**Upper Tier Tribunal**
**(Immigration and Asylum Chamber)**

Appeal Numbers: HU/04307/2019
HU/04309/2019

**THE IMMIGRATION ACTS**

| **Heard Remotely at Manchester CJC** | **Decision & Reasons Promulgated** |
|---|---|
| **On 5 August 2020** | **On 11 August 2020** |

**Before**

**Upper Tribunal Judge Pickup**

**Between**

**[M M]**
**and**
**[M K D]**
**[Anonymity direction not made]**

Appellants

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**
For the appellants: No attendance by sponsor or Paragon Law
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS (P)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of XX pages, the contents of which I have noted and taken full account of. The order made is described at the end of these reasons.

1. Notice of the hearing was sent to the parties by email on 17.7.20, listing the hearing for 2:30pm. There was no attendance on behalf of the appellants. I caused a telephone call to be made to Paragon Law but it could not be verified that anyone was planning to attend. No person having conduct of the case could be located by the receptionist at Paragon Law. The Tribunal informed that the previous casework Melanie Vasselin had left the firm. We waited a further 20 minutes without any response from Paragon Law. In the circumstances, I was satisfied that it was consistent with the Tribunal's overriding duties to deal with cases fairly and justly to proceed with the hearing in the absence of any representation on behalf of the appellants.

2. This is the appellants' appeal against the decision of First-tier Tribunal Judge Lodge promulgated 20.11.19, dismissing their linked appeals against the decisions of the Secretary of State, dated 18.1.19, to refuse their applications for entry clearance to the UK to join their brother and sponsor, Mr Samuel [K], pursuant to paragraph 352D of the Immigration Rules.

3. First-tier Tribunal Judge Swaney granted permission to appeal on 10.4.20.

*Error of Law*

4. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside.

5. The appellants are now 17 and 8 years of age. The sponsor, Mr [K], fled Eritrea in 2014 and came to the UK, where he recognised as a refugee in August 2018 and granted limited leave to remain, to expire 15.8.22. It is claimed that the sponsor previously lived in Eritrea with the two appellants and helped look after them following their mother's departure for Saudi Arabia in 2013. At that time the sponsor was about 13 years of age and the youngest child was said to still need bottle feeding. He left them the following year and has not seen them since.

6. It is claimed that the two appellants were kidnapped from Eritrea in March 2018 and were taken to South Sudan, from where they were sent to reside in Kampala, Uganda, with a former neighbour (Byanesh), who is not related to them and is no longer able to look after them. They claim to have no contact with their mother and do not know where their father is. In November 2018 the appellants applied for family reunion with their brother in the UK.

7. The application for entry clearance was refused under paragraph 352D because the Entry Clearance Officer was not satisfied on the limited evidence provided that either of the appellants formed part of the sponsor's pre-flight family at the time he left the country of his habitual residence in order to seek asylum, as required under 352D(iv). Neither was the Entry Clearance Officer satisfied that the appellants were not leading an independent life as required under 352D(iii).

8. For the several reasons set out in the decision, the First-tier Tribunal found the factual matrix advanced by the sponsor and the appellants entirely implausible and ultimately not credible. The judge was prepared to accept that the appellants were

now in Uganda but concluded that the story of how they came to be there was concocted. Amongst other matters, the judge at [37] pointed to the effort and resources that must have gone into assisting the appellants with their applications for entry clearance. At [36] of the decision, the judge was not satisfied that they were not still in contact with their mother and did not continue to have the support of their their mother and wider family members. Neither did the judge accept that it was in the best interests of the two minor appellants to come to the UK. The judge found no exceptional circumstances to justify granting leave to enter the UK on the basis that it would be unduly harsh for them to remain in Uganda.

9. The grounds of appeal focus on identifying matters which it is said were never put to the sponsor in evidence, relying on a statement of truth of a caseworker he had conduct of the appellants cases. However, this person was not the legal representative at the hearing and in fact was not at the hearing. Instead, reliance is placed on (1) a heavily redacted document, what is said to be counsel's notes from the hearing. This is not supported by any statement from counsel, Ms Mottershaw. Document (2) is another heavily redacted document, described as a Telephone Note, in which the caseworker asked for the sponsor's response to the adverse matters addressed in the Tribunal's decision. As stated above, this caseworker is no longer employed by Paragon Law and did not attend the hearing. The evidence relied on in this regard is far from satisfactory.

10. In granting permission, Judge Swaney considered that, based on the representative's note of the proceedings, material matters on which the judge made negative findings, which were not raised in the refusal letter, were not put to the sponsor at the hearing. "That this gives rise to unfairness is arguable."

11. Whilst the only right of appeal to the First-tier Tribunal was on human rights grounds, the extent to which the appellants met the requirements of the Rules is highly relevant to any article 8 ECHR claim. However, as the First-tier Tribunal noted, the appellants cannot in any event meet 352D as the sponsor is the sibling and not the parent of the appellants. It is not at all clear why the Entry Clearance Officer considered 352D at all. There was no purpose in the judge considering paragraph 353D. In fact, there does not appear to be any valid family reunion route under the Rules under which the appellants could ever have succeeded in an application for entry clearance for settlement, as Mr McVeety confirmed. The only possible ground of appeal against the respondent's decision lies outside the Rules under article 8 ECHR on the basis of their being exceptional circumstances justifying the grant of leave.

12. On human rights grounds, there was insufficient evidence to demonstrate that at the date of application the appellants enjoyed any family life with their brother sufficient to engage article 8 ECHR. Even taking their case at its highest, the sponsor was only 12-13 years of age when their mother left in 2013 and they have not lived with or seen him since 2014. In the refusal decision, the respondent raised a number of credibility issues and was not even satisfied that they had ever met him. For example, it is not at all clear who provided for them in the approximately three years

between 2014 and 2017. The judge found at [38] of the decision that they were safe in Uganda and there was no evidence that they were anything other than fit and healthy. The sponsor himself is in care and is unable to provide for the appellants even if they came to the UK. The judge was not satisfied on the facts of the case that it was even in the best interests of the appellants to come to the UK.

13. The evidence put before the First-tier Tribunal was woefully inadequate and left many questions unanswered. In criticising the judge for taking credibility points against the appellants without notice, the grounds and the grant of permission miss the point that even taking the appellants' case at its highest, there was no basis upon which the decision of the respondent could lead to unjustifiably harsh consequences or be disproportionate to their article 8 rights. I am satisfied that on the facts of this case their appeal could never have succeeded. It follows that any alleged unfairness in the points made by the judge in explaining the implausibility of the core claim are not material to the outcome of the appeal.

14. In any event, I accept Mr McVeety's submission that credibility was obviously an issue from the outset, as is clear from the refusal decision. There was little satisfactory evidence to support many aspects of the appellants' claimed circumstances, which were largely dependent on mere assertion. It was, I am satisfied, open to the judge to disbelieve the claim that their mother left the appellants in the care of their brother, himself still of young age. It remains unclear exactly what their true circumstances are and the judge was entitled to conclude that there was insufficient evidence of any compelling circumstances to justify, exceptionally, granted entry clearance outside the Rules.

15. It is not incumbent on a judge to have to put every adverse finding to an appellant for comment or other response. If that were the case then almost every case would have to be brought back for the judge to outline the findings and invite comment from the appellant. As stated above, credibility was an obvious issue from the outset. The judge has given cogent reasons open on the limited evidence for rejecting the core factual claim.

16. Even if the judge had erred in taking points that were not put to the sponsor in evidence, there was no basis on which the appeal could have succeeded without such error. In Anoliefo (permission to appeal) [2013] UKUT 00345 (IAC), at para 16, the President said that "Where there is no reasonable prospect that any error of law alleged in the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that it is otherwise in the public interest to determine." It follows that such error cannot be material to the outcome of the appeal.

*Decision*

17. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of each appellant remains dismissed.

**Signed *DMW Pickup***

**Upper Tribunal Judge Pickup**

**Dated 5 August 2020**

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is "sent' is that appearing on the covering letter or covering email**