



IAC-FH-NL-V1

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

Appeal Numbers: OA/07294/2014
OA/07295/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 27 July 2015**

**Decision & Reasons Promulgated
On 15 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

**MSIS LADAN ADAN ABDI
MISS AMINO ADAN ABDI
(ANONYMITY DIRECTION NOT MADE)**

Respondents

Representation:

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondents: Ms J Howorth, instructed by Irving and Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this appeal I shall refer to the parties as they were described before the First-tier Tribunal, that is Messrs Abdi as the appellants and the Secretary of State as the respondent.
2. The appellants are sisters born on 6 December 2003 and 17 October 1998 and are aged 11 and 16 respectively and are citizens of Somalia.

They appealed against the immigration decisions of the respondent dated 12 May 2014 to refuse their applications of 6 April 2014 for entry clearance as children of the sponsor in the UK. Those applications were made further to paragraph 297 for entry clearance to settle with their mother, Farhiyo Ibrahim Ahmed. The sponsor had claimed asylum on her arrival in the UK on 15 November 2004 but that claim was refused albeit she was granted indefinite leave to remain on 10 October 2008. It was said she regained contact with two of the children after a neighbour located them in Kenya after being cared for by a friend of Ms Ahmed. The children advised that their father had deserted them. Ms Ahmed applied for those two children to join her in the UK. She only located the appellants later in 2012 being cared for by a different friend in Kenya. She was keen to reunite her family and was already undertaking three cleaning jobs and would be starting a fourth one in January 2015.

3. The application was refused on the basis that the Entry Clearance Officer was not satisfied as to the claimed relationship on the documents provided which were readily available in Kenya and the photographs did not contribute to the claimed biological relationship. The sponsor had not provided evidence of contact and she had re-located the children and she was granted ILR in May 2011 but the application in 2014 was the first made for the appellants. The Entry Clearance Officer was not satisfied the funds were transferred for the benefit of the appellants and there was no evidence in relation to the appellants' father. According to the formulae the income minus accommodation costs were less than that would be available to the appellants on income support and thus the appellants would not be satisfactorily maintained and accommodated. The applications did not raise any exceptional circumstances which were consistent with the right to respect for family life and Article 8.
4. The appeal was decided by Judge of the First-tier Tribunal Steer on 15 January 2015 and the judge allowed the appeal on Article 8 grounds having accepted that the appellants could not comply with the Immigration Rules.
5. At the hearing before the First-tier Tribunal a DNA report was provided and there was no challenge by the Home Office as to the claimed relationship between the appellants and their sponsor.
6. An application for permission to appeal was made on the basis that the appellants' case failed to meet the requirements of the Immigration Rules but it was made clear in **Gulshan [2013] UKUT 00640** that the Article 8 assessment should only be carried out when there were compelling circumstances not recognised by the Rules. Further, it was asserted, **Nagre [2013] EWHC 270 (Admin)** endorsed the Secretary of State's guidance on the meaning of exceptional circumstances namely ones where refusal would lead to an unjustifiably harsh outcome. The case had failed to meet the requirements of the Immigration Rules and the appeal was then allowed under the ECHR and this, it was submitted, was wrong. The outcome could not be considered to be unjustifiably harsh.

7. Permission to appeal was granted by First-tier Tribunal Judge Frankish who stated that the determination made no reference whatsoever to the legal basis for considering the case outside the Rules arguing that the basis for proceeding outside the Rules was inadequately justified.
8. At the hearing Mr Melvin submitted that there were no compelling circumstances which caused this appeal to be considered outside the Immigration Rules. There had been no face-to-face contact between the appellants and the mother for ten years and nothing in the consideration of the circumstances which warranted exploration outside the Immigration Rules. There was scant consideration given to the maintenance of immigration control and Counsel had admitted that the income threshold was not met. Only in the last two years had the appellants' sponsor made contact with them and I was referred to case law of **SS (Congo) v Secretary of State for the Home Department [2015] EWCA Civ 387**, **SM & Others (Somalia) v SSHD [2015] EWCA Civ 223** and **AAO v Entry Clearance Officer [2011] EWCA Civ 840**.
9. Ms Howorth submitted that the First-tier Tribunal had weighed up all the evidence and bore in mind the best interests of the children and it was that reason that the matter was considered outside the Rules. The mother has sole responsibility for the children and the siblings were in the UK. The current carer was too old to care for the appellants, there were no other family members. The judge went through the **Razgar** assessment, that the children had no carer and their best interests were to be with one of their parents. There was no error of law which was material.
10. Mr Melvin identified that there was an important financial requirement to be considered and it was not acceptable that the Rule should be considered to be met at a future date post the decision date. As at the date of the decision both for the Immigration Rules and human rights purposes the relevant date was that of the decision of the Entry Clearance Officer.
11. In his submissions Mr Melvin stated that the children were being looked after by a neighbour and attending school and coming to no harm. Section 117B of the Nationality Immigration and Asylum Act 2002 emphasised the consideration of the British taxpayer and I was referred to paragraph 49 of **AAO** and paragraph 17 of **SM (Somalia)**. These children would be a burden on the public purse. The family life itself had a reduced quality as there had been no contact for the past ten years. The children could not speak English. **SM (Somalia)** confirms that the 'trauma in breaking up a family' and thereby rupturing lives maybe significantly greater than the effect of not facilitating the re-union of family members that have become accustomed to living apart. There may be family life but the seriousness of the interference was not such that it was a breach of Article 8.
12. Ms Howorth submitted that Mr Melvin relied on Appendix FM but these did not apply as the relevant old case law under paragraph 297 was still

relevant. There was still a documented family life between the sponsor and her children and these were two minor children with three siblings in the UK. The compelling circumstances test was met and the best interests of the children were to join their family.

13. I am not persuaded that the authorities quoted that is **Gulshan, Nagre** and **MM (Lebanon)** can be read as seeking to qualify the assessment of Article 8 or displace Strasbourg jurisprudence. I am supported in this view by **Oludoyi v Secretary of State for the Home Department** IJR [2014] UKUT00539 (IAC).

14. **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192** states at paragraphs 41 and 42:

“41 We accept this submission. In view of the strictures contained at para 20 of **Huang**, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase ‘in exceptional circumstances’ might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be ‘precarious’ (because he had no right to remain in the UK). The cases were helpfully reviewed by Sales J in **R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)**. The fact that **Nagre** was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase ‘exceptional circumstances’.

42. At para 40, Sales J referred to a statement in the case law that, in ‘precarious’ cases, ‘it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8’. This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a ‘precarious’ family life case, it is only in ‘exceptional’ or ‘the most exceptional circumstances’ that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be ‘exceptional’) is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase ‘exceptional circumstances’ is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.”

15. Further, as stated in **MM (Lebanon) [2014] EWCA Civ 985**

“... if the relevant group of IRs is not such a ‘complete code’ then the proportionality test would be more at large albeit guided by the **Huang** test and UK and Strasbourg case law”.

16. Paragraph 297 is not part of Appendix FM and **Gulshan** concentrated on the immigration requirements as set out in Appendix FM as does **MF (Article 8: new rules) Nigeria [2012] UKUT 00393** and as does **Izuazu (Article 8: new rules) [2013] UKUT 00045**. The opening paragraph of **Nagre** refers to an application for judicial review of the lawfulness of certain additions to the Immigration Rules promulgated by the Secretary of State on 13 June 2012 in relation to claims based on family life as now contained in provisions contained in Sections E-LTRP and EX.1.
17. I can accept that the preamble to Appendix FM states that:

“It sets out the requirements to be met and in considering applications under this route, it reflects how under Article 8 of the Human Rights Convention the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic wellbeing of the UK: the prevention of disorder and crime: the protection of health or morals: and the protection of rights and freedoms of others (and in doing so reflects the relevant public interest considerations set out at part 5A of the Nationality, Immigration and Asylum Act 2002. It also takes into account the need to safeguard and promote the welfare of children in the UK in line with the Secretary of State’s duty under Section 55 of the Borders, Citizenship and Immigration Act 2009.”
18. The Immigration Rules in reference to paragraph 297 were implemented prior to the implementation of Appendix FM and do not set out the strict financial requirements referred to in **MM (Lebanon)** and in the application for permission to appeal. Appendix FM-SE which was referred to by Mr Melvin refers to the specified evidence applicants need to provide to meet the requirements of the Rules contained in Appendix FM and where those requirements are also contained in other Rules and unless otherwise stated the specified evidence applicants need to provide to meet the requirements of those Rules. The Rule in relation to paragraph 297(5) is separate from Appendix FM (A280 (b)) and merely states that the appellants “can and will be maintained adequately by the parents or relative the child is seeking to join without recourse to public funds” and the relevant guidance to be taken into account is that set out in the case law at **KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065**.
19. The application for permission to appeal was couched on the basis that the Tribunal did not identify compelling circumstances to consider the matter outside the rules and this was the extent of the permission granted by Judge Frankish.
20. I take the point of Mr Melvin that the relevant time for consideration was that at the date of the Entry Clearance Officer’s decision and that the judge referred unfortunately in the last paragraph [27] to “given that the appellants’ mother can *now* (my emphasis) adequately maintain and accommodate the appellants, I find that the reunion of the appellants with their mother and siblings in the UK outweighs the public interest in the

maintenance of effective immigration control.” Even with that error, the judge was aware that the appellants could not meet the Immigration Rules. The judge did identify at the outset of the conclusions that the appellants could not meet the financial requirements of the Immigration Rules [19]. The judge again referred to that fact at [25]. Further the judge makes reference to Section 117B which includes the issue of whether there would be a financial burden on the state with the admission of the appellants [21].

21. As the judge stated, however, first, there was no real challenge to the fact that the mother had sole responsibility for the appellants since she left the father in 2004 and secondly, no real challenge to the evidence of the appellants’ mother or that of the affidavit of the appellants’ current carer who states that she could no longer care for them. The judge also found that the mother had previously obtained leave for her other two children to settle with her in the UK and that it was in the children’s best interests to live with at least one of his/her parents [27]. These were in effect, despite the difficulties with the financial requirements, the compelling circumstances and on which the judge found the decision to be disproportionate. The judge had already referred to **Mundeba (s55 and para 297(i)(f) [2013] UKUT 00088** and the application of the best interests principle to children outside the UK and whether the combination of circumstances is sufficiently compelling to require admission.
22. I find that there is just sufficient in this determination that there is no error of law. **Shizad (sufficiency of reasons: set aside) [2013] UKUT 00085 (IAC)** confirms at its headnote

‘Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge.
23. I took into account **SM & Others (Somalia)** but in my view this supports the contention that the application for permission is merely a disagreement with the findings of the judge which although they may have been generous it was open to her. In that case there were five appellants who lived abroad and seeking entry clearance whilst it was found that the sponsor could relocate abroad. In this case the sponsor here has already been given permission to bring in two of her children to the UK and a requirement to relocate (of which there was no suggestion here) would have the effect of disrupting their lives and existing ties here of children. **AAO** in fact related to the claim of a mother wishing to join her children in the UK. As **AAO v Entry Clearance Officer [2011] EWCA Civ 840** confirms, and indeed **MF**, the Appellate Immigration Authority should consider that decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a minority of exceptional cases identifiable on a case by case basis but it is not necessary that the Appellate Immigration Authority need ask itself in addition whether the case met the test of exceptionality (**Razgar v SSHD [2004] UKHL 27 [20]**).

Notice of Decision

24. I therefore find that there is no error of law and the decision shall stand.

25. No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Rimington