge's doubts as to the paternity of the children. However, that failed to take account of the evidence indicating that there may be a parental relationship outside of the biological relationship claimed.

13. In these circumstances, there is no need to consider the issues around the proportionality assessment and the failure to consider Section 55 and the

best interests of the children as accepted by Ms Brocklesby-Weller. The judge erred in his approach to these issues. However, that is not material given my finding that the judge erred in his assessment of family life and therefore that decision must be made again.

14. Ms Elliott-Kelly also pursued the Grounds of Appeal complaining that the judge erred in his assessment of the objective country conditions. She submitted that there were two consequences of this failure. These were that not only had the judge failed to consider the security situation in relation to the Appellant's own return to Somalia but also in relation to the assessment of proportionality in relation to family life. In terms of the Appellant's own situation under Article 3 or humanitarian protection I am satisfied that the judge properly applied the guidance in **MOJ [2014] UKUT 442** on the basis of the findings in relation to the Appellant and his personal circumstances. There is no error in the judge's approach to this issue in the particular circumstances of this case at paragraph 35 of the decision. In my view the judge clearly dealt with the fact that the Appellant is from a minority clan at paragraph 25 where he related the evidence and also reached a conclusion that the alleged difficulties in Mogadishu were not specified or identified. The judge also considered this matter at paragraphs 31 and 34. I am accordingly satisfied that the judge gave adequate consideration to this issue.

15. In terms of the proportionality assessment and the impact of return to Mogadishu on the particular circumstances of the children I accept that this was not properly assessed however given my finding in relation to paragraph 39 this decision has to be set aside to be remade in any event.

16. The parties were in agreement that the Article 8 issue should be remitted to the First-tier Tribunal in light of the fact that there had been a failure to consider the documentary evidence and in light of the fact that there has now been a significant change of circumstances with the acquisition of DNA evidence.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law in relation to Article 8 of the European Convention on Human Rights.

That part of the decision is set aside. The remainder of the decision is preserved.

The appeal is remitted to the First-tier Tribunal for assessment to be remade only in relation to the Article 8 element of the appeal.

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

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

Signed Date: 28 February 2018

Deputy Upper Tribunal Judge Grimes

<u>TO THE RESPONDENT</u>
<u>FEE AWARD</u>

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 28 February 2018

Deputy Upper Tribunal Judge Grimes