Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04772/2020 (R)

THE IMMIGRATION ACTS

Remote Hearing by Microsoft Teams	**Decision & Reasons Promulgated**
Field House	
On 28th January 2022	**On 26th May 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

ZTG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Afzal, instructed by IAS Lawyers
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS (R)

An anonymity direction was made by the First-tier Tribunal. As the appellant has been granted refugee status in Ethiopia and is a child, it is appropriate that a direction is made by the Upper Tribunal. Unless and until a Tribunal or Court directs otherwise, ZTG is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

1. The hearing before me on 28th January 2020 took the form of a remote hearing using Microsoft Teams. Neither party objected. The appellant's sponsor (her brother) joined the hearing remotely from the offices of the appellant's representatives. I sat at Field House. I was addressed by the representatives in exactly the same way as I would have been if the parties had attended the hearing together. I was satisfied: that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate. I was satisfied that a remote hearing will ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, and the complexity of the issues that arise. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

2. At the outset of the hearing, I informed Mr Afzal that I had been unable to locate a copy of the appellant's bundle that was before the First-tier Tribunal containing the evidence that had been relied upon by the appellant. Mr Afzal forwarded a copy to the Upper Tribunal by email. The appellant's bundle comprises of 92 pages.

The background

3. The appellant was born in March 2005 and is a national of Eritrea. She has been granted refugee status in Ethiopia and currently lives with a Guardian, who is a friend of her brother, GT. GT was granted refugee status in the UK on 13th February 2019. On 28th November 2019, the appellant made an application for entry clearance as a child of a relative with limited leave to enter or remain in the UK as a refugee or for humanitarian protection. Her application was refused by the respondent for reasons set out in a decision dated 4th February 2020. The respondent noted that the appellant is unable to meet the requirements set out in paragraph 319X of the immigration rules because GT was

granted indefinite leave to remain on 12th February 2019 and does not have limited leave to remain as required by the immigration rules.

4. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Freer ("Judge Freer") for reasons set out in a decision promulgated on 31st March 2021. GT attended the hearing of the appellant's appeal and gave evidence as set out in paragraphs [11] to [19] of the decision. Broadly put, Judge Freer found the appellant and GT to be credible witnesses. He noted, at [29], that there was a substantial volume of documentary evidence that support his findings of credibility. He found that the appellant is a minor, now 16 years of age. He noted that the family friend, N, who cares for the appellant in Ethiopia, lives in Addis Ababa. He found that the sponsor has supported the appellant, first, informally for a number of years from around 2014, and then, by formal transfers of money since 2019. Judge Freer found that the care provided for the appellant is temporary and extends *"in fits and starts"* due to the goodwill of the Guardian and the efforts of the sponsor. At paragraph [36], Judge Freer found that there is a continuing 'family life' between the appellant and GT, "..*whereby [GT] is in reality performing the role of an overseas parent."*. At paragraph [37], Judge Freer said:

> "The Appellant lives in a private household, not a refugee camp. The accommodation of the appellant in Ethiopia is not unsuitable. It has not been shown by evidence that it is impossible or very difficult to find a suitable replacement Guardian for the next few years. It is not even shown by the appellant that the current Guardian will, more likely than not, cease to act as such within that period. It is merely a possibility. The current Guardian has indeed continued to act beyond the cut-off date of 11 November 2020 previously specified. There is no reason shown in the evidence why the current Guardian cannot make efforts locally to locate a suitable replacement, if that is a pressing need."

5. Judge Freer found the appellant cannot satisfy the requirements of the immigration rules. He addressed the appellant's human rights claim outside the immigration rules at paragraphs [41] to [47] of the decision. Having accepted that the appellant and GT enjoy 'family life' for the purposes of Article 8, he referred to s55, and at paragraph [43], said that "*the current accommodation and quasi parental care are suitable, on the evidence.*". At paragraphs [46] and [47] of his decision he said:

> "46. The status quo meets the basic needs of the child and it can continue; if it breaks down in the future, the sponsor can make an occasional visit to the appellant for the purpose of finding and appointing a new Guardian and the appellant will have an opportunity to make a fresh application. Alternatively, the current Guardian can find a suitable replacement. I conclude that the balancing exercise on proportionality manifestly favours the respondent, starting with the strong weight generally given to enforcing the immigration rules according to law. The appellant has not produced sufficiently weighty factors to match it.
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> 47. I find that the appellant's circumstances do not outweigh the public interest and that the respondent's decision does not give rise to unjustifiably harsh consequences for the appellant or indeed any other outcome prohibited by the Agyarko test. Accordingly, I find that the respondent's decision is proportionate and therefore lawful, pursuant to section 6 of the Human Rights Act 1998."

The appeal before me

6. The appellant claims Judge Freer erroneously concluded that the status quo meets the basic needs of the appellant and that it can continue. It is said that in reaching that conclusion, Judge Freer failed to have regard to what is said in paragraph [12] of the witness statement of GT, dated 15th March 2021. GT was found to be a credible witness and had said in his witness statement that the appellant had fled Eritrea and travelled to Ethiopia. He was unable to travel to Ethiopia and rang his friend, N, who was living in Addis Ababa, and asked him to help the appellant. GT states that he sent a power of attorney from the UK in order for 'N' to be granted temporary guardianship. It is said in his witness statement that it was his friend that had helped the appellant leave the refugee camp, and he is still looking after her *"... but this arrangement is not for a permanent basis. He is constantly asking me when will [the appellant] join me in the UK and I am having to plead with him to be patient as the matter is ongoing. He is pressurising me that he will abandon my sister if I do not make alternative care arrangements."*. The appellant claims neither the Home Office Presenting Officer nor the Judge raised any concerns about the content of the witness statement. The appellant claims that the judge failed to adequately undertake the proportionality exercise, and in reaching his decision, failed to take into account all relevant matters and provide adequate and proper reasons for dismissing the appeal.

7. Permission to appeal was granted by Upper Tribunal Judge Gleeson on 27th June 2021. In doing so she observed that Judge Freer, arguably, overlooked the evidence of the sponsor that he was under pressure from N that he would abandon the appellant if alternative arrangements for the appellant's care were not made.

8. Before me, Mr Afzal submits the appellant and sponsor were found to be credible and there was no evidence before the Judge regarding the availability of an alternative carer for the appellant in Ethiopia. The Judge found, at [36], that there is a continuing family life between the appellant and sponsor as siblings, whereby the sponsor is in reality, performing the role of an overseas parent. Mr Afzal submits the temporary nature of the current arrangements was in the witness statement of the sponsor, and that the conclusion that the status quo meets the basic need of the appellant, and it can continue, is therefore erroneous.

9. In reply, Mr Diwnycz accepts that there is a tension in the decision between the finding that the sponsor was a credible witness and the finding that the 'status quo' can continue when the sponsor states in his statement that the arrangement is not permanent, and that N is constantly asking him when the appellant will be joining him in the UK. Nevertheless, Mr Diwnycz submits Judge Freer, at [37], characterises the mere possibility of the arrangement coming to an end. He submits that in the end it was open to the judge to conclude that was a 'mere possibility' and that if the current arrangements break down, other arrangements can be made.

Discussion

10. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998.

11. There is in my judgment some merit to the claim made by the appellant that the judge failed to adequately address the evidence before him and

failed to adequately consider whether the decision to refuse leave to enter, is, in all the circumstances, proportionate.

12. As Mr Afzal submits, Judge Freer found that the appellant's brother GT is a credible witness. He also found the same to be true of the appellant. He accepted there is overwhelming evidence that the appellant and her brother GT are siblings. At paragraph [35] of his decision, Judge Freer said that the *"care of the guardian is temporary"* and he found that the care extends *"in fits and starts"*, due to the goodwill of the Guardian and efforts of the sponsor. Judge Freer concludes that the 'status quo' can continue, and that an alternative suitable guardian could be identified. He states at paragraph [37] that there is no evidence why the current Guardian cannot make efforts locally to locate a suitable replacement if that is a pressing need. In reaching his decision, Judge Freer does not refer to the evidence set out in the witness statement of GT, that N is constantly asking him when the appellant will join him in the UK and that he is having to plead with N to be patient as the matter is ongoing. The judge does not refer to the evidence of GT threatening that the appellant will be abandoned if GT does not make alternative care arrangements. As Mr Diwncyz accepts there is a tension between the evidence of GT, who the judge accepted to be credible, and the conclusion, at [37], that the appellant has not shown that the current Guardian will, more likely than not, seek to act as such for the next few years. The judge found it to be "a mere possibility" that the current guardian will cease to act as a guardian but that is to disregard the evidence of GT, that the appellant may be abandoned if alternative care arrangements are not made.

13. At paragraph [42] of his decision, Judge Freer said that the remaining issue for him to resolve is whether the respondent's decision is proportionate to the legitimate aim. To that end, he referred to the public interest considerations set out in s117B of the 2002 Act, and at [45], referred to the decision of the Supreme Court in Agyarko v SSHD [2017] UKSC 11. The Supreme Court confirmed that the ultimate issue is whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the rules. Here, Judge Freer found that the appellant has failed to establish that the

consequences of the decision to refuse leave to enter will cause very substantial difficulties or is unjustifiably harsh for the appellant. In reaching that decision he again stated, at [45] and [46], that the status quo meets the basic needs of the appellant and can continue. That is, as I have already said, to disregard the evidence of GT.

14. Finally, although Judge Freer refers to s55 of the 2009 Act at paragraph [43] of his decision and states the "welfare of the child is a primary consideration", the judge does not address the 'best interests' of the appellant. He simply states: "*I find that this welfare factor has been considered already by the decision makers. The current accommodation and quasi-parental care are suitable, on the evidence".* There is no assessment of the best interests of the appellant. In her decision of 4th February 2020 the respondent simply refers to the decision taking into account, as a primary consideration, the best interests "*of any relevant child"*, but does not say anything more about the bests interests of the appellant.

15. Although brevity is to be commended, in my judgment, the errors of law in the decision of Judge Freer are such that the decision cannot stand and must be set aside.

16. As to disposal, in my judgement the appropriate course is for the matter to be remitted to the First-tier Tribunal for hearing afresh with no findings preserved. Remittal to the First-tier Tribunal will ensure the appellant has a fair and proper opportunity to ensure the First-tier Tribunal has before it all of the evidence relating to the best interests of the appellant and the current and future arrangements for the care of the appellant. I note that in paragraph [4] of his witness statement, GT refers to a 'Guardianship Letter' issued by the Ethiopian Refugee authorities granting N permission to look after the appellant. A copy of that document is at page 22 of the appellant's bundle, but Mr Afzal was unable to draw my attention to a translation of that document, or any evidence regarding the effect of that letter insofar as it imposes or infers any duties or obligations upon N relating to the care of the appellant. In all the circumstances, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, I am satisfied

that the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

17. The appeal is allowed. The decision of FtT Judge Freer promulgated on 31st March 2021 is set aside.

18. The parties will be advised of the date of the hearing of the appeal before the First-tier Tribunal in due course.

V. Mandalia **2nd May 2022**

Upper Tribunal Judge Mandalia