



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

Appeal Numbers: OA/08274/2012  
OA/08277/2012  
OA/08316/2012  
OA/08321/2012  
OA/08329/2012  
OA/08330/2012

**THE IMMIGRATION ACTS**

**Heard at Bradford  
On 17<sup>th</sup> February 2015**

**Decision & Reasons Promulgated  
On 25<sup>th</sup> February 2015**

**Before**

**UPPER TRIBUNAL JUDGE D E TAYLOR**

**Between**

**SAHRA ABDILLE AHMED  
ABDALLA ABDULKADIR MOHAMMED  
ABDISALAM ABDULKADIR MOHAMMED  
FATMA ABDULKADIR MOHAMMED  
YUSUF ABDULKADIR MOHAMMED  
MOHAMED ABDULKADIR MOHAMMED  
(ANONYMITY DIRECTION NOT MADE)**

**Appellants**

**and**

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

**Respondent**

**Representation:**

For the Appellant: Mr M Hachemi of Counsel instructed by Ison Harrison Solicitors  
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

## **DECISION AND REASONS**

### **Background**

1. The history of this matter is as follows. The Appellants are all nationals of Somalia resident in Syria. They applied for entry clearance to join the first Appellant's husband and the remaining dependants' father, a British citizen but were refused on 28<sup>th</sup> March 2012 on the grounds that the Entry Clearance Officer was not satisfied that the principal Appellant was married to someone present and settled in the UK, that the marriage was subsisting, that she was exempt from the English language requirement or that the maintenance and accommodation requirements of the Rules could be met.
2. The Appellants appealed to an Immigration Judge and, on 9<sup>th</sup> April 2013 the appeal was dismissed. The judge was satisfied that the couple were related as claimed and that the marriage was subsisting.
3. So far as the finances were concerned the Sponsor's average monthly salary was £1,160.77 and, if the family joined him, there would be an entitlement to £309.11 per week of working family tax credit which constituted recourse to public funds. The Sponsor had produced evidence that a 3 to 4-bedroom property would be available to rent but he was not in a financial position to afford a greater rental commitment.
4. He made no findings in respect of the absence of an English language test certificate and concluded that there would be no breach of the UK's obligations under the ECHR by the refusal.
5. The Appellants appealed to the Upper Tribunal and was granted permission but, on 5<sup>th</sup> September 2013 Deputy Judge Dearden found no error of law in the determination.
6. The Appellants then sought permission to appeal to the Court of Appeal. On 15<sup>th</sup> October 2014 the court, having considered the joint statement of reasons, was satisfied that there were good and sufficient reasons to allow the appeal without determining the merits, and approved the remittal of the matter insofar as it concerns the third, fourth and fifth Appellants who are minor children.
7. The determination of the Upper Tribunal was quashed and the Appellants' appeal remitted to a freshly-constituted panel of the Upper Tribunal for a de novo hearing on Article 8 of the ECHR 1950.

### **The facts of this case**

8. There are no longer any credibility issues. The family left Somalia in 2003. The Appellants went to Syria and the Sponsor came to the UK and claimed asylum. He was refused in 2005 but granted indefinite leave to remain under the legacy programme following a fresh claim in 2010. He is now a British citizen.

9. The Sponsor works but is unable to earn sufficient to meet the maintenance and accommodation requirements of the Rules.
10. Communication with the family is extremely difficult. There is substantial evidence of money being sent to them and the Sponsor has made efforts to visit, but obviously that has become increasingly difficult. He went to Syria in September 2011, before the present conflict started, in order to try to secure their exit and he last visited them at the end of 2013 returning in January 2014. He was not able to do so before because of his own lack of status.
11. It is not possible to get a visa as a British citizen to enter Syria and the Sponsor had great difficulty entering on the last occasion, finally managing to do so via Lebanon.
12. The principal Appellant is diabetic and one of the children has gastrointestinal problems for which he needs "surgical reconstruction" according to the medical report provided by Dr Emad Alyamani.
13. The Sponsor's main concern however is for the family's safety. They live in Barzeh suburb next to Douma which is right in the centre of the conflict zone. They have no heating and have only four hours' electricity every day because of the shelling. His daughter cannot go to school because of the threat of rape.
14. The Foreign Office advice as at the date of decision was against all travel to Syria. British nationals in Syria were urged to leave by whatever practical means. Those who choose to remain in Syria or visit against the very strong and clear advice not to should be aware that the Embassy was not able to provide consular services nor able to assist with evacuation from the country.
15. The Foreign Office states:

"Fighting has triggered the temporary suspension of commercial flights, caused road closures, seriously impeded access to land border crossing points and led to the closure of some border crossings."
16. It may not be possible to guarantee security along the routes. All border crossings and routes should be checked before travel and some are in the hands of opposition groups and vulnerable to attack. That advice remains.
17. There is widespread fighting in Damascus and its suburbs and military operations have resulted in a significant number of deaths and injuries. According to the Human Rights Watch Report of November 2012 cluster bombs have killed children in a town near Damascus. The ICRC Report for July 2012 states that humanitarian needs are growing there, where various neighbourhoods have been cut off from each other and people are trapped in the midst of the fighting. Many buildings are reduced to rubble.

18. The Respondent's position, rather unenthusiastically advanced by Mr Diwnycz, is that family life could continue as it has before with the Appellants remaining in Syria.

### The Law

19. Mundeba (Section 55 and paragraph 297(1F)) [2013] UKUT 00088 (IAC) was concerned with paragraph 297(1)(f) which requires entry clearance to be issued where there are "serious and compelling family or other considerations which make exclusion of the child undesirable."

20. The President of the Tribunal held that

"Where an immigration decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. An entry clearance decision for the admission of a child under 18 is 'an action concerning children... undertaken by... administrative authorities' and so by Article 3 the best interests of the child shall be a primary consideration. Although the statutory duty under Section 55 of the UK Borders Act 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the statutory guidance under Section 55."

21. The relevant IDIs in respect of that Rule, dated July 2011 state as follows:

"(1) Serious and compelling family or other considerations.

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction arrangements to safeguard and promote children's welfare in the UK Border Agency sets out the key principles to take into account in all agency activities:

- Our statutory duty to children includes the need to demonstrate:
- Fair treatment which meets the same standard as a British child would receive;
- The child's interest being a primary although not the only consideration;
- No discrimination of any kind;

- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.”

22. The IDI goes on to state that it is not the intention of the Rules that a child should be admitted because of the wishes of other relatives in the UK, and the Tribunal emphasised that cases where it was simply the wishes of the party to be together, however natural that ambition might be, should be excluded.

23. So far as Article 8 was concerned, the President wrote as follows:

“Where Article 8 is relied on the 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.”

24. The comment that Article 8 adds little to the Family Admissions Rules is interesting. It implies that the requirement for there to be serious and compelling considerations is relevant to the question of proportionality.

25. So far as that particular Appellant was concerned he said:

“Again we emphasise the Appellant is not being denied reunion with a previous carer or needs admission in order to supply a basic unmet need of his. The material advantages of life in the UK is not the test; the loss of his cultural roots in the society in which he has grown up to date is a relevant factor. There is no evidence that he is at risk of harm where he is.”

26. It can be seen therefore that both in the IDIs in relation to the admission of children and in the comments of the Tribunal in Mundeba, unsurprisingly there is strong emphasis on whether the children are at risk of harm.

### **Consideration of Article 8**

27. This family have not lived together for many years, but no issue is taken with the existence of family life between the Sponsor, his wife and children at present. Nor with the duty to look to the future and the development of family ties, and not only in the present heavily restricted context.

28. This is not a case such as Mundeba where the Appellant and Sponsor had never lived together. This family were united until 2003 when the decision was made, because of the circumstances prevailing in Somalia at that time, for them to leave and to separate.

29. The refusal is a clear interference with the right to enjoy a family life. No meaningful family life can be conducted in circumstances where communication is so difficult.

30. The decision is however lawful since the Appellants do not meet the requirements of the Immigration Rules and in pursuit of a legitimate aim, not only the maintenance of immigration control but the clear economic disbenefit to the UK by this family's arrival. There would manifestly be recourse to public funds.
31. In assessing the proportionality of the decision I am required to take into account the factors listed in 117B of the Immigration Act 2014, all of which argue in favour of the Respondent.
32. The Appellants do not meet the requirements of the Immigration Rules. The Sponsor speaks excellent English and he said that his children had had some education in English and I have no doubt that the logistics of attending a test centre in Damascus are impossible. Nevertheless there is no demonstration that the family can speak English and accordingly paragraph 117B(2) should be considered as weighing against them.
33. More significantly is the requirement in 117(3) i.e it is in the public interest that persons who seek to enter or remain in the UK are financially independent. The cost to the public purse of this family entering, at least in the short term, is considerable. I fully accept that the Sponsor is a hardworking individual who has done his best at all times to make a positive economic contribution to the UK but he is simply unable to earn what is considered to be an adequate wage.
34. In AAO v ECO [2011] EWCA Civ 840 the Court of Appeal said:

"A requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens. It is an unfortunate reality of life that states especially one like the UK which is generally accessible and welcoming to refugees and immigrants cannot undertake to allow all members of a family to join together here even those members who can show emotional and financial dependency without creating unsupportable burdens."
35. Moreover in MS [2013] CSOH1 Lord Brody stated that a case which had succeeded on Article 8 grounds, having failed in terms of the Rules, would be described as exceptional even though a failure to comply with the Immigration Rules remained the starting point of an Article 8 enquiry and not its conclusion.
36. On the other hand, if entry clearance refusal is maintained there can be no family life at all for these Appellants with the Sponsor. This is not a case where family can be continued elsewhere either in Syria itself or in another country. The refusal means an absolute severance.
37. The Sponsor is not able to travel to Syria, not only because it is dangerous for British citizens to go there but also because he cannot practically get there. He was fortunate in persuading a Syrian Immigration Officer on the Lebanese border to allow him in

last time, but there is no guarantee at all that he will be able to do so again in the future.

38. Moreover it is not at all clear, in the present context of the war in Syria, whether it would even be possible for the Appellants to leave and relocate back to Somalia. The Sponsor's unchallenged evidence is that his wife has tried to leave Syria several times and he sent 2,000 dollars to her which she paid to an agent to try to get her to Turkey or to Lebanon but both attempts ended in failure due to heavy fighting along the way to the border.
39. The best interests of the children are a primary consideration, not because Section 55 applies to them, but because of the broader duties under the UN Convention on the Rights of the Child, reflected in the guidance to Entry Clearance Officers that the child's interests are a primary although not the only consideration.
40. The most relevant aspect of the guidance is clearly the identification of those that might be at risk from harm.
41. No issue is taken with the objective evidence on Syria and Damascus in particular. The Foreign Office advice is entirely clear. There is widespread fighting throughout Syria. The continuing violence, the deteriorating security situation and Syria's chemical and biological weapons programme creates a volatile situation.
42. I take full account of the Respondent's interests. I bear in mind that the Immigration Rules are compliant with human rights legislation and that the Appellants cannot meet them. On the other hand the Sponsor has no real capacity to enjoy any kind of family life with the Appellants in Syria or they with him. The best interests in this case are absolutely clearly in favour of entry to the UK. On any view the situation in Syria is highly dangerous in the context of a civil war which has decimated the country.
43. In this case there are significant justified reasons of public interest. However, given the real risks which these children are experiencing simply as a consequence of living where they do, and their inability to remove themselves from a place of danger I conclude that the refusal of entry clearance to enable them to join their British father in the UK is a disproportionate interference with their right to enjoy family life with him and he with them.

### **Notice of Decision**

44. The Appellants' appeals are allowed on human rights grounds.

No anonymity direction is made.

Signed  
Upper Tribunal Judge Taylor

Date **24<sup>th</sup> February 2015**