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

Appeal Numbers: OA/02825/2014  
OA/02824/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 24 November 2015**

**Decision and Reasons Promulgated  
On 16 December 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE A M BLACK**

**Between**

**(1) A M S D**

**(2) H M S D**

**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms Foot, counsel

For the Respondent: Mr Nath, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Given my references to the personal circumstances of the appellants and their minority at the date of application, I make an anonymity direction.

2. This matter has a lengthy history. The appellants are brothers and Eritrean citizens. They applied in 2013 for entry clearance under paragraph 319X of the Immigration Rules and on human rights grounds. The applications were refused. Following those decisions, the second appellant disappeared; his whereabouts are not known. Notwithstanding this event (which is said to be involuntary), notices of appeal were issued in the names of both appellants. Their appeals were dismissed under the Immigration Rules by FTTJ Pacey but allowed on Article 8 grounds. The respondent appealed to the Upper Tribunal and DUTJ Davey, having found a material error of law in the FTTJ's assessment of the public interest, remitted the matter to the First-tier Tribunal for a fresh hearing. He did so in terms that the findings of FTTJ Pacey as regards the Immigration Rules were to stand, as did certain of FTTJ Pacey's findings of fact.
3. The matter was heard afresh by FTTJ Grimmett whose decision was promulgated on 22 June 2015. Her findings were limited to the appellant's human rights claims and included the preserved findings of FTTJ Pacey. FTTJ Grimmett dismissed the appeals on Article 8 grounds.
4. The appellants applied for permission to appeal and this was granted by Designated Judge Shaerf on 21 September 2015 who noted:

"The disappearance, said to be involuntary, of the Second Appellant needed to have been considered, if only for the light it might have thrown on the situation of the Appellants at the date of the Respondent's decisions. The Upper Tribunal had expressly referred to it as a matter to be considered in its decision remitting the appeals to the First-tier Tribunal.

The Judge's treatment of the claim under Article 8 of the European Convention outside the Immigration Rules did not take into account that the factors referred to in sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 as amended are matters which need to be reflected in the assessment of the proportionality of the decision, taking into account the principles enunciated in *Mundebe* [2013] UKUT 00088.

The grounds disclose arguable errors of law and having regard to the history of these appeals, all may be advanced."
5. Thus the matter came before me.
6. Ms Foot, for the appellants, relied on her skeleton argument in asserting the decision contained errors of law. In summary, it is the appellants' case that FTTJ Grimmett materially misdirected herself with regard to the application of ss85 and 85A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act); she should have taken into account the disappearance of the second appellant because this was post-decision evidence which illuminated the circumstances appertaining at the date of decision. Furthermore, her failure to do so was contrary to the direction of the Upper Tribunal. In addition, the FTTJ had misdirected herself with regard to the weight to be given to the maintenance of effective immigration control in the proportionality assessment. Nor had the FTTJ considered the protected rights of the sponsor or the compelling circumstances of the appellants. There had been no identification of the best interests of the appellants or recognition that this was a refugee family reunion

case. Nor had the FTTJ considered the relevance of the preserved findings of FTTJ Pacey (albeit they had been cited). She submitted that, being an entry clearance case, more subtle consideration of s117 was required than that undertaken by the FTTJ. She submitted that there was an obligation on the respondent to facilitate the reunion of refugees, particularly children.

7. Mr Nath, for the respondent, conceded that it had been appropriate for the FTTJ to consider the appeals in accordance with the Article 8 jurisprudence, outside the Immigration Rules. However, he submitted that that assessment of proportionality had been appropriate. He further submitted that the findings of the FTTJ with regard to the application of s85A were sustainable. He relied on **SSHD v SS (Congo) & Ors [2015] EWCA Civ 387**, para 39(iii) and (iv). He also cited **AM (S117B) Malawi [2015] UKUT 0260 (IAC)** and **Dube (ss.117A-117D) [2015] UKUT 90 (IAC)**. Whilst the FTTJ had not referred to s55, she had taken into account the appellants' compelling situation and therefore their best interests. She had considered those against s117B.
8. Contrary to the grounds of appeal, DUTJ Davey had made it clear that the only issue before him was Article 8; there was therefore no need for FTTJ Grimmett to make a decision under the Immigration Rules.
9. Given that DUTJ Davey had expressly referred in his decision promulgated on 24 March 2015 to FTTJ Pacey's inadequate findings with regard to the disappearance of the second appellant and that this would "need to be reconsidered and analysed with reasons", it is surprising that FTTJ Grimmett has not addressed this matter in her decision. FTTJ Grimmett notes the submission of Mr Lane for the appellants that she could take into account matters arising after the date of decision, including the disappearance of the second appellant, pursuant to s85(4) of the Nationality, Immigration and Asylum Act 2002 but find (paragraph 7):

"... with regard to out of country appeals that is only permissible where the matter arising after the date of decision relates back to the position at the date of decision. Section 85A which was in force at the time of the decision provides that:-

"85A: Matters to be considered: new evidence: exceptions

  - (1) This section sets out the exceptions mentioned in Section 85(5).
  - (2) Exception 1 is that in relation to an appeal under Section 82(1) against an immigration decision of a kind specified in Section 82(2)(b) or (c) the Tribunal may consider only the circumstances appertaining at the date of decision."
10. FTTJ Grimmett goes on to state: "In my view the disappearance of [the second appellant] in the early part of 2014 is not a matter which was foreseeable at the date of decision and is not a matter that can therefore relate back to the date of decision". No reason is given for this conclusion and it ignores the evidence of the appellants that, shortly before the applications were made, the appellants' elder brother had disappeared, eventually making contact with the sponsor by telephone to tell her that he had been taken, with other children, into forced labour in Libya. Given this

evidence, which was available to the FTTJ and unchallenged by the respondent, the FTTJ's conclusions that the similar disappearance by the second appellant was not "foreseeable" required reasoning and explanation, particularly as the sponsor had specifically identified such a risk prior to the applications being made. In the light of this evidence, the FTTJ's finding that the disappearance was not foreseeable is inadequately reasoned and unsustainable. The appellants were living, at that time, in impoverished circumstances and the risk of being trafficked was a live issue of relevance to an assessment of their circumstances at the date of decision. Further, it was a material fact which might have impacted on the outcome of the appeals.

11. Whilst the FTTJ took into account (her paragraph 9) the current circumstances of the children, at no stage did she identify their best interests. As was decided in **Zoumbas v SSHD [2013] UKSC 74**, the best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR and must be a primary consideration albeit they can be outweighed by the cumulative effect of other considerations. The FTTJ's failure to identify the best interests of the appellants infects her proportionality assessment: it should have been an integral part of it. This failure is a material error of law.
12. Ms Foot and Mr Nath agreed that, given my findings of errors of law, the decision should be remade on human rights grounds, there being no challenge to the dismissal of the appeals under the Immigration Rules. Both agreed that the findings of fact of FTTJ Grimmett and the earlier findings of FTTJ Pacey (as set out in FTTJ Grimmett's paragraph 6) should be preserved.
13. On the substantive Article 8 issue, Ms Foot submitted that the sponsor's efforts to get her brothers to the UK were an indication of the nature of the family's relationship: the appellants were dependent on the sponsor who was in loco parentis. She submitted that the issues raised in the reasons for refusal letter had now been addressed. Findings could be made on the reasons for the second appellant's disappearance. The expert evidence and that of the sponsor was that the best interests of the children required them to be reunited in the UK. Given the appellants' highly precarious circumstances at the date of decision, their best interests required them to be granted entry clearance. Entry clearance was the only reasonable hope for the sponsor and appellants to enjoy family life; their relatives had disappeared. They were a refugee family who should be reunited. Ms Foot was uncertain whether the "historic family reunion policy" still applied as this was now addressed in the Rules but, in any event, it had been established that if the Rules were not met, entry clearance could be granted if compelling and compassionate circumstances existed. That was the case here. This gave reduced weight to the s117 factors, she submitted. She said there was an obligation on states to facilitate the reunion of families torn apart by persecution; it was always going to be unlikely for refugee children outside the UK to have English language skills or financial independence. The factors in s117B were not capable of outweighing these children's best interests.

14. I have also borne in mind Ms Foot's skeleton argument and the two skeleton arguments of Mr Lane who represented the appellants in the First-tier Tribunal on two occasions.
15. Mr Nath, for the respondent, noted that the sponsor was not employed at the date of decision. There was no evidence of her financial circumstances or accommodation. He did not contest that accommodation would be provided for them in the UK. However, there was no evidence of the level of dependence of the appellants on the sponsor; this was a relevant issue in the assessment of proportionality. The brothers had lived in Sudan for about five years at the date of decision. At the date of application they were aged 16 and 14 and, at the date of decision, aged 17 and 15. Their best interests were not a trump card. The appellants had sponsor had been separated since 2008. There was little evidence of contact or dependency.
16. Mr Nath accepted that, the appellants having failed to demonstrate that they fulfil the criteria in the Immigration Rules, their appeal should be considered in the light of the Article 8 jurisprudence. I proceed on that basis, given the guidance in SS (Congo): the appellants' circumstances are compelling; they are minors without parental support and they are living in impoverished circumstances.
17. The burden of proof insofar as the Article 8 claims are concerned, the burden of proof is on the appellants to show that the respondent's decisions interfere with their right to respect for their private and family lives. If the appellants are able to establish that, it is for the respondent to justify the decisions under Article 8(2). The sole issue in this case is whether the decisions of the respondent breach Article 8.
18. I bear in mind the guidance in **Razgar [2004] UKHL 27**. I also bear in mind the findings of JFTT Grimmett which includes those of JFTT Pacey. The respondent has acknowledged through her representatives at the hearing before FTTJ Grimmett and before me, that the appellants and sponsor have a family life. Nonetheless I set out the nature and extent of that family life because it is not straightforward.
19. The sponsor is the appellants' eldest sibling, their sister. The appellants and sponsor had co-habited in Eritrea prior to the latter's flight to the UK in 2008; this was organised by the sponsor's mother. At that time, the siblings were all minors. The sponsor was granted asylum in the UK. At the time of their applications, the sponsor had limited leave to remain in the UK as a refugee. The appellants continued to live with their mother in Eritrea until 2009 when their mother was arrested (their father having previously been arrested and disappeared). The appellants' and sponsor's mother has since disappeared and there has been no contact with her. In January 2009 the appellants fled to Sudan to live with their elder brother who had previously fled there having escaped from the Eritrean army. The sponsor regained contact with the appellants and their elder brother in 2010. From that time, she has made attempts to obtain entry clearance for her three brothers (including the two appellants) to settle in the UK. Her efforts were initially hampered by her inability to pay the respondent's fees. Before applications were eventually submitted in 2013 the appellants' elder brother disappeared. It later became apparent (when he contacted

the sponsor by telephone in April 2015) that he had been taken by traffickers to work on a fruit farm in Libya, where he is being held against his will. As a result, the applications for entry clearance which have given rise to these appeals, were made only by the two appellants, with the support of the sponsor.

20. I bear in mind the guidance in **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88 (IAC)** which identifies the issues to be addressed arising in connection with an application under paragraph 297. These appeals arise in connection with paragraph 319X which contains the requirements for leave to enter the UK as the child of a relative with limited leave to enter or remain in the UK as a refugee. Nonetheless **Mundeba's** guidance is instructive and I make the following findings with regard to the best interests of the appellants.
21. The appellants are de facto orphans. They were aged 15 and 17 at the date of decision. They have lived in Sudan since January 2009, having arrived there at the ages of 12 and 14. Until shortly before they made their applications for entry clearance, the appellants were living with their elder brother; he was then trafficked to Libya where he is now known to be in forced labour on a fruit farm. The elder brother is in contact with his sister in the UK, the appellants' sponsor, by telephone occasionally. The second appellant disappeared after the date of decision and is believed to have been trafficked also but there has been no contact with him. Both the second appellant and his elder brother were adults when they disappeared.
22. There is no suggestion of any delay by the respondent in making her decisions.
23. At the date of decision, the appellants were living in unacceptably basic conditions in Sudan. They were reliant on the charity of their community and mosque. They slept outside in a yard in inadequate bedding, only being permitted to sleep indoors when it was raining and only then, for cultural reasons, when the brother of the occupier was present. When sleeping indoors, they slept on the floor, not in a bed. This arrangement was insecure because the occupier envisaged returning to her family in Eritrea and would then give up the tenancy of the property. The appellants would be unable to pay the rent and there was no guarantee the landlord would accept them as tenants.
24. The appellants lived a hand to mouth existence with very basic access to food and to sanitation. They had no access to education and considerable problems arose when one became ill because there were no funds to obtain proper medical care. Were it not for the assistance of the occupier of the property, the appellants would be destitute.
25. The sponsor describes her brothers as "good at studying" which suggests that they have been educated in the past. There is no evidence they have access to education in Sudan.
26. Until 2013 and their elder brother's disappearance, the appellants were under his supervision and care. Since his disappearance, shortly before their applications were made in 2013, they have had limited adult support from the person on whose

premises they live. This is said to be a short-term arrangement but has continued for some time with very limited financial support from the sponsor. There is no evidence to suggest that the sponsor's limited and sporadic financial support cannot continue. The assistance of the person who provides food and limited accommodation to date is therefore precarious but ongoing.

27. The sponsor was not employed at the date of decision but was living on Jobseekers Allowance (JSA) of £65 a week. At the date of decision "the Sponsor ... has worked hard to learn English and to put herself in a position where she is able to support herself and it does look as if that will happen in the very near future." (paragraph 10). However, at that time she was not working. Thus she had not worked from 2008 when she arrived in the UK until the date of decision (January 2014), a period of six years. In her asylum interview the sponsor refers to an elder step-brother, Omar, whom she met in France and who, at the time of her interview, was also seeking asylum. She described him as being with her at the time of interview. She described him as "my brother from my mother". According to the appellants' solicitors in their letter of 27 August 2013 accompanying the applications, Omar (who is erroneously described as the sponsor's cousin) was not working at that time. He has been unable to support the appellants either.
28. I recognise that settlement in the UK would remove these child appellants from their precarious and vulnerable situation and that to live with their elder sister in the UK would be in their best interests, addressing their day-to-day welfare needs: they would benefit from her support and could live in her accommodation. Whilst she has a very limited income of £65, this is greater than the appellants have at the moment. That said, there would be some difficulties associated with living in the UK, a country which is significantly different to Eritrea and Sudan. There would be difficulties integrating into British society, even with the support of their sister who is now familiar with life in the UK. They are of an age when they would not necessarily find it straightforward to learn English. It is in their interests to remain in a society which is familiar to them and where they can engage with friends of their own culture and background. This is particularly the case given that they have already moved from their country of origin to a new environment and have now become used to life in Sudan, albeit in very precarious and difficult circumstances. They are living as impecunious migrants, on the charity of others. They have minor health issues (constant colds) and limited access to healthcare for which they must pay.
29. Given my findings as regards the appellants' circumstances, I find that it is in their best interests to come to the UK to live with their sister and to benefit from all that life in the UK would offer: adequate accommodation, maintenance, free healthcare and opportunities to study, work and better themselves.
30. In addressing the proportionality of the interference with the appellants' and their sister's protected rights, I must also bear in mind the provisions of s117A-C of the Nationality, Immigration and Asylum Act 2002. In particular, the maintenance of

effective immigration control is in the public interest: the appellants do not fulfil the criteria in the Immigration Rules for entry clearance, specifically paragraph 319X.

31. The Immigration Rules manifest the public interest in effective immigration control. The appellants do not fulfil the criteria in the Rules insofar as family reunion is concerned notwithstanding paragraph 319X is drafted to reflect the state's obligations insofar as the reunion of refugee families is concerned. It is relevant that paragraph 319X requires not only that there are "serious and compelling family or other considerations which make exclusion of the child undesirable" but also seeks to address the public interest factors in s117B by requiring the applicant to demonstrate they would be able to live here without recourse to public funds.
32. I am satisfied that there are serious and compelling circumstances which make the exclusion of the appellants undesirable because they are *de facto* orphans, have no older relatives in Sudan to care for them and are living in poverty with limited health care. Thus they fulfil the criteria in paragraph 319X(ii). However, whilst there is adequate space for the appellants in the sponsor's accommodation, that accommodation is partly funded by the state in that she receives housing benefit and a council tax discount. There would therefore be a small increase in the public funds payable as a result of the appellants' living in the sponsor's accommodation because she would no longer qualify for the single occupancy discount. Nor would the appellants be "maintained adequately", as required by paragraph 319X(vii) of the Immigration Rules, without recourse to public funds. In that regard, I refer to the definition of "adequately" in Paragraph 6 of the Immigration Rules:

"... in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."
33. Insofar as the public interests factors in s117B are concerned, neither the appellants nor their sponsor are financially independent (unsurprisingly in the case of minor migrants such as these). Furthermore, even after six years in the UK, the sponsor has yet to find employment despite attendance on various courses. Also her step-brother had not found work by 2013. These facts suggest that the appellants, who do not speak English, would have similar difficulties finding work and that they would be a burden on the state for several years after their arrival. I also note the sponsor intends that they should study here yet they have no means to pay for such studies.
34. The appellants' lack of English language skills will hamper their ability to integrate into British society. The appellants have never been to the UK and have no understanding of British society apart from what they have been told by their sister. I bear in mind that whilst the sponsor has sent some funds to the appellants, there is little evidence of dependency between them although I accept that there is some emotional dependency arising from the fact the sponsor is their eldest sibling and feels responsible for them. The relationship of the sponsor with the appellants cannot be said to be a *de facto* or quasi-parental one given the lack of dependency



and that the sponsor has never had a role in their upbringing. The sponsor has limited telephone contact with the appellants.

35. The preserved finding of FTTJ Pacey (paragraph 37 of the decision promulgated on 4 November 2014) is that “the funds available to the family would be below the minimum deemed necessary for a family of 3 here, nonetheless the sponsor has access to proper shelter, to running water and sanitation and to cooking facilities. The standard of living would be considerably better than the Appellants experience at present (and at the date of decision).” However, even though the conditions in this country would be better than in Sudan, the appellants would be living at a standard well below that which is considered adequate by Parliament, as demonstrated by the terms of paragraph 319X. The finding of FTTJ Pacey that they would not resort to public funds has been preserved and I bear that in mind. Nonetheless, I must give weight to the fact that the appellants and sponsor are not financially independent and are unable to fulfil the maintenance and accommodation criteria in paragraph 319X. I also bear in mind that they intend to study in the UK and yet have no funding to do so. Furthermore, they would be entitled to free healthcare. In any event, the mere fact of not needing to rely on the state for an income is not sufficient alone to outweigh the requirement for effective immigration control (**ZY (Turkey) v Secretary of State for the Home Department [2011] EWCA Civ 65**).
36. It is also relevant that, at the date of decision, the sponsor’s evidence is that she anticipated being able to find a job soon. On this evidence, I conclude that she would, on finding a job, increase the financial contribution she makes to her brothers’ upkeep and accommodation with a view to paying their rent and providing them with a more secure environment. She would also be able to visit them in the Sudan. The sponsor speaks to the appellants by telephone and that arrangement can continue. Thus on the sponsor’s evidence, the appellants’ current living arrangements in Sudan will not be maintained in the long term.
37. I am unable to find that the appellants’ welfare would be jeopardised by exclusion from the United Kingdom (**T (s.55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483(IAC)**). Whilst it has been claimed that the adult currently assisting the appellants will not maintain this arrangement, the sponsor has sent her money occasionally to enable her to do so. I take into account that the risk of kidnapping for forced labour existed at the date of decision and I bear in mind the background material and expert evidence on the issue. I note the appellant’s elder brother and the second appellant were kidnapped as adults rather than children which suggests there had been, during their minority, a degree of protection available for them from the adult who supported them. Nonetheless, I take into account that the appellants were vulnerable to harassment and abuse at the date of decision.
38. For the reasons set out above, I find that Article 8 is engaged by the respondent’s decisions because there are grave consequences for the appellants as a result: they must continue to live in precarious and difficult circumstances without personal

contact with their sister. The decisions are lawful in that the appellants do not fulfil the criteria in the Immigration Rules.

39. Insofar as the issue of proportionality is concerned, I make the appellants' best interests, as set out above, a primary consideration and take into account the factual matrix set out above. Having done so, I find that the degree of interference with their own and their sponsor's rights to family and private life is proportionate to the respondent's objective of maintaining effective immigration control: the public interest outweighs the degree of interference in the appellants' and their sister's protected rights. I make this finding in the light of the facts set out above and because, notwithstanding the appellants' compelling and compassionate circumstances described above, most of the relevant public interest factors listed in s117B apply and the appellants do not fulfil the criteria in paragraph 319X which reflects the UNHCR guidance on family reunion. Indeed paragraph 319X is arguably more favourable to the appellants in that it contains no requirement for dependency. The appellants' situation in Sudan warrants considerable sympathy but the appellants, who were approaching maturity at the date of decision, were being supported and accommodated (albeit inadequately and precariously) by members of their own lay and religious communities. They were in a similar situation to many Eritrean children in Sudan save that they had reconnected with their elder sibling in the UK who has been able to provide them with limited financial support.
40. Whilst I note the UNHCR family reunion guidance, the appellants have never been and are not now dependent on the sponsor. Even when they did regain contact in 2010 the sponsor did not become responsible for the appellants' upbringing or welfare: they were under the care of their elder brother. Whilst I accept they were not dependent on their elder brother at the date of application and decision, there is insufficient evidence of contact to demonstrate the appellants were emotionally and financially dependent on the sponsor at the date of decision. They were dependent on members of their community in practical terms and it is likely there has been a degree of emotional support from that source also, given the appellants' ages, length of residence and circumstances.
41. The evidence of the sponsor is that, at the date of decision, she expected to find work shortly and thus the appellants' current situation is a short-term one: the sponsor's limited qualifications and experience indicate that such employment is unlikely to make her financially independent such that she need no longer resort to public funds but, nonetheless, as her financial situation improves, she will be able to make a greater and more impactful financial contribution to the appellants' accommodation and maintenance in Sudan. She can also continue to maintain contact and provide support by telephone as she does at the moment. In the meantime, the appellants, at the date of decision, had accommodation and maintenance (albeit meagre and inadequate).
42. In summary, the decisions to refuse entry clearance do not upset the existing dynamic of the siblings' relationship: they have lived apart during their formative years. Whilst they are siblings and the decisions to refuse them entry clearance

prevent their re-establishing personal contact as such, in the short term, they do not prevent the maintenance of existing telephone contact and, once the sponsor has found employment, personal contact through visits to Sudan.

43. I set aside the decision of FTTJ Grimmett and remake it dismissing the appeals on human rights grounds.

**Decision**

44. The making of the decision of the First-tier Tribunal did involve an error on a point of law.
45. I set aside the decision.
46. I re-make the decision in the appeals by dismissing them.

*Angela M Black*

Dated

Deputy Upper Tribunal Judge A M Black

**Anonymity Direction**

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellants. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

**Fee Award**

The FTTJ did not make fee awards and, given my decision, that remains appropriate.

*Angela M Black*

Dated

Deputy Upper Tribunal Judge A M Black