Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02097/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 7 August 2019	On 27 August 2019
Decision given orally	

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

HABTE DEBAS TEDROS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Hollywood, Andrew Russell & Co Solicitors
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Eritrea, who was born in 1973. He had applied for entry clearance to join his wife in the UK who had been recognised as a refugee following her successful appeal (together with her two children) in 2013 leading to a status document dated 12 May 2014. The Entry Clearance Officer was not satisfied that the appellant had a subsisting relationship with his wife or that he intended to live together permanently with her in the United Kingdom.

2. First-tier Tribunal Judge Fox heard evidence from the appellant's wife and concluded she had been unable to demonstrate evidence that pointed to a subsisting relationship. He wrongly began his decision with the observation that the sponsor had been granted limited leave to remain outside the Immigration Rules. As to the core issue that he was required to decide, he explained between [19] to [21] of his decision:

> "19. The sponsor is also unable to demonstrate on behalf of the Appellant, evidence that would point to a subsisting, or indeed any relationship with the Appellant while they were in Sudan. There is no evidence before me today to suggest that the relationship was under some pressure or handicap that meant they had to keep a low profile to such a degree that support documentation would and was always unavailable to them, such that would support the claim to have lived together while in Sudan.
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> 20. On the evidence before me today I cannot accept that the Appellant has demonstrated even to the lower standard, that his relationship with the sponsor is as claimed. I note that her [sic] there is a lack of DNA evidence. This is not an essential requirement. Had there been other support by way of documents, that could be relied upon, that may help the Appellant get over the obvious hurdle in demonstrating that he is related to the children, as claimed. Such documents are not available before me today. The hurdle that the appellant must cross has been increased in size when the sponsor's credibility is also called into question, albeit to a limited extent.
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> 21. The Appellant has produced an original test certificate for tuberculosis. That is attached to the Appellants papers are [sic] at page 14. The issue date is 14 February 2018. I understand the Respondent has yet to see the original certificate. It may be that a fresh certificate will have to be produced and presented to the Appellant if any fresh claim is made."

The judge continued at [22]:

> "22. I am satisfied on the evidence before me today that the Appellant has not demonstrated, even to the lower standard, that he was in a relationship with the sponsor, as claimed for any period of time prior to her arrival in the United Kingdom. I am satisfied on the evidence before me today, to the lower standard, that he is not related as claimed to the sponsor's children. The Appellant has not demonstrated that those documents that could have been produced [in] an original format are available for inspection prior to today's hearing by the Respondent and therefore cannot be taken as satisfactory proof that he is related as claimed to the sponsor's children. The information contained in the screening interview for the sponsor is not enough on its own. When supported with additional documentation it would then become support of. The Appellant is therefore not entitled to Entry Clearance and such Entry Clearance should not be issued to the Appellant as confirmation of his right to enter the United Kingdom."

3. The grounds of challenge questioned the correctness of the judge's approach to the standard of proof and the judge's error that the decision in an asylum appeal by the sponsor was not before him whereas in fact it had been. The judge had failed to make any findings regarding the appellant's children's testimony. It is also contended that it was difficult to follow the judge's reasoning regarding his treatment of evidence of telephone calls. The judge had made no findings regarding the appellant's partner's statement and the evidence of Sara Habte (and from the appellant's son). There was also a challenge to the judge's approach to Article 8 by reference to [25] of the judge's decision as follows:

> "25. The Immigration Rules now include provisions for applicants wishing to remain in the United Kingdom based on their family or private life. These rules are located at Appendix FM and Paragraph 276ADE respectively. Should the Appellant wish the UK Immigration Rules Authority to consider an application on this basis then the Appellant should make a separate charged application using the appropriate specified application forms, for the 5-year partner route, or for the 5-year parent route, or the 10-year partner or parent route, or the 10-year private life route. As the Appellant has not made a valid application for Article 8 consideration, consideration has not been given as to whether the Appellant's removal from the UK would breach Article 8 of the ECHR. I also have not considered such removal within an Article 8 ECHR context. It is to be noted that the decision not to issue a Residence Card does not require the Appellant to leave the United Kingdom if the Appellant could otherwise demonstrate that they have a right to reside under the Regulations."

4. In granting permission to appeal First-tier Tribunal Judge Keane considered that for the many reasons outlined in the grounds the judge's decision disclosed arguable errors, with reference to the arguably confusing descriptions of the standard of proof, the relevance of the appellant's children's evidence in an earlier appeal, the failure by the judge to take into account the decision in that earlier appeal, and the judge's failure to make findings on the evidence from the children that was before him, including the oral evidence of the eldest child.

5. Mr Diwnycz readily accepts that the First-tier Tribunal erred on the basis of these grounds of challenge, and in my judgment he was right to do so. In addition to a statement by the sponsor dated 3 May 2018, the judge heard evidence from the sponsor's daughter, Sarah Habte, dated 3 May 2018 in which she sets out her memory of the role of her father's life in Sudan before their flight, and also the written statement of Alexander Habte which refers to his young age at the time of events in Sudan.

6. The judge explains at [8] of his decision that he had given full and careful consideration to all the documents attached to the appeal. However, it is difficult to discern from the judgment that in substance he did so. He did not make findings on the evidence of the children and as to the testimony of the sponsor he explained at [18], and I quote:

> "18. The Appellant's sponsor apologises for her previous on [sic] truthful activity at a previous immigration hearing. There are no circumstances or evidence placed before me today that would allow me to look behind the findings of Judge Hutchinson, [even] if they were before me. It is not disputed that a negative credibility finding however, has been made against the sponsor. That must be tempered, as noted above, by the Respondent's granting of Limited Leave to Remain since that hearing. With regard to these original certificates the Respondent has not had the opportunity of inspecting them and therefore little weight may be attached to them."

7. The judge in fact had before him a copy (although the first page was missing) of the determination of First-tier Tribunal Judge Hutchinson. He had found the sponsor not credible in respect of many aspects of her claim but nevertheless concluded that although she may be exempt from national service and thus would not face a risk as a consequence on return to Eritrea the children who were appellants to that appeal would nevertheless be at risk. It was on this basis that the appeal was allowed.

8. The negative credibility findings by Judge Hutchinson related to the sponsor's asylum account rather than to her specific family circumstances, which were the subject of the appeal before Judge Fox. It is unclear to me why the judge felt compelled to consider Appendix FM and paragraph 276ADE since neither provision had any bearing on this case. The failure by the judge to explain what he made of all the evidence before him, including in particular the testimony of the children, was a material error that requires the decision to be set aside, and I therefore do so.

9. As to re-making the decision, Mr Diwnycz candidly acknowledges the force of the testimony of the children as set out in their statements. Whilst he did not have any note by the Presenting Officer in the First-tier Tribunal of what was said in evidence he did not challenge the evidence in the children's statements. Mr Diwnycz also indicates that he is content for the appeal to be allowed on the basis of that evidence. I consider that he is correct to do so.

10. The nub of the matter is whether the relationship between the sponsor and the appellant is subsisting. The eldest child's statement refers to her limited memories of the time the family lived together in Sudan and provided an account of what she is able to recall from those early years. The sponsor explained in her statement how she has maintained contact with her husband. She has candidly acknowledged her untruthfulness in relation to the asylum claim but there is no challenge by Mr Diwnycz to the evidence she gave and the material relied on in support of continuing and recent contact between the parties. Accordingly, I am satisfied that the appellant has made out his case in relation to the matter in issue under paragraph 352A of the Immigration Rules.

11. The Entry Clearance Officer refused also with reference to paragraph 320(8A) regarding a failure by the appellant to produce a certificate issued

by an approved clinic showing that he was free from infectious tuberculosis. It is accepted and it was acknowledged by Judge Fox that this was produced by the time of the hearing before him.

12. In order for the appellant to succeed in this appeal it is necessary for him to demonstrate that there is a disproportionate interference by the Secretary of State with his rights under Article 8 of the Human Rights Convention. In the light of the matters as accepted by Mr Diwnycz there is no dispute to the family that exists between the appellant, sponsor and his children in the United Kingdom, and accordingly I am satisfied that Article 8 is engaged. The decision by the Entry Clearance Officer interferes with that right, and the issue to be decided is whether that interference is proportionate in all the circumstances.

13. Paragraph 352A of the Immigration Rules sets out the public interest being the Secretary of State's position, in relation to applications for leave to enter as the partner of a refugee. Aside from the tuberculosis issue, the aspect that the Entry Clearance Officer contended the appellant had not met was paragraph 352A(v):

> "(v) Each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting."

14. Given that this requirement has been met, in my judgment, that deals satisfactorily with the public interest. Accordingly, in all the circumstances, it would be a disproportionate interference with the appellant's rights under article 8 for him to be precluded from coming to the United Kingdom to achieve family unity.

15. By way of summary therefore, the decision of First-tier Tribunal Judge Fox is set aside for error of law. I re-make the decision on the unchallenged evidence that was before the First-tier Tribunal, and allow the appeal on Article 8 grounds.

No anonymity direction is made.

Signed Date 20 August 2019

UTJ Dawson
Upper Tribunal Judge Dawsonl