Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/07450/2017**
HU/07451/2017
HU/07452/2017
HU/07455/2017
HU/07456/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 8 August 2019	**On 5 September 2019**
Judgment given orally	

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) FI
(2) MA
(3) MEA
(4) ZA
(5) AA
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondents: Mr S Hollywood, Andrew Russell & Co Solicitors, Belfast

DECISION AND REASONS

1. I make an order for anonymity pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting disclosure of any matter that may lead to the identification of the appellants and other parties to these proceedings. Any breach may lead to contempt proceedings.

2. I am grateful to Mr Hollywood who only became aware that this appeal had been listed late yesterday; the Upper Tribunal had sent the notice of hearing to a former address despite notification of the change in an email which may not however have referred specifically to this case being of a general nature. He was content to proceed with consideration of whether the FtT had erred in law.

3. This is an appeal by the Secretary of State against the decision of Designated Judge of the First-tier Tribunal Murray who, for reasons given in her decision promulgated 8 October 2018, allowed the appeals by the respondents on Article 8 grounds against the decision of the Entry Clearance Officer who had refused the respondents' applications for family reunion as the family members of the sponsor, a citizen of Somalia, who was granted refugee status in the United Kingdom in 2012. He now has indefinite leave to remain.

4. The first respondent is the mother of the sponsor and of the other respondents who were born in 2005, 2006, 2008 and 2010 are her children and his siblings respectively. As summarised by the judge at [3] and [4] of her decision, their applications had been refused for the following reasons:

> "3. The applications were refused for a number of reasons. The respondent found that there was no supporting evidence to confirm the relationship between the appellants and their sponsor and DNA testing was suggested. In 2014 the first appellant applied to join the same sponsor but that application was refused as there was no provision within the Immigration Rules to cover their relationship, i.e. mother joining her son, so even if the appellants can show and confirm their relationship to the sponsor, there is no provision to consider the application under the pre-flight rules as none of the appellants are the partner or child of the person granted refugee status. With regard to post-flight family reunion this attracts a fee which has not been paid but even if the fee had been paid the respondent was not satisfied with the appellants' relationship to the UK sponsor or that the other sub-requirements under paragraph 319V(i) and 319V(8f) of the Immigration Rules had been satisfied.
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> 4. The respondent then considered whether the particular circumstances in the application constitute exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 of ECHR, warrant consideration by the Secretary of State of a grant of entry clearance to come to the

United Kingdom outside the requirements of the Immigration Rules. The respondent found that they do not because the relationship has not been established."

5. The judge found the sponsor to be credible, likewise the evidence of his foster father and found that the relationship between the parties as I have described above could be accepted.

6. The judge then proceeded to consider the case under Article 8, there being no argument that the respondents met the requirements of the Immigration Rules. She explained her conclusions as follows:

"41. I have to decide if there is family life between the sponsor and the appellants and the respondent has made the point that the sponsor at the date of the application was an adult but attempts were made before he was an adult. The hurdles in these applications have now been overcome but by the time they were overcome the sponsor was an adult. I do not find that this should be held against him and I find that there is family life between the appellants and the respondent [sic], shown by his continuing contact with them and the monies he sends them and also the help he gives them, for example saving money so that his brother could have medical treatment. I find that the sponsor has a stronger than normal relationship with his family than in most cases. He is also the head of the family since his father and brothers were killed.

42. The terms of the Immigration Rules cannot be satisfied as there is no provision to consider an application under the pre-flight rules and in any case the appellants are not the partner or a child of a person granted refugee status. The appellants in this case are a mother and siblings.

43. I have therefore considered this claim under Article 8 outside the Rules and have carried out a proportionality assessment. I have considered the case of Razgar [2004] UKHL 27. I find that there is family life and I accept the relationship. The sponsor stayed with the appellants before he fled to the UK. This was a family unit.

44. Section 117 of the 2002 Act deals with public interest. There is public interest in the maintenance of effective immigration control and the appellants do not speak English. Although they will not be financially independent their sponsor will be providing for them as will his foster father Mr Noble. This will be for the foreseeable future and I found their evidence to be credible. There will be no need for the appellants to claim benefits.

45. I also have to consider the safeguarding of the children. Out of the five appellants four are children and although they no longer live in a camp in Addis Ababa, and they have a house of their own, I find that it must be in their best interests to live as a family unit in safety and as the family unit cannot be complete without the sponsor, I find that it is in their best interests for them to

> come to the United Kingdom to join the sponsor. It is also in their best interests to be with their mother, the first appellant.
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> 46. I therefore find that when public interest is balanced against the human rights of the sponsor and the five appellants the five appellants and the sponsor must succeed and it would be disproportionate when considering the right to respect for family life to dismiss this appeal.
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> 47. This is a claim which succeeds under Article 8 outside the Rules."

7. The grounds of challenge rely on four grounds. As to the first, the respondents had not made a valid application under paragraph 319V of the Immigration Rules (ground one). This had been explicitly addressed in the refusal letter and the judge had not addressed it in her determination.

8. As to the second ground it is contended that an assessment of the case within the Rules was critical. The Entry Clearance Officer found that the evidence had failed to demonstrate that the respondents satisfied paragraph 352A or 352D and did not establish that they were living alone or in the most compelling circumstances under paragraph 317V(i)(d) and (f). The judge had failed to make any assessment under the latter provision to determine whether or not the application was valid and, if so, whether the respondents met any of the provisions.

9. The third ground argues that having identified the best interests of the minor respondents and that it would be disproportionate for the family to remain separated the judge had undertaken no further consideration of the evidence or submissions made by the respondent. The judge had elevated the best interests consideration to be paramount and the only consideration using those best interests to be the sole determinative factor in a proportionality assessment. It is contended that the judge had failed to explain her reasons with reference to *MK (duty to give reasons) Pakistan* [2013] UKUT 00641.

10. The fourth ground argues the lack of reasoning for the finding that there were stronger than normal ties and a failure to address the appellant's position that the family could return to live in Mogadishu.

11. In granting permission to appeal the Deputy Upper Tribunal Judge Storey observed:

> "It is arguable that the judge failed to attach due weight to the fact that the appellants did not meet the requirements of the Rules (see para 42); elevated the best interests of the child appellants (who now had a house of their own) to a paramount consideration; and failed to take into account relevant public interest consideration, in particular lack of financial independence and lack of English."

He made no comment on the fourth ground.

12. Before hearing submissions from the representatives, matters were clarified with reference to the Immigration Rules. It was accepted by both parties that paragraph 317 of the Immigration Rules identified by the Secretary of State in the grounds of challenge did not apply to this case. The applicable rule was identified by the judge herself in the decision in the paragraph I have cited above being paragraph 319V.

13. By way of submissions in respect of ground one, Mr Diwnycz accepted that the application and the covering letter from the respondents' representatives made no reference to the applicable rule and that, in substance, an Article 8 application was pending before the Entry Clearance Officer. This was acknowledged by the Entry Clearance Officer with reference to an exchange of emails between the African Region International Operations and Visa and the Home Office dated 12 May 2014 and Mr Hollywood. The email of 12 May 2014 from the Entry Clearance Manager confirmed as follows:

> "I have told colleagues in Addis and they will be accepted as gratis and they will not be refused or turned away. They can take this email as proof."

14. Mr Diwnycz acknowledged that the judge had referred to the absence of an application having been made under paragraph 319V in paragraph 3 of her decision. When asked what the judge was required to do in relation to the first ground of challenge, he candidly acknowledged that he could not make out that ground. Accordingly, Mr Hollywood had no submissions to make on this ground.

15. I turn to ground two. It was accepted by Mr Diwnycz that this erroneously referred to paragraph 317 which it had been accepted had no purchase in this appeal. He indicated that he did not wish to amend the grounds and accepted as a consequence that this ground fell away. Inevitably Mr Hollywood had no submissions to make on this ground.

16. I turn now to ground three. The purport of the challenge and submissions related to [41] of the judge's decision, in particular, the reference to the history of earlier applications. Mr Diwnycz's initial argument was that the judge was not entitled in the Article 8 exercise to reset the clock, but on further reflection he accepted this had not in fact occurred here in the light of the judge's reference to time having passed and the fact of the sponsor being an adult, now aged 21, at the time of the decision. On reflection, he conceded that this disposed of ground three. He conceded that in the event that I found no error in the decision of the judge there would be "no complaint in the light of there being no merit in the grounds".

17. In relation to ground three, Mr Hollywood simply reminded me that the judge had accepted the credibility of the sponsor and that the judge had given proper consideration to Part 5A in particular section 117B of the Nationality, Immigration and Asylum Act 2002. He accepted that whilst

another judge might have come to another decision but, based on the way in which the challenge had been put and developed before me today, he contended that the judge had not erred.

18. This is an adversarial jurisdiction. It is an appeal in which I am to consider whether the judge erred on the basis of the challenges on which permission had been granted taking into account the submissions that have been made on behalf of the Secretary of State. It has been accepted that none of those challenges in grounds one to three can be made out.

19. I now turn to ground four for which I paused giving my judgment as I had not heard submissions. This ground argues the failure by the judge to deal with the submission that the family could move to Somalia in the light of the improved conditions there. The ground seeks to distinguish *AT & Others (Article 8 ECHR - Child Refugee - Family Reunification) Eritrea* [2016] UKUT 00227 on the basis that the sponsor was thriving in the United Kingdom and there was no evidence he would be in a position of danger given the change in country conditions in Somalia. The judge acknowledged this aspect in [26] of her decision as follows:

> "26. The Presenting Officer submitted that the first appellant states that things are very difficult in Ethiopia and they may require return to Somalia but at paragraph 26 of the sponsor's statement he states their only hope of living safely together is to live here in the United Kingdom. He cannot face being apart from them; "I would have to decide being between being with my family again and safety in the UK. Returning to risks in Somalia may be my only hope of seeing them". He submitted that there are no statements from the appellants to say that they are unable to go to Somalia. He submitted that he accepts that the sponsor was credible but based on the evidence there is nothing to show that the family is actually going to have to go back to Somalia. I was asked to consider the current humanitarian [situation] in Somalia and he submitted that the COI report indicates that as the appellants are from Mogadishu they could return there in safety. At present there is no conflict there."

20. At [34] of her decision, the judge explained her understanding of the decision in *AT & Another* and from which she cites a passage from the decision of the President: "… In particular in my view the orientation of these principles and policies adds to the favour rather than undermine what the appellants seek to achieve by these appeals. They qualify for substantiate weight in the proportionality balancing exercise."

21. In his submissions Mr Diwnycz acknowledged the lateness of the point having been raised by the Presenting Officer at the hearing and accepted that it had not been raised by the Entry Clearance Officer in the refusal decision which sets out the case the respondents were required to meet. Candidly he explained that he was unsure that the Presenting Officer had the power to suggest such relocation, but might make submissions on

such an issue and it was for the judge to deal with it. He considered that the judge had done so at [34] of her decision. Whilst he thought there ought to have been more but Mr Diwnycz did not suggest that the sponsor should surrender his refugee status and accepted that no cessation had been applied nor would it be so.

22. By way of response Mr Hollywood argued that he had been driven by the grant of permission and submitted that Dr Storey had not granted on ground four. Beyond that he further submitted that the judge had made a positive credibility finding in relation to the account that the sponsor had given of the circumstances that had given rise to his asylum claim. In the absence of cessation, relocation of this family unit to Mogadishu was not viable. Even if permission had been granted on ground four, he contended that there was no error of law.

23. It is clear to me that the point was raised as faithfully recorded by the judge at the hearing. In order for the submission to be given effect, the burden was on the Secretary of State to apply cessation to the sponsor's refugee status. Given Mr Diwnycz's acceptance that this had not been done and that it would not be done, whilst I have concerns about the adequacy of the judge's reasoning on this point, in my judgment it did not lead to a material error.

24. This appeal was concerned with family reunification and it is one on which it has been accepted that the judge gave sufficient reasons for her conclusion that that would be best achieved in the United Kingdom. It has been accepted that grounds one to three have not been made out. I am satisfied that on the basis of the argument before me that there was no material error in relation to ground four. Accordingly, this appeal is dismissed.

Signed Date 20 August 2019

UTJ Dawson

Upper Tribunal Judge Dawson