IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/18275/2013
OA/18280/2013
OA/18288/2013
OA/18293/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 10th April 2015	**On 17th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MS MARYAN SHARIF OMAR
(2) MS SACDIA SHARIF OMAR
(3) MS MUNA SHARIF OMAR
(4) MR MOHAMED SHARIF OMAR
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:
For the Appellants: Mr A Pipe (Counsel)
For the Respondent: Mr N Smart (HOPO)

DECISION AND REASONS

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1. This is an appeal against the determination of First-tier Tribunal Judge Stott promulgated on 24th July 2014, following a hearing at Birmingham on 17th July 2014. In the determination, the judge dismissed the appeals of the Appellants, who subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants comprise the four eldest children of their sponsoring father in the UK, namely, of Mr Sharif Omar Osman, who is a person present and settled in the UK with British citizenship, now his youngest five children still remain in Somalia. The Appellants are citizens of Somalia. They were born on 12th December 1998, on 30th December 1999, on 30th October 1997, and on 30th October 1997 (the latter being twins). They appealed against the decision of the Entry Clearance Officer in Nairobi refusing them a visa for indefinite leave to remain in the UK under paragraph 297 of the HC 395, as children of a parent in the UK who had exercised "sole responsibility" in relation to their welfare and upbringing, and in relation to there being serious compelling circumstances that would make their exclusion undesirable from the UK.

The Appellants' Claim

3. The Appellants' claim is that they have been abandoned by their mother, following a disagreement with their father, whereupon she left them in the care of other people and took the youngest five children away with them. The Entry Clearance Officer, in his decision of 6th September 2013 noted the claim that they had been abandoned by their mother in April 2013, and that their father had been in the UK since 28th January 2006. However, the Entry Clearance Officer stated that no explanation has been provided regarding why after seven years of care the mother would suddenly abandon them. There was a letter from the Somali Community Centre dated 10th April 2013 which states that a person named Abdulkadie Yusu Mohamud said "police come and take me those children of Somalia community". The letter is difficult to understand. It is not clear what is meant by it. In any event the letter is in a format that is easily produced locally at low cost. The letter also does not say what happened to the mother. Therefore, the ECO could not be satisfied that the father in the UK had sole responsibility for the children or that there were serious and compelling circumstances making exclusion undesirable.

The Judge's Findings

4. The judge carefully set out the Respondent's case in the body of the determination (see paragraph 4(a) to (j)). Equally, the judge set out carefully the Appellants' case (see paragraph 5(a) to (n)). With respect to the former, the judge observed that the Respondent's case was that there had been at least three individuals caring for the Appellants, one of whom

was Abdulkadie Yusuf Mohamud, another being Halima Nur, and yet another being Habibo Hussein Abdulla. The Respondent's case was that,

> "From the oral evidence provided, the Appellants' Sponsor has had little control or direction as to the selection and choice of those carers and consequently for this reason also it is not accepted that he has had sole responsibility for the Appellants" (see paragraph 4(d)).

With respect to the latter, there was evidence of the fact that the

> "Transfer of caring duties between the three individuals is evidenced by the money transfer forms on which can be seen the names initially of the Sponsor's second wife, followed by those of Abdulkadie Yusuf, Halima Nur and Habibo Abdulla" (see paragraph 5(f)).

Moreover, the Appellants are from the Ashraf Clan, which is a minority grouping, and "they can expect little in the way of protection from the authorities and bearing in mind their ages are unable to care for themselves" (see paragraph 5(g)). Furthermore, the Sponsor has "visited his children in Addis Ababa in April 2013 and again in February 2014. He is distraught as to their situation and keeps in regular contact with them by phone (as evidenced by the copy of phone cards – see pages 76 to 82 in the bundle)" (see paragraph 5(h)).

5. In his findings of fact, the judge considered the position in relation to the "sole responsibility" test (at paragraphs 12 to 15) and observed that "clear evidence was not given to him by Halima Nur as to who the responsibility for caring of the Appellants was being passed to, and therefore the Respondent has had no inference or control in that regard" (paragraph 12)). The judge also observed that there was "confusion in the evidence given in respect of the Appellants' schooling where several reasons has been provided as to why their education ceased" (paragraph 13). For these reasons, the judge could not be satisfied that the requirements of paragraph 297(e) of HC 395 had been satisfied with respect to sole responsibility (see paragraph 14).

6. In relation to whether there were serious and compelling circumstances to make exclusion undesirable, the judge began by saying that, "as indicated I have accepted that they had been cared for by a series of individuals as evidenced by the money transfer forms and the evidence confirmed by the author of the expert report" (paragraph 15). The judge also observed that, whereas the UNHCR's assistance had not been sought in relation to the position of the children, nevertheless, "their situation is extremely difficult", but the judge did not accept that it is such as to satisfy the Rule in relation to serious and compelling circumstances (see paragraph 16).

7. Accordingly, since the Sponsor had maintained communication with his family over a number of years in this manner this could continue (paragraph 18).

8. The appeal was dismissed.

Grounds of Application

9. The grounds of application state that the judge erred in law because in his findings of fact there is no consideration whatsoever of the fact that the Sponsor is ultimately financially responsible for all the Appellants. There is no reference to the daily telephone contact he is having with them. There is no reference to the fact that he has twice visited his children in Ethiopia in the twelve month period following the disappearance of their mother. Furthermore, the suggestion that the carer is not clear about when she is planning to leave is not relevant given that the carer is planning to leave and the judge makes no finding that she is not planning to leave. On 12th September 2014, permission to appeal was granted on the basis that it was arguable that the judge's failure to deal with the Sponsor being financially responsible for the children was an arguable error of law.

Submissions

10. At the hearing before me on 10th April 2015 Mr Pipe, appearing as Counsel on behalf of the Appellants, submitted that the findings made by the judge from paragraphs 6 to 16 are inadequate. This was a case concerning a British citizen parent in the UK. Yet, the judge did not address the parents' two visits to Djibouti before the abandonment of the children by the wife, and the two visits to Addis Ababa after she had abandoned them. Whereas the two earlier visits are not technically directly relevant, they are relevant to the question of the continued support, interest, and contribution that the sponsoring parent made to the welfare of his children in Somalia. What the judge should surely have addressed was that within twelve months of the mother of the children having abandoned them, he made two visits to see them, one in April 2013 and the other in February 2014.

11. Second, the export report of Gunther Schroeder (at pages 30 to 75) has not been given due and proper weight by the judge in his findings of fact in relation to the two core elements of paragraph 297. This report (dated 15th April 2014) puts forward a factual scenario which the judge was bound to have taken into account but did not. Mr Schroeder explains that:

> "On 28th December 2013 I visited the children of Sharif Omar at their residence accompanied by my local research assistant. The children live in Bole sub-city of Addis Ababa in Saris area in a neighbourhood named Addisu Sefer located east of Addis Ababa Eastern Ring Road. In recent years Saris has become a major settlement area for Somalians with a major concentration in Addisu Sefer (literally "new quarter"), a new residential quarter having development over the past ten years. They rent houses or rooms from Ethiopian house owners for exorbitant rents. (Paragraph 158).
>
> "We met with the children ..... [the children are named].

"And the caretaker Mrs Halima Ali Nur and her 16 year old granddaughter, Sofia, who translated from Somali to Amharic and English. The children, their caretaker and the granddaughter received us in a friendly and open manner without diffidence or furtiveness. As they already had contact with my assistant there was no apprehension or visible signs of mistrust ..... (paragraph 159).

"The children live with the caretaker in two small rooms in the service quarter of a compound owned by an Ethiopian lady in Addisu Sefer. Each of these rooms has a size of about nine metres square and one window each. The second room can only be reached through the first. Adjacent to the two rooms there is a small kitchen shed ...." (paragraph 160).

"Due to shortage of funds they currently do not attend school" (paragraph 164).

"Some months ago Adbulkadie had to travel to Mogadishu because his father fell ill and he is still there. Abdulkadie contacted Halima Ali Nur, an elderly lady from the Tumal clan, who holds an Ethiopian ID card, living the neighbourhood to move in with the children and to take care of them" (paragraph 166).

"Being from a despised minority clan, Halima, her daughter and her grandchildren are registered for resettlement to Canada, which could come any time soon. At the moment there is no arrangement yet ....." (paragraph 168).

"The children do not have any legal status in Ethiopia ....." (paragraph 169).

"The children are adamant that they cannot return to Mogadishu as they no longer have paternal family members there, who in the Somali culture would be obliged to take care of them" (paragraph 171).

"On 23rd March 2014, during a renewed visit to Addis Ababa, my assistant and I paid an unannounced visit to the children and their caretaker. I did not inform the children or those looking after them that I would making a visit, I simply arrived at a place where they living that I had visited previously" (paragraph 174).

"The children were living at the same place and their living conditions had not changed. However, the caretaker informed me that she and her granddaughter had been accepted for resettlement .... (paragraph 175)."

12. The expert, Mr Gunther Schroeder, then goes on to make his "assessment of the situation of the children". The expert goes on to say the following:

"The children clearly indicated they could not expect any support from the relatives of their mother ..." (paragraph 176).

"The children Sharif do not have any legal status in Ethiopia ..." (paragraph 177).

"If the children were to register now with the UNHCR and ARRA they might either be sent to one of the camps or might given as unaccompanied minors to remain in Addis Ababa under UNHCR/ARRA protection. However, the children have no information on the procedure for registering" (paragraph 178).

> "Somalian refugees in Ethiopia do not have the option to acquire this Ethiopian citizen through naturalisation ..." (paragraph 180).
>
> "For political reasons the Ethiopian authorities tolerate the large presence of illegal Somalian residents in Addis Ababa ... " (paragraph 181).
>
> "As illegal immigrations in Addis Ababa the children will not be able, once having grown up, to acquire a secure livelihood ..." (paragraph 182).
>
> "They have no legal status and no legal protection in case of conflict with local authorities ...." (paragraph 183).
>
> "Family reunification with family members living in third countries and having acquired refugee status and residence rights that can only be affected by resettlement of refugees from Ethiopia to join their family members in third countries and not vice versa ..." (paragraph 184).
>
> "According to the current legislation on immigration it would not be possible for father of the children to resettle in Ethiopia" (paragraph 185).
>
> "With the departure of the current caretaker to Canada being imminent the children would lose the protection the status of the caretaker provided in regard to the Ethiopian authorities" (paragraph 186)."

13. Mr Pipe continued with his submissions to say that when at paragraph 13 the judge refers to "the confusion in the evidence" he still makes no reference in this paragraph to three important matters.

14. First, that there were two visits made after the departure of the mother of the children, by the Sponsor to see his children in April 2013 and February 2014.

15. Second, that he has continuously been sending them monies.

16. Third, that he is in constant touch on a regular daily basis with them by telephone. None of these matters are factored in at paragraph 13 which is the crucial paragraph where the judge begins to make his decisions in relation to the "sole responsibility" test. Furthermore, given that Gunther Schroeder had accepted that the situation in the children's home was no longer tenable, it was incumbent upon the judge to give specific attention to the expert's report in this regard. Therefore, the findings in relation to "sole responsibility", could not be upheld.

17. Moreover, the judge had regard to a matter that was entirely irrelevant, namely, that, "there is also no suggestion that the help of the UNHCR cannot be enlisted ..." (see paragraph 16), because whether or not the UNHCR can help, is a matter that may be relevant to an asylum claim, but was not relevant to the question of "sole responsibility" here.

18. As far as the test of "exclusion undesirable" was concerned, the judge had made a clear finding (at paragraph 16) that "their situation is extremely difficult". This was important, because it had to be read in the context of the decision in **Mundeba (s.55 and paragraph 297(i)(f)) [2013] UKUT 00088 (IAC)**, because here Mr Justice Blake considered the application of

Section 55 in conjunction with paragraph 297 of HC 395. This case makes it clear that although the statutory duty under Section 55 of the BCIA 2009 only applies to children within the UK, "the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers so consider the statutory guidance issued under Section 55".

19. The case also makes it clear that due regard must be had to the UN Convention on the Rights of the Child and that an Entry Clearance Officer's decision for the admission of children 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". What this means is that family considerations require an evaluation of the child's welfare including emotional needs. Moreover "other considerations" come into play where there are other aspects of the child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment."

20. What this means is a consideration of, whether there is evidence of neglect or abuse; or whether there are unmet needs that should be catered for; and whether there are stable arrangements of the child's physical care. Mr Pipe submitted that if one looked at the section on "security risks for Somalian refugees within Ethiopia" (at page 59 of the bundle, it is clear that the "relatively positive treatment of refugees in Ethiopia is less a result of ... legal framework conditions, but largely the result of political considerations, which could easily change" (see paragraph 105). Essentially, these children were *de facto* refugees.

21. Therefore, Mr Pipe urged me to make a finding on an error of law on the part of the judge and remake the decision. In so doing, he submitted that I should have regard to the fact that the fact that the judge had already found that the situation of the children was "extremely difficult", and that the report by Gunther Schroeder, the expert, plainly pointed to the position that they are currently living in being untenable.

22. For his part, Mr Smart submitted that I should have, as my starting point, the well-known sole responsibility decision on **TD (Yemen)**. This makes it quite clear that "sole responsibility" is an issue that must be decided on "all the evidence", but that where two parents are involved in the care of children, then it will only be in "exceptional" circumstances that an application will succeed. This was a case where the mother had been involved in the care of the children. Not only this, there were other carers involved with respect to the children. This was the plain and clear finding of the judge in this case. The central part of his decision was that, "they have been cared for by a series of individuals as evidenced by the money transfer forms and the evidence as confirmed by the author of the expert report" (paragraph 15). The element of sharing of responsibility plainly meant that it could not be "sole responsibility". It was clear from **TD (Yemen)** that the question of "sole responsibility" has to be approached

with regard to nine separate factors (see paragraph 52 of the determination). Of these nine factors, it is clear that a factor (v) is to the effect that,

> "If it is said that both are not involved in the child's upbringing, one of the indicators for that will be that the other has abandoned or abdicated his responsibility. In such cases, it may well be justified to find that that parent no longer has responsibility for the child".

Moreover, it also clear that (see factor (v), (vi) that "the issue of sole responsibility is not just a matter between the parents. So even if there is only parent involved in the child's upbringing, that parent may not have sole responsibility".

What this meant, according to Mr Smart, was that if the responsibility was being shared by three different carers, it was clear that the parent could not have had the "sole responsibility". It was accepted, submitted Mr Smart, that the sponsoring father had made two visits to see his children and that financial remittances had been made.

But the judge cannot be criticised for overlooking this. This is because the judge makes it clear in relation to the "Appellants' case" that this is the submission and the case on behalf of the Appellants (see paragraph 5(h)). In his "findings of fact", the judge does not say that he does not accept this as a fact. Therefore, it was not a material error on his part not to have mentioned it.

23. As far as the question of "serious and compelling circumstances" is concerned, the case of **Mundeba** plainly applies. However, Mr Gunther Schroeder, does not say that the children are being neglected or abused in any way (see pages 72 to 73) and therefore the judge was right in concluding at paragraph 16 as he did that the requirements of "serious and compelling" circumstances could not be satisfied.

24. In reply, Mr Pipe submitted that one had to return to **Mundeba** because the Upper Tribunal, under the chairmanship of the President, Mr Justice Blake, had made it clear that the question that has to be asked is in relation to the child's welfare and the child's "best interest" and this had not been done. Mr Piper made three further points.

25. First, the case of **TD (Yemen)** does not imply that the taking into account of "all of the evidence" means that, once consideration is given to the two visits made by the sponsoring father, and his consistent financial remittances to not just one, but to three separate carers, militates against the Appellants.

26. Second, the judge does refer to the visits by the sponsoring father, but does so only in relation to the Appellants' case. There is no reference at all in his "findings of fact" to how this tilts the balance one way or the other in favour of the Appellants or against them.

27. Third, the case of **Mundeba** makes it clear (at headnote (iv)) that a child's welfare includes "emotional needs" and that the phrase "other considerations" comes into play where there are other aspects of a child's life that are serious and compelling, and in this case the fact that the children were de facto refugees, and had no one else to turn to, and were on the verge of being abandoned altogether by the current carer, who was now going to go Canada, were material facts that the judge ought to have taken into account. **Mundeba** is quite clear in saying that where there "unmet needs that should be catered for" or where there are questions about "stable arrangements for the child's physical care" then this goes directly to the Section 55 duty at hand and to the consideration of the "best interests of the child".

28. Finally, since there were no challenges to the credibility findings of the judge, no further evidence should be heard and no cross-examination allowed on the evidence, because if there is to be a finding of an error of law by this Tribunal, this Tribunal can proceed to remake the decision on the evidence as it stands.

Error of Law

29. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1)) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.

30. First, the nub of the judge's findings are at paragraphs 13 to 15. Central to this consideration is paragraph 13 where the judge refers to "the confusion in the evidence", but does so in relation to why the children's education ceased. After this, the judge forms a clear view that the Appellant had not satisfied paragraph 297(e) of the Immigration Rules (see paragraph 14). There is no consideration here given to the two visits made by the sponsoring parent to Addis Ababa, or to the monies that have been sent, or to the way in which the children's emotional and other needs with respect to their welfare, are met by the regular telephone contact that the sponsoring father makes. All of this is relevant to the satisfaction or otherwise of the "sole responsibility" test. It is only after the judge makes his clear finding in relation to paragraph 297(e) that he then moved on to stating that there are "money transfer forms and the evidence confirmed by the author of the expert report", but this is in relation to the fact that the "Appellants' situation, ... that they have been cared for by a series of individuals as evidenced by the money transfer forms ...." (paragraph 15). In short, therefore, the failure to factor in the visits, the monies sent, and the regular contact, amounts to an error of law, in that it is not possible to see how this would have affected the balance of considerations that are relevant to the determination of the "sole responsibility" test.

31. Second, no consideration is given to Section 55 BCIA and to the "best interests" of the children in the situation that is described in the expert report of Mr Gunther Schroeder. Failure to give consideration to Section 55 is an error of law.

32. Third, in relation to the second part of paragraph 297, namely, whether there are "serious and compelling circumstances" such as to make "exclusion undesirable", whereas the judge makes a finding that "their situation is extremely difficult", he imports into his consideration a irrelevant consideration, namely, that, "there is ... no suggestion that the help of the UNHCR cannot be enlisted" (paragraph 16). The help of the UNHCR is relevant to a asylum application being made but not relevant to the satisfaction of the sole responsibility test. There is no obligation on a parent seeking to be unified with his children in the UK that he enlisted the help of the UNHCR as this is a contradiction in terms in circumstances where what he has to do, on the contrary, is to show that he has been exercising sole responsibility in relation to the children.

33. Furthermore, and no less importantly, a finding that "the situation is extremely difficult" has to be assessed in the context of Mr Gunther Schroeder's expert report, which makes it quite clear that the position of the children now is increasingly untenable, as set out in the provisions of that report that have been laid out above. The failure to give specific consideration to Mr Gunther's report, and to indicate whether aspects of this report are rejected or accepted, and if so to what extent, is an error of law, when the question of "exclusion undesirable" has to be resolved.

Remaking the Decision

34. I have remade the decision on the basis of the findings of the original judge, the evidence that was before him, and the submissions that I have heard today.

35. I am allowing this appeal for the following reasons. This is a case where, contrary to the suggestion in the ECO's decision in Nairobi, the judge did not find that the position of the children, where it was alleged that the mother had abandoned them by taking the youngest five children with them but leaving the eldest four behind, was contrived. On the contrary, the judge was satisfied that the situation in which they found themselves was a genuine one. If so, then the fact that money was being transferred on a regular basis, not just to one particular carer, but to every other one who came on to the scene, where the sponsoring father himself had no control in the way in which his children were being passed on, shows that the consistent practice on his part of sending monies, did show an exercise of "sole responsibility".

36. It has been clear since the case of **Emmanuel**, that "sole responsibility" is not to be literally understood as there can never be "sole responsibility" literally in circumstances where a child is being shared in terms of

responsibility abroad. What is clear, however, is that this is a case where the Sponsor already visited on two occasions his children when his wife was still looking after them in Djibouti. Subsequently, after his wife had abandoned them, he visited them again on two occasions within a year of that abandonment. It is also clear that he has been sending them monies consistently. He has done so with respect to whether was the person looking after his children. He had no control over the way in which these children were being passed on from one person to the other.

37. What is abundantly plain, nevertheless, is that the children were being looked after in an environment which was increasingly more and more unstable. Mr Gunther Schroeder's expert report has now made it clear that this instability has culminated in the children being left without any care and protection whatsoever in the immediate foreseeable future. Whereas it is not clear when the current carer will also leave them, what is clear is that the current carer is destined to go to Canada and the children will be left alone. These are children who are vulnerable. They belong to a minority clan. They are *de facto* refugees. They are not in the protection of the UNHCR or ARRA. They are all the more exposed to a risk of ill-treatment. The fact that the sponsor is in regular touch with them on the telephone and is increasingly desperate for their welfare is not entirely difficult to see. It is in these circumstances that the conclusion must inevitably fall, on a balance of probabilities, that he has been exercising sole responsibility for them.

38. As far as the existence of "serious and compelling circumstances" is concerned which makes their "exclusion undesirable", the judge had already earlier at first instance found that "their situation is extremely difficult". Whereas this is not the same as finding that it makes "exclusion undesirable" what is directly relevant is the expert report of Mr Gunther Schroeder. On the basis of the provisions that have been set out, and considering the report in its entirety, it is clear that their exclusion would indeed be undesirable, where they now will no longer have a carer to look after them at a time when they are vulnerable and at a critical age in their lives.

39. Also relevant with respect to these same facts is the application of Section 55 of the BCIA. The case of **T (S.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC)** has established that it stands to be applied in this case. This is a case where the interests of the child were plainly under consideration in an entry clearance case, and the original judge failed to pay close attention to the issue of "best interest" of the Appellant. It is now well-established that where the interests of the child are under consideration appropriate enquiries need to be made in entry clearance cases with regard to the age, and care arrangements of the child (see **JO (section 55 duty) Nigeria [2014] UKUT 00517)**. The decision maker must be properly informed of the position of the child. Being properly informed and conducting a scrupulous analysis is a pre-

requisite of identifying the child's best interests, and then balancing them with other essential considerations. Performing these duties will be an intensely fact sensitive and contextual exercise. This is a case where the ECO did not do this. This was a failing of an administrative responsibility. It was also a failing of a legal obligation.

40. First, the facts of this case clearly indicate that these Appellant children's welfare will be jeopardised by exclusion from the United Kingdom. It is possible that if one has regard to the "exclusion undesirable" provisions of the Immigration Rules, and the extra statutory guidance to Entry Clearance Officers to apply the spirit of the statutory guidance in circumstances where children are involved, that the balance is in favour of the Appellant (see **T (S.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 IAC**). It is clear that the "best interest" consideration is not irrelevant to an Article 8 evaluation. In fact, Article 8 is the *genus* and "best interest" is the *specie* where children are involved.

41. The case-law makes it quite clear that, "it is difficult to contemplate a scenario where a Section 55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not" (see paragraph 29 of **T (S.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483**). When the facts of this case are considered it is plain that there is a risk of moral or physical danger to the Appellants. They are young and in the formative years of their age. They are being looked after by someone who is not any longer able to. The wishes of the Appellants are to be with the parent in the UK. The Appellant's parent in the UK who can provide maintenance and accommodation and who has a clear desire to care for him. In these circumstances, the requirements of Article 8 are plainly met. This is for the following reasons.

42. In **Mundeba [2013] UKUT 88** (IAC) it has now been explained yet again that the focus in s.55 cases is on the circumstances of the child in the light of his / her age, social background and developmental history. It requires an inquiry into whether there is (a) evidence of neglect or abuse ; (b) there are unmet needs that should be catered for; and (c) whether there are stable arrangements for the child's physical care. The assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require the admission of this appellant into the UK. Taking all these matters into account, I am allowing this appeal for a number of reasons.

43. If one applies Lord Bingham's tabulation in **Razgar** (at paragraph 17), the following emerges. First, it is plain that the continued exclusion of the Appellant is an interference by a public authority, namely, the Secretary of State, with the exercise of the Appellant's right to respect for his family life. This family life is qualitatively different with one that the Appellants are enjoying in her country of origin, where their carer has her own

obligations, as against the family life that she will enjoy with her own parent, who is keen and able to look after the Appellant.

44. Second, the interference here does have consequences of such gravity as to potentially engage the operation of Article 8 (bearing in mind that this is a low threshold). Third, and on the other hand however, the interference is in accordance with the law because the Appellants cannot comply with the Immigration Rules at paragraph 297 of HC 395. Fourth, though, the interference is not necessary in a democratic society, because it is not necessary for the economic wellbeing of the country, or for the prevention of crime, or for the protection of the rights and freedoms of others. There is no hint whatsoever of any wrongdoing or illegality by any of the parties concerned. In fact, all the evidence is that the Appellants' parent is in the UK in a settled capacity. Fifth, all in all, the interference here is not proportionate to the legitimate public end that is sought to be achieved.

45. It is well accepted that the material question engaging the proportionality of an administrative decision that threatens to break a family is whether it is reasonable to expect the Appellant to remain separately from her natural parents, which in this case means her natural mother (her father effectively not providing her with any care), who is now a person with legitimate legal status in the UK and is settled. On the facts of this case, it is not reasonable.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity order is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 16th April 2015

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award of the whole fee award which has been paid or may be payable.

Signed Dated

Deputy Upper Tribunal Judge Juss 16th April 2015