Upper Tribunal
(Immigration and Asylum Chamber)

HH ('conditional' appeal decisions) Somalia [2017] UKUT 00490 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2017

Decision & Reasons Promulgated

Decision given orally at hearing

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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE BLUM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HH

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer
For the Respondent: Mr Ibrahim (sponsor)

(1) The scheme of sections 82 to 85 of the Nationality, Immigration and Asylum Act 2002 does not permit an appeal to be conditionally allowed or dismissed.
(2) Even in entry clearance cases, section 85(4) allows post decision evidence provided it does not constitute a new matter.

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal, made on 7 March 2017, in which the First-tier Tribunal Judge gave as his decision that he was "minded to allow the appeal either under paragraph 297 or under paragraph 352D, family reunion with a person granted refugee status, subject to compliance with my direction relevant to that provision, otherwise it is not allowed". In paragraph 54 of his decision, the judge reiterated that "I will to that extent allow the appeal under the Immigration Rules. The respondent's decision was not in accordance with the law, subject to the provision of the evidence indicated".

2. We shall explain in due course why these pronouncements of the judge are seriously problematic. First, we need to give some background.

3. The appellant in the appeal is a young lady from Somaliland whose father, the sponsor, is a British citizen by naturalisation. An application was made (probably in 2014 but certainly before 6th April 2015) by the appellant to be granted entry clearance to the United Kingdom under paragraph 297 of the Immigration Rules. This was to allow her to rejoin her father, the United Kingdom sponsor. The sponsor works in the transportation industry in London. He arrived in the United Kingdom in January 2001 and was granted indefinite leave to remain in August 2005. That followed a period of four years' limited leave to remain. He became a British citizen on 2 February 2007.

4. It is common ground that the decision refusing the appellant entry clearance is to be treated as being made on 6 May 2015. It is therefore necessary to establish what appellate enactments govern the appeal proceedings.

5. Article 9 of the Immigration Act 2014 (Commencement No 3, Transitional and Saving Provisions) Order 2014 (as inserted by SI 2015/371) provides as follows-

> "9 (1) Notwithstanding the commencement of the relevant provisions [which include new sections 82 to 85 and amended section 86 of the Nationality, Immigration and Asylum Act 2002] the saved provisions [which include sections 82 to 86, as they were immediately before commencement] continue to have effect and the relevant provisions do not have effect so far as they relate to the following decisions of the Secretary of State –
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> …
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> (c) a decision made on or after 6th April 2015 … to refuse an application made before 6th April 2015, where that decision is –
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> …
>
> (ii) to refuse entry clearance;
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> unless that decision is also a refusal of a … human rights claim."

6. The Secretary of State's Guidance indicates that a human rights claim for this purpose includes an application made under Part 8 of the Immigration Rules, where the sponsor is present and settled in the United Kingdom. Part 8 is entitled "Family members" and includes paragraph 297. We see no reason why the Tribunal should take a different view. Accordingly, the new provisions of the relevant legislation apply; that is to say, the new sections 82 to 85 and amended 86 of the Nationality, Immigration and Asylum Act 2002, as substituted by the Immigration Act 2014. As we shall see, this has relevance to the evidence that may be considered to any re-making of the decision.

7. The judge heard evidence from the sponsor, Mr Ibrahim, whom he plainly regarded as a credible witness. The judge appears to have thought (incorrectly, as things turned out) that the sponsor had been given refugee status. This prompted the judge to embark on a consideration of the Rules relating to refugee family reunion. It is, however, common ground that the sponsor has never been a refugee; and so that part of the judge's decision is irrelevant.

8. As far as concerns paragraph 297, the judge found in favour of the appellant on the two issues which had caused the Secretary of State's entry clearance officer to refuse the paragraph 297 application. The judge was satisfied that the appellant was the sponsor's biological child and that the sponsor had sole responsibility for the appellant. But the judge raised of his own motion the issue of whether the sponsor's circumstances were such as to enable the appellant to meet the requirements of paragraph 297, concerning the availability of suitable accommodation for her, if admitted to this country. The judge was troubled by the fact that the sponsor at that time occupied a studio apartment, comprising a single room. The judge felt this might not be satisfactory for a 15-year-old girl. The sponsor said that it would be his intention to divide the room by a screen in order to give the appellant the requisite amount of privacy. Nevertheless, at paragraph 40 the judge decided that the sponsor should be required to obtain a surveyor's report relating to the room and its adequacy for that purpose.

9. This brings us to the judge's directions. At paragraphs 51 and 52 of the decision, the judge directed that a copy of the grant by the Secretary of State of refugee status to the sponsor should be filed and served. As we have said, that issue has fallen away. Alternatively, however, in paragraph 52 the judge directed the appellant to provide documentary proof of his landlord's consent to shared occupation of the premises; together with a surveyor's report on the adequacy of the accommodation for occupation by the appellant and the sponsor. It was because the submission of these materials might demonstrate compliance with the requirements of paragraph 297 that the judge decided to allow the appeal on a conditional basis.

10. It is quite plain that the judge committed a material error of law in allowing the appeal on a conditional basis. The scheme of sections 82 to 86 of the 2002 Act does not permit appeals to be conditionally allowed or, for that matter, conditionally dismissed.

11. It is true that amended section 86 no longer states in terms that the Tribunal must allow the appeal, insofar as it thinks that the appealed decision was not in

accordance with the law or that a discretionary decision should have been exercised differently; and that it must otherwise dismiss the appeal. Nevertheless, the present version of section 86(2) continues to require the Tribunal to determine "any matter raised as a ground of appeal and … any matter which section 85 requires it to consider". The position, therefore, continues to be that the appeal has to be decided. That will require a judge to allow the appeal in whole or part or to dismiss it in whole or part (or a combination of both).

12. In the circumstances that arose in the present case, where the judge raised issues regarding compliance with the Rules that did not feature in the Secretary of State's decision, the obvious course would have been for the judge to have adjourned the matter, with directions, in order to establish the factual position on the remaining issues, before proceeding to make a decision. Instead, the judge purported wrongly to allow the appeal on a conditional basis. How he thought that an actual, unconditional decision would eventually emerge from the Tribunal is entirely unclear. His decision contains no indication of who, if anyone, was to scrutinise and form a view on any materials that might emanate from the sponsor's landlord and from a surveyor, in response to the judge's directions.

13. For these reasons the Tribunal finds that the judge committed an error which was plainly a material one. In other words, it affected his decision.

14. Mr Jarvis did not pursue the first of the Secretary of State's grounds of application, which contended that the judge had additionally erred in finding that the decision of the Secretary of State was not in accordance with the law. In the circumstances, we make no observation on that ground, save to say that the judge's reference in paragraph 54 to the Secretary of State's decision not being in accordance with the law clearly flowed from and was subsidiary to the judge's decision to allow the appeal conditionally.

15. We therefore proceed to re-make the decision in this case. We reiterate that the provision of the Immigration Rules with which we are concerned is paragraph 297.

16. As we have seen, the Entry Clearance Officer was concerned about the family relationship between the appellant and the sponsor. The First-tier Tribunal Judge was satisfied from DNA evidence that that relationship had been satisfactorily established. The judge was also satisfied that the sponsor had sole responsibility for the appellant. Notwithstanding the errors in the judge's decision, Mr Jarvis accepted there was no need to revisit these findings. He accepted the judge was entitled to make them.

17. There was also no issue before the judge as to the financial ability of the sponsor to provide for the appellant if she were admitted to the United Kingdom. The sponsor works both as a bus driver and a minicab driver in London and Mr Jarvis correctly raised no issue regarding that aspect of the Immigration Rules.

18. The only potential problematic area of the Rules is that which concerned the judge; namely, whether there would be satisfactory accommodation for the appellant, if admitted.

19. We said earlier that the fact this appeal is proceeding under the new appeal provisions in the 2002 Act is relevant to the re-making of the decision. The reason is as follows.

20. It is no longer the case that the Tribunal, in deciding an appeal of this kind, is confined to the evidential situation as it was at the date of the refusal of entry clearance. Section 85(4) provides that it is possible for the Tribunal to consider evidence arising at a later time, providing that it does not constitute a "new matter", as defined by section 85(6). It is common ground that the evidence to which we are about to refer does not comprise a "new matter".

21. The sponsor gave evidence. He said that, since April 2017, he been living in a council flat, which comprises one bedroom plus a separate sitting room. He provided the Tribunal with written evidence, which indicated that he had indeed moved home since the hearing before the First-tier Tribunal. Mr Jarvis cross-examined the sponsor regarding the nature of that accommodation but, having done, so Mr Jarvis made no submissions that the sponsor's evidence was incredible or should otherwise be given no or only limited weight. For our part, we agree with Mr Jarvis's stance. The sponsor is credible. We are satisfied on the balance of probabilities that, if admitted to the United Kingdom, the appellant would live with the sponsor in a one- bedroom flat in London NW6. There is no other person living in that accommodation. We find that the accommodation would be suitable for the appellant and the sponsor. Accordingly, the requirements of paragraph 297 of the Immigration Rules are made out.

Notice of Decision

We therefore re-make this decision by allowing the appeal under paragraph 297 of the Immigration Rules.

Fee award

Oddly, given the conditional nature of his decision, the First-tier Tribunal judge made a fee award in favour of the appellant. That fee award falls with the setting aside of the judge's decision. Having allowed the appeal on re-making the decision, we make a whole fee award in the sum of £140.

Signed

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber