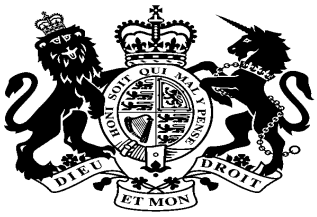

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** HU/06790/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 24th January 2019

Decision & Reasons Promulgated
On 14th February 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MELAT [T]

Appellant

and

ENTRY CLEARANCE OFFICER, Pretoria

Respondent

For the Appellant: Mrs F Farrell, of Peter G Farrell, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against the decision of FtT Judge J C Grant-Hutchison, promulgated on 12 June 2018.

2. The grounds, lightly edited, are as follows:

> "[1] The judge made an adverse finding at [16] against the appellant's adoptive father because he left Ethiopia to try to join his wife in Sudan, later returning to Ethiopia, and because after succeeding in his appeal, he left the appellant in Ethiopia to join his wife in the UK. This failed to take account of the fact that the

> sponsor is a refugee entitled to family reunion. She fled Ethiopia through necessity rather than desire. Her husband would understandably wish to join his wife. The judge's assessment of the facts affected her subsequent proportionality decision in relation to article 8 of the ECHR. She clearly accepts at [15] that the applicant was orphaned then went to live with the sponsor and her husband on 17 June 2008. At [17 (d)] the judge states correctly that her father can visit her in Ethiopia because he is not a refugee however she fails to make any findings with regard to the sponsor who cannot enter Ethiopia as she is a refugee.
>
> [2] At [21] the judge finds that the interference … for the maintenance of effective immigration control is proportionate… The Home Office Policy on Family Reunion can be considered even though the applicant does not meet the strict requirements of the immigration rules. The respondent's decision and reconsideration relied in part on the assertion that the applicant had not formed part of the sponsor's family unit before she fled Ethiopia and … could remain in Ethiopia with her father who had also been refused. The case of *Al-Anizi* was referred to in submissions… at [15] it quotes from the … policy and states that "success outside the rules" is specifically contemplated, case workers being enjoined to consider "the family exceptional circumstances guidance or whether there are any compassionate factors"."

3. Permission was granted by FtT Judge Scott-Baker on 26 September 2018.

4. Mrs Farrell (fairly and correctly) drew attention to a slip in the grant. It says that arguably the judge erred by not recognising that the sponsor's husband "was also a refugee and could not return to Ethiopia". In fact, he came to the UK as a spouse, and has not been recognised as a refugee.

5. The grant continues, "There was no clear finding on whether family life existed and the finding at [12] that the consequences of refusal potentially engaged article 8 was [arguably] unreasoned."

6. The respondent's rule 24 response dated 24 October 2018 says that the judge evidently did consider there to be family life, and that she undertook a careful proportionality balancing exercise, taking account of the appellant's best interests.

7. Mrs Farrell submitted along the lines of the grounds. She referred to *R (on the application of Al-Anizy) v Secretary of State for the Home Department* (undocumented Bidoons – Home Office policy) [2017] UKUT 00197 (IAC) at [25]:

> "Second, I consider that the Secretary of State's failure to examine the family reunification applications on their merits and determine them accordingly infringes the rights of all six family members under Article 8(1) ECHR. Third, given that it is manifestly in the best interests of the children concerned that the family unit be recomposed in the United Kingdom, there has been a clear breach of section 55(1) of the 2009 Act (vis-à-vis the two older children) and the Secretary of State's policy which, in substance, applies section 55 without material qualification to children outside the United Kingdom such as the third and fourth children of this family."

8. Mrs Farrell relied also upon the following passage at the end of the respondent's policy:

> Family reunion: for refugees and those with humanitarian protection. Version 2.0. Publication date: 29 July 2016
>
> …
>
> Applications from children on the basis that they are *de-facto* adopted children may be made under the provisions for *de-facto* adopted children in the Immigration Rules. However, if the sponsor is in the UK, a *de-facto* adoption application under the Immigration Rules is bound to fail because the Immigration Rules define a *de-facto* adoption in a specific way and require the parent to be living with the *de-facto* adopted child at the time of the application. Such cases must then be considered under paragraph 319X as set out above. The requirement to consider Article 8 and compassionate factors also applies. If the separation of the *de-facto* adopted child and the sponsoring parent has been due entirely to the need to flee persecution that specific fact should be properly taken into account and need not weigh against the applicant if all the other evidence points to a genuine *de-facto* adoption.

9. The further points which I took from the submissions and the reply for the appellant were these:

   (i) The judge appeared to accept many of the contentions of the appellant, which disclosed family life, but failed to make a finding accordingly.

   (ii) The judge did not make a finding on the inability of the sponsor, the appellant's (adoptive) mother, to visit her, and failed to take that into account in assessing proportionality.

   (iii) Correctly applying *Al-Anizi* and the respondent's policy, the appeal should have been allowed in the FtT, and the UT should reverse the outcome.

   (iv) The decision of the ECO on 6/4/17 and the reconsideration by the ECM on 19/2/18 were both based on the appellant having the sponsor's husband with her in Ethiopia. By the time of the FtT hearing he had joined the sponsor in the UK. The judge failed to appreciate the significance of the appellant no longer being with either of her adoptive parents.

10. The main points which I took from the submissions for the respondent were these:

   (i) The statutory ground of appeal was limited to whether the decision was unlawful under section 6 of the Human Rights Act 1998, a general ground which did not relate directly to any policy.

   (ii) The ECO's decision explicitly considered the case in terms of human rights and the scope for appeal, outside the rules.

(iii) It was accepted that policy might be relevant to whether a decision was in breach of human rights, but it could not be decisive.

(iv) In any event, the terms of the policy, applied to the facts of this case, did not indicate another outcome.

(v) The facts in *Al-Anizi* were very different. It was not an authority which assisted the appellant, because in this case, it was not established that it would be "manifestly in the best interests" of the child to enter the UK.

(vi) On unchallenged findings of the judge, the appellant's interests were not damaged by continuing to live as she did.

(vii) The judge stated no explicit conclusion on whether there was family life between appellant and sponsor, but obviously did so find. The decision from the first sentence of [12] onwards was written on that assumption, and otherwise would have been otiose.

(viii) The decision at [16] was not an adverse finding, but an accurate narration.

(ix) If the facts narrated at [16] had been taken as not helping the appellant's case, there was no error in that.

(x) The judge was aware that the sponsor is a refugee, to which she made several references. She might have left to avoid persecution, but the other parent did not. His departure was a matter of choice. The evidence indicated that he was satisfied that the circumstances in which the appellant was left were at least adequate.

(xi) The judge at [14 & 17 - 19] found the appellant to be well cared for in a stable home. Uprooting her from her environment was a major consideration. The judge rejected contentions about dangers and difficulties with her schooling. She found the appellant's grandmother to be a strong and capable individual, and declined to accept that she was in declining health, on which her evidence was self-contradictory. She found no reason for the appellant not to continue living with her grandmother in Ethiopia, of for the sponsor and her husband not to continue with financial support. No error was suggested in those findings.

(xii) It was relevant that the appellant has lived only for a short time with the sponsor, for interrupted periods with her husband, and throughout her life close to or with her grandmother.

(xiii) The judge might have considered paragraph 319X of the immigration rules, as suggested by the policy, even though the application had been made by another route. However, that would not have assisted the appellant, as she did not provide evidence that the requirements of the rules, including "accommodation and maintenance", could be met.

(xiv) In relation to s.117B of the 2002 Act, at [20], the judge was wrong to think that as a minor the appellant is not expected to speak English or to be financially independent (the latter point not being restricted to her personal resources). However, those matters were incidental to the decision, were not mentioned in the grounds, and the error went in the appellant's favour.

(xv) The judge accordingly reached a decision on proportionality which was open to her, left no relevant factor out of account, and disclosed no error of law.

11. I reserved my decision.

12. The decision at [16] is not an adverse finding but an accurate narration.

13. To the extent that the judge took the circumstances set out at [16] into account in her proportionality assessment, they were relevant, and no error arises.

14. The proportionality assessment included recognition that the sponsor has been recognised as a refugee, and has been joined by her husband. There has been no debate over the correct date at which the circumstances fell to be assessed, but the decision plainly treats that as the date at which the appellant put her case. The decision is based on the existence of family life, and on the sponsor's husband being in the UK - i.e., on circumstances at the date of the hearing, not of the ECO's or ECM's decisions.

15. The respondent's policy does not say that all *de-facto* adopted children of refugees have a right of entry into the UK. Rather, it recognises that if an adoption is not official but is genuine, the absence of legal formality should not stand in an applicant's way. All depends on the individual facts.

16. In *Al-Anizi* it was manifestly in the best interests of the children to come to the UK. The FtT found in this case that there was "no reason for the appellant not to continue living with her grandmother in her home country". The case that her interests would be better served by coming to the UK was weak.

17. The absence of direct reference of paragraph 319X of the rules is not significant. There was no evidence to cover "accommodation and maintenance". The rule also requires "serious and compelling family or other circumstances which make exclusion of the child undesirable". Although not directed to that specific test, the judge found that no such circumstances had been established.

18. There is nothing in the rules, case law, or policy which requires the contrary outcome on the facts found by the FtT.

19. The case for the appellant has been advanced on all available points, both in the FtT and in the UT. The submissions for the respondent in the UT, however, are well founded. The judge made no error in arriving at the primary facts. Her decision on proportionality was open to her, was firmly rooted in those facts, and did not involve

the making of any error on a point of law. The grounds, in the end, are only disagreement with her assessment.

20. The decision of the First-tier Tribunal shall stand.

21. No anonymity direction has been requested or made.

24 January 2019
UT Judge Macleman