Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/01067/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 13 November 2015

Decision and Reasons Promulgated
On 5 January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Ms FADUMA HUSSEIN ADAN

Respondent

Representation:
For the Appellant: Ms N Willoks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Mr D Ball (counsel), instructed by Hersi & Co, solicitors.

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Lingam,

promulgated on 11 March 2015, which allowed the Appellant's appeal under both the immigration rules and article 8 ECHR.

Background

3. The appellant is a Somalian national, born on 4 May 1987.

4. On 16 December 2013, the respondent refused the appellant's application for entry clearance as a dependent relative of the sponsor (her son) present and settled in the UK.

The Judge's Decision

5. The appellant appealed to the First Tier Tribunal. First Tier Tribunal Judge Lingam ("the Judge") allowed the appellant's appeal under both the Immigration Rules and on Article 8 ECHR grounds.

6. Grounds of appeal were lodged and on 13 May 2015, First Tier Tribunal Judge Lambert gave permission to appeal, stating *inter alia*:

> "2 Ground 1 argues that in finding relevant a medical certificate dated almost a year after the date of decision, the judge failed to have regard to Section 85A(2), 2002 Act, which remains in force in relation to this type of appeal. This is arguable. Ground 2 depends on it and is also arguable.
>
> 3 Ground 3 claims inadequate reasoning under Article 8 as to family between the appellant and sponsor given the latter's departure from Somalia in 2002. This may or may not be arguable given the content of paragraphs 31 and 32 of the decision, but is not excluded from the grant of permission."

7. In a decision promulgated on 25 September 2015, the Upper Tribunal set aside the First Tier Tribunal decision finding that a material error of law had been made, stating *inter alia*

> "A fair reading of the Judge's decision indicates that the Judge's decision was influenced by the appellant's medical conditions in December 2014. Section 85A(2) of the 2002 Act prevents the Judge from taking account of the appellant's circumstances after the date of decision. The decision should have been made on the basis of the appellant's circumstances in December 2013, not December 2014. "

The Hearing

8. Mr Ball counsel for the appellant told me that he had some difficulty because his instructing agents had not seen a copy of the Upper Tribunal decision promulgated 25 September 2015 (finding that the First-tier Tribunal's decision was tainted by material error of law & setting aside that decision). He was provided with a copy of the decision promulgated on 25 September 2015 by the Home Office presenting officer. After taking instructions from the sponsor he moved to adjourn the hearing so that the appellant and sponsor could have further time to prepare.

9. Ms Willocks-Briscoe opposed the application to adjourn on the basis that the sponsor was present, ready and able to evidence of the central issues which were matters within his knowledge.

10. I refused the application to adjourn. The case file indicates that the decision promulgated on 25 September 2015 was intimated to the appellant's solicitors. The appellant's solicitors were separately sent notice of today's hearing on 27 October 2015. The appellant's solicitors knew there would be a hearing today, but made no enquiry about the nature of today's hearing. It is surprising that they chose to instruct counsel without being able to tell counsel the purpose of today's hearing. The sponsor was present and was ready to give evidence; the sponsor wanted to proceed today rather than wait for an adjourned hearing date.

11. I heard evidence from the appellant's son, Abdi Mohamed Muse. He gave evidence with the assistance of a court interpreter. He participated fully in the hearing. I remain satisfied that there were no difficulties with linguistic interpretation or comprehension. He was taken to the terms of his witness statement, dated 7 January 2015, which he adopted as the main part of his evidence in chief before he answered a number of supplementary questions from counsel for the appellant. He was then cross examined before questions were asked in brief re-examination. I then heard parties' agents' submissions.

12. I considered the documentary evidence which had been lodged addresses the most important issues. This consists of:

(i) The Home Office PF1 bundle;

(ii) The appellant's bundle which contains the items listed on the index to the bundle, together with background materials relating to care & treatment of the elderly in Ethiopia

Findings of Fact

13. The appellant is the mother of Abdi Mohamed Muse ("the sponsor"). In 2002 the sponsor moved to Addis Ababa, Ethiopia to avoid the violence in Somalia. The appellant divorced from the sponsor's father when the appellant was only two years old. For most of the sponsor's childhood he lived alone with his mother. His mother remarried and had three children with the appellant's stepfather.

14. When the sponsor left Somalia in 2002 the appellant remained there with the appellant's stepfather and his three par- siblings. In April 2009 the sponsor came to the UK and claimed asylum. He was granted humanitarian protection on 12 June 2012.

15. In 2009 the appellant fled from Mogadishu with her husband and her three younger children. They made their way to a refugee camp where they lived until 2011. One-day that refugee camp was attacked by Al-Shabab. The appellant was not in the refugee camp at the time of the attack because she had gone to visit a local market. When she returned there was no trace of her husband and her three younger children. She has not seen them since that day. The appellant joined a small group of other Somali refugees and crossed

the border into Ethiopia. From Ethiopia the appellant contacted the sponsor; the sponsor has sent money for the appellant's maintenance and accommodation since then.

16. The appellant lives alone in a one roomed property rented from an Ethiopian landlord. In March 2013 the sponsor visited the appellant in Ethiopia. He hired a carer for his mother. That carer has been dismissed. The appellant only speaks Somali, which is not the language of Ethiopia. The sponsor telephones his mother at least three times a week.

17. In February and March 2014 the appellant visited a hospital Addis Ababa were on examination she was found to be suffering from hypertension and "*mental problem*". On 14 December 2014 the appellant was seen at a hospital in Addis Ababa and found to be suffering from PTSD, depression, rheumatoid arthritis and back and joint pains.

18. On 6 November 2013 an on-line application for leave to enter the UK to join the sponsor as a parent dependent relative was submitted to the respondent. The application form was completed online by solicitors appointed by the appellant. In answer to question 1.7 it was stated that the appellant suffers from "*dementia/blood pressure*". In answer to question 1.8 it was declared that the appellant is able to care for herself on a daily basis.

19. The sponsor lives alone in a one-bedroom rented flat. The sponsor's flat has a living room which is converted into a bedroom for the appellant. The sponsor works as a cleaner and typically earns between £1400 and £1500 a month. His income after his rental is deducted exceeds the amount that the appellant and sponsor would be entitled to if they claimed DWP benefits in the UK.

The Immigration Rules

20. On 20 November 2015 the following direction was served on parties' representatives.

> "In this case the Respondent's decision was made on 16 December 2013. The appellant's application was submitted as an adult dependent relative under appendix FM of the Immigration Rules. The respondent refused the application under paragraph EC-DR1.1. Submissions in this appeal focused principally on E-ECDR2.4.
>
> It is common ground that the sponsor has been granted humanitarian protection. Parties are directed to provide written submissions focusing on the impact and effect of paragraph 319V of the Immigration Rules on the facts and circumstances of this appeal within 14 days.
>
> If either party requires to make an application for extension of time, such application must be made in writing within 14 days of today's date."

21. Counsel for the appellant responded to that direction 25 November 2015 & candidly conceded that paragraph 319V of the rules only applies to applications made before 9 July 2012. The application in this case was made on 6 November 2013 so that I cannot consider the provisions of paragraph 319V. I am invited to take account of the fact that if this application had been made prior to 9 July 2012 it would have succeeded under paragraph 319V of the Immigration Rules. What I cannot ignore is that this application was made on 6 November 2013, 16 months after the changes to the Immigration Rules which prevent the appellant from benefiting from the terms of paragraph 319V of the Immigration Rules.

22. The respondent refused the appellant's application after considering paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules. The relevant provisions of Appendix FM are E-ECDR 2.4 and 2.5 which provide as follows:

> "2.4 The applicant must as a result of age, illness or disability require long-term personal care to perform everyday tasks.
>
> 2.5 The applicant must be unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where they are living, because
>
> (a) it is not available and there is no person in that country who could reasonably provide it; or
>
> (b) it is not affordable."

23. The respondent's decision was made on 16 December 2013 and sent to the appellant on 23 December 2013. I must look at the facts of this case as they were in December 2013. There is evidence that by December 2014 the appellant suffered from depression, rheumatoid arthritis and back and joint pain. There is evidence that 12 months after the date of decision the appellant suffered from PTSD. The only reliable evidence of the appellant's state of health in December 2013 is contained in appendix 1 to the application form, which was completed by solicitors. In answer to question 1.8 it is confirmed on the appellant's behalf that she is able to take care of herself on a daily basis, and is able to pursue the ordinary activities of daily living independently.

24. The reliable evidence indicates that the appellant cannot meet the requirements of paragraph EC-DR.1.1(d) of Appendix FM of the Immigration Rules.

25. The "outpatients medical certificate" produced by the appellant is dated 12 months after the date of decision and cannot be considered because of the operation of section 85A(2) of the 2002 Act. In any event, appendix FM-SE (paragraphs 33 to 37) sets out the evidential requirements for the applications of this nature. The "outpatients medical certificate" falls short of those requirements. The burden of proof rests with the appellant. The appellant manifestly fails to discharge the burden of proving that she fulfils the requirements of the Immigration Rules.

Article 8 ECHR.

26. In R (on the application of Esther Ebun Oludoyi & Ors) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre) IJR [2014] UKUT 00539 (IAC) it was held that 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.

27. In SS (Congo) and Others [2015] EWCA Civ 387 Lord Justice Richards said at paragraph 33 "*In our judgment, even though a test of exceptionality does not apply in every case falling within the scope of Appendix FM, it is accurate to say that the general position outside the sorts of special contexts referred to above is that compelling circumstances would need to be identified to support a claim for grant of LTR outside the new Rules in Appendix FM. In our view, that is a formulation which is not as strict as a test of exceptionality or a requirement of "very compelling reasons" (as referred to in MF (Nigeria) in the context of the Rules applicable to foreign criminals), but which gives appropriate weight to the focused consideration of public interest factors as finds expression in the Secretary of State's formulation of the new Rules in Appendix FM. It also reflects the formulation in Nagre at para. [29], which has been tested and has survived scrutiny in this court: see, e.g., Haleemudeen at [44], per Beatson LJ*".

28. Section 117 of the 2002 Act is a factor to be taken into account in determining proportionality. I appreciate that as the public interest provisions are now contained in primary legislation they override existing case law, Section 117A(2) requires me to have regard to the considerations listed in Sections 117B and 117C. I am conscious of my statutory duty to take these factors into account when coming to my conclusions. I am also aware that Section 117A(3) imposes upon me the duty of carrying out a balancing exercise. In so doing I remind myself of the guidance contained within Razgar.

29. The appellant's article 8 ECHR argument proceeds on the basis that family life exists between the appellant and her sponsoring son. It is argued that the factors which create family life within the meaning of article 8 ECHR are that the appellant fled violence in Mogadishu only to be separated from her husband and younger children by an attack on their refugee camp; that she and the sponsor re-establish contact when the appellant made her way to Ethiopia; the appellant's advancing age and increasing frailty; and the financial dependency of the appellant or her sponsoring son, who provides the money necessary to pay for accommodation and health care.

30. In Kugathas v SSHD [2003] INLR 170 the Court of Appeal said that, in order to establish family life, it is necessary to show that there is a real committed or effective support or relationship between the family members and the normal emotional ties between a mother and an adult son would not, without more, be enough. In Etti-Adegbola v SSHD [2009] EWCA Civ 1319 the Court of Appeal concentrated on the last part of that test and confirmed that the Tribunal had applied the right test in finding that a family's behavior was "*no way exceptional or beyond the norm*".

31. The case of AAO v Entry Clearance Officer [2011] EWCA Civ 840 involved an elderly Somali mother living in Kenya supported by a daughter in the UK who she had not seen for 12 years. The Court of Appeal held that family life would not normally exist between parents and adult children within the meaning of Article 8 in the absence of further elements of dependency which went beyond normal emotional ties: Although the money

sent to the Claimant raised an element of dependency, it did not take the matter very far. The provision of such money could be as much an insulation against family life as evidence of it. There was nothing to prevent the daughter continuing with the provision of money and to that extent there was no interference with family life. Of more importance was the evidence which led to the conclusion that there was no strong bond between the Claimant and her daughter. For 12 years, there had been little contact between them other than the provision of the money and monthly telephone calls. As for the Claimant's situation in Nairobi, she had accommodation, albeit in straitened circumstances, and was looked after by neighbours. Under all the circumstances there could be no complaint about the judges' conclusion that the family life between the Claimant and her daughter was too weak as to render the ECO's decision an interference with or failure to show respect for the Claimant's Article 8 rights (paras 35 and 42 – 46).

32. In Vikas and Manesh Singh [2015] EWCA Civ 630 when there was no evidence of anything beyond the normal bonds of affection between adult children and their parents, possibly apart from some financial support of the family in India, that support could not lead to a finding of family life.

33. No reliable evidence was led before the First-tier for the Upper Tier tribunal to indicate that the facts and circumstances of this case are any different from the determinative factors in each of the cases narrated above. On the facts as I find them to be, the relationship between the appellant and sponsor extends to nothing more than normal emotional ties between a mother and her adult son. For 10 years between 2002 & 2012 the was little, if any, contact between the appellant and sponsor. Since 2012 there has been regular contact. The sponsor has visited the appellant in Ethiopia.

34. The appellant fails to discharge the burden of proving that family life within the meaning of article 8 ECHR exists. On the facts and circumstances of this case, if I had found that family life exists, I would then have to find that the respondent's decision does not amount to a disproportionate interference to the right to respect for that family life because the respondent's decision does not prevent the established financial support from continuing, nor does it interrupt the frequent telephone contact between the appellant and sponsor, nor does the decision prevent the sponsor from visiting his mother again.

Decision

35. The appeal is dismissed under the Immigration Rules.

36. The Appeal is dismissed on Article 8 ECHR grounds.

Signed Date 18 December 2015

Deputy Upper Tribunal Judge Doyle