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

Appeal Numbers: HU/20380/2016
HU/20383/2016, HU/20390/2016
HU/20392/2016, HU/20398/2016
HU/20406/2016, HU/20413/2016
HU/20415/2016, HU/20418/2016

**THE IMMIGRATION ACTS**

**Heard at Royal Courts of Justice, Belfast**
**On 7 August 2019**

**Decision & Reasons Promulgated**
**On 30 August 2019**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**(1) BF**
**(2) MM**
**(3) IM**
**(4) AM**
**(5) AM**
**(6) AM**
**(7) AM**
**(8) AM**
**(9) SM**

**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellants: Mr S McTaggart, instructed by RP Crawford & Co Solicitors
For the Respondent: Mr Diwnycz, Senior Presenting Officer

**DECISION AND REASONS**

**© CROWN COPYRIGHT 2019**

1. I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellants and other parties to these proceedings. Any breach may lead to contempt proceedings.

2. The first appellant is a citizen of Somalia, born in 1974. The remaining eight appellants are her children aged between 9 and 18. They appealed against the Entry Clearance Officer's decision refusing applications by the first appellant to join her daughter and the eight appellants to join their sister in the United Kingdom (the sponsor) who has refugee status. The ECO refused the applications on the basis that paragraph 352 of the Immigration Rules did not make provision for family reunion on the basis sought. Furthermore, he was not satisfied that the relationship between the appellants and the sponsor was as claimed.

3. First-tier Tribunal Judge Fox dismissed the appeals for reasons given in his decision dated 15 June 2018. He heard evidence from the sponsor. It was accepted that none of the appellants could meet the requirements of the Immigration Rules and the appeals therefore turned on Article 8 grounds.

4. In his survey of the evidence the judge observed that the appellants live in Nairobi in a camp, having claimed international protection in Kenya. He considered in the light of the circumstances of the appellants that interference with their right to family life was proportionate.

5. The grounds of challenge argue a mis-direction by the judge as to the timing of evidence that he could take into account (ground 1). The judge had failed to have regard to the relevant case law specifically *AT & Another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea* [2016] UKUT 00227 (IAC) (ground 2). In addition, the judge had given little or no weight to the fact that the sponsor suffers from depression and had misunderstood the evidence why she would not return to Kenya to meet her family (ground 3). Finally, reasons that were not understandable had been given to the appellants by the judge for "refusal of their applications" (ground 4).

6. In granting permission to appeal Upper Tribunal Judge Martin considered there was no merit in the first two grounds. Although the judge did not specifically refer to *AT & Another*, he had clearly considered it because his findings indicated how the facts were distinguishable. Judge Martin also considered the third ground to be without merit but nevertheless concluded that the last ground was arguable and explained:

> "5. The last ground is arguable. In what is otherwise a clear, reasoned decision the Judge, from [36] onwards refers to "removing" the Appellants, but they are not in the UK. The Judge also refers to their application for a residence card. This confirmation and consequent lack of clarity is arguably an error of law. Whether it is material is for the Upper Tribunal to decide."

And added at [6]:

> "6. I add that I am unsure from the Decision and Reasons whether the Respondent accepted the family relationship, as it is clearly challenged in the Refusals, but the Judge proceeded on the basis that it was not challenged."

7. The First tier Tribunal sent this decision to the parties with a covering letter dated 27 September 2018 in terms that the application for permission had been refused. The appellants' representatives then renewed the application on the same grounds to the Upper Tribunal on 3 October 2018 but filled out the form indicating that the first application had been refused. In error they failed to complete the box indicating that there had been a limited grant. By email dated 8 October the Upper Tribunal explained that the First-tier Tribunal had issued the wrong notice and asked if they wanted to proceed with the application in the light of the grant. On 23 October the representatives indicated that they wished to proceed "notwithstanding the grounds on which permission has been granted". It appears that no steps were taken. Meanwhile the Upper Tribunal proceeded to list the appeal based on the Upper Tribunal Judge Martin's grant. This triggered an email dated 29 July 2019 from the representatives asking for the renewed application to be considered. Upper Tribunal Judge Gill then made a decision dated 2 August 2019 refusing permission on all grounds. She explained her reasons as follows including the ground on which permission had been granted in [5]:

> "5. Paras 9 and 10 of the grounds do not arguably make any material difference. It is unarguably plain, when the judge's decision is read as a whole, that he was fully aware that he was deciding appeals against decisions of the Entry Clearance Officer. It is simply unarguable that he was confused in this regard."

8. I have considered the effect of the refusal by Upper Tribunal Judge Gill and the lack of any indication by her that the decision of Upper Tribunal Judge Martin had been set aside. I cannot see any basis that would have enabled her to do so absent any suggestion that there had been a clerical mistake, accidental slip or omission (see Rule 42 of the Tribunal Procedure (Upper Tribunal) Rules 2008). I therefore proceeded with the hearing of the appeal on the basis of the limited grant.

9. In anticipation of this being the case, Mr McTaggart and Mr Diwnycz were content to proceed on this basis. The passages that have given rise to the grant are preceded by paragraphs [39] and [40] in which the judge states:

> "39. I am satisfied on the evidence before me today that the Appellants are not entitled to Entry Clearance and such Entry Clearance should not be issued to the Appellants as confirmation of her right to reside in the United Kingdom.
>
> 40. I have considered the Appellants' claim under the Human Rights Act 1998, Article 8. I find that the UK Government, in its exercise of a fair and firm immigration policy has acted proportionately by refusing to issue Entry Clearance as for the reasons recorded above, to include the failure of the Appellants to meet the requirements of the Immigration Rules. There has been family life that has been interfered with but in an entirely

> proportionate manner, on the evidence before me today. The Appellants do not identify any interference with private life."

10. The judge then explained in the following paragraphs his reasoning in relation to matters which were not in play. These relate to right to remain under Article 8 as well as paragraph 276ADE of the Rules and a Residence Card as follows:

> "41. On 11 June 2012 the Government announced changes to the Immigration Rules to unify consideration under the Rules and Article 8 of the European Convention on Human Rights. The Immigration Rules set out the requirements for those seeking Leave to Enter or Remain on the basis of their right to respect for private or family life by defining the criteria that a person is expected to fulfil in order to qualify this right to remain in the United Kingdom. These criteria are set out in Appendix FM and Paragraph 276ADE of the Immigration Rules. As a consequence, because the Appellant had not applied under these provisions a full consideration of their Article 8 ECHR rights has not been undertaken by the Respondent and by myself today.
>
> 42. 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 276 ADE respectively. Should the appellant wish the UK Immigration 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."

11. Mr McTaggart relied on a skeleton argument which he supplemented with oral submissions. In essence he contended that the judge had failed to proceed in a way that allowed confidence in the decision making process. His skeleton highlights how the matters referred to in the closing paragraphs of the judge's decision did not engage with the issue in the case which related to the Article 8 context of an entry clearance decision. He contended that it could not be said that the determination clearly disclosed the reasons for the decision.

12. Mr Diwnycz conceded that there had been material error. I observed that the materiality of the error and whether the decision should be set aside would be a matter for me to consider particularly in the context of the unchallenged (in the light of the refusal of permission) factual findings by the judge between paragraphs [36] and [45]. By way of response Mr McTaggart submitted that if the findings of the court were to be maintained it was for the court to decide if Article 8 had been breached. Factors which he contended were relevant related to the sponsor's

depression, although he accepted that she was an adult when before Judge Fox. No new evidence had been lodged and neither party had anything more to say in the event that the decision was set aside and required to be remade.

13. Mr McTaggart understandably struggled to make sense of paragraphs [41] and [42] of the judge's decision. For the sake of completeness, the final paragraph [43] is in the following terms:

> "43. On the totality of the evidence before me today, I find the Appellants have not discharged the burden of proof and reasons given by the Respondent justify the refusals. Therefore, the Respondent's decision is in accordance with the law and the applicable Immigration Rules."

14. It is clear to me, having regard to the detail earlier in the decision and the conclusions expressed at [39] and [40], that by that point the judge had completed what was required of him. This was to decide whether the appellants had been able to establish that the refusal of entry clearance resulted in a disproportionate breach of their rights under Article 8 and those of the sponsor in the United Kingdom. It is clear to me that the judge took all the evidence into account and directed himself earlier in his decision as to the law he was required to apply in relation to Article 8. He correctly recorded the sponsor's circumstances and in relation to her mental health was entitled to refer to the brevity of the letter from her GP in respect of her depression. It was open to the judge to observe the absence of any more detailed evidence.

15. Mr McTaggart drew my attention to a "routine" referral to the Common Mental Health Problems Hub as an outpatient on 6 March 2018. There was no more recent evidence after that indicating the extent and gravity of the GP's diagnosis. In this regard the judge explained at [18]:

> "18. The sponsor claims to suffer from depression. There is a 1½ line letter from a General Practitioner, confirming that she suffers from depression. [There is] no indication as to the depth of such suffering, the treatment prescribed, the grounds upon which a diagnosis has been ascertained the expected recovery period, if any, details of any medication or treatment regime. All of this, in the absence of evidence to the contrary, suggest that if there is a genuine claim to suffer from depression, it can only be of minimal proportions. It clearly cannot be interfering with her activities of daily living as she maintains an active working lifestyle coupled with an active and productive educational lifestyle. [A] diagnosis of depression is not mutually exclusive of a work and educational regime. However, the sponsor has a clear ability to conduct such lifestyles without any apparent difficulty is suggest [sic] that the claimed diagnosis of depression is not in any way significant or material. I have noted the GP referral to counselling. This has only occurred very recently. There is no [evidence] provided as to the nature of the counselling requested, whether an assessment would be required before counselling may be offered, or who is to undertake such assessment and when."

16. In respect of the appellants' circumstances in Kenya, the judge explained his findings at [19] to [23]:

> "19. The first appellant and her children were granted asylum status having claimed international protection in Kenya. They live in Nairobi. I am told that this is a camp. There is no detail before me as to the living conditions that the Appellants enjoyed at the date of the application or currently. Photographs have been provided of some of the Appellants and clearly show them to be in a reasonable state of health, based only upon their presentation to the camera. They appear happy, jovial, well-dressed, well-nourished and the background to each of the photographs suggest nothing untoward in terms of the lifestyle they currently appear to enjoy. Coupled with this the children and their mother seen to enjoy regular contact using such modern means of communication with their sponsor, in particular Viber. I am also aware that alternative means of electronic communication such as WhatsApp, FaceTime, Facebook, video call, email are available to the sponsor and the Appellants. The sponsor's evidence is that they continue to enjoy contact through such modern means of electronic communication. Some of the information supporting this claim has not been translated and as a consequence can carry little weight. The documents before me today, presented to support this contention, certainly did not indicate that the Appellants and each of them are suffering in the most exceptional and compassionate circumstances. [The] very fact that [they] are able to afford, maintain, make use of electronic devices to facilitate continuing contact with the sponsor, indicates a reasonably comfortable lifestyle.
>
> 20. The documents that have been provided in support of the contact between family members has not all been translated. It demonstrates that contact is maintained at a base level alone. It does not demonstrate any evidence of a family enduring the most compassionate of circumstances. It reflects the obvious situation that the family are in contact and do not highlight concerns on any front between them.
>
> 21. All of the Appellants are part of a family unit and there is no evidence before me today that would suggest that they should in any way be separated from one another. There is no evidence before me today that anyone of the Appellants would benefit from such a separation. There is no evidence before me today to suggest how such a separation would unfold.
>
> 22. They have applied for and succeeded in securing international protection from the state in Kenya. They are safe from harm. There is no evidence that the Kenyan authorities proposed removing the Appellants or others like them to Somalia.
>
> 23. The sponsor has been separated from her family since she departed from her home country. She gives evidence today that she would not be willing to go to [Kenya] to visit her family. She gives no evidence as to why such a journey would be out of question, difficult or impossible to undertake. There is no evidence before me today that the sponsor could not travel elsewhere, rather than Kenya, to meet her family."

17. The judge continued at [25] to [26] as follows:

> "25. So far as I am aware, all of the Appellants and the sponsor are in a robust state of good health. Their living accommodation has not been identified to any degree, let alone something that could match a description of exceptional circumstances or the most compelling of circumstances. The sponsor sends money to the Appellants from the United Kingdom. It would be unfair to suggest that these funds were not significant. They would be significant for the Appellants and they would be significant for the sponsor given her level of earnings. They clearly have been put to good use and in the absence of any evidence to the contrary clearly provide a handsome level of sustainable income for the Appellants and each of them. There me today [sic] that the sponsor cannot continue to support her family from the UK. [She] says in her statement that she wishes to continue to work and to study.
>
> 26. I am told today that the Appellants live in Nairobi, albeit in a camp. As indicated above the photographs do not suggest that the Appellants have difficulties with their accommodation or their immediate surroundings. If granted entry clearance would be considerable public expenditure encountered in sourcing appropriate accommodation, providing education and welfare support. These are considerations which have to be taken into account. There is no evidence before me today to suggest that there is a change in their circumstances, to their detriment since they first achieved international protection in Kenya."

18. There is a degree of repetition and a recovering earlier ground in the subsequent paragraphs before the judge reached his conclusions which I have set out above at [39] and [40]. By that stage of the decision, any reader would be in no doubt why the judge reached his conclusion. Although it is speculative, it is possible that paragraphs [41] and [42] which make no specific reference to the appellants have been included in error. They do not form part of the judge's Article 8 analysis and bear no relevance to the issues in the case. If they are struck out, the determination survives as a self-contained reasoned judicial decision. Paragraphs [41] and [42] do not detract from that. At worst they indicate carelessness or an oversight by the judge in proof-reading but in my judgment no more than that. They have been included clearly in error and the matters referred to in those paragraphs were not matters required to be addressed by the judge.

19. I do not consider the error material, and accordingly, this appeal is dismissed

Signed Date 20 August 2019

*UTJ Dawson*

Upper Tribunal Judge Dawson