



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: HU/20723/2016  
HU/20724/2016

THE IMMIGRATION ACTS

Heard at: Bradford  
On: 11<sup>th</sup> April 2019

Decision and Reasons Promulgated  
On: 18<sup>th</sup> April 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Entry Clearance Officer, Pretoria

Appellant

and

M H A H

M A A A

(anonymity direction made)

Respondents

For the Appellant: Mr M. Diwnycz, Senior Home Office Presenting Officer  
For the Respondents: Ms S. Khan, Counsel instructed by Legal Justice Solicitors

DECISION and REASONS

1. The Respondents are both nationals of Somalia, currently residing in Ethiopia. They seek entry clearance as the dependent family members of a refugee living in the United Kingdom, the Sponsor Ms [HA]. HAH is Ms [A]'s half-sister, born on the 1<sup>st</sup> October 2006; AAA was born on the 25<sup>th</sup> May 2009 and it is said that she is the daughter of Ms [A]'s cousin. She has cared for both children since they were infants, and treats them as her own daughters. Both children were refused entry clearance

on the 3<sup>rd</sup> August 2016, those decisions being maintained upon 'Entry Clearance Manager' review on the 9<sup>th</sup> December 2016. The children exercised their right of appeal on human rights grounds.

2. By a determination dated the 2<sup>nd</sup> September 2017 the First-tier Tribunal (Judge MR Oliver) allowed the linked appeals of the two girls. The Entry Clearance Officer (ECO) in Pretoria subsequently applied for permission to appeal, such permission being granted by First-tier Tribunal Judge Grant-Hutchinson on the 23<sup>rd</sup> February 2018.
3. On the 1<sup>st</sup> November 2018 the matter came before me. On that occasion Ms [A] appeared without representation; the Secretary of State was represented by Senior Presenting Officer Mr A. McVeety. In my written decision dated the 2<sup>nd</sup> November 2018 I found that the decision of Judge MR Oliver must be set aside for a failure to have regard to the public interest in the proportionality balancing exercise. The decision had carefully set out the very compelling circumstances faced by this family, but in its final reckoning had not balanced those matters against, for instance, the matters set out by parliament in s117B Nationality, Immigration and Asylum Act 2002. A number of findings of fact made by the Judge were however preserved (see below) and the matter adjourned to be relisted before me.
4. The primary reason for the adjournment was that Ms [A] did not have any representation; she was not in a position to make submissions on the law, nor to produce bundles etc. She informed me that she was without funds and had found it difficult to secure legal representation. Ms Shazia Khan of Counsel, who appears for the Respondents today, was present at court on another matter. She very helpfully assisted Ms [A] by making some telephone calls until she found a solicitor who was prepared to take the matter on: Legal Justice Solicitors. They then faced obstacles and delay in securing legal aid. The resumed hearing was adjourned on at least two occasions as a result. Before me Ms Khan explained that the application for legal aid was outstanding but in view of the delay Ms [A] wished to proceed with the hearing. Ms Khan then represented the family, with her customary skill and professionalism, on a pro-bono basis.

### **Factual Matrix**

5. The core facts are now uncontested. Although the ECO had originally doubted the claimed relationships, those doubts were resolved by the production of DNA evidence (at least in respect of HAH), and by Judge Oliver's findings on the evidence of Ms [A]. I should add that having heard Ms [A]'s live evidence myself I was left in no doubt at all that the relationships are as claimed; Mr Diwnycz was similarly satisfied. I therefore find that HAH is the maternal half-sister of Ms [A]. She came into Ms [A]'s care when she was very young, after her father went missing and their mother was killed. HAH is today 12 years old. AAA is the daughter of a cousin of Ms [A]. Her parents were killed in a bombing raid shortly after her birth. Ms [A]

looked after her from when she was about three months old. AAA is approaching her 10<sup>th</sup> birthday.

6. The account of how the various members of this family came to be in their present situations was narrated by Ms [A] when she first arrived in this country and claimed asylum in 2015. In broad summary she had taken the girls and fled fighting around their native Afgoye, Somalia. In the spring of 2014 they ended up, with other family members, in Yemen. Ms [A] met a man who helped them. They stayed with him and Ms [A] married him: this was Mr [B]. He provided for Ms [A] and the children. After they had lived there for about one year the war broke out. Fighting started everywhere. One day Ms [A] went out to buy food for the family; Mr [B] had been unable to go because men were being targeted. When she returned the whole family had disappeared. She spent a day looking for them but everyone was leaving. People were getting on boats to get out and they told her she should do this too. Ms [A] spent \$150 on a ticket to Djibouti. The sailing took 2 days. When she arrived there she contacted her brother-in-law who lives in South Africa. He arranged for her to stay with someone he knew. She stayed there two weeks before her brother-in-law arranged for her to be flown to the United Kingdom with the assistance of an agent. It was only after she had arrived here that she managed, again with the assistance of this brother-in-law, to re-establish contact with her husband and the children. They had managed to get on a boat to Ethiopia.
7. As to the question of the girls' current circumstances, there are also some agreed facts. Judge Oliver accepted, and his findings are undisturbed, that AAA is totally blind. It seems that this has been the case since she was born. He accepted that the children are, and have always been, entirely supported by Ms [A], who continues to send remittances every month to pay for their maintenance. This was evidenced before the First-tier Tribunal by Dahabshiil receipts but the accepted evidence was that these money transfers were supplemented by money being carried by Somali people visiting Ethiopia and passing money on Ms [A]'s behalf. Ms [A] maintains regular contact with the children by telephone. There can be difficulties with the network coverage but she manages to speak to them once or twice per week. The children are currently living in Ethiopia, under the care of an unrelated Somali woman named Fadumo.
8. At the hearing before me Ms [A] gave oral evidence about the children's lives. She was assisted by a Somali interpreter and I am satisfied that she and the interpreter understood each other and, as far as I can be, that all of her evidence was properly translated to the court. Ms [A] began by explaining the background:

"I have looked after [HAH] since the day that she was born. The only time that we have been apart is since I have been here. [HAH]'s father has been missing all that time. I have no information about him. We share a mother.

I arrived in the United Kingdom on the 22<sup>nd</sup> May 2015. At that time the girls were living with my then husband, Mr [AMB]. They were in Addis at the time and then they moved out a little bit to the suburbs. Before then we had all been in Yemen together. We had been in a refugee camp there.

My marriage broke down in May 2017. The girls were taken to live with a Somali lady called Fadumo. This was in the same area in the suburbs of Addis; there was a bit of trouble there so they moved to a new place, which is where they are now. It's near the border between Ethiopia and Somalia. It's a small town"

9. Ms Khan then asked Ms [A] if she was able to describe the house that the children live in. There followed some discussion between Ms [A] and the interpreter, who was unsure about the terminology to describe the way that the house was constructed. Ms [A] then indicated that she had a picture of the house and asked if we would like to see it. When I indicated that we would, Ms [A] produced her mobile phone. I think it important to record that at this stage Ms [A]'s entire demeanour changed. She had, up to this moment, been very quiet, flat and emotionless. Just before she found the relevant item on her phone she said this:

"it's a video. I am unable to watch it because it upsets me so much. I saw it when it was first sent to me but I haven't watched it since - I can't bear to see the way that the children are living. The woman they are with is not treating them properly. This was sent to me by the man whose phone they use to speak to me. Fadumo asked him to record some audio of the girls to send to me but he secretly took this film. She didn't know he was filming so she didn't realise I could see everything. He sent to me because he wanted me to know how the children are living".

Ms [A] then broke down and cried uncontrollably. Her mobile telephone was passed to the bench where a short video was viewed by myself, Ms Khan and Mr Diwnycz.

10. The video shows a small makeshift structure, approximately 10 feet wide. It appeared to be constructed from mud/ straw with some breezeblocks. It is topped by various bits of what appears to be ripped tarpaulins and old grains sacks that have been roped together. There is no flooring. The girls are sitting on the bare ground outside of the hut with a woman whom Ms [A] identifies as Fadumo. At the beginning of the film both girls are speaking to the camera. Fadumo appears to be gesturing at them to get them to co-operate: this is consistent with Ms [A]'s explanation that she was unaware that she is being filmed. At one point Fadumo appears to scold them and HAH starts to cry. Neither child looks well cared for. They both looked thin, and are dressed in worn and dirty clothes. AAA has her head shaved. A bowl of what appears to be dirty water is lying on the ground in front of them.
11. Ms [A] reiterated that she finds it very distressing to see the conditions that the children are in. She became very concerned when she saw that film. She continued:
- "When my husband was looking after the children this Fadumo was living nearby. When he left me he left the children with Fadumo. Until I saw that film I had no idea how bad it was. There is no water there. No electricity. No sanitation. I believe that she lives there with her husband and their own four children as well. There is no school for the children. Fadumo is always telling

me she is fed up looking after them. I am frightened about the way she treats them. She has also told me that she wants to perform FGM on the children. She says that it is a stigma for her to have the girls in her home 'uncut'. In that area Somalis look down on girls who are not cut. I have forbidden Fadumo to cut them but I am very afraid about this. I send her \$100 per month. Despite this money she won't send them to school - she says there is no school for [AAA] because she is blind. She won't send [HAH] because she needs her there because it is she who looks after AAA. She is probably using my money for her own children as well - they are living a really hard life there".

Ms [A] remained distressed throughout the remainder of her evidence.

12. In respect of her own circumstances Ms [A] explained that she has remarried in the United Kingdom. Her husband is a Portuguese national of Somali origin. They have two children of their own now. [A] is 1 year 10 months and [M] is 5 months old (the babies were not present in court - they were being cared for by Ms [A]'s husband). She explained that her husband has been working but he is unable to at present because he has injured his back. He was an 'Uber Eats' driver, and he also worked as a security guard. Ms [A] is not working because she looks after the children. The family are therefore currently living on benefits. They live in a two-bedroom property with a lounge. Ms [A] said that if the girls were to come here she would look after them in exactly the same way as she looks after her own children. Neither she or her husband have a criminal record.
13. Mr Diwnycz indicated that none of that evidence was challenged. It was further accepted, having regard to the photos on file, that the children shown in the video are the Respondents.

### **The Legal Framework**

14. Ms Khan concedes that these are facts that fall outwith the framework of the immigration rules. The rule most pertinent to these applicants would be paragraph 352D which is concerned with the children of refugees:

'352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who currently has refugee status are that the applicant:

  - (i) is the child of a parent who currently has refugee status granted under the Immigration Rules in the United Kingdom; and
  - (ii) is under the age of 18; and
  - (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

- (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum; and
- (v) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and
- (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity.'

Although it is accepted that the children meet all of the requirements at (ii) to (v) they cannot meet that at (i) since they are not the children of Ms [A].

15. The parties agreed that whilst in the past these children would have fallen squarely within the 'Somali Family Reunion Policy' published by the Secretary of State on a concessionary basis, that policy is no longer in force today. All other paragraphs of the rules relating to the entry of children - for instance the applicable parts of Appendix FM, paragraph 297 or the provisions relating to adopted children - cannot avail them because Ms [A] is not settled. She is a refugee with limited leave to remain until 2020.
16. The case therefore was put on Article 8 grounds only. It is for the Respondents to establish, on the balance of probabilities, that there is here a family life, and that by his refusal the ECO has shown a 'lack of respect' for it. It is then for the ECO to establish that his decision is nevertheless a proportionate response to the need to maintain immigration control, having particular regard to the public interest as expressed at s117B Nationality, Immigration and Asylum Act 2002 (as amended). Whilst s.55 of the Borders Citizenship and Immigration Act 2009 has no direct application to children who are outside of the United Kingdom the ECO accepts, in accordance with published policy, that applications by children should be assessed in the spirit of the legislation: T (s.55 BCIA 2009 - entry clearance) Jamaica [2011] UKUT 00483 (IAC).

### **Discussion and Findings**

17. Mr Diwnycz accepted that there is between the sponsor Ms [A] and these two children a meaningful family life within the scope of Article 8. Ms [A] looked after both girls from early infancy and I accept that the bond between them is essentially maternal. Despite their separation that bond has persisted, by the means of regular telephone calls and Ms [A]'s continuing support for them. This was a family unit that was established prior to Ms [A]'s flight and arrival in the United Kingdom. The case is therefore concerned with the reunification of a refugee family and I am satisfied that the decision to refuse entry clearance surmounts the relatively modest threshold required to engage Article 8 obligations: it shows a 'lack of respect' for, or interference with, the family life that the children share with Ms [A].

18. The decision is one that was, as a matter of law, open to the ECO take. The question before me is whether it was a proportionate response.
19. The weight of the public interest in maintaining a refusal of entry clearance in this case is substantial. The children are unable to qualify for leave under any provision of the rules because their sponsor is not 'settled' and because they are not her children, by either biology or the operation of law. There is a strong public interest in the maintenance of immigration control and the failure to meet the rules is a matter that must weigh against the children.
20. I have considered why the rules are framed in the way that they are. As Ms Khan points out, there is no provision under the Rules which would apply to these children, but it is entirely possible that there is a reason for that. It is easy to understand why the Secretary of State would not wish to encourage applications by children seeking to join adults in this country who are not their biological parents. Trafficking, abuse and even the well-intentioned but misplaced altruism seen in some 'foreign adoption' cases are all real risks. I have borne that in mind. Having had regard to the accepted nature of the relationship between sponsor and the applicants, and the very genuine and heartfelt response of Ms [A] to their children's plight I am quite satisfied that she sponsors these applications for no reason other than her desire to be reunited with the children and to return to looking after them as a mother.
21. Neither child can speak English. I recognise that where migrants seek to settle in this country it is in the public interest that they speak English, since this better aids their integration. I find however that in the case of these applicants that weight against them is slightly diminished by the fact that they are children. I accept Ms Khan's submission that for that reason they can be expected to quickly learn, and I note that children seeking entry clearance under the rules are not routinely expected to be able to speak English in the way that adults are.
22. The children, and the family that they seek to join, are not in any way financially independent. This is a matter that attracts substantial weight in the balancing exercise. Although I accept that Ms [A]'s husband was until recently working and supporting the family, at present they are all dependent upon state funds. Whether or not he manages to return to work, the reality is that the children will place a significant additional burden on the taxpayer. Both will need to attend school, access the health-service and in the case of AAA, additional support because of her disability. Ms [A], her two babies and husband currently live in a two bedroomed property. I am satisfied that this will be adequate accommodation even if the two girls come to live here. It will be full, but not as a matter of law 'overcrowded'<sup>1</sup>.
23. These are all matters that weigh heavily against the children in the balancing exercise.
24. Against that Ms Khan asked me to weigh in the balance the following matters.

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<sup>1</sup>[https://england.shelter.org.uk/housing\\_advice/repairs/check\\_if\\_your\\_home\\_is\\_overcrowded\\_by\\_law](https://england.shelter.org.uk/housing_advice/repairs/check_if_your_home_is_overcrowded_by_law)

25. First, this case concerns the pre-existing family of a refugee. Ms [A] named these children as her dependents as long ago as 2015 and has maintained her support for them ever since. Although the United Kingdom is under no formal legal obligation to unify families, it has long recognised that in the spirit of the Refugee Convention efforts should be made to ensure that families can be together, particularly where children are involved<sup>2</sup>. This is particularly so where the parties involved have proven their vulnerabilities. In Tanda-Muzinga v. France Case No. 2260/10 (10 July 2014) the ECtHR recognised, in its consideration of a case involving Article 8, the interplay between obligations arising under the Refugee Convention and the ECHR:

“The Court recalls that family unity is an essential right of refugees and that family reunification is a fundamental element allowing persons who have fled persecution to resume a normal life. It recalls also that it has also recognized that obtaining such international protection constitutes a proof of the vulnerability of the persons concerned. It notes in this respect that the necessity for refugees to benefit from a family reunification procedure that is more favourable than that available to other foreigners is a matter of international and European consensus, as indicated in the mandate and activities of UNHCR and the norms set out in Directive 2003/86 of the EU. In this context, the Court considers that it was essential for the national authorities to take account of the vulnerability of the applicant and his particularly difficult personal experience, for them to pay great attention to the pertinent arguments he raised in the matter, for them to provide reasons for not implementing his family reunification, and for them to rule on the visa request promptly.”

26. Second, that the best interests of the children are overwhelmingly to be granted entry clearance. Practitioners will very often assume that the best interests of their child clients would best be served by being allowed to enter or remain in the United Kingdom. These are assumptions that are often without any evidential foundation, instead underpinned by the frankly racist hypothesis that the United Kingdom is automatically better than anywhere else. Ms Khan’s submissions were not based on any such assumptions.
27. It is accepted that these children look to Ms [A] as a mother and that she in turn considers them to be her daughters. Whilst their separation over the past few years has inevitably weakened that bond to some extent, it was evident from Ms [A]’s emotional response to the video, and by the children’s pleading entreaties to camera, that this relationship subsists. It is generally in a child’s best interests to be cared for by her ‘parent’, be that biological or otherwise. Conversely it is generally not in a child’s best interests to be ‘cared for’ by someone who has no interest in their future: on the evidence it is hard to disagree with Ms [A]’s assessment that Fadumo is motivated by nothing more than the \$100 she receives each month from the United Kingdom. The children that I, Ms Khan and Mr Diwnycz saw on camera looked malnourished, dirty and unkempt. They did not look happy. They are not being sent to school. Whilst Fadumo is no doubt right to say that there is no such provision for a

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<sup>2</sup> At the date of writing the Refugee Family Reunion Bill, which would significantly widen the class of applicants who can join refugee family members here, is before parliament.



blind child on the Somali-Ethiopian border, the only reason that HAH is being kept from education is because she is being used as a carer for AAA (and possibly Fadumo's other children). It is strongly contrary to the children's best interests to be living in such extreme deprivation, and to have no prospect of gaining an education.

28. Another very worrying aspect of the evidence, and one that caused visible distress to Ms [A], is the prospect that Fadumo will have the girls cut. I have no reason to doubt that Fadumo considers it a stain on her family's reputation to have uncircumcised girls living under her roof. That evidence must be read in light of the available country background material which indicates that girls who are not cut are viewed as 'unclean' and face stigma as a result: the current CPIN quotes statistics that 97% of Somali females over the age of 15 are subject to FGM<sup>3</sup>. Whilst the girls may have been immune from this social pressure whilst they were young, HAH in particular is reaching an age where it will be hard to resist. Ms [A] is understandably afraid that she will soon lose this argument, and there is nothing to prevent Fadumo going ahead without her consent. It would be strongly contrary to the girls' best interests if they were to be subjected to this procedure.
29. A further matter raised by Ms Khan in submissions is the uncertain future that the girls face in Ethiopia. As far as Ms [A] is aware both they and their host family are without formal legal status there. I accept that it would be in their best interests to have their status issues resolved, wherever they are.
30. I have weighed all of these matters in the balance. I take into account that there are factors which weigh heavily against a grant of entry clearance, the financial dependency of this family upon the state being foremost amongst them. Although I accept Ms Khan may be correct when she surmises that the care these children require will by and large be provided within the family unit, the reality is that children, and particularly children with disabilities, cost money. Against those matters are these. This is a law-abiding family who but for the back injury suffered by Ms [A]'s husband would be financially independent. Ms [A] is a recognised refugee whose separation from these children is causing her understandable distress. The compassionate factors are overwhelming. These are children who have already had an intensely difficult life. Having lost their parents they were forced to flee their country of nationality, only to be driven out of their place of sanctuary as war erupted there as well. Separated from their primary carer they are now living in what appears to be conditions of the most extreme poverty and deprivation. There is a significant risk that one or both of them could be subjected to FGM in the immediate future if they remain living with their carer in Ethiopia. The cumulative effect of these matters is such that I am compelled to find the very substantial public interest to be outweighed. I cannot accept that it would be proportionate or necessary to continue to refuse to grant these children entry clearance in order to join the woman who is, to all intents and purposes, their mother.

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<sup>3</sup> Country Policy and Information Note Somalia: Women fearing gender based violence (Version 4.0) April 2018 at 5.1.2

### **Anonymity Order**

31. This case concerns two minors. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Respondents are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies to, amongst others, both the Appellant and the Respondents. Failure to comply with this direction could lead to contempt of court proceedings”

### **Decisions**

32. The decision of the First-tier Tribunal contains a material error of law and it is set aside to the extent identified above. In remaking the decision of the First-tier Tribunal I nevertheless reach the same conclusion: the appeals must be allowed on human rights grounds. In view of the matters set out above it would be highly desirable if entry clearance could be granted as soon as practicable.
33. There is an order for anonymity.

Upper Tribunal Judge Bruce  
15<sup>th</sup> April 2019

### **Fee Award**

Both appellants before the First-tier Tribunal (the Respondents in this Tribunal) paid a fee of £140 for their oral hearing. They won their appeal in the First-tier Tribunal and before this Tribunal on facts that were available to the decision maker. I therefore make a full fee award in respect of both appellants.