



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

Appeal Number: AA/05908/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31 March 2015**

**Determination Promulgated  
On 21 May 2015**

**Before**

**Upper Tribunal Judge Southern**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SAID IBRAHIM ABDI RAHMAN**

Respondent

**Representation:**

For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr M. A. Rana, counsel instructed by Aden & Co

**DETERMINATION AND REASONS**

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge O'Flynn who, by a determination promulgated on 15 January 2015, allowed the appellant's appeal. Therefore, the appellant is the respondent before the Upper Tribunal but, because it will be necessary to reproduce extracts from the determination of the First-tier Tribunal, for convenience and in the interests of consistency, I shall continue to refer to the Secretary of State as the respondent and to Mr Rahman as the appellant.

2. The appellant, who was born on 16 August 1990, is a citizen of Somalia. He claimed asylum on arrival in the United Kingdom on 11 November 2013. He appealed against refusal of that claim, and against the decision that he be removed from the United Kingdom. His grounds for appealing were first that, on the basis of being a member of a minority clan who had experienced clan based persecutory ill-treatment in the past, he should be recognised to be a refugee. Secondly, he was now reunited in the United Kingdom with his mother and siblings, who had travelled here some 15 years ago and who are now all settled here. Therefore, there would be an impermissible infringement of rights protected by article 8 of the ECHR if he were not allowed to stay to re-establish the family life that had been shattered when the family were separated by violence in Mogadishu, causing his mother to flee to seek asylum.
3. First-tier Tribunal Judge O'Flynn heard oral evidence from the appellant and from his mother and sister and found them all to be credible witnesses who had given a truthful account of the difficulties they had experienced in the past in Somalia on account of being members of a persecuted minority clan. The judge rejected the protection claim because, in the light of the current country guidance in *MOJ and Ors (Return to Mogadishu)* Somalia CG [2014] UKUT 00442, it was plain that the appellant no longer faced a real risk of persecution or other ill-treatment on return to Mogadishu, where he had been working as a labourer before his departure.
4. The judge was plainly correct in that regard, as is reflected by the absence of any challenge to his decision to dismiss the appeal on asylum grounds.
5. However, the judge allowed the appeal on human rights grounds, founded upon the article 8 claim. In granting permission to appeal First-tier Tribunal Judge Heynes said:

“The grounds of appeal complain that the judge erred in the consideration of section 117 of the 2002 Act.

There are arguable errors of law.”

6. The judge commenced his consideration of the article 8 claim at paragraph 19 of the determination. His approach to that exercise cannot be faulted. He recognised that the appellant's article 8 claim could not succeed under the immigration rules and although he recognised also that the immigration rules now sought to incorporate the principles enshrined in article 8, as he put it, he said that it was clear from the emerging jurisprudence that there remained a need to see, where there was arguably good grounds for doing so, if there were an arguable case outside the rules. He then said, at paragraph 22 of the determination:

“Bearing those cases in mind, I am satisfied that the appellant's circumstances in this appeal warrant and analysis under Article 8, not restricted by the Rules, for these reasons. The appellant got separated from his mother and family when they were attacked in 1998. This was, sadly, a common occurrence in Somalia in those days. Since then, his mother and sister have been granted refugee status and one brother is a British citizen. The status of the second brother was unknown but he is in the UK. It is not beyond the bounds of possibility to think that, had the family not been separated, this appellant would also be in the UK with his family. Instead, he has been separated from them for some 15 years. His mother said that, after they were reunited, "I thought all the feelings a mother feels. You can't imagine it - he

does everything a son is expected to do." This case cannot rest simply on the Rules. Mr Rahman, as a result of war and internal conflict, has been separated from them for a very long time. It was suggested that he could apply for a visit fees from time to time but I find this totally unrealistic given that he was a labourer in Somalia and the family is hard pressed financially in the UK. Plainly, his mother will not return to Somalia: she is now 71 and has refugee status in the UK. Put starkly, the reality is that it is unlikely that the appellant will ever see his mother again if he were to return to Somalia."

7. Having set out the provisions of articles 8(1) and 8(2) of the ECHR, the judge reminded himself that it was for the appellant to establish that the article was engaged after which it was for the respondent to show that the interference that would arise was lawful and proportionate. He then said this:

"In order to properly consider Article 8 I use the case of **Razgar [2004] UKHL 27** and the five step approach to proportionality. Before I come to that, however, importantly I must take into account that, from 28 July 2014, section 19 of the Immigration Act 2014 was brought into force: Article 3 of the Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014 SI 2014/1820). This amends the Nationality, Immigration and Asylum Act 2002 by introducing a new Part 5A which contains sections 117A, 117B, 117C and 117D. These statutory provisions apply to all appeals heard on or after 28 July 2014 irrespective of when the application or immigration decision was made.... In short, where the Immigration Rules, found at Appendix FM, paragraph 276ADE or paragraphs 398 and 399, reflecting the respondent's Article 8 obligation do not apply, Section 117 of the Nationality, Immigration and asylum Act 2002 (as amended) provides the factors to which the Tribunal must have regard"

8. The judge then set out those provisions, so far as they were relevant to this appellant. It is not necessary, therefore, for me to reproduce them once again. This establishes, unambiguously, that the judge had the provisions of s117 at the forefront of his mind as he embarked upon his assessment of the article 8 claim. He then proceeded to consider each of the five *Razgar* steps.
9. First, the judge found that, although now an adult, the appellant did enjoy family life with his mother and sister and that his removal would constitute an interference with their enjoyment of it. That was because, having directed himself in terms of *Kugathas v SSHD [2003] EWCA Civ 31*, he found that:

"... the bond between Mr Rahman and his mother in this case is, I am satisfied, far stronger than "normal emotional ties". They were separated for 15 years. He was only 8 when the conflict wrenched apart this family. Far from being less because of the absence, the relationship now is cemented by those very years of absence; absence which clearly laid heavily on his mother. To separate them now would be far more devastating for the appellant's mother than if they had been together all these years..."

10. Reminding himself that the Court of Appeal had observed in *AG (Eritrea) v SSHD [2007] EWCA Civ 407* that the threshold of engagement with Article 8 was not an especially high one, he found that it was engaged in this case because:

"The appellant would be leaving a life with the family that he has just re-discovered. It is clear from the evidence that he and his mother and sister (with whom he lives) are very close. In the circumstances, I have no doubt that removal will have consequences of such gravity so as to potentially engage the Article."

11. The judge recognised that the proposed interference was in accordance with the law.
12. Finally, the judge took together the fourth and fifth steps, considering whether the proposed interference with the family life he found to exist was necessary and proportionate, arriving at the conclusion that it was not. This was for the reasons already given in his determination and because:
 

“Mr Rahman has been separated from his family far too long. Had he not, as an 8 year old child, been lost when the family was attacked, there is every possibility he would have been here with leave for years as his sister and brother have. He should not be penalised for being torn away from his family as a young child. He has not been able to grow up in his close family (he was brought up by a cousin of his father). He should now be given that opportunity. The effect of losing his family at the age of 8 can barely be imagined. I have fully taken into account that he does not, at this stage, speak English or have financial independence; however, I am satisfied that it would be entirely disproportionate to the necessity for an effective immigration policy for him to have to go through the break up with his family again when he has just re-discovered his mother and his mother has re-discovered him.”
13. The grounds for seeking permission to appeal, all of which are pursued before the Upper Tribunal by Mr Wilding, set out a comprehensive challenge to the determination. It is possible to identify that 8 separate complaints are being made. It is submitted that the judge erred in law in that:
  - i. He incorrectly interpreted the requirements of s117B(2) and (3) as being something that the appellant can attain at some point in the future instead of assessing the position at the date of the hearing;
  - ii. He incorrectly looked at the ability of the appellant’s siblings to satisfy those criteria instead of the appellant’s ability to satisfy them;
  - iii. He failed to weight the appellant’s inability to satisfy the requirements of s117B (2) and (3) against him in the balancing exercise;
  - iv. He failed to attach little weight to private life established when immigration status precarious;
  - v. He misdirected himself when determining that family life with adult siblings go beyond normal emotional ties – *Kugathas v SSHD* [2003] EWCA Civ 31;
  - vi. He failed to identify any element of dependency going beyond normal emotional ties between parents and adult children;
  - vii. He failed to factor in the non attendance of 2 siblings at hearing;
  - viii. He failed to recognise that S117A-D does not envisage family life being outside of a qualifying partner or qualifying child.
14. In determining the appeal to the Upper Tribunal it is, of course, important to remember that I am concerned with the grounds advanced and not with any other point or issue that the judge, or another judge, might have taken against the appellant. Mr Wilding confirmed in advancing his oral submissions in support of the grounds that there was no perversity challenge pursued. The real complaint is that the assessment of the judge was not properly informed by the matters he was

required to have regard to by the provision of s117. Also, Mr Wilding submitted that the judge erred in finding that there existed family life because there was no evidence of dependency or that the ties went beyond what would be expected in any relationship between adult relatives and that the judge fell into error in considering that the appellant might expect to achieve financial independence and fluency in the English language at some future time, when those features were not established at the date of the hearing. The judge was required to weigh those matters against the appellant and he failed to do so.

15. I will address in turn each of the challenges raised in the grounds, as I have listed above, in the light of Mr Wilding's oral submissions.
16. I do not accept that the judge erred in considering that the appellant met the requirements of s117(B)(2) and (3) because he would become financially independent and fluent in the English language in the future. The judge was simply recording the fact that, as required by those provisions, he was having regard to the fact that the appellant did not have language fluency or financial independence but was explaining why, despite that counting against the appellant, he still concluded that his article 8 claim should succeed. In recognising that these were factors to which he was required to have regard, the judge was doing precise what s117 demanded of him.
17. For the same reason, nor can it be said that the judge was somehow finding that, at the date of the hearing, somehow the requirements of s117B were met vicariously by the appellant's siblings.
18. Therefore, the judge did not fail to weigh these matters against the appellant. He has given legally sufficient reasons for explaining why, in his judgement, in this particular case, the fact that the appellant did not meet these requirements did not weigh heavily against him.
19. There is no merit in the ground complaining that the judge failed to attach little weight to private life established while the appellant's immigration status was precarious because the appeal was not allowed on the basis of the appellant's right to respect for any private life.
20. The grounds complain next that the judge was wrong to find that family life existed because the evidence did not disclose anything that went beyond the normal ties or bonds one would expect between adult relatives. But it is plain from a reading of the determination why the judge arrived at that conclusion. He heard oral evidence from the appellant, his mother and his sister and so the judge was best placed to make that judgement. That may not have been the only view possible of the evidence but I am unable to say that it was one not open to the judge on the evidence before him.
21. Similarly, the absence of specific evidence of dependency did not disqualify the judge from being entitled to arrive at the conclusion he did. The judge looked at the evidence as a whole and was entitled to conclude that the circumstances in which this family became separated and then reunited, taken together with the circumstances in which the appellant's mother, now aged 71 and, in his view, unlikely to be able to visit the appellant in Somalia or anywhere else, had to flee

from Somalia to seek asylum, were sufficient to demonstrate the existence of family life where, absent those characteristics, it might not exist. In his submissions, Mr Wilding suggested that this reasoning may be thought to illustrate that the judge was impermissibly using article 8 of the ECHR as a “general dispensing power”. However, it seems to me that the judge was focussing upon the relationships as they were and the impact upon those concerned of bringing about a separation, that being a legitimate area of application of rights protected by article 8.

22. Next, the grounds point out that the judge did not address the fact that there were 2 siblings of the appellant in the United Kingdom who did not attend the hearing to give evidence in support of the appellant’s claim. However, the family life found to exist was between the appellant, his mother and sister, those three individuals living together in the same household. The fact that the appellant may have other relatives in the United Kingdom with whom he did not enjoy family life was not something that in any way diluted the strength of the relationships that were found by the judge to be more significant in terms of the claim under article 8.
23. The final complaint that can be distilled from the grounds is that the judge erred in failing to recognise that s.117 does not envisage family life existing outside a qualifying partner or qualifying child. Mr Wilding did not seek to enlarge upon that in his submissions and was plainly correct not to do so. It cannot sensibly be argued that the effect of s117 is that family life cannot exist except between qualifying partners or between parents and minor children.
24. Drawing all of this together I reach the following conclusions. This was a fact based assessment for the judge to carry out and, as he had the benefit of hearing oral evidence, he was best placed to do so. As was observed by Carnwath LJ (as he then was) in *Mukarkar v SSHD* [2006] EWCA Civ 1045:
 


“Factual judgments of this kind are often not easy, but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case (as is indeed illustrated by Mr Fountain’s decision after the second hearing). The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new. Nor does it create any precedent, so as to limit the Secretary of State’s right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.”
25. It may well be that this appellant is the beneficiary of a generous decision and that the outcome of his appeal may have been different had it been determined by another judge. It may well be that it is possible to construct lines of reasoning that sit uncomfortably with those set out in this determination, for example the fact that this appellant had been able to buy himself a ticket for his flight to the United Kingdom is not altogether easy to reconcile with a finding that there would be no scope for future face to face contact if he were not granted leave to remain. But the question to be addressed by the Upper Tribunal is whether the grounds that have been advanced in challenge to the decision of the judge have identified an error of law such as to require that it be set aside. Having examined carefully each

of those grounds of challenge I am satisfied, for the reasons I have given, that whether considered individually or cumulatively, those grounds have not established that the judge made any error of law.

Summary of decision

26. The First-tier Tribunal made no error of law and the decision of Judge O’Flynn to dismiss the appeal, contained in a determination promulgated on 15 January 2015, is to stand.
27. The appeal to the Upper Tribunal is dismissed.

Signed



Judge of the Upper Tribunal

Date: 1 April 2015