



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: OA/23747/2012

**THE IMMIGRATION ACTS**

Heard at Bennett House, Stoke  
On 29<sup>th</sup> May 2015

Decision & Reasons Promulgated  
On 26<sup>th</sup> June 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

BETHELHEM BELETE TEKLU  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms J Campbell, Counsel instructed by French & Company  
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. This appeal comes before the Upper Tribunal for the second time. On the first occasion the appeal was heard in the Upper Tribunal on 14<sup>th</sup> March 2014 following the grant of permission to appeal against a decision of Judge of the First-tier Tribunal P J M Hollingworth who dismissed the appeal against the decision of an Entry

Clearance Officer taken on 30<sup>th</sup> October 2012 to refuse entry clearance as the child of a parent present and settled in the United Kingdom in accordance with the provisions of paragraph 297 of the Immigration Rules. Having found an error in the decision of the First-tier Tribunal, Deputy Upper Tribunal Judge Coates submitted the matter to the First-tier Tribunal for hearing afresh. Judge Coates (sitting as a Designated Judge of the First-tier Tribunal) then heard the matter on that basis in the First-tier Tribunal on 16<sup>th</sup> May 2014. His decision to dismiss the appeal on immigration and human rights grounds was sent out on 2<sup>nd</sup> June 2014.

2. On 1<sup>st</sup> August 2014 Designated Judge of the First-tier Tribunal McCarthy gave permission to the appellant to appeal against the decision of Designated Judge Coates and it is on that basis that the matter came before me in the Upper Tribunal.

### **Error on a Point of Law**

3. In granting permission Designated Judge McCarthy found that most of the grounds of application did not show an arguable error on a point of law. However, he thought there was merit in the argument that the judge had failed to properly assess issues relating to the appellant's wellbeing as a child at the date of decision which was the operative date for consideration of Article 8 issues as confirmed by the House of Lords in *AS (Somalia)* [2009] UKHL 32. That was because the judge appeared to have considered human rights issues at the date of hearing, (when she was 17 years) as opposed to the date of decision when she was 15 years of age.
4. The respondent entered a response on 13<sup>th</sup> August 2014. It was submitted that, whilst it may have been an error for the judge to have had regard to the appellant's age at the date of hearing, the judge was entitled to find that the Immigration Rules could not be met as the appellant lived with her father in Ethiopia and that she was not experiencing problems with her father on the basis claimed.
5. At the hearing before me Ms Campbell confirmed that the sole issue was the judge's approach to the Article 8 claim which he had, she argued, considered at the date of hearing when the appellant was 17 years of age rather than at the date of decision on 30<sup>th</sup> October 2012 when she was 15 years. She submitted that, even if the judge's unfavourable findings in relation to alleged abuse by the appellant's father were to stand, the judge had not made findings about her family life generally or evaluated the relationship between mother and child taking into consideration maintenance payments made by the mother for the benefit of her child.
6. Mr McVeety confirmed that the respondent relied on the Rule 24 response. He emphasised that, as it had been agreed at the hearing that the appellant could not benefit from the provisions of paragraph 297 of the Immigration Rules as a dependent child, he could not see how she could succeed on an Article 8 claim. This was particularly so since the appellant had not lived with her mother since she was 7 years of age. These were factors which applied whether the judge had looked at human rights issues at the date of decision or hearing.
7. Ms Campbell emphasised that there had been financial support between sponsor and appellant over a number of years with a strong bond between the parties despite the fact that they had not seen each other for a long time. She argued that not to allow the appellant to live with her mother in the United Kingdom made the respondent's decision disproportionate and not in the best interests of the appellant.

In respect of the application of that principle and the respondent's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009 she reminded me of the decisions of the Upper Tribunal in *MK (Best interests of child)* [2011] UKUT 475 (IAC) and *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 315 (IAC).

8. After hearing submissions I indicated that I would reserve my decision. It was also agreed that, if I were to find that there was a material error in the decision, I could continue to re-make the decision based upon the submissions made on Article 8 issues set out in the light of the negative findings of fact of the First-tier Tribunal. However, for the reasons I give below, I am not satisfied that the decision shows an arguable error on point of law.

### Conclusions

9. It is not in issue that the judge considered Article 8 issues at the date of hearing when the appellant was 17 years of age. This is an error because the decision of the House of Lords in *AS (Somalia)* [2009] UKHL 32 makes it clear that Section 85(5) of the Nationality, Immigration and Asylum Act 2002 prevents the admission of evidence postdating the immigration decision in appeals against a refusal of entry clearance. However, the issue for me to decide is whether or not the error in the decision in that respect is material to the Article 8 decision made by the Designated Judge. I am not satisfied that the error is material for the reasons which follow.
10. The judge made sound findings about the credibility of the appellant's claims which are as relevant to the situation at the date of decision as they would have been at the date of hearing.
11. For cogent reasons the judge found that the appellant's claim to have been the subject of abusive behaviour by her father from 2012 was not credible. The judge examines the claims by the sponsor and appellant in some detail in this respect in paragraphs 26 and 27 of the decision taking into account correspondence which he was entitled to find was inconclusive in proving the claim of abusive behaviour. The sponsor also confirmed, in evidence, that the appellant was living with her father at the date of her application for entry clearance in August 2012. Thus, it cannot be contended that any human rights claim based upon events at the date of decision can be affected by the claimed abusive behaviour of the appellant's father. Nor can it be said that the appellant was living independently of her father at the date of application. There is nothing to suggest that the situation was any different at the date of decision two months later on 30<sup>th</sup> October 2012.
12. It is, no doubt, for the preceding reasons that the appellant's representative at the First-tier hearing conceded that the appellant could not satisfy the requirements of paragraph 297 of the Immigration Rules. Sub-paragraphs (e) and (f) are relevant in that respect as it was being conceded that the parent in the United Kingdom did not have sole responsibility for the appellant's upbringing nor were there serious and compelling family or other considerations which made exclusion of the appellant undesirable. As seen against the background of the judge's conclusion that the appellant had not suffered abusive behaviour at the hands of her father even from a time before the date of decision, the concession was an important factor in enabling the judge to reach his conclusions on Article 8 issues. Additionally, the judge noted that the sponsor and appellant had not met since 1998 and no earlier application for entry clearance had been made nor had there been any attempt by the sponsor to

visit the appellant either in Ethiopia or a third country in the intervening years. These were all matters which would have applied equally at the date of decision.

13. Although the experienced judge does not specifically refer to the five stage *Razgar* process in dismissing the human rights appeal, it is quite evident that he had identified factors which could not possibly have allowed a favourable Article 8 decision, even based upon evidence as it was found to be at the date of decision. There was clearly only limited family life between the appellant and her mother even if the financial contributions for the appellant's upkeep were taken into consideration. At the relevant time the appellant was also living with her father with whom she had lived since her mother came to the United Kingdom in 2004. The judge also correctly pointed out in paragraph 19 of the decision that the respondent's obligations under Section 55 of the 2009 Act had no application. As the Court of Appeal made clear in *SS (Congo) and Ors* [2015] EWCA Civ 387 the requirements upon the state under Article 8 are less stringent in the leave to enter context rather than in that of leave to remain. Against that, the judge's failure to follow a *Razgar* five stage process can hardly be considered significant when he had already identified factors which could only point to the respondent's refusal decision being proportionate.

### **Notice of Decision**

The decision of the First-tier Tribunal does not show a material error on a point of law and shall stand.

### **Anonymity**

Anonymity was not requested before the First-tier Tribunal nor do I consider it appropriate in this entry clearance case.

Signed

Date

Deputy Upper Tribunal Judge Garratt