



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

Appeal Number: OA/06451/2014  
& OA/06454/2014

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
On 15 September 2015**

**Decision & Reasons Promulgated  
On 17 September 2015**

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**ISMAHAN HUSSEIN ABDI  
& ANAB HUSSEIN ABDI**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellants: Miss J Todd, of Latta & Co, Solicitors

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellants, citizens of Somalia, appeal against a determination by First-tier Tribunal Judge Dennis, dismissing their appeals against refusal of entry clearance to settle in the UK with their mother. She is also originally a citizen of Somalia, and now a citizen of the UK.
2. It was conceded that the case for the appellants could not succeed under the Immigration Rules. They argued for a right of admission based on their and their mother's rights to family life under Article 8 of the ECHR, notwithstanding the requirements of the Rules.

3. The appellants' first ground of appeal to the Upper Tribunal, 1(a), complains that the judge was wrong to hold at paragraphs 15 and 27 that there was no protected family life for Article 8 purposes, because there is a presumption of family life between parents and minor children, which could subsist even where families "voluntarily separate", and no reason to depart from that general rule.
4. Mr Mullen argued that the judge's finding was to the effect that although family life existed it was not sufficient to qualify for Article 8 protection.
5. I am not satisfied that the judge's finding is to that effect, or at any rate that the finding is as clear as it should be. In my view, the finding should have been reached that family life did exist between mother and daughters. However, I do not think that any error is material, for these reasons:
  - (a) The real question was not whether family life existed for Article 8 purposes, but whether any interference with that family life was such, taken with all the other circumstances of the case, as to render the decisions appealed against disproportionate. The substance of the judge's decision is clearly based on that overarching issue.
  - (b) The judge from paragraph 28 onwards reaches his conclusions on the alternative that there is family life which qualifies for Article 8 purposes.
  - (c) It is correct that family life may exist "even when families voluntarily separate", but on the findings this was not a voluntary separation. It was willingly created by the sponsor.
6. Ground 1(b) complains that the judge speculated as to the reasons for the failure of the sponsor's asylum appeal, and reached a finding for which there was no evidential basis. I find nothing in this ground, for these reasons:
  - (a) The judge's analysis was that the sponsor put forward as the truth in these proceedings the same account on which she had relied in her asylum appeal. If accepted then as true, it would almost certainly have resulted in recognition as a refugee. She had not been so recognised, and so her account must have been rejected as unreliable. Miss Todd submitted that was speculative, but it appears to me to be sensible. No other likely alternative analysis was suggested.
  - (b) The sponsor, who was effectively instructing the proceedings, knew perfectly well why her claim for asylum had been refused. The reasons were withheld from the judge. The appellants are scarcely in a position to complain about an adverse inference.
  - (c) In response to the grounds of appeal the respondent sought to file a copy of the determination. It discloses that the sponsor's asylum appeal in 2006 did fail because she was not accepted to be a credible witness or a minority clan member. Miss Todd submitted that the determination should not be admitted for purposes of

determining error of law, but in principle appellants should not be permitted to gain from what was at best concealment, if not deceit.

7. Grounds 1(c), (d) and (e) are that the judge took into account irrelevant matters, being (c) the outcome of the sponsor's asylum appeal in relation to the existence of family life, (d) the possibility of the father of the sponsors being alive, which was irrelevant to whether there was family life between them and their mother, and (e) the question whether the appellant exercised sole responsibility, which was relevant to the requirements of the Rules but not to Article 8. Those points are too narrowly taken. The issues they cover were all relevant to the overall outcome of the appeal in terms of the reliability of the sponsor's evidence, and whether there was truthful disclosure of the family circumstances.
8. Ground 2 is error in the proportionality assessment, in that the judge ought not to have taken the Immigration Rules as a starting point, and ought not to have imposed an exceptionality requirement.
9. The judge directed himself at paragraph 28 that the Rules were likely to lead to a proportionate outcome, and that it would "... only be an unusual case where such circumstances presented themselves as were not contemplated or covered by the Immigration Rules that [a decision] might be rendered disproportionate." I see no legal error there. The grounds seize on the use of the words "exceptional circumstances" at paragraph 29, but that is selective. The judge did not mention only exceptionality (which has different meaning in different contexts), he said "... there are no exceptional circumstances or compelling or serious ones presented reliably before me" (emphasis added).
10. This criticism is at best one of form and not of substance. While there has been a proliferation of formulae on the interaction between Article 8 of the ECHR and the Immigration Rules, what is crucial is whether the judge carries out the fact-sensitive inquiry required by the case. The judge's self-directions are followed by weighing the circumstances as they appeared before him, including all relevant factors. It is not shown that the judge's formulation of the correct approach to Article 8 outside the Rules requires to be corrected in any way, or that any further elaboration of the relevant criteria might have led to a different result.
11. Miss Todd mentioned a further matter. The appellants have a half-sibling, the sponsor's son born in 2006, who is a UK citizen. She said that it would not be reasonable to expect him to leave the United Kingdom. However, the point is not in the grounds; it was a circumstance plainly before the judge; there is no reason to think he did not give it such weight in the overall balance as it deserved; and it would be far fetched to suppose that the best interests of the half-brother of the appellants, with whom they have had little if any contact, might be so strongly served by their admission to the UK as to make any difference.
12. Miss Todd said that paragraph 297 of the Immigration Rules was of another nature from the private and family life provisions as modified in

July 2012, and so required a different approach to Article 8 outside the Rules. Mr Mullen said that the same general approach to proportionality applied, that paragraph 297 did have a broadly humanitarian purpose, and that its exploration of the relevant factors roughly equated to a proportionality exercise, if not exhaustive in all cases.

13. It would be academic and futile to consider the exact degree to which paragraph 297 reflects Article 8. The judge accepted that there was a proportionality assessment to be carried out outside the Rules, which was the entire thrust of the case. The extent to which the appellants met or missed the terms of paragraph 297 was relevant to that exercise.
14. Miss Todd also put the argument that the appellants were in effect being penalised for the adverse features of the immigration history of the sponsor. It is of course correct that the appellants should not suffer for the shortcomings of their parent, but it is difficult for them to show the outcome is disproportionate when their actual history has not “been accurately or fully presented in either their applications or on appeal” (as put by the judge at paragraph 30 of his determination).
15. If the decision were to be re-made, the appellants sought admission of further evidence, a statement of the sponsor regarding her visits to the appellants in Ethiopia in January to February and again in June to August 2015, on which occasions she left with them US\$ 400 and US\$ 700. Her explanation for the source of funds is that she “took out cash here, plus some came from my friends.” I notice from the determination that she had made previous visits, and had paid US\$ 3000 for one of the appellants to have knee surgery. Her only admitted income has been from working as a cleaner and from benefits. Presently she is in receipt of Job Seekers Allowance only. Her travels and expenditure do not fit well with her claimed economic circumstances. If re-making the decision, in the light of the determination of the asylum appeal and of the further evidence presented, I would have been at least as sceptical as the original judge as to whether genuine disclosure of the family circumstances was being made. I also note that the factors to be weighed in terms of s.117B (2) and (3) of the 2002 Act, ability in English and financial independence, would count significantly against the appellants. Those matters were mentioned by the judge, although not by reference to the statute. I would have had no difficulty in reaching the same outcome as the First-tier Tribunal.
16. For all these reasons, I find that the appellants have not shown the making of the decision of the First-tier Tribunal involved the making of any error on a point of law such that the decision ought to be set aside.
17. The determination of the First-tier Tribunal shall stand.
18. No anonymity direction has been requested or made.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style, with the first name "Hugh" and the last name "Macleman" clearly legible.

Upper Tribunal Judge Macleman

15 September 2015