Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02981/2013
OA/02982/2013
OA/02983/2013

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
On 22 January 2015	**On 5 February 2015**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER – ISLAMABAD

Appellant

and

ZAHEER KHAN
NADIR KHAN
SARDAR KHAN
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondents: Mr Khan, instructed by Jusmount & Co Solicitors

DECISION AND REASONS

1. The respondents, Zaheer Khan, Nadir Khan and Sardar Khan, are citizens of Afghanistan. They are brothers. The first respondent was born on 20 March 2003, the second respondent 28 February 1995, the third respondent 14 October 1999. I shall hereafter refer to the respondents as the appellants and the Entry Clearance Officer as the respondent (as they appeared respectively before the First-tier

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Tribunal). By decisions of the respondent dated 22 October 2013, the appellants were refused entry clearance to the United Kingdom as dependant relatives of a refugee, their older sponsor brother, Omar Khan (paragraph 352 of HC 395). The appellants appealed to the First-tier Tribunal (Judge Juss) which, in a determination promulgated on 10 July 2014, allowed the appeals. The respondent now appeals, with permission, to the Upper Tribunal.

2. The application to the First-tier Tribunal (Judge Saffer) for permission was out of time. Judge Saffer refused to extend time. The application was renewed to the Upper Tribunal (Judge Gleeson) and, by an order dated 17 September 2014, she admitted the application having received an explanation for the delay and having found that it was in the interests of justice to do so (paragraph 21(7) of the Upper Tribunal Procedure (Upper Tribunal) Rules 2008). Mr Khan, who appeared for the appellants before the Upper Tribunal at Birmingham on 22 January 2015, did not satisfy me that I had any jurisdiction to interfere or reverse Judge Gleeson's grant of permission. Accordingly, the initial hearing proceeded.

3. This is a case of a *de facto* adoption by the brother of the appellants and his wife. I understand that the sponsor brother's wife has been granted entry clearance to join her husband in the United Kingdom. Judge Juss found that the appellants were also entitled, as *de facto* adopted children of the couple, to entry clearance. The respondent disputes that. The respondent relies on *Mohamoud (Paragraphs 352D and 309A – de facto adoption) Ethiopia* [2011] UKUT 00378 (IAC) in particular at [21] and [27]:

> Unfortunately, neither Mr. Alim nor Ms. Saunders referred me to the judgment of the Court of Appeal in MK (Somalia) & Ors v Entry Clearance Officer [2008] EWCA Civ 1453, paragraph 17 of which reads:
>
> "17. In the present case (and, I accept, many others), this test of de facto adoption is not satisfied because it requires that both adoptive parents have spent at least 18 months living with the child immediately prior to the child's application for entry clearance, whereas in an asylum case at least one of the parental figures will usually be in the United Kingdom, having successfully sought asylum."

It is clear in the present case that paragraph 309A of HC 395 cannot be satisfied since the sponsor brother has not resided with the appellants for a period of 18 months, including at least 12 months immediately prior to the making of the application for entry clearance. As I told the representatives and the sponsor at the hearing, Judge Juss's determination has to be set aside because it is wrong in law. It is true that Judge Juss also allowed the appeal under Article 8 but, as the grounds of appeal point out, he did so solely because he found (incorrectly) that the appellants succeeded under the Immigration Rules. His analysis on Article 8 began and ended there. I am satisfied that the entire determination should be set aside as the Article 8 analysis is inevitably tainted by the error of law concerning the application of the Immigration Rules.

4. Mr Khan acknowledged the appellants could not succeed under the Immigration Rules and both he and Mr Smart made representations to me (on the basis of the evidence before the Tribunal – I did not hear any new oral evidence) as regards Article 8 ECHR. Having set aside the determination, I reserved the remaking of the decision.

5. *Mohamoud* makes it clear that, whilst an appellant may not fall within the provisions of the Immigration Rules, Article 8 ECHR may be "available in appropriate cases". I acknowledge that an appeal on Article 8 grounds may succeed in an out-of-country entry clearance case. It is important, however, to ensure that a proper proportionality assessment is carried out, weighing the interference which the immigration decision may cause to family relationships against the public interest concerned with regulating immigration by a transparent and consistent system. In the present case, the appellants have established by reference to DNA evidence that they are related to the sponsor brother. Mr Khan told me that the children had been in the care of the sponsor brother before he came to the United Kingdom in July 2006. He said that, notwithstanding the separation, the sponsor brother and the appellants have maintained a strong bond by way of regular communication. However, as Mr Smart pointed out, the youngest appellant was only 3 years old when the sponsor brother came to the United Kingdom; he is now nearly 12 years old. I am prepared to accept that the sponsor brother and the children have maintained contact but the strength of their family life while physically separated for nearly nine years is, in my opinion, outweighed by the public interest concerned with refusing entry to those who cannot comply with the Immigration Rules. I am not satisfied on the evidence that the family bond between the sponsor and the children, after so many years of living apart, is such that it should trump or outweigh the public interest in this instance. For that reason, I dismiss the appeals on Article 8 grounds. I am aware that the sponsor brother's wife may seek to make an application which will enable her to bring the appellants (or at least the first and third appellants) with her to the United Kingdom. However, that is a matter for the family and their advisers.

<u>Notice of Decision</u>

The determination of the First-tier Tribunal promulgated 10 July 2014 is set aside. I have remade the decision. The appeals against the ECO's decisions dated 22 October 2012 are dismissed.

No anonymity direction is made.

Signed Date 2 February 2015

Upper Tribunal Judge Clive Lane