



IAC-TH-CP-V1

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

Appeal Number: OA/03382/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**Decision &  
Promulgated**

**Reasons**

**On 17<sup>th</sup> September 2014**

**On 15<sup>th</sup> April 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE R C CAMPBELL**

**Between**

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

Appellant

**and**

**MR ASHFORD YEBOAH BOATENG  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis (Senior Home Office Presenting Officer)

For the Respondent: Mr B Hoshi (Counsel)

**DECISION AND REASONS**

1. The respondent's appeal against a decision to refuse him entry clearance was allowed by First-tier Tribunal Judge Cooper ("the judge") in a decision promulgated on 29<sup>th</sup> May 2013. The respondent applied for entry clearance, together with his sister, to join his sponsor in the United Kingdom. His sister is the biological child of the sponsor whereas the respondent's biological father left when he was a baby. The respondent and his sister have the same mother, who died in 2009.

2. The judge found that the respondent's sister met the requirements of the immigration rules ("the rules") under paragraph 297 and he allowed her appeal on that basis. So far as the respondent is concerned, he could not meet the requirements of paragraph 297 as he was not his sponsor's biological child and could not meet the requirements of paragraph 309A regarding adoption, as he and his sponsor could not show that they had been living together immediately before the application for entry clearance. It was not a "de facto" adoption falling within the rules. The judge did, however, accept the sponsor's evidence that he had been the respondent's effective father since only a few months after the appellant was born. He accepted a submission that this was a case where the circumstances were not catered for by the rules, so that a need for an Article 8 assessment outside them arose. The judge went on to find that family life existed between the respondent and his sponsor and that refusal of entry clearance, particularly in circumstances where his sister had succeeded, engaged Article 8. Moving on to proportionality, the judge found that the respondent's circumstances were in all respects very similar to those of his sister, save that the sponsor was not his biological father. Taking into account the family life ties, and having weighed the competing interests, he concluded that refusal of entry clearance in the respondent's case was disproportionate.
3. The Secretary of State applied for permission to appeal. It was contended on her behalf that the judge erred in allowing the appeal under Article 8 of the Human Rights Convention. Having found that the respondent could not meet the requirements of the rules, only if there were arguably good grounds for granting leave outside them would it be necessary for the judge to proceed to consider whether compelling circumstances existed, not sufficiently recognised under them. The Secretary of State contended that there were no compelling circumstances in the respondent's case. Refusal of entry clearance did not result in unjustifiably harsh consequences, as required in the light of Gulshan [2013] UKUT 00640. The respondent had spent many years in Ghana without his sponsor and was now an adult able to lead an independent life. He could visit his sponsor and his sister if he so wished. Furthermore, there was no evidence before the Tribunal showing that the relationships between the respondent and his sponsor or between the respondent and his sister went beyond normal emotional ties, so as to suggest family life for Article 8 purposes. The judge's finding to contrary effect amounted to an error which led to his finding that refusal of entry clearance was disproportionate. Finally, it was contended that the judge misdirected himself in finding that there were compelling circumstances in the case and good grounds for granting leave outside the rules.
4. Permission to appeal was granted. The grantor of permission noted that it was common ground that the respondent was under the age of 18 years when he made his application for entry clearance, although a young adult as at the date of decision.

5. In a rule 24 response, the appeal was opposed. The respondent would submit that the rules did not amount to a complete code. The judge followed the approach suggested in Gulshan and Nagre [2013] EWHC 720 (Admin), without expressly mentioning those cases. He found compelling factors justifying a grant of leave outside the rules, being entitled to find that the respondent's circumstances were not adequately catered for within them. He moved on to undertake a "traditional" Razgar assessment and did not err in law in so doing. Nor did the judge err in finding that family life existed between the respondent and his sponsor. There was an abundance of evidence before the Tribunal, written and oral, justifying the judge's findings. The judge gave reasons for reaching a rational, evidence based conclusion that a de facto father-son relationship existed between the sponsor and the respondent at the material date, at a time when the latter was still a child. Moreover, the judge was entitled to find that refusal of entry clearance to the respondent also constituted a disproportionate interference with the relationship with his sister, whose appeal was granted and in relation to whom the Secretary of State did not seek to overturn the First-tier Tribunal's decision.

### **Submissions on Error of Law**

6. Mr Jarvis said that the respondent's case was put to the First-tier Tribunal on the basis of a lacuna, the case not being covered by the rules. The Secretary of State's view was that the Article 8 assessment carried out by the judge was not lawful and that he had misunderstood the position. There was no lacuna. On a proper analysis, the respondent's case was based on a "near miss", an argument which could not succeed in the light of the judgment of the Supreme Court in Patel [2013] UKSC 72. It created an illusion that a separate analysis was required and invited the judge to speculate as to the policy behind the rules. Seeking to succeed on the basis that the requirements of the rules were met, save for one particular requirement in a sub-rule, amounted to an argument based on a near miss, not the identification of a lacuna.
7. The rules contained provision for adoption, for example in paragraphs 309A and 310. There were also Article 8 rules and it was certainly the case that there was no particular paragraph in Appendix FM dealing precisely with the respondent's circumstances. The application he made in August 2012 simply could not succeed under the rules. Paragraphs 44 and 47 of the decision showed that the judge adopted a flawed approach to Article 8 and he had not understood the proper balance to be struck between the competing interests. He mentioned economic wellbeing at paragraph 48 but the public interest was not confined to this aspect. The proper approach was set out by the Court of Appeal in Haleemudeen [2014] EWCA Civ 558. Before making an assessment outside the rules, the was required to give proper weight to the fact that the respondent could not qualify under them and then search for compelling circumstances. He failed to adopt the correct approach.

8. The Court of Appeal in MM [2014] EWCA Civ 985 did not touch directly on this issue and the need to identify compelling circumstances remained. What was missing was a fair assessment of the public interest.
9. Mr Jarvis said that the circumstances required to be identified had to be compelling, so as to show a disproportionate outcome. The judge in the present appeal narrowed the public interest to economic circumstances. In Haleemudeen, the court looked at the rules and Article 8. The rules contained particular requirements and showed where the Secretary of State considered the balance to lie. A disproportionate outcome was not to be equated with the position under the old, pre-9<sup>th</sup> July 2012 rules.
10. Mr Hoshi said in reply that there was no requirement expressly to refer to Gulshan or Nagre [2013] EWHC 720 (Admin). Those two cases gave guidance on how to approach the proportionality assessment. MM also gave guidance in paragraph 134 of the judgment. In any event, the judge was alive to the need to find reasons, amounting to what were described in Gulshan as good, arguable grounds. The rules simply did not provide for a relationship such as that which existed between the respondent and his sponsor. This was properly a parent and child relationship save that the two were not directly related by blood. Article 8 sought to protect this sort of family life. The judge was also clear that this was not a case concerning a near miss. He also took into account recent jurisprudence and, at paragraph 49, the policy intention that the rules would encapsulate Article 8.
11. It was clear from both MM and MF (Nigeria) [2013] EWCA Civ 1192 that the rules were not a complete code, outside the deportation context. They did not cover every circumstance. In the present appeal, the rules provided that the respondent's sister should be allowed to join her father, which the Secretary of State accepted was the right outcome. The judge was entitled to find that it was disproportionate to exclude the respondent as his relationship with the sponsor was exactly the same as that enjoyed by his sister and, in addition, the respondent and his sister had a relationship as siblings.
12. So far as the public interest was concerned, the judge expressly accepted submissions made on the respondent's behalf, contained in paragraphs 32 and 47 of Mr Hoshi's skeleton argument. Economic wellbeing was certainly a relevant factor but other arguments were also considered and taken into account. Overall, there was no error of law and certainly no material error. Haleemudeen was no authority for the proposition that a failure to meet the rules meant that a claimant could not qualify for leave. The assessment had to be made in the light of the accepted evidence that the respondent and his sponsor enjoyed a parental relationship and had done so for many years.
13. In a brief reply, Mr Jarvis said that in MM, the court had not heard argument on whether the rules amounted to a complete code and any comments regarding the extent to which the proportionality assessment

was more at large were strictly obiter. The correct approach was set out in Haleemudeen. There was a failure on the judge's part to recognise this and he was led into an unnecessary diversion in seeking to identify a lacuna in the rules. This was not the proper approach. The closest relevant rule was paragraph 309A, regarding de facto adoption and this required a period in which a claimant and an adoptive parent had lived together for a particular period of time, including twelve months immediately preceding the application for entry clearance. On the other side lay the public interest. The Secretary of State considered that this had not been properly understood by the judge, at least in regard to the weight to be given to a failure to meet the requirements of the new rules. Compelling circumstances were required to outweigh the public interest. The relevant question was whether the judge properly weighed the two competing interests.

### **Conclusion on Error of Law**

14. I conclude that the decision of the First-tier Tribunal contains no material error of law and shall stand.
15. As Mr Jarvis submitted, if the approach taken by the judge amounted to an assessment based on a "near miss", by virtue of the respondent failing to meet the requirements of paragraph 297 of the rules solely on the basis that he is not the natural son of the sponsor, that would be an error. As has been made clear by the Supreme Court in Patel [2013] UKSC 72, arguments based on a "near miss" cannot succeed. The proper focus is on the family life or private life claimed to exist. In the present appeal, however, the judge did indeed properly focus on the relationships the respondent enjoyed with his sponsor and with his sister. The decision shows that he had clearly in mind the real ties and relationships which existed. His approach was consistent with the guidance given by Lord Carnwath in Patel.
16. Nor was he led into error by confusing a lacuna with a "near miss". In the light of the evidence before him, he was entitled to find that the family relationships were not catered for in the rules. The decision shows that he had two particular aspects in mind here. First, the respondent's relationship with his sponsor began a few months after his birth and continued thereafter, being indistinguishable as a parent-child relationship from that which existed between his sister and her father. Second, the relationship between the respondent and his sister was also a component in the family life he enjoyed. The particular family circumstances, viewed overall, do not feature in Appendix FM, insofar as that appendix is relevant, as the basis for a grant of leave and paragraph 297 does not cater for them either. As a matter of fact, the date of application for entry clearance was 16<sup>th</sup> August 2012, before paragraph A277C of the rules came into effect on 6<sup>th</sup> September that year. Mr Jarvis suggested that the closest rule is paragraph 309A, dealing with de facto adoption. That may well be so but the circumstances of a de facto adoption are, in reality, very

far removed from those of a family where a parental relationship begins within months of a child's birth and where the child's natural mother and (in the present case, from her birth some eighteen months later) sister are also present and where family life has endured for many years.

17. I find that the judge was entitled to conclude that an Article 8 assessment was required, not on the basis of a "near miss", but in consequence of his finding on the evidence that the relationships were not catered for under the rules and yet amounted to family life to which weight was required to be given.
18. Did the judge err in apparently failing to identify "compelling circumstances"? I find that he did not. Mr Jarvis may be right to describe paragraph 134 of the judgment in MM as *obiter* (where it is suggested that if the rules do not amount to a complete code, "then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law") but that guidance is nonetheless deserving of very great respect and it is perfectly consistent with the approach of the Court of Appeal in MF (Nigeria), where the rules considered in that case, contained in part 13, were held to amount to a "complete code". There is no suggestion in any of the recent authorities that other parts of the rules amount to a "complete code", although a reference to "exceptional" or, perhaps, "compelling" circumstances in a particular rule or set of rules might indicate such a code. In any event, the decision shows that the judge did identify arguably good grounds, to use the phrase employed in Nagre, for granting leave outside the rules and so proceeding to make an assessment outside them. He did not expressly refer to either Gulshan or Nagre but that does not of itself amount to an error of law. Paragraphs 44 and 45 of the decision show that the judge moved on to make an Article 8 assessment, acting consistently with the guidance given in those cases and with the guidance given in MM. He accepted submissions made on the respondent's behalf, contained in counsel's skeleton but, again, that does not disclose an error of itself and at paragraph 47, he accepted submissions which were based on Lord Bingham's structured approach in Razgar [2004] 2 AC 368, nonetheless recording his own findings in the light of those submissions.
19. Did the judge err in narrowing the public interest? I find that he did not improperly narrow the public interest to merely economic circumstances, although the maintenance of immigration control is typically seen as an aspect of this particular legitimate aim. It is clear, as Mr Hoshi submitted, that he accepted arguments put on the respondent's behalf and contained in paragraph 32 of the skeleton argument before him. In other words, he had in mind the maintenance of a firm and fair system of immigration control, safeguarding the economic wellbeing of the United Kingdom (as a factor in its own right) and the need to protect the rights and freedoms of others.
20. Drawing these threads together, I conclude that the judge gave sustainable reasons for finding that family life existed in the particular

relationships the respondent has enjoyed for many years with his sponsor and with his sister, for his conclusion that the rules do not cater for the respondent's particular circumstances and for striking the balance between the competing interests as he did. He did not err in law in his approach. The decision of the First-tier Tribunal shall stand.

21. There has been considerable delay in the preparation and promulgation of this decision on error of law, entirely the fault of the author. My conclusion that the judge did not err was reached soon after the hearing and is unaffected by later guidance from the Court of Appeal, particularly in Singh [2015] EWCA Civ 74, where there is an analysis of the transitional provisions in HC194, the judgments in Edgehill [2014] EWCA Civ 402 and Haleemudeen [2014] EWCA Civ 558 and approval of a "two stage approach".

## **DECISION**

The decision of the First-tier Tribunal shall stand.

Signed

Date **15<sup>th</sup> April 2015**

Deputy Upper Tribunal Judge R C Campbell

## **ANONYMITY**

There has been no application for anonymity and I make no direction on this occasion.

Signed

Date **15<sup>th</sup> April 2015**

Deputy Upper Tribunal Judge R C Campbell