



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal numbers: HU/06922/2019

HU/06928/2019

& HU/06929/2019

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 18 May 2021

On 28 May 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SHARMARKE WASUGE OMAR

DEQO WASUGE OMAR

ABDULLAHI MOHAMED MUSE

(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellants: Mr A Hersi of Hersi & Co Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

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. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The sibling appellants¹, who are Somali nationals with dates of birth given as 17.10.02, 1.11.01, and 5.7.01, respectively, have appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 17.3.20 (Judge Lever), dismissing on all grounds their linked appeals against the decisions of the Entry Clearance Officer, dated 13.3.19, to refuse their applications made on 10.1.19 for entry clearance to the UK to join their mother and stepmother, Faduna Hussein Adanhile (the sponsor), a person with leave to remain as a refugee limited until 8.5.23, pursuant to the family reunion provisions under paragraph 352D of the Immigration Rules.
2. Permission to appeal was refused by the First-tier Tribunal on 27.8.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Blundell granted permission on 5.11.20, considering it arguable that the judge “failed to consider whether there was a family life between the appellants and the sponsor and that he overlooked what is said to be extensive evidence of financial support passing from the latter to the former.” Judge Blundell considered as arguable the “headline complaint”, that the judge’s assessment of Article 8 ECHR was legally wrong or inadequate. However, Judge Blundell added, “On full analysis, it might well be that the Upper Tribunal concludes that the unchallenged finding that the appellants have lived an independent life from the sponsor for some years was dispositive of the Article 8 concerns raised in the grounds. That is necessarily a matter for the hearing, however.”
3. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
4. As the appellants were each over the age of 18 at the date of their applications, as the judge concluded at [25] to [26] of the impugned decision, it is unarguable but that they could not meet the requirements of paragraph 352D of the Immigration Rules. Furthermore, it is highly significant to the argument in the grounds that the First-tier Tribunal Judge’s finding at [26] that the appellants each failed to demonstrate that they were not leading an independent life is entirely unchallenged by the grounds. There, the judge rejected as not credible

¹ The sponsor is the biological mother of the first two appellants and the stepmother of the third.

the sponsor's claimed circumstances of losing contact with the appellants in 2011. The judge noted discrepancies between the accounts of the sponsor and her son in the UK, Mr Muse, and their earlier statements. For example, when seeking entry clearance in 2013, the sponsor claimed to be the adult dependent relative of her son in the UK, Mr Muse, and to have only this one child. In stating that he was separated from his stepfather and siblings, Mr Muse's witness statement failed entirely to mention the claim that his stepfather had been killed in 2005. In reality, for the cogent reasons set out in the decision the judge found the appellants' claim to be minor children incredible and concluded that they were adults living independent lives at the date of their applications for entry clearance.

5. In the premises, whilst there may be a limited degree of 'family life' between the sponsor and her adult children, the appellants, the judge was entitled to conclude it was not family life such as to engage article 8 ECHR, despite evidence of contact and financial support over a period of around 13 months or so to the date of the appeal hearing, or even to two years as Mr Hersi submitted.
6. More importantly, the only right of appeal was on article 8 grounds. However, the judge explained at [28] of the decision, he had separately looked at all the article 8 criteria but found no exceptional circumstances that would indicate that a refusal of entry clearance was disproportionate in the proportionality balancing exercise. I do not accept the submission that the judge was there applying a test of exceptionality but making reference to the requirement that where the Rules cannot be met it is only where the circumstances are so compelling that, exceptionally, entry clearance should be granted on the basis that otherwise the decision would produce unjustifiably harsh consequences and, therefore, be disproportionate to the right to respect for family life.
7. Having carefully considered the submissions made to me in the context of the available evidence, I am not satisfied that the evidence before the First-tier Tribunal was sufficient to demonstrate that, notwithstanding the other and unchallenged findings of the First-tier Tribunal, the judge erred in failing to consider and find that family life engaging article 8 ECHR existed between the sponsor and any or all of the adult appellants. The First-tier Tribunal disbelieved the sponsor and her son in the UK as to the ages of the appellants, whether and when they lost contact with each other, and whether and when the sponsor's husband passed away. Their evidence was neither credible nor consistent. Whilst the First-tier Tribunal Judge is criticised for not making a specific finding whether the appellants are dependent on the sponsor, I note that dependency is not a requirement of paragraph 352D, though it may be a relevant factor when considering the existence of family life. However, I am

satisfied that the finding that the appellants have led independent lives “for some time separate and away from the Sponsor mother” is necessarily inconsistent with being dependent on the sponsor as alleged, even if there is some financial support. It follows that no error of law is disclosed by this ground.

8. Neither do I accept the submission in the grounds that on the facts of this case the First-tier Tribunal Judge should have considered whether family life could be lived elsewhere. The findings in this case were to the effect that there was no family life sufficient to engage article 8 or to otherwise render the decision of the respondent disproportionate to the right to respect for such family life as the appellants and the sponsor enjoy.
9. Whilst the First-tier Tribunal dealt with the article 8 family life issue in relatively brief terms, the degree to which the Rules are met was highly relevant to any article 8 proportionality consideration. Article 8 is not a shortcut to compliance with the Rules and the appellants are not entitled to entry to the UK regardless of the Rules, even if the sponsor provides them significant financial support and/or has maintained contact with them as adults. The only right of appeal was on human rights grounds and the appellants first had to demonstrate that any family life with their sponsor was sufficient to engage article 8 ECHR. If that is not made out, the proportionality balancing exercise of in the last stage of the Razgar stepped approach does not come into play and neither does the burden of proof on the respondent to demonstrate on the balance of probabilities that the decision is proportionate. Effectively, the family life claim fell at the first Razgar hurdle and in those circumstances the appeal was doomed to failure once the judge concluded that they have been living independently lives as adults away from the sponsor for a period of some years.
10. Although it could have been spelt out in somewhat greater detail, I am satisfied that the First-tier Tribunal Judge did make an adequate consideration of article 8 family life. However, even if that amounted to an error of law, as the judge granting permission anticipated I am also satisfied that the unchallenged finding that the appellants have for some years lived their lives independent from the sponsor is effectively fatal and dispositive of the article 8 family life claim.
11. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal.

Decision

The linked appeals of the appellants to the Upper Tribunal are each dismissed.

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

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 18 May 2021