IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08826/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st July 2015	**On 10th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR KHALED YOUSUF ABDU MOHAMED SHARIF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss V Maslord (Counsel)
For the Respondent: Mr S Walker (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge S D Lloyd, promulgated on 30th March 2015, following a hearing at Sheldon Court, Birmingham on 18th February 2015. In the determination, the judge dismissed the appeal of the Appellant. The Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matters come before me.

The Appellant

2. The Appellant is a male, a citizen of Somalia, who was born on 22nd October 1982. He applied for entry clearance to join his spouse, Mrs Latifa Amir Sharif, who had entered the UK on 27th December 2014 with limited leave to remain on the basis of humanitarian protection, but the application was refused on 27th May 2014.

The Appellant's Claim

3. The Appellant's claim is that he and his sponsoring wife, Mrs Latifa Amir Sharif, met in a refugee camp. They were married on 24th December 2011 in a religious ceremony in front of an imam. There was no official documentation whatsoever. Their names, however, were written down on a piece of paper which has since been lost (see paragraph 7). Some six months later in July or August 2012, Ethiopian militia entered the camp and took away many of the men, including the Appellant himself. The Sponsor fled. She came to the UK and she claimed asylum. She later gave birth to their son, Yousuf Khaled Yousuf Sharif on 19th January 2013.

4. DNA evidence has been provided showing that the Appellant is indeed the father of Yousuf (see paragraph 8). The Sponsor was able to contact the Appellant after she left, finding him at the camp so that he was left with contact details, and when the Appellant returned to make enquiries he was able to contact the Sponsor in the UK (see paragraph 9). The Appellant now contends that he meets the criteria of the Immigration Rules for family reunion with his spouse and he also relies upon Article 8 ECHR rights (see paragraph 11).

The Judge's Findings

5. The judge held that,

> "I accept the Sponsor's evidence as broadly consistent with the other available evidence. The evidence weighing in favour of the Appellant is that a DNA test has confirmed the paternity of the Sponsor's child as the Appellant, and of course the spouse's statement. There are some receipts for money transfers dated 12th February 2013, 5th February 2014, 1st March 2014 and 4th March 2014. There is also another receipt which has the date partially cut off, but reads 2013. I suspect this is a duplicate ..."(paragraph 29).

6. The main issue in the appeal was, "as to whether the Appellant and the Sponsor are married" (paragraph 28).

7. Nevertheless, a considerable number of factors weighed against the Appellant and the Sponsor. There was nothing to explain why or how the Appellant came to be released by the Ethiopian militia (paragraph 30). There was no evidence that the Sponsor had found herself in Ethiopia "other than a broad statement that her guardian was becoming elderly and the situation was becoming unstable" (paragraph 31).

8. The judge held that the Appellant could not succeed under the Immigration Rules and could not succeed under Appendix FM because this contains no provisions for entry clearance as a partner, the Appellant having failed to demonstrate that he was married to the Sponsor in any legal sense (see paragraph 38). If one considered the position under human rights law, the judge held that she would accept "that Yousuf is the Appellant's child and that the Appellant lived with the Sponsor for eight months prior to the application, although this period was cut short by his removal from the camp by Ethiopian militia" (paragraph 41).

9. The judge held that, "I find the Appellant has a family life with the Sponsor and his son. The decision under appeal interferes with his right to enjoy such a life together ..." (paragraph 41). Nevertheless there was no disproportionality in the decision of the Secretary of State. The Rules provided for the Appellant and the Sponsor to live together subject to the conditions being satisfied. Moreover, they had stayed in contact through Skype and there was no disproportionality in requiring them to carry on doing so (paragraph 42). The appeal was dismissed.

Grounds of Application

10. The grounds of application state that the judge had dismissed the appeal because she was not satisfied that the Appellant and the Sponsor were married. However, there was strong evidence that included the DNA evidence confirming that the Appellant was the father of the Sponsor's child, and the fact that the Sponsor has been supporting the Appellant financially in Ethiopia, and the Sponsor's evidence that she and her son have recently visited the Appellant in Ethiopia, which the judge accepted was consistent with the stamps in the son's passport. The judge's findings that the couple were not married was therefore irrational.

11. On 20th May 2015, permission to appeal was granted on this basis by the Tribunal. It was also granted on the basis of the judge's consideration of Article 8 was materially flawed in that she failed to have regard to the best interests of the Appellant's child on the issue of proportionality.

12. A Rule 24 response was entered on 3rd June 2015. This stated that the judge had balanced the findings in favour of the Appellant, given at paragraph 29 of the determination, against the findings that were not in his favour at paragraphs 30 and 31. The judge reminded himself at paragraph 32 of the evidence of the Appellant and the Sponsor's status. The determination was plainly sufficiently reasoned. As far as Article 8 was concerned the judge had considered Appendix FM and had regard to the fact that the child was that of the Appellant. However, the child's leave would expire in 2018 and this was significant. The judge could not have reached a different decision. The child was young and family life could be enjoyed in Addis Ababa.

Submissions

13. At the hearing before me on 31st July 2015, Miss Maslord, appearing on behalf of the Appellant relied upon the Grounds of Appeal. She submitted that the judge simply failed to make proper findings of fact. On the one hand, she was stating that the Appellant was properly married to his wife, the Sponsor, and there was a child of the marriage. She was even implying that they had lived as a family unit for eight months (see paragraph 41). On the other hand, the judge appeared to be suggesting that none of this was proved because of the way in which they had lived their lives having fled from a refugee camp. It was well established that evidence needs to be properly determined and a firm view taken on matters that are germane to the appeal. One example of the irrational approach of the judge is the reference to the DNA report, which confirms the fact that the child Yousuf is 99.9% the child of the Appellant. However, at paragraph 35, the judge curiously states that, "I treat the DNA evidence with a degree of caution." With that, the judge proceeds to state that, "accordingly I dismiss the appeal under the Immigration Rules ..." (paragraph 36). The judge also seems to then imply that the parties are not married.

14. For his part, Mr Walker submitted that he would rely upon the Rule 24 response. This was a complete answer to the appeal. The judge was entitled to come to the conclusions that she did. She did direct herself appropriately. She did have regard to both the Immigration Rules and to human rights arguments. These findings were made. Appendix FM and Article 8 were properly considered at paragraph 4.

15. In reply, Miss Maslord submitted that given the way in which the findings had been made the appropriate course of action was to make a finding of an error of law and to remit the case back to a First-tier Tribunal Judge.

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law such that I should set aside the decision (see Section 12(1) of **TCEA [2007]**). My reasons are as follows. First, whilst the judge states that, "I treat the DNA evidence with a degree of caution" (paragraph 35), nevertheless, in her ultimate conclusions, the judge is clear that,

> "I accept for these purposes that Yousuf is the Appellant's child and that the Appellant lived with the Sponsor for eight months prior to the application, although this period was cut short by his removal from the camp by Ethiopian militia. Accordingly, I find that the Appellant has a family life with the Sponsor and his son ..." (paragraph 41)

17. In the circumstances, it is simply not credible to say that the decision of the Secretary of State is not disproportionate to the Article 8 rights of this family bearing in mind that they had lived together as a family unit prior to the Sponsor coming to the UK, and that present communication through modern means of communication such as Skype (see paragraph 42) is an unrealistic means of sustaining family life for any period of time.

18. Second, the judge does not appear to give proper regard at all to the fact that this was a marriage situation, and a family life situation which was subject to the family reunification policy for refugees. The threshold standard is lower here.

19. Third, there is the issue of the Appellant's marriage to the sponsoring wife, Mrs Latifa Amir Sharif. The judge is ambivalent about this. The evidence was that the marriage took place by way of an Islamic marriage before an imam (see paragraph 17). It is as a consequence of that marriage that there is "confirmatory DNA testing results showing that the Appellant and the Sponsor to be the parents of the child Yousuf" (paragraph 18).

20. On a balance of probabilities, there is every reason to conclude here that this was a genuine marriage, for a genuine purpose, which was still subsisting in every way. There are, after all, remittances of monies, which the judge expressly refers to (see paragraph 29). The judge is clear that, "the Sponsor's evidence" is "broadly consistent with the other available evidence" (paragraph 29).

Re-making the Decision

21. I have re-made the decision on the basis of the findings of the original judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have given above. The nub of this claim is set out in the factual findings of the judge herself. She states (at paragraph 29) that, "I accept the Sponsor's evidence as broadly consistent with the other available evidence." She states (at paragraph 32) that,

> "I must bear in mind that the Sponsor tells me that they were both refugees in Ethiopia, that resources were sparse, and there was no requirement for documents to prove a marriage and indeed none was provided. As the Appellant left the camp it would have been difficult for them to contact anyone there. Accordingly, I must be careful not to impose too high an evidential standard ..."

22. Yet, this is exactly what appears to have been done and, if determined on a balance of probabilities, there is no reason why this appeal should not be allowed, and not least, given that this marriage led to the birth of Yousuf, who the DNA evidence now proves, to be the child of the Appellant and the Sponsor. The judge is clear (at paragraph 41) that, "I accept for these purposes that Yousuf is the Appellant's child and that the Appellant lived with the Sponsor for eight months prior to the application ..."

23. In the same way, the judge is clear (at paragraph 35) that, "the presence of positive DNA evidence of course supports the presence of a relationship ..." The plain fact is that the judge has accepted that the child is the Sponsor's son and that the couple lived together before the Sponsor was removed from the refugee camp and the Sponsor then came to claim asylum in the UK.

24. Furthermore, the Sponsor had been found to be credible by the Tribunal in her own application for asylum. For a refugee family reunion policy to apply, this has to be the starting point. Thereafter, once the DNA evidence points irrefutably to the fact that the child, Yousuf, is the child of the Sponsor and the Appellant, then this indicates, on the requisite standard of proof, that reasonably speaking, there is a genuine and subsisting marriage relationship between the Appellant and the Sponsor, as that is the evidence given before the judge, in circumstances where documentary evidence is difficult to come by, and is acknowledged to be so by the judge herself.

25. Finally, the Sponsor had submitted travel documents confirming her visit to see her husband. There was also a copy of her son's visa which indicated the same. There were photographs submitted. Accordingly, if the central issue was whether the Sponsor and the Appellant were married, then this issue is resolved in favour of the Appellant and the appeal must be allowed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 9th November 2015