IAC-FH-CK-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Numbers: OA/17804/2013
OA/17808/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 16th October 2014**

**Determination Promulgated**
**On 6th November 2014**

**Before**

**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**N W**
**A N**
**(ANONYMITY DIRECTION MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER - NAIROBI**

Respondent

**Representation:**

For the Appellants: Mrs L Brakaj, Solicitor from Iris Law Firm Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellants are citizens of Uganda born on 8th February 2000. They applied for entry clearance to the United Kingdom in order to join their maternal aunt, who had been granted refugee status, but their applications were refused by the Respondent on 30th July 2013.

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2. This appeal is subject to an anonymity direction that no report or other publication of these proceedings or any part or parts of them shall name or directly or indirectly identify the Appellants. Reference to the Appellants may be by use of their initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to contempt of court. This direction shall continue in force until the Upper Tribunal (IAC) or an appropriate court lifts or varies this direction.

3. The Appellants appeal against the decision of the First-tier Tribunal (Judge Fisher) who dismissed their appeals against the Respondent's decision taken on 30th July 2013 to refuse their applications for entry clearance under paragraph 352D of the Immigration Rules (HC 395) as amended.

4. The Appellants are citizens of Uganda born on 8th February 2000 and are therefore minors. They made applications to join their maternal aunt under the family reunion provisions under paragraph 352D. The Sponsor, J N, has leave to remain as a refugee. That status was granted on 21st September 2013. The application forms submitted by both Appellants set out their history in Uganda by reference to their upbringing and care having been taken by the Sponsor, J N who whilst she was not their biological mother had cared for them since the death of their mother during childbirth.

5. The Respondent refused their applications in notices of immigration decision dated 30th July 2013. The Entry Clearance Officer considered those applications under paragraphs 352D in conjunction with 309A. The reasons given by the Entry Clearance Officer made reference to the fact that a legal adoption had not taken place and therefore considered the circumstances as to whether a de facto adoption had taken place. By applying paragraph 309A(a) the Entry Clearance Officer considered that a de facto adoption had not taken place as the Sponsor and the Appellants had not been living abroad for at least eighteen months and the Sponsor had not been caring for them for at least twelve months. The decision recorded that the Entry Clearance Officer was not satisfied that either Appellant could be described as a child of a parent who had been granted refugee status in the United Kingdom (see paragraph 352D(i)). In the body of the refusal there was reference to the fact that the Sponsor was also their aunt and therefore they could apply to join her under paragraph 319X of the Immigration Rules but as a fee had not been paid the application was only assessed under the family reunion provisions. The decision also gave consideration to Article 8 but it was stated that whilst there may be a "perceived interference", the interference was justified for the purpose of maintaining an effective immigration control and was proportionate, thus the applications were also refused under Article 8.

6. The Appellants exercised their right to appeal those decisions and the appeals came before the First-tier Tribunal (Judge Fisher) on 14th April

2014. In a determination promulgated on 25th April 2014 he dismissed their appeals.

7. It is plain from reading the determination and it is not in dispute that the Appellants could not succeed under the family reunion provisions of paragraph 352D of the Immigration Rules. As the judge noted at [9] the applicant must be the child of a parent granted refugee status but that whilst the definition of a parent at paragraph 6 of the Rules included an adoptive parent (where the child was adopted in accordance with the decision taken by a competent administrative authority or court in a country whose adoption orders are recognised by the UK) or where the child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of the Rules. In this case, the Appellants could not satisfy 352D or 309A. The judge therefore considered the Grounds of Appeal advanced on behalf of the Appellant which was based on Article 8 grounds by reference to what were described as the "compassionate circumstances" of the Appellants and the factual circumstances that applied. The judge observed at [10] that it was not suggested that the Appellants could succeed under the provisions of Appendix FM of the Immigration Rules and thus made a specific finding that they could not do so. He went on to apply **Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)** and reached the conclusion at [11] that the nature of the relationship between the Appellants and their Sponsor would amount to arguably good grounds for considering whether there were compelling circumstances not sufficiently recognised under the Rules. Neither party in the appeal before me suggests that the judge erred in that respect.

8. In making an assessment of Article 8, the judge dealt with the issue of whether there was family life between the Appellants, their Sponsor and her biological children. This is a case where the Sponsor had three biological children and had raised the two Appellants since her sister's death as her own children. The Sponsor had entered the United Kingdom in March 2012 and was granted asylum and then made an application for family reunion in July 2013. The applications included both her biological children and the present Appellants. The application for family reunion relating to the biological children was successful and they joined her on 1st November 2013 but the Appellants' applications were refused. The judge at [12] considered the jurisprudence concerning family life and at [13] observed that whilst there had been no form of adoption in relation to the Appellants, it was to the Sponsor's credit, that despite being named on the Appellants' birth certificates as their mother, she admitted that this was not the case. It was accepted by the Presenting Officer that the children had been mentioned in her asylum claim and the judge reached the conclusion that he accepted that the Appellants were raised by the Sponsor until she left Uganda and she still remits funds for them. He therefore found that there was "some family life between the Appellants, their Sponsor and her biological children." He went on to find that the rest of the questions of the established test in **Razgar** were met which led him to the issue of proportionality. At [14] he reached the conclusion that the

Appellants were not at risk in Uganda; he did not find the Appellants were in a "bad situation". There was no evidence that they had been threatened since the Sponsor left and no medical evidence as to any illness suffered. At [15] the judge observed that it would be open to the Appellants to make an application under paragraph 319X but reached the conclusion that he was not satisfied on the evidence that there were "serious and compelling family or other considerations that would make their exclusion undesirable". He further noted that under both paragraph 319X and Article 8, that the Sponsor was wholly reliant on state benefits and that the Appellants could not succeed under 319X because it was required that they should be maintained by a relative in the UK without recourse to public funds.

9. At [16] the judge considered the best interests of the Appellants although it appears that the representative did not address that issue. He began from the starting point that it is in the best interests of the children to be with both their parents but found that:

> "it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. In the absence of sufficient evidence to show that the Appellants are genuinely at risk in Uganda, and given the lack of evidence of the first-named Appellant's health, I conclude that their best interests are served by growing up in the society to which they belong."

The judge also stated that the weight he attached to the inability of the Sponsor to maintain the Appellants without recourse to public funds outweighed any family life considerations. Thus he dismissed the appeals.

10. The Appellants sought permission to appeal that decision and permission was granted by a Judge of the First-tier Tribunal on 30th July 2014. Thus the appeal came before the Upper Tribunal. Mrs Brakaj appeared on behalf of the Appellants. She relied upon the grounds as drafted. She referred the Tribunal to the judge's findings at paragraphs 15 and 16 of the determination which purported to deal with the "compelling circumstances" relevant to the Article 8 assessment. In particular she referred me to the documents in the Appellants' bundle at pages 14, 15 and 198 which the judge had made reference to at [14]. She highlighted the particular contents of those letters in the context of the judge's finding at [14] that the letter stated that she is "good here" although she does speak of "certain hardships" and that page 198 of the bundle states "that they are doing fine." She submitted that that was the only evidence the judge had referred to in reaching the conclusion that the evidence was inconsistent with the Sponsor's claim. However, she submitted, the evidence in the letters referred to "compelling circumstances" and whilst he had stated that the evidence was inconsistent with the Sponsor's claim he did not make any findings that were consistent with the letters. He did not say the letters were unreliable and whilst he referred to "certain hardships" that appeared to be inconsistent. She further submitted that there was background evidence in the SEF asylum claim as to what had happened to the family and therefore the background factors that had led

to the family living together were relevant factors in the Article 8 assessment but paragraph 14 of the determination did not indicate that those factors were taken into account when considering the "compelling circumstances".

11. By reference to paragraph [16] of the determination, she referred the Tribunal to the judge's reference to risk in Uganda but that failed to bear in mind the circumstances in which they were living and why the Sponsor was forced to leave which was of a compelling nature. She submitted that looking at the spirit and intention of family reunion, those circumstances should have been a consideration. Even if the Appellants could not meet the Immigration Rules of family reunion the spirit of those provisions applied in the Article 8 assessment. She submitted also that there was undue weight placed on the public interest factors at [16]. She further submitted that at [16] the starting point was that the children were dependent children who had formed part of the household but in looking at the other factors identified by the judge such as education and cultural factors, the judge did not consider that by reference to the background. In any event, the letter referred to them no longer being in education.

12. She also made reference to the decision of **<u>AS</u> (Somalia)** as referred to in the grounds and also **<u>AA</u> (Somalia)** and highlighting the importance of Article 8 in such cases. In essence, she also submitted that the judge failed to engage with the uncontested evidence and background relevant to the balancing exercise. As to any remaking of the decision should an error of law be found, she submitted that there would need to be further evidence and this required a further assessment by way of a further hearing then a remittal to the First-tier Tribunal would be appropriate.

13. Mr Wilding on behalf of the Secretary of State submitted that the challenge to the First-tier Tribunal's decision was essentially a disagreement with the conclusions reached and an attempt to reargue the case. He submitted that there had been an Article 8 assessment undertaken but that the Appellants did not agree with the outcome and it has not been demonstrated that the judge did anything materially wrong. He further submitted matters of weight were for the judge and only if it could be shown that the judge acted perversely by attributing too much weight to a factor could there be any challenge on grounds of weight.

14. As to the public interest, that was clearly a relevant consideration and it was inevitable that there would be recourse to public funds and therefore significant weight should be placed on that factor.

15. As to the authorities referred to in the grant of permission, he submitted that **<u>AS</u> (Somalia)** did not deal with Article 8 in the way suggested and that the facts were wholly dissimilar. The entry clearance decisions in those cases were made some time ago; in **<u>AS</u>** and **<u>AA</u>** their decisions under appeal were in 2009 and 2010 and in **<u>AS</u> (Somalia)** it was not known when the application was made but they were granted entry clearance in 2008. He submitted those decisions predated paragraph

319X and its introduction into the Rules which was a broad generous Rule for those relatives of refugees. This was a charged application and had also a requirement for maintenance and accommodation. He submitted further that paragraph [16] dealt with the Section 55 issues and found the Entry Clearance Officer's decision to be a proportionate one. He took into account the circumstances and put in the balance of public interest. The grounds do not demonstrate any material error of law.

16. By way of reply Mrs Brakaj submitted that in the decision of **AA (Somalia)** it made it clear that cases that could not succeed under the Immigration Rules should be dealt with under Article 8 and that there had been a failure to consider the Article 8 issues and considerations by the First-tier Tribunal. She submitted that there was no evidence in the determination that the compelling factors and history of the two Appellants had been considered within the balancing exercise and there was an inadequate consideration of the detailed circumstances of the children including the previous asylum claim which was before the judge. There was no reference to the historic background at [16], thus it was not a matter of weight of various factors but that he had failed to put factors into the balance.

17. I reserved my determination.

18. I have had the opportunity of hearing both advocates' oral argument concerning the decision of the First-tier Tribunal and whether those arguments disclose an error of law. Having heard them and considered those submissions in the light of the determination, I have reached the conclusion that the determination of the First-tier Tribunal does disclose an error of law in its approach to the issues. I shall set out below why I have reached that decision.

19. I should observe that the grounds as originally drafted relied upon the failure of the First-tier Tribunal to make reference to and apply the decision of **AS (Somalia) (FC) and another v SSHD [2009] UKHL 32**. The grant of permission made express reference to Ground 3 when granting leave at paragraph 2. However, it is right to observe that the First-tier Tribunal Judge granted permission to appeal "on all grounds." However, I cannot see that the failure to either quote or consider **AS (Somalia)** could give rise to an error of law. The issue raised in that case related to the effect of Section 85(5) of the Nationality, Immigration and Asylum Act 2002 and also whether Section 85(5) was incompatible with the Convention. Furthermore the Appellants in **AS** had already been granted entry clearance by the date of the appeal on Article 8 grounds (see paragraph 29). As I read the case, it does not set out any guidance concerning either the Immigration Rules relating to family reunion or Article 8 of the ECHR.

20. However, Mrs Brakaj's oral submissions are centred upon a number of issues concerning the determination relating to the "compassionate and compelling circumstances" that were not identified by the judge and the

relevance to those in the balancing exercise. Furthermore those submissions are centred upon issues concerning the judge's findings as to whether there were compelling circumstances relating to the Appellants and that those considerations had not formed part of the balancing exercise. In her submissions she made reference to paragraph 14 of the determination where the judge set out what purported to be findings of fact relating to their circumstances in Uganda. She submitted that the evidence before the judge was "compelling" but that whilst the judge stated the evidence was inconsistent with the Sponsor's claim that the children were "in a bad situation" he did not make a finding that the letters were unreliable and therefore gave the appearance of having accepted the letters. I do not conclude that it could be said that the judge accepted those letters. Having read the letters and having done so in the context of the findings at [14] it seems to me that the two are wholly inconsistent. The judge stated that he did not believe the Appellants were at risk in Uganda primarily because of the "tenor of the correspondence to the Sponsor". He cited the letter at page 15 relying on the part that referred to the Appellant being "good here" but then referred to "certain hardships". The judge then contrasted this letter with the letter set out at page 198 stating that they are "doing fine" and it was on this basis that he reached the conclusion that it was inconsistent with the Sponsor's claim that the Appellants were in a "bad situation". However, as Mrs Brakaj pointed out, the letters did not demonstrate that the circumstances in which the children were living were in fact "fine". Indeed, it made reference to a number of factors that one of the children was travelling to the forest to obtain water and firewood alone, due to the carer's infirmity the children were cooking and searching for their own food and that they were no longer in school and their carer was ill. There was some reference to these matters in the witness statement of the Appellant. Therefore the findings of the judge do not take account of that evidence nor are they consistent with that evidence before him. It was incumbent upon the judge to make clear findings of fact upon the circumstances in which the children were living at the time of the application for a number of relevant reasons. Firstly, the case could not succeed under the family reunion provisions of paragraph 352D of the Immigration Rules for the reasons properly set out at [9] which have not been challenged on behalf of the Appellants. The case was therefore properly advanced on the basis of Article 8 of the ECHR. Again, Mr Wilding does not suggest that that was an inappropriate way to proceed given the factual circumstances of this case. Indeed that is an approach supported by the decision of **AA (Somalia) v ECO (Addis Ababa) [2013] UKSC 88** where the Supreme Court reached the conclusion that whilst a de facto adoption is not covered by the definition of a parent within Rule 352D as the adoption had to be recognised in the UK, the Immigration Rules are not exhaustive of the UK's obligations under international law. In that case the Appellants were allowed entry to the UK under Article 8 and the case made reference to the debate about the rights in comparison to someone who could qualify under paragraph 352D. Further, the decision in **Muse v the ECO [2012] EWCA Civ 10** at paragraph 21 recognised that the statutory jurisprudence

placed a high value on the ability of families to live together. Therefore whether the judge was considering the issues under paragraph 319X as "serious or compelling family and other considerations which would make their exclusion undesirable" or under Article 8 of the ECHR, the factual circumstances of the Appellants were highly relevant and clear findings were necessary. The balancing exercise under Article 8 could not be properly carried out without findings in accordance with the evidence and those findings then being set alongside what were the accepted facts. As the decision in **Muse** stated, the authorities provide examples of cases which fall outside the Rules but where the positive obligations of the state under Article 8 may require the granting of leave to enter and that such cases are difficult and require" a close analysis of the facts".

21. Whilst the grounds were not clearly drafted in this regard and the oral submissions that were made advanced this in a more clear form, I am satisfied that these issues do properly form part of the grounds on behalf of the Appellants and are relevant considerations. In this context the decision of **Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88 (IAC)** has relevance. The judge did make reference to this authority at [16] even though the representative had not addressed him on the issue of the best interests of the Appellants. He made reference to the "best interests of the children" in that paragraph and that as a starting point it is in the best interests of the children to be with

> "both of their parents and, if both parents are being removed from the United Kingdom, then the starting point suggests that so should dependent children who form part of their household, unless there are reasons to the contrary. Significantly in this case, it is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. In the absence of sufficient evidence to show that the Appellants are genuinely at risk in Uganda, and given the lack of evidence of the first-named Appellant's health, I conclude that their best interests are served by growing up in the society to which they belong."

However, whilst the stability and continuity of social and educational provisions and the benefits of growing up in the cultural norms are relevant considerations they are not the only ones. The case of **Mundeba** makes reference at paragraph 37 to the actual circumstances in which they are living, and their social background, their development history and that such matters require an inquiry into whether there are unmet needs that should be catered for and whether there are stable arrangements for the children's physical care. Those considerations were not identified or taken account of as the judge considered that there was insufficient evidence to show that they were at risk. This failed to consider the issues I have outlined earlier in relation to the letters upon which there were no clear findings made and that their social background, developmental history and whether there would be unmet needs and the stable arrangements for the children's care were also factors identified in **Mundeba** which were not taken into account or put in the balance. I consider that Mrs Brakaj is right in her submission to state that the

continuity of stability needs to be considered in the light of their past circumstances. I also agree with Mrs Brakaj that the judge made little or no reference to the background facts set out in the SEF, asylum claim concerning what had happened to the family in the past and how this impacted on the balancing exercise. This is a case where the family were living together, including the biological children of the Sponsor and these Appellants who believe the Sponsor to be their mother and saw themselves as one family unit. The findings at paragraphs 14 and 16 do not take those matters into account.

22. Whilst Mr Wilding submitted that the grounds were essentially a disagreement with the decision of the First-tier Tribunal I do not consider that that is made out. I also do not think it is a matter of weight to be given to the factors but that relevant and clear findings have not been made and material considerations were not put in the balance. The judge was wholly entitled to consider the public interest factors he identified but those matters had to be set against the other relevant factors identified in the appeals. I would also add that there did not seem to be any consideration of the relationship between the biological children and the Appellants nor any consideration of how family life could be enjoyed outside of the UK in the circumstances where the Sponsor was a refugee.

23. For those reasons I consider that the decision cannot stand and should be set aside. As to the remaking of the decision, Mrs Brakaj submitted that there would have to be a further hearing and she indicated that further evidence was necessary and indeed in the light of my decision, further findings of fact are necessary.

24. As there will be a further hearing in this case and further fact-finding to take place, I consider that the best course would be to remit the case to the First-tier Tribunal to consider these matters under Article 8 of the ECHR. There is no dispute that the Appellants cannot meet paragraph 352D but that the case is advanced on Article 8 grounds as the case is one which falls outside of the Rules. I have therefore given particular regard to the overriding objective of the efficient disposal of appeals and the nature of the error. Therefore the decision of the First-tier Tribunal is set aside and the case is to be remitted to the First-tier Tribunal for a rehearing in accordance with Section 12(2)(b) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the practice statement of 10th February 2010 (as amended).

Signed                                                  Date 1st November 2014

Upper Tribunal Judge Reeds

No fee is paid or payable and therefore there can be no fee award.

Signed Date 1st November 2014

Upper Tribunal Judge Reeds