



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

Appeal Number: OA/10799/2013
OA/10798/2013

THE IMMIGRATION ACTS

Heard at Field House, London

On 28 November 2014

Determination

Promulgated

On 2 January 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

**MRS ASHO HAJI DINI (A1)
MISS HAJIYA AWES SHEIKH (A2)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

And

**ENTRY CLEARANCE OFFICER
KENYA (NAIROBI)**

Respondent

Representation:

For the Appellant: Mr E Nicholson, Counsel, instructed by Irving & Co, Solicitors
For the Respondent: Mr T Wilding, Presenting Officer.

DETERMINATION AND REASONS

Claim History

1. A1 and A2 are nationals of Somalia residing in Kenya. A2 is the granddaughter of A1. The latter, whose date of birth is 10 March 1949, applied for leave to enter the UK as an elderly dependent relative of the Sponsor. She is his mother. Her application was made under the provisions of Appendix FM of HC 395, as amended (the Immigration Rules). A2, whose

date of birth is 10 February 2001 and who resides with A1, applied for leave to enter as a dependent relative of the Sponsor. A2 is his niece. Her application was under paragraph 297 of the Immigration Rules.

2. Their applications were refused on 10 April 2013. This was because A1 was not able to establish that that she met the provisions of paragraph EC-DR.1.1 (d) of Appendix FM to the Immigration Rules because (i) she did not provide evidence that she required long term personal care to perform day to day tasks due to her physical or mental health; and (ii) under paragraph E-ECDR.3.1, she was not able to establish that she could be maintained and accommodated by the Sponsor without recourse to public funds. A2's application was refused because (i) it was not established that there were serious and compelling reasons family or other reasons which made her exclusion from the UK undesirable, pursuant to paragraph 297(i)(f) of the Immigration Rules; and (ii) there was no evidence to establish that the Sponsor could maintain and accommodate the Appellant without recourse to public funds, pursuant to paragraph 297 (iv) and (v).
3. The Appellants appealed against the decisions. Their appeals were heard by First-tier Tribunal Judge Plumtre on 6 December 2013, who dismissed the appeals on all grounds. The Appellants were granted permission to appeal against her decision and their appeals were heard by Deputy Upper Tribunal Judge Mailer, who allowed the appeals, set aside the decision of Judge Plumtre and remitted the matter to the First-tier Tribunal for a rehearing of all the issues.
4. The rehearing took place before First-tier Tribunal Judge Hodgkinson on 23 July 2014. He dismissed the appeals, finding that A1 was not able to meet the provisions of paragraphs E-CDR.2.4 and 2.5, and A2 was not able to meet the provisions of paragraph 297 (i)(f). Due to this, he did not go on to consider whether the maintenance and accommodation requirements were met by either Appellant.
5. Permission to appeal was granted by Designated First-tier Tribunal Judge Macdonald on 21 October 2014. Between the time that permission was granted and the matter coming before me on 28 November 2014, the grounds of application had gone astray and neither Mr Wilding nor I had a copy. A Rule 24 Response (the Response) was filed, a copy of which had been sent to the Appellants' representatives the day before the hearing but it was apparent that neither Mr Nicholson nor Mr Wilding had seen a copy. The Response was brief; it was stated therein that "The respondent does not oppose the appellant's (sic) application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider paragraph 297(i)(f)." Mr Wilding was surprised at the contents of the Response, and indicated that he was likely to withdraw it but would like to reserve his decision until after he had read the grounds of application. I rose to enable Mr Wilding to read the grounds of application.
6. On resuming the hearing, Mr Wilding confirmed that he was withdrawing the Rule 24 Response because, having read the grounds of application, he did not accept that the Judge had not properly dealt with paragraph 297(i)(f). He stated that he was not sure whether the person who drafted the

Response had had sight of the grounds of application or only a copy of the grant of permission, which was all that he had on his file. He submitted that there was nothing within the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended (the Procedure Rules), which prevented him from withdrawing the response, that the Appellants were not prejudiced by withdrawal of it because Mr Nicholson had not, in any event, seen a copy of it and therefore had prepared for the hearing on the basis of the grounds of application and the grant of permission.

7. Mr Nicholson, on this issue, stated that there was no provision permitting a withdrawal of a response (or for that matter, a reply filed to deal with a response) and therefore, once a Rule 24 response had been filed, it could not be withdrawn. The whole purpose of the procedure, Mr Nicholson submitted, was to ensure that there was a narrowing of the issues before the matter came before the Upper Tribunal and, for his part, the outcome suggested in the Response was a very acceptable outcome as far as the Appellants were concerned and he wanted to make clear his view that a Rule 24 Response could not be withdrawn once it had been filed.
8. By way of background, against which the grounds of application are set, Mr Nicholson submitted that the Sponsor fled from Somalia initially going to Kenya and arriving in the UK when he was 13 years old. He was granted refugee status and became a naturalised British citizen in 2010. A1's mother, the Sponsor's sister, died in childbirth. A1's mother and A2 formed part of the Sponsor's pre-flight family. A1 has been cared for by A2 since her mother died. The Appellants went to Kenya in 2005 or 2006, they re-established contact with the Sponsor in 2006 and they had been financially dependent on him since they re-established contact. The Sponsor then attempted to pursue a 'family reunion' application at some point in the past but had to abandon this application due to his circumstances in the UK. There was no dispute before the Judge as to the circumstances in which the Sponsor came to the UK, his status or that the Appellants were financially dependent on the Sponsor. Mr Nicholson submitted that had the Sponsor pursued the family reunion application when it was initially made, they would have been entitled to entry clearance on the basis of a policy which had since been withdrawn. The family had been fragmented by his fleeing Somalia to seek asylum in the UK.
9. Mr Nicholson further submitted that the relevant provisions within the Immigration Rules under which the applications for entry clearance were assessed are set out in full in the determination at [6 - 7]. In relation to A2, the ECO stated that her position was no different to other children in Kenya and the Sponsor could relocate to Kenya to enjoy family life with her. These reasons were relevant to her decision that there were no serious and compelling family and other reasons which made her exclusion from the UK undesirable and that her right to family life under Article 8 ECHR was not breached by the refusal to grant entry clearance. As to A1's application, it was refused because there was an absence of evidence regarding her need for care under Appendix FM and FM-SE.

10. As to the grounds of application submitted on behalf of the Appellants, taken together with Mr Nicholson's oral submissions, these fell under 3 heads as follows:

The failure to determine issues central to the Respondent's decision under subparagraph 297(i)(f) of the Immigration Rules (Ground 1)

11. The Respondent in the notice of decision relating to A2 stated that it was not established that there were serious and compelling reasons why it was undesirable for A2 to be excluded from the UK because her circumstances were no different from other children in Kenya and there was nothing to prevent the Sponsor, upon whom she was dependent, going to live with her there. However, A2 was a child without status in Kenya; there is nothing within the determination to suggest that the Judge did not accept that this was the case. The Respondent's reliance on family life continuing in Kenya was significant because the Court of Appeal in **Husna Begum v ECO (Dhaka) [2001] INLR 115** had accepted that the ability of a sponsor to live with an applicant outside the UK was relevant for the purposes of determining the 'far more stringent' "most exceptional compassionate circumstances test" under paragraph 317 of the Immigration Rules. What A1 needed to establish was that there were serious and compelling 'family' or 'other' reasons which made her exclusion from the UK undesirable.
12. As the Court of Appeal in **Husna Begum** accepted that the ability of the sponsor to live with an applicant in the country in which the applicant was based was a relevant factor for the purposes of the 'most exceptional compassionate circumstances' test of sub rule 317(i)(f), that sub rule could therefore be met if the Sponsor was unable to live abroad. Therefore, if this was read across to paragraph 297(i)(f), that sub rule could be met if the Sponsor in A2's case was not able to live in Kenya. The Respondent was aware that the issue of whether or not the Sponsor could live in Kenya fell to be determined and it was unsurprising that in the withdrawn Response the Respondent had conceded that the issues under paragraph 297(i)(f) should be re-determined. The wording of the decision notice in respect of A2 was important; the ECO referred to the possibility of the Sponsor relocating to Kenya, which would be reasonable if the Sponsor was a Kenyan national but he was a British national and prior to that he had been a national of Somalia. The inability of the Sponsor to live in Kenya was a serious and compelling family reason which was why the Respondent relied on her contention that the family could live together in Kenya. In the grounds, Mr Nicholson submitted that if the only country in which they could live together was the UK, then the requirement in 297(i)(f) could be satisfied.
13. A2 had no status in Kenya, the Sponsor could not make an application for settlement in Kenya; it was, as stated in the outline submissions before the First-tier Tribunal, inconceivable that the Sponsor could go and live in Kenya. The Sponsor must make an application to enter Kenya to join them and it must first be established that he had relatives there. When asked what evidence there was before the Judge that the Kenyan authorities would require the Sponsor to establish that he had relatives in Kenya whom he was seeking to join, Mr Nicholson stated that it was the Respondent who

had asserted that the Sponsor could live in Kenya with the Appellants and it was therefore for the Respondent to prove that this was a route that was available to him. He submitted that the ECO must have thought that the Sponsor was previously Kenyan.

14. Mr Nicholson further submitted that in the outline submissions before the First-tier Tribunal, at paragraph 14, he had submitted that the Respondent had asserted that the Sponsor could join the Appellants in Kenya, and had asserted that A2's circumstances were no different from other children in Kenya. As the assertions were made by the Respondent, it was for the Respondent to prove. He submitted that you could not just walk into a country and live there. The Judge had to find why the Sponsor could live in Kenya and by failing to do so, he erred in law. This point was connected to the **Husna Begum** case and the application of the principle in that case to paragraph 297(i)(f). The ECO was right to raise it as an issue and findings should have been made on it.
15. Mr Nicholson stated that Mr Wilding would suggest that **VW (Uganda) and AB (Somalia) v SSHD [2009] EWCA Civ 5** would meet this point. At paragraph 45 of that case, in which the Court of Appeal was dealing with **AB (Somalia)** it was stated that there was no evidence that the sponsor or his family was entitled to reside in Ethiopia. However, the Court of Appeal stated that case was not one of enforced family break up and therefore the 'moral pressures were different'. In the case of the Appellants and the Sponsor, given the Sponsor's immigration history, there had been an enforced family break up; it was not through choice. As stated at paragraphs 17 - 19 of **VW (Uganda)** the decision of the Respondent frustrates family life and, as set out in the outline submissions to the First-tier Tribunal at paragraph 19, Bean J citing from **H (Somalia) [2004] UKAIT 27** in **Yussuf v SSHD [2005] EWHC 2847**, stated "It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves in the normal course of the changes to family life which naturally occur as children grow up." The Sponsor had fled persecution. It was not open to suggest that he could live in Kenya. Had he stayed in Kenya, he would now be being rounded up and returned. He had no choice but to come to the UK. The Judge did not deal with this point and his failure to do so vitiated his determination.
16. The Judge also failed to determine whether or not the circumstances of A2 were different from those of other children in Kenya. The Respondent's position on this point was untenable because it cannot be said that a child who has no status in Kenya is the same as other children there, and the Judge failed to make findings on this issue.
Therefore, one of the points on which the Respondent relied to establish that the requirements of paragraph 297(i)(f) were not met was untenable.
17. The second point on which the Respondent relied, that being that the Sponsor could live in Kenya, was also untenable. The Judge made no findings on these issues, which were pivotal to the Respondent's refusal of A2's application and he erred in law in failing to make findings on them.

Material misdirection as to the appropriate standard of proof in establishing the existence of serious and compelling “other” reasons (Ground 2)

18. The main thrust of the grounds of application under this head was that as the Appellants had no status in Kenya, and the Respondent’s Operational Guidance Note on Kenya dated December 2013 (OGN) set out the action taken by the Kenyan authorities against Somali nationals who had no status in Kenya, the standard of proof that should be applied in determining whether serious and compelling “other reasons” had been established was not the balance of probabilities but that of a ‘real risk’ that the Appellants would be rounded up. The Judge considered the contents of the OGN and decided that this “(fell) materially short of establishing that the appellants themselves were more likely than not to be the subject of such treatment” because he did not accept that the risk was at such a level that it was more likely than not that A2 and her grandmother would suffer the actualisation of the risk.
19. Mr Nicholson submitted that A2 was now 13 years of age. The Judge stated at [36] that he did not accept that she was infirm as is now claimed. However, it was never suggested that A2 was infirm. It was A1 who was infirm. The Judge referred to the OGN at [39] and he was aware that A2 had no leave to remain in Kenya. Mr Nicholson made it clear that he appreciated that the test for establishing that there were serious and compelling family and other reasons which made it undesirable for A2 to be excluded from the UK was a high test, but submitted that the Judge was wrong to state that the material before him, that is the OGN, did not “...reach the threshold of establishing that the Appellants themselves are likely to be so treated...” He submitted that it was tempting to consider the OGN only against the high threshold for establishing that there were serious and compelling other circumstances under the Immigration Rules but the serious and compelling “other” circumstances must be set against the background of risk. The only way in which the Appellants could escape their circumstances was by making this application; they would remain at risk if they returned to Somalia notwithstanding the Upper Tribunal country guidance decision on Somalia. The Judge found that the OGN did not establish that it was more likely than not that the Appellants will be ill-treated in Kenya and his findings would not survive an appeal under an asylum application. What the Judge should have said was that he recognised that what he should consider was whether the real risk of being rounded up and ill-treated amounted to serious and compelling other reasons which made the exclusion of A2 from the UK undesirable. The test was not whether it was more likely than not that the Appellants would be rounded up but whether there was a ‘real risk’ that they would. He submitted that it was incompatible with the UK’s obligations under Article 3 of the UN Convention on the Rights of the Child to permit A2 to be exposed to continuing risk (Ground 2).
20. It is stated in the grounds of application that it is absurd that the Immigration Rules contemplate “...its being consistent with the UK’s obligations under Article 3 of the UN Convention on the Rights of the Child to *allow* a child to continue to be exposed to a risk of ill treatment at the

level of 'real risk' or 'a serious possibility' or a 'reasonable degree of likelihood' but where such ill treatment was more likely than not to occur."

Misdirection as to applicability of Appendix FM to A2's appeal under Article 8 ECHR (Ground 3).

21. Appendix FM makes no provision for the consideration of A2's appeal under Article 8 ECHR. The Judge recognised this at paragraph 30 of the determination but then stated that he had considered both Appellants' cases in accordance with **Gulshan (Article 8 - new Rules) [2013] UKUT 00640**. This meant that the Judge had first considered whether the Rules applied and then went on to decide if there were arguable grounds for a grant of leave outside the Rules and he found there were no such arguable grounds. However, **Gulshan** was predicated on Appendix FM providing a 'complete code' for the determination of appeals based on Article 8. **Gulshan** therefore could not apply when there is no consideration at all under Appendix FM, as was the case for A2, and the Judge erred in law in failing to consider the appeal of A2 under Article 8 ECHR. In view of this, the Judge's consideration of A1's appeal under Article 8 was also erroneous in law because "the ability of the Judge....to decide whether there was any arguable basis for her appeal to succeed notwithstanding her not having met the requirements of Appendix FM is stymied by his failure properly to determine the second Appellant's appeal" (see grounds of application).
22. Mr Nicholson submitted that what the Judge stated was that he had considered the Appellants' appeals pursuant to **Gulshan** and he was "...satisfied that there are no arguable grounds for the issue for the grant of leave outside the Immigration Rules..." He submitted that the Judge was aware that it was only A1 whose appeal could be considered under Appendix FM. A2's appeal was considered under paragraph 297. However, the Judge suggested that he had considered the appeals of both Appellants under Appendix FM. In the grant of permission, Judge Macdonald stated that **Gulshan** was predicated on the premise that Appendix FM provides a complete code but this could only be for cases in which the appeal of an Appellant is capable of being decided under Appendix FM. However, paragraph 297 falls outside Appendix FM, as preserved by paragraph A280. Appendix FM had no application in the case of A2 and the Judge stating that he considered that there were no arguable grounds was a clear error of law.
23. Mr Nicholson also submitted that **Gulshan** had not survived the Court of Appeal decision **MM (Lebanon) EWCA Civ 985**, at paragraph 132 in which it was held that there was no practical utility in applying the 'arguable grounds' test. He submitted that the Judge should, therefore, have proceeded to apply the step by step approach in **Razgar [2004] UKHL 27**; he should have asked if Article 8 was engaged, then if interference was justified. The Respondent provided no evidence. It was impossible to reconcile the analysis of the Judge with the two stage test envisaged by **MF (Nigeria) [2013] EWCA Civ 1192** and which continued to apply under **MM (Lebanon)**. The problem with the determination, Mr Nicholson submitted, was that if A1's appeal could not succeed under the Immigration Rules or under Article 8, then it became a factor to be taken into account in determining the appeal of A2. However, the appeal of A2 should have been

considered first, taking into account the duty of the UK under Article 3 of the UN Convention on the Rights of the Child and the duty to take into account the best interests of the child under s 55 of the Borders, Citizenship and Immigration Act 2009. Otherwise the appeal of A2 amounted to little more than saying that the grandmother was with her and therefore there are no serious or compelling reasons for admitting the niece. He submitted that A2's appeal should have been determined first.

24. In response, Mr Wilding submitted that:

25. Grounds 1 and 2 were inextricably intertwined. As to the way in which the case was put on behalf of the Appellants, much of it was an attempt to re-argue the issues. However, permission was granted because the grounds were arguable; the grant of permission did not establish that the Judge was wrong in law.

26. At paragraph 16 of the grounds, it is stated that it is 'inconceivable that the Sponsor can live in Kenya.' However, it was not inconceivable. In **AB (Somalia)** (the second appeal before the Court of Appeal in **VW (Uganda)**), it was not accepted that it was inconceivable for the sponsor to live in Ethiopia, even though neither he nor his family (who were residing there) had permission to reside there from the Ethiopian authorities. Otherwise, in all such cases it would not matter what the test was; in all such cases an applicant would be entitled to succeed on the basis of the nationality of the sponsor and that must be wrong.

27. As to the facts of **AB (Somalia)**, these were set out at paragraph 9 of **VW (Uganda)**. The sponsor was not British. He was a Somalia national. The appellants in that case were the sponsor's wife and 6 children. They had lived in Ethiopia for many years without permission. In the case before us, the Appellants had lived in Kenya for many years (from 2005 - 2014) without permission. The only difference between the cases was that the sponsor in **AB (Somalia)** had indefinite leave to remain in the UK and the Sponsor in the case before us was British. In **AB (Somalia)**, Sedley LJ stated that "It was in my judgement open to the immigration judge to infer that if the sponsor's family could reside in Ethiopia without entitlement or leave, he could do so...." Mr Wilding submitted that the case before us was not of enforced family break up; but of family reunion. It was not the only option for the Sponsor to join the Appellants in Kenya. The current state of affairs could continue. It was also not inconceivable for the Sponsor to join the Appellants in Kenya; as with **AB (Somalia)** it was open for the Judge to infer that he could go to Kenya. The Judge dealt with the issues that he needed to address; that is whether there were serious and compelling family and other reasons why exclusion from the UK was undesirable. He considered all the issues raised and these went against A2.

28. With regard to the standard of proof to be applied for the serious and compelling reasons test, Mr Wilding submitted that it was not, as submitted by Mr Nicholson, no greater than the 'reasonable degree of likelihood' test. That applied to applications for asylum and humanitarian protection. The test was the balance of probabilities as provided in **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC)**. At para 30 of **E-**

A, Mr Justice Blake made clear that the burden of proof was on the appellant and the standard of proof was the balance of probabilities and this was confirmed in **Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 00040(IAC)**. As stated in the headnote (i) to **Naz**:

“...It is for a claimant to establish that the requirements of the Immigration Rules are met or that an immigration decision would be an interference with established family life. In both cases, the relevant standard for establishing the facts is the balance of probabilities.”

29. The only time where the lower standard of proof applies is where there has been a claim to Article 3 protection, it has not been established that an applicant is at risk and historical ill-treatment ‘morphs’ into the Article 8 assessment.
30. Mr Wilding submitted that the Judge had considered the test at head note (iv) of **Mundeba (s.55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC)**. At paragraphs 44 – 45 of **Mundeba**, the Tribunal stated that the threshold was not reached. The Tribunal in **Mundeba** then looked at the circumstances of the appellant’s case and decided that, even taking the circumstances at their highest, it could not be said that he could meet the test. The Judge, as far as A2 was concerned, had clearly set out that the ‘serious and compelling reasons’ test was a high test, as provided by **Mundeba**. He then fully considered all the points raised in favour of A2’s appeal under paragraph 297(i)(f) and found that these could not meet the high test for establishing serious and compelling family and other circumstances.
31. With regard to Article 8, Mr Nicholson had submitted that **Gulshan** had not survived **MM (Lebanon)**. However, it was wrong to say that **Gulshan** was not good law; it dealt with the interplay between the Immigration Rules and Article 8. **Mundeba** was promulgated before **Gulshan** and the Tribunal in **Mundeba** concluded that “where Article 8 is relied on to secure the admission of a child to reside with a relative who has never previously cared for him, whether the case is examined from the perspective of the positive obligation to respect family life or the negative one not to interfere with it save for justified and proportionate reasons of public interest, we doubt that Article 8 adds significantly to the basic criteria of the family admissions rules.”
32. Mr Wilding submitted that what Mr Nicholson seemed to be suggesting was that in relation to A2, because her case fell under paragraph 297(i)(f), it was not considered under Appendix FM and therefore the Immigration Rules could not be a complete code for a consideration of A2’s Article 8 rights. Mr Nicholson stated that that was not what he had submitted. Although this is in fact what Mr Nicholson submitted in the grounds of application, his stance before me had shifted so as to include the submission that the provisions of paragraph 297 were insufficient to take into account all factors which would need to be considered under Article 8. Mr Wilding submitted that paragraph 297 and the need to consider serious and compelling family and other reasons was sufficient to encompass all relevant factors. The

Judge directed himself properly, his conclusions were properly open to him and he did not need to set them all out again in the context of an Article 8 assessment outside the Rules. Mr Wilding submitted that the Judge confirmed that he had taken into account the factors relevant to A2's case at [47] and his reasoning follows that of **Mundeba** closely. The Judge was aware that the solution to the issues of Article 8 was not that the Sponsor should go and live with the Appellants. He noted at [48] that there was no reason why the Sponsor could not maintain contact.

33. Mr Wilding also submitted that in fact, the Judge did go on to consider Article 8 in the alternative. He identified the public interest at [49] and referred to having taken it into account in the 'balancing exercise'. However, he would only need to consider the balancing exercise if he was considering proportionality. He either did consider proportionality or he did not. Mr Wilding further submitted that, as provided in **FK and BK (Botswana) [2013] EWCA Civ 238** and **AAO [2011] EWCA Civ 840**, the public interest in immigration control was underpinned by sound economic reasons, which is why the Tribunal in **Mundeba** doubted that consideration of Article 8 issues outside the Rules would add significantly to the family admissions rules.
34. Mr Nicholson, in reply, submitted that although it was submitted by Mr Wilding that there was no difference between the Sponsor and the sponsor in **AB (Somalia)**, the sponsor in that case was not a refugee. There was no recognition that he had a well-founded fear of persecution. The Sponsor in this case was trying to return to the situation which prevailed before he fled; the split in the family was due to persecution not choice.
35. As to Mr Wilding's submission that he was simply trying to re-argue the merits of the case, Mr Nicholson submitted that he was simply attempting to get the decision properly made. In **AB (Somalia)** the Respondent did not rely on an assertion that the sponsor there could live in Kenya. The Respondent did in the case of this Sponsor and it was no answer to say that the Appellants would have to prove that the Sponsor could not live with them in Kenya. The standard of proof in relation to establishing risk was the same as in an asylum application; if A2 was left alone in Somalia, she would face real risk and the reference to **Mundeba** was therefore misleading; the decision in this case would be lifesaving. If A2 was sent back to Somalia she would be killed by Al-Shabab, without even considering the risk of being rounded up in Kenya, detained, raped and returned to Somalia, as recognised by the Respondent's own OGN. It was misleading to say that the stringent test was not met when her situation in Kenya was life threatening. She was not like other children in Kenya; other children were not at risk of being rounded up. She is not attempting to enter the UK because education here is better. The Judge had to decide if there were serious and compelling family and other reasons. He failed to ask the right question. It was not whether A2 fell materially short of the 'more likely than not test'. This test was not right in the absence of clear authority.
36. With regard to Ground 3, Mr Nicholson asked whether the Judge had complied with the law in **Gulshan** and **Nagre**. He submitted that whatever Mr Wilding submitted the Judge had done between paragraphs 47 and 49

he did not carry out a second stage test. He now also submitted that paragraph 297 was not in Appendix FM and the question the Judge asked himself was whether they had met the provisions of Appendix FM. If the Judge found that there were no arguable grounds, he would have to find that paragraph 297 was a complete code. If it was not, he should follow the proper approach to determining the Article 8 claim outside the Rules. Mr Nicholson finally submitted that the decision of the ECO clearly frustrates family life under Article 8. It was not enough to state that the status quo could be preserved. If the parties were not reunited, there was still a breach of Article 8.

Analysis and reasons

Withdrawal of the Rule 24 Response

37. The procedure set down within the Procedure Rules for the filing of a Response and a Reply may in some circumstances result in the narrowing of issues prior to the Upper Tribunal hearing. However, as stated by Mr Wilding, due to the procedural failures which resulted in neither him nor me receiving the grounds of application prior to the hearing and neither him nor Mr Nicholson having had sight of the Rule 24 response, it was not in fact the case that the issues before me had been narrowed before the hearing.
38. Whilst there is no provision for the withdrawal of a Rule 24 response once it has been filed, this does not mean, in my view, that the Respondent cannot withdraw it. The contents of the Rule 24 response are analogous to a concession from the Respondent that the Judge had erred in law in his assessment under paragraph 297(i)(f) of the Immigration Rules. Pursuant to **NR (Jamaica) v SSHD [2009] EWCA Civ 856**, there is nothing before me which suggests that withdrawal of the concession would result in prejudice to the Appellants; the concession would not necessarily mean that a redetermination of A2's appeal would result in a successful outcome. There was also nothing before me to suggest that there was bad faith on the part of Mr Wilding in his withdrawal of the concession. In the absence of the grounds of application, which were not before me or on the Respondent's file, the basis on which the writer of the Response accepted that the First-tier Tribunal had erred in law was not clear. Furthermore, having read the grounds of application, it is clear to me that the grounds were arguable, permission was granted on the basis that the grounds were arguable and Mr Nicholson had come prepared to argue the grounds. This was not a case in which the contents of the Response had been communicated to the Appellants and therefore they had been disadvantaged by the failure to prepare adequately for the hearing. Withdrawal of the concession would result in a fair and just outcome, with both parties able to fully argue the grounds. In the circumstances, I find that it was open to Mr Wilding to withdraw the Response and I accept the withdrawal of it.

Grounds of application

39. The main thrust of Mr Nicholson's submissions was that the Judge materially erred in law because he should have made specific findings in relation to the particular reasons given by the ECO for refusal of A2's

application; that the fact that the Sponsor was not able to join A2 in Kenya was a sufficient reason, following the principle set out in **Husna Begum**, for finding that there were serious and compelling 'family reasons' why exclusion of A2 from the UK was undesirable; that the Judge applied the wrong standard of proof in assessing whether there were serious and compelling 'other reasons' why excluding her from the UK was undesirable because of the instability of country conditions in Kenya and this factor alone meant that the lower standard of proof relevant in asylum applications should have been applied by him in deciding whether the threshold was met; that A2's appeal should have been considered first by the Judge because if she were to be granted leave to enter either under paragraph 287 or under Article 8, this would necessarily impact on the outcome of A1's appeal because A2 had always resided with A1; and that the Judge was wrong to find that there was no arguable case for considering A2's Article 8 ECHR application outside the Immigration Rules either because it could not be considered under the provisions of Appendix FM or because the criteria set out in paragraph 297 did not permit a full consideration of all the factors that were relevant to an assessment of proportionality under Article 8 (2).

40. The appeals of each Appellant must be decided on the basis of whether or not they met the criteria set out in the particular Immigration Rule under which they applied; the Judge was well aware that different considerations applied to the determination of their appeals because he clearly set out the relevant provisions within the Immigration Rules at [22]. However, A2's circumstances in Kenya cannot be considered without reference to those of A1; she has always lived with A1 and the circumstances in which she is residing are relevant to considering whether or not there are serious and compelling family or other reasons why her exclusion from the UK is undesirable. It is therefore not arguable that the Judge should have considered the appeal of A2 before he considered that of A1.
41. The standard of proof in relation to entry clearance appeals is the balance of probabilities. This is clear from **E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC)** and **Naz (subsisting marriage - standard of proof) Pakistan [2012] UKUT 00040(IAC)**. The task of a judge is to consider the evidence presented and find whether it establishes that there are serious and compelling family or other reasons why exclusion of A2 from the UK is undesirable. It is not the case that the mere possibility of risk, in the absence of any evidence of persecution directed at the Appellants, was sufficient for a judge to apply the lower standard of proof applicable in asylum cases to determining whether there were serious and compelling other reasons why exclusion of A2 from the UK was undesirable. Mr Nicholson submitted the OGN to the First-tier Tribunal to establish the unstable country conditions in Kenya to show that there were serious and compelling 'other reasons' why A2 should not be excluded and that what the Judge should have considered was whether there was a real risk that the Appellants would be subjected to such treatment, not whether they were more likely than not to be subjected to such treatment.
42. The Judge directed himself properly to the burden and standard of proof at [27]. There is nothing within the outline submissions before the First-tier

Tribunal to suggest that it was submitted to him that a lower standard of proof applied under the serious and compelling 'other factors' head and there is nothing within the determination to suggest that this was raised by Mr Nicholson at the hearing. There is also nothing to suggest that the Judge was asked to consider the background circumstances should be evaluated on the basis of real risk but the threshold test of serious and compelling 'other circumstances' test was to be evaluated against the more likely than not test. In any event, there is no evidence before me that A2 made an application under Article 3 and, despite Mr Nicholson's submission that the Judge's application of the civil standard of proof would not have survived an asylum application, there was no evidence that the case was pleaded on behalf of A2 on the basis that she was at risk of ill-treatment under Article 2 or 3 of the ECHR. This would have raised separate and distinct issues as to whether or not an out of country application can be made for asylum or protection under Articles 2 and 3 of the ECHR. The correct test to be applied, and which was in fact applied by the Judge at [42] is that which is set out in **Mundeba**. In reaching his decision, he took into account the best interest of A2 at [47].

43. The Judge found, and he was entitled to find, that the evidence fell materially short of reaching the threshold of establishing that the Appellants are likely to be ill-treated. A1 and A2 had resided in Kenya since 2005 - 2006 and there was no evidence before the Judge that A1 or A2 had been harassed let alone ill-treated. The Judge set out the full extent of the evidence presented by Mr Nicholson as to country conditions in Kenya for Somali nationals residing there at [39]. At [40], the Judge found that the limited material before him was insufficient to establish that the Appellants themselves were more likely than not to suffer such treatment. This is the balance of probabilities standard as provided by **E - A** and **Naz**. There are therefore no material errors of law in the determination of the Judge in relation to the burden or standard of proof; Ground 2 is therefore not made out.
44. For completeness, I would note that Mr Nicholson's submissions included the assertion that, in the context of his submissions as to the relevant burden of proof, the reference by the ECO (and by extension the Judge) to **Mundeba** was misleading. This submission, in the context of the standard of proof as stated in **E - A** and **Naz**, is without merit.
45. The Judge considered A1's appeal under the Immigration Rules. No issue is taken as to the findings of the Judge in relation to the inability of A1 to meet the Immigration Rules. Mr Nicholson submits that the Judge, at [41] referred to the health of A2 when considering her appeal under 297(i)(f) and it had never been alleged that A2 was in poor health. However, it is clear from the determination read as a whole that the Judge, when considering the circumstances of A2 refers to her as Hajiya, when he refers to A1, he refers to the 'appellant' and when referring to both of them he refers to them as the 'appellants'. Therefore, at [38] when the Judge states that he has "... already indicated that the evidence before me does not establish that the appellant herself is infirm, as is now claimed on her behalf", he is referring back to his findings in relation to A1. At [41], the Judge states, "With further reference to Hajiya and paragraph 297(f) (sic), I reiterate my above findings

and observations regarding the appellant's health, the financial provisions provided by the sponsor to the appellants, and the fact that Hajiya is clearly able to attend school, she having all of the necessities of life." In so doing, when he refers to the 'appellant's health' he is only stating that it is not established that the appellant (ie A1) is in poor health and therefore not able to care for A2.

46. Mr Nicholson submits that the ECO had clearly stated that A2 was no different to other children in Kenya, and in fact she is not the same as other children in Kenya because she had no status. He submits that the Judge should have made findings on this issue, that the Respondent recognised that this was something that needed to be considered in the context of 297(i)(f), which is why the Response was submitted. In the Notice of decision sent to A2, the ECO referred to part of the headnote to **Mundeba** which set out the focus of the enquiry under 297(i)(f), and he states:

"...Looking at your personal circumstances, it is noted that you live with your grandmother in Kenya who has applied for entry clearance and has been refused today. You attend school and your accommodation, food and medical bills are paid by your sponsor. I do not therefore consider your circumstances in Kenya are different to those of other children living there..."

47. The fact that A1 has no status in Kenya had not prevented her from living there, being properly maintained and accommodated and accessing education, the latter being something that the appellant in **Mundeba** was not able to do. The test in Rule 297(i)(f) is whether her circumstances, viewed as whole, establish that there are serious and compelling reasons why her exclusion from the UK is undesirable. The Judge found, taking into account A1's circumstances viewed as whole, and this included the evidence within the OGN, that there were no serious and compelling circumstances why her exclusion from the UK was undesirable. This finding was open to him on the facts before him. There was no need for the Judge to make a specific finding on whether A2 had status in Kenya; it is implicit from his consideration of the facts that he accepted that she did not have status.

48. Mr Nicholson's detailed submissions on the **Husna Begum** point are set out in paragraphs -11 - 14 above. He submitted that the Respondent had specifically raised the fact that 297(i)(f) could be met because the Sponsor could travel to Kenya and this was an issue on which the Judge needed to make a specific finding. Mr Nicholson stated that the ECO clearly thought that the Sponsor's ability to live abroad was a relevant factor, and that the Respondent maintained this position in the withdrawn Response. He supported his submission by analogy with **Husna Begum**. I disagree with Mr Nicholson that the principle established by **Husna Begum** is that if the sponsor in that case could not live in Bangladesh this satisfied the sub rule in 317(i)(f) and that this can be read across to Rule 297(i)(f) to confirm that if the Sponsor cannot live in Kenya, then it is established that that sub rule is met. All that **Husna Begum** establishes is that the ability of a sponsor to live with an applicant abroad is one factor which must be considered, and not necessarily the 'crucial or overwhelming factor' in deciding whether the

applicant is *'living alone* in the most exceptional compassionate circumstances' (my emphasis), because the ability of a sponsor to live with the applicant abroad may mean that the applicant will not be living alone.

49. It is to be remembered that the test in 317(i)(f) is not the same as the test in 297(i)(f); the Judge was not considering if A2 is 'living alone in the most exceptional compassionate circumstances'; he was considering whether there were 'serious and compelling family or other reasons' why exclusion of A2 from the UK was undesirable. A2 had never lived alone and she would not be living alone in consequence of the ECO's decision. The ability of the Sponsor to live in Kenya was therefore not a relevant consideration for the purposes of paragraph 297(i)(f), whatever the ECO may have stated in the Notice of decision. It is also difficult to see why the Judge should have considered A2's appeal before he considered that of A1; the outcome of A1's appeal would necessarily affect the assessment of the circumstances of A2's appeal. The Judge therefore did not err in law in determining A1's appeal under the Immigration Rules before deciding that of A2.
50. There was no need for the Judge to make express findings on whether or not the Sponsor could live in Kenya for the purposes of assessing whether or not there were serious and compelling family reasons why exclusion of A2 from the UK was undesirable. This assessment could not be affected materially by a consideration of whether the Sponsor could continue family life with her in Kenya, particularly when it was not established that they had ever lived together; that was a separate question under Article 8 if the decision of the ECO interfered with family life between them.
51. Mr Nicholson made various submissions as to the factors that the Judge should have taken into account when deciding whether there were serious and compelling 'family reasons' which made the exclusion of A2 from the UK undesirable. Seeking to draw on **Yussuf** and **H (Somalia)** he submitted that the circumstances in which family life was disrupted were a relevant factor; therefore, where family life was disrupted due to persecution, that was a relevant 'family' consideration which made exclusion undesirable. He stated that although Mr Wilding would seek to submit that the Court of Appeal in **AB (Somalia)** recognised that in a removal case the moral pressures were different from a case in which the parties had chosen to live apart, that case could be distinguished because the sponsor in **AB (Somalia)** had not been able to establish that he had fled Somalia due to persecution and he himself only had indefinite leave to remain whereas the Sponsor had been recognised as a refugee and was now a British national.
52. However, When the Court of Appeal referred to the 'moral pressures' being different in that case, it was a reference to it not being a removal case but a family reunion case. The appellants in that case were a mother and six children living illegally in Ethiopia. They applied for leave to enter the UK to join the husband and father, who had entered the UK and had failed to secure a grant of asylum, but had indefinite leave to remain. The appellants' applications had been refused by the ECO. The distinction in that case was not between disruption to family life caused by persecution and disruption due to choice; it was the difference between the disruption to family life by removal of an appellant who was residing in the UK with his

family and the disruption to family life in an entry clearance case where the appellants are not currently residing with the Sponsor. The CA reference to 'moral pressures' being different in removal cases from family reunion cases was in that context.

53. Mr Nicholson submitted that **H (Somalia)** and **Yussuf** were cases in which the family life of applicants and those they were seeking to join (**H (Somalia)**) or remain with (**Yussuf**) was disrupted due to persecution and the fact that their circumstances were different was recognised by the Courts. The person the applicants were seeking to join in **H (Somalia)** was a recognised refugee in the UK. **H (Somalia)** is directly relevant, as the applications made for entry clearance by the appellants were under paragraph 297. However, despite it being accepted by the Tribunal in that case that family life had been disrupted due to persecution, this was insufficient to satisfy the test under Rule 297(i)(f). The applicants' appeal in **H (Somalia)** was allowed to the limited extent that the Respondent had failed to consider the position of the appellants under the family reunion policy. This policy was not available to the Appellants, even if it had at some time in the past been available to them. Reliance on **H (Somalia)** on the basis that separation between the Appellants and the Sponsor took place due to persecution is not a relevant factor for the purposes of the serious and compelling family or other reasons test. Neither can it strengthen their position under Article 8 in an entry clearance case, particularly where the obligation of the UK to admit those whose family life has been disrupted due to persecution is contained within the family reunion provisions of the Immigration Rules. **Yussuf** is not directly relevant to a consideration of paragraph 297(i)(f).
54. On the basis of the above, I find there are no material errors of law in the determination of the Judge in relation to his handling of the appeal of A2 under the Immigration Rules and Ground 1 is not made out.
55. Finally, in relation to Article 8, Mr Nicholson made a number of submissions but none of them are capable of establishing that the Judge materially erred in law. He submitted that the Judge erred because (i) he referred to being guided by **Gulshan**, which firstly did not survive **MM (Lebanon)**, and secondly was predicated on the fact that an applicant's rights under Article 8 ECHR were adequately considered under Appendix FM but A2's appeal could not be considered under Appendix FM; (ii) he found that all the circumstances of A2 could properly be considered under Rule 297(i)(f) and they could not; and (iii) there was no separate assessment of A2's appeal under Article 8 ECHR.
56. Does the approach in **Gulshan** survive **MM (Lebanon)**? The case of **Aliyu [2014] EWHC 3919 (Admin)**, not referred to by either party, is directly relevant to the submissions made by Mr Nicholson as set out above, as is **R (on the application of Esther Egun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 - MM (Lebanon) (2014))** and **Nagre IJR [2014] UKUT 00539 (IAC) (Oludoyi)** (which was not available at the date of hearing). In relation to the question of whether it is always necessary to conduct an Article 8 assessment outside the

Immigration Rules, Judge Grubb, sitting as Deputy Judge of the High Court, after a review of the relevant authorities, states, at paragraph 59,

“In my judgment, the Secretary of State (apart from ‘complete code’ situations) always has a discretion to grant leave outside the Rules. That discretion must be exercised on the basis of Article 8 considerations, in particular assessing all relevant factors in determining whether a decision is proportionate under Article 8.2. There is, in principle, no “threshold” criterion of “arguability”. I respectfully agree with what Aikens LJ said in this regard in MM (at [128]). However that factor, taken together with other factors such as the extent to which the Rules have taken into account an individual’s circumstances relevant to Article 8, will condition the nature and extent of the consideration required as a matter of law by the Secretary of State of an individual’s claim under Article 8 outside the Rules. If there is no arguable case, it will suffice for the Secretary of State simply briefly to say so giving adequate reasons for that conclusion. At the other extreme, where there are arguable good grounds that the Rules do not adequately deal with an individual’s circumstances relevant in assessing Article 8, the Secretary of State must consider those circumstances and identifiably carry out the balancing exercise required by proportionality in determining whether there are “exceptional circumstances” requiring the grant of leave outside the Rules under Article 8.

57. **Oludoyi** provides, in the headnote:

“There is nothing in R (Nagre) v SSHD [2013] EWHC 720 (Admin), Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC) or Shahzad (Art 8: legitimate aim) [2014] UKUT 00085 (IAC) that suggests that a threshold test was being suggested as opposed to making it clear that there was a need to look at the evidence to see if there was anything which has not already been adequately considered in the context of the Immigration Rules and which could lead to a successful Article 8 claim. These authorities must not be read as seeking to qualify or fetter the assessment of Article 8. This is consistent with para 128 of R (MM & Others) v SSHD [2014] EWCA Civ 985, that there is no utility in imposing a further intermediate test as a preliminary to a consideration of an Article 8 claim beyond the relevant criterion-based Rule. As is held in R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin), there is no prior threshold which dictates whether the exercise of discretion should be considered; rather the nature of the assessment and the reasoning which are called for are informed by threshold considerations.”

58. In the present case, what the Judge stated was that he had borne in mind the reasoning in **Gulshan** when considering the appeal under Article 8 and that he was “...satisfied that there are no arguable grounds for the issue of the grant of leave to remain outside the Rules...” This is because in his view there are no circumstances which have not been considered under Rule 297(i)(f) which, if they were considered, would be capable of establishing a right to a grant of leave outside the Immigration Rules. The Judge’s approach is consistent, in the 297(i)(f) context, with **Mundeba** at paragraph 49. It is also consistent **Aliyu** and **Oludoyi** and with the higher Courts, where it has consistently been held that it is only in a small minority of cases that a grant of leave under Article 8 ECHR could be founded where

an applicant has failed to meet the Immigration Rules and that each case is fact specific.

59. The further difficulty that Mr Nicholson has is that the Judge, in fact, went on to support his view that there was no arguable case for granting leave outside the Rules by considering the particular facts of the case in the context of an Article 8 ECHR assessment, as set out at [47 – 50]. He starts by assessing the circumstances of the Appellants at [47]. He finds that contact can be maintained between the Sponsor and the Appellants as it has been in the past at [48]. He takes into account that the Sponsor and the Appellants have not in fact resided together for in excess of 10 years at [49]. He clearly refers to the decision of the Respondent being in accordance with the law and sets out the need to balance the rights of the Appellants with the need to maintain immigration control, a legitimate public interest under Article 8(2). It is clear that the Judge had in mind the guidance in **Razgar** when he undertook this exercise even if it is not specifically referred to. It is not, of course, an error of law for a judge not to cite case law if it is clear that his decision was guided by the relevant principles. Ground 3 is therefore not made out.

60. I find that Mr Nicholson’s submissions were creative but lacked substance when properly analysed. There are no material errors of law in the determination of the Judge in relation to the appeals under Article 8 and I agree with Mr Wilding that Mr Nicholson was simply attempting to re-argue the merits of the case.

Decision

61. The determination of Judge Hodgkinson contains no material errors of law and his decision therefore must stand.
62. The Appellants’ appeals are dismissed.
63. There was no application for an anonymity order before the First-tier Tribunal or before us. In the circumstances of this case, I see no reason to direct anonymity.

Signed

Date

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award (Rule 9(1) (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2014 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Respondent's appeal has been dismissed, Judge Hodgkinson's fee award is confirmed.

Signed

Dated

M Robertson
Deputy Judge of the Upper Tribunal