



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

Appeal Numbers: OA027312015
OA027322015
OA027332015
OA027352015

THE IMMIGRATION ACTS

Heard at Field House

On 10 May 2017

**Decision & Reasons
Promulgated
On 22 May 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

**HASSAN AWEYS ABDULLAHI (FIRST APPELLANT)
HALIMA HASSAN AWEYS (SECOND APPELLANT)
FARTUN HASSAN AWEYS (THIRD APPELLANT)
MOHAMED HASSAN AWEYS (FOURTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

ENTRY CLEARANCE OFFICER, KAMPALA/PRETORIA

Respondent

Representation:

For the Appellants: Miss Pinder of Counsel instructed by Polpitiya & Co,
Solicitors

For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Roots promulgated on 11 August 2016 dismissing their appeals against decisions of the Entry Clearance Officer in Kampala to refuse them entry clearance as in the case of the first appellant, the spouse of a refugee present in the United Kingdom, and in the case of the second to fourth appellants as the children of Mrs Nasra Abdullahi Mohamed whom I refer to as “the sponsor”, and the first appellant.
2. The decisions in this case were made on 9 January 2015 in respect of the first appellant and on 16 January 2015 in respect of the third, second and fourth appellants.
3. Their case is, in brief, that the first appellant and sponsor are a married couple and that the second to fourth appellants are their children; that the marriage took place in Somalia in 1995; that the children were born in Somalia; and, it was only later that they were forced to flee in different directions, the sponsor arriving in the United Kingdom relatively recently having left Somalia in 2009 and becoming separated from her family. Prior to her arrival in the United Kingdom the youngest child of the family (who is not an appellant) had arrived here in it appears 2008 and she was able to get back in contact with him.
4. It is said that the couple became separated in 2008 and it was only after her arrival in the United Kingdom that by chance the sponsor was able to get back in contact with her husband and children, finding that they were by this point in Uganda.
5. Judge Roots heard oral evidence from the first appellant. He also had before him a bundle containing witness statements and a certain number of other documents. It is also important to note that by this point DNA evidence had been provided indicating that the second to fourth appellants were the children of the first appellant and the sponsor.
6. Judge Roots directed himself as to the relevant Immigration Rules at paragraph 27 and then went on to make findings which are set out at paragraphs 29 to 43 of the decision.
7. Judge Roots was not satisfied that the sponsor and first appellant were married, was not satisfied that the relationship was genuine and subsisting, and was not satisfied that the appellants had shown, in the case of the second to fourth appellants, that they were not leading an independent life, were unmarried and had not formed an independent family unit.
8. The challenge to the judge’s findings made in the grounds of appeal is primarily characterised as one of perversity, although it is also argued that Judge Roots failed to reach proper findings in respect to material facts and failed to take into account properly material evidence.

9. There are, as Miss Pinder characterised in the grounds, three specific issues:-
 - (a) findings in respect of whether the marriage had taken place or not;
 - (b) whether the relationship was genuine and subsisting; and
 - (c) whether the family unit had pre-existed the decision to flee.
10. One thread of the challenges is that Judge Roots had improperly made adverse findings in respect of a failure it is said on the part of the sponsor to give sufficient detail in respect to certain matters. This can be seen primarily in paragraphs [34] to [38].
11. Although this appears at first glance to be a perversity challenge, it has to be informed by the fact that what Judge Roots has done in rejecting evidence given orally which would appear to have answered the questions that he had, consideration has been made only what was in witness statements, and whilst that might have justified a decision to reject the evidence, in this case what Judge Roots failed to do is to take into account what the sponsor had clearly said some years before in her asylum interview and in her screening interview about, for example, the circumstances in which she had tried to relocate family, which is dealt with at paragraph 33, and the difficulties in how they were separated at paragraph 35. It cannot thus be said that the sponsor was only now disclosing material facts; she had already done so.
12. In addition, whilst it is correct that as Judge Roots recorded at paragraph 34 there is limited evidence about how she had become separated out from her youngest son, I consider that this matter is not material. This is not part of the Secretary of State's case, nor is there any explanation from the judge as to why it was thought a relevant and material matter, or why the failure to give evidence about an immaterial matter is something that could probably be taken into account in reaching an adverse credibility finding.
13. Further, it is to draw inferences adverse to the appellants evidence of funds being transferred simply because, as Judge Roots recorded at [36], the total transfers had not been provided is irrational as is the conclusion that the transfers in themselves did not show that the appellants were financially dependent on the sponsor is unreasoned.
14. Further, at [37] Judge Roots wrongly said that matters have not been dealt with in a witness statement when in fact they have, and again this was a matter which formed a reason why he concluded that the relationship between the first appellant and sponsor was not subsisting.
15. At paragraph [39] I am satisfied that Judge Root's approach to the evidence in stating that the difficulties that there may well be in keeping in contact, and indeed that it may be very difficult to obtain, is arguably an

indication of irrationality when considering the way in which the judge had viewed earlier the inability to provide evidence and finding not that it was simply neutral, but that it undermined credibility. Further, the Judge Roots wrongly said at [40], contrary to what is said in her witness statement at paragraph [12], that the sponsor had not explained why she had not made any attempts to visit Uganda, the issue clearly being cost.

16. Taking these factors into account and given that Mr Duffy did not seek to persuade me that this was a decision which could be upheld, I am satisfied that the decision of the First-tier Tribunal did involve the making of an error of law in that the judge's findings of fact were, and this is not a conclusion I reach easily, perverse. I am satisfied that the high threshold for that is met, together with the fact that there has been a failure to take into account material evidence and the taking into account of immaterial matters. It is also of some concern that Judge Roots appears in two passages to have considered the role simply as one of review and that is specifically at paragraphs [32] and [42].

Remaking the decision

17. I am satisfied that it would now be appropriate to remake the decision and with the agreement of the parties I have proceeded to do so in the Upper Tribunal in the absence of it being necessary on the facts of this case, given the additional evidence which has been provided and which I consider can properly be taken into account as it goes to show the situation between the parties as at the date of decision, should be admitted.
18. The first issue is in relation to paragraph 352A in respect of the sponsor and the first appellant. There is no doubt that the sponsor and the first appellant are the parents of three children. That is not now disputed by the respondent. I consider that given what the background material shows about the attitude in Somalia towards having children or sex outside wedlock, that it is more likely than not that the first appellant and sponsor were married, given that they subsequently had four children together.
19. I accept that there are difficulties with the marriage certificate, but given the upheaval that has occurred in Somalia and which is a matter of record, is not a matter which concerns me greatly. Further, and in any event, I am satisfied that they had been living together in a relationship akin to marriage, even if not lawfully married for the purposes of English law, given the number of children born in that relationship over a period of several years, greatly in excess of two years.
20. Second, I am satisfied, given the timescale of the birth of the children, this relationship must have existed before the sponsor, and for that matter the appellants, left Somalia. That is because of the account given by the sponsor in her asylum interviews, which I see no reason to doubt, nor has

it been suggested by the respondent that this account should be doubted, and indeed it is on that account that the sponsor was granted asylum.

21. I then arrive at a starting point where this must have been a marriage which was genuine and subsisting in the past, and one out of which four children were born. I accept that it may well be the case that this has ceased to be genuine and subsisting, but the fact that it pre-existed in the past for a number of years is a factor which I take into account in assessing whether it continues to subsist. I accept from the documents provided which now includes copies of messages through electronic messaging systems produced show a significant degree of contact between the appellants and the sponsor. I am satisfied also that the sponsor has now been able to go to visit the family in Uganda, albeit that as that it something which postdates the previous appeal decision, it is difficult to attach a great deal of weight.
22. I am satisfied that the sponsor has transferred to her husband what is, in Ugandan terms, and indeed in terms of the sponsor's own income a significant transfer of money from the sponsor to the appellants to help to support them in Uganda.
23. I have considered carefully all the accounts provided by the sponsor in her interviews and in her witness statements, and indeed the record of what she said to Judge Roots. It has not been submitted to me that there is any basis on which I should disbelieve her account and I accept it. I consider that on the balance of probabilities I am satisfied that what was a genuine and subsisting marriage in the past, continues to be one, albeit that it has through the well-known difficulties which have occurred in Somalia in the last twenty years, been one in which the family have had to flee in different directions. They have, as I accept, lived apart, but I find, despite that and despite the length of time that has elapsed, that I am satisfied that both as to the truth of the marriage subsisting, and I note that it was of course mentioned in the asylum interview which was accepted as being the sponsor's true account, and I am satisfied that the marriage continues to be genuine and subsisting. I am satisfied also that it is from this the intent to live permanently with each other, and that accordingly in respect of the first appellant all the requirements of paragraph 352A of the Immigration Rules are met.
24. Further, and in the alternative, I am satisfied that all the requirements of paragraph 352AA of the Immigration Rules are met.
25. I now turn to the case of the second to fourth appellants. I am satisfied:-
 - (a) It is not disputed that the mother has refugee status in the United Kingdom.
 - (b) It is not disputed either that as at the date of decision they were under the age of 18.

- (c) The question then arises in respect of 352D(iii) and (iv) which are best viewed together. I am satisfied by the accounts that have been given to me of the situation that the children continue to live with their father and that this forms a family unit.
26. Having found that the relationship between the father and the mother, who is the sponsor, continues to be genuine and subsisting, I am satisfied that there continues to be a family unit, albeit one that has through the difficulties arising from the conflict in Somalia, one that has had to take place in different countries. I am satisfied that they all formed part of the same family unit when the sponsor left her country of her habitual residence in order to seek asylum; it has not been submitted to me that this was not so.
27. Finally, I note that it has not been submitted that sub-paragraph (v) applies in this case, nor is there any indication that it should.

Conclusion

28. For these reasons I am satisfied that the appellants fulfil the requirements of the Immigration Rules and on that basis I allow their appeals. In the circumstances it is unnecessary for me to consider also whether their refusal of entry clearance was in breach of the United Kingdom's obligations pursuant to Article 8 of the Human Rights Convention.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside
2. I remake the decision by allowing all the appeals under the Immigration Rules.

Signed

Date 18 May 2017



Upper Tribunal Judge Rintoul