Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/08942/2012
OA/08943/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2013	**On 4 July 2013**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

FARDOWSA SALAH MOHAMED
ABDI MOHAMED MOHAMOUD

Appellant

and

THE ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Mr A Hersi of Hersi & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The first appellant is a citizen of Somalia who was born on 21 June 1978. The second appellant is her son who was born on 1 March 2000 and is also a citizen of Somalia. On 23 March 2012, the appellants applied for entry clearance to join the sponsor, Mr Ali Mahmud Mohamed, a British citizen in the UK. The first appellant is his wife and the second appellant

is his stepson. On 5 April 2012, the Entry Clearance Officer at Nairobi refused each of the appellant's applications under paragraphs 281 and 291 respectively of the Immigration Rules (HC 395 as amended). The appellants appealed to the First-tier Tribunal. In a determination promulgated on 19 February 2013, Judge Woolley dismissed each of the appellants' appeals. The Judge accepted that the first appellant and sponsor were validly married. However, the Judge found that the first appellant could not meet the English language requirement in para 281(i). Further, in respect of each appellant the Judge found that, although the accommodation requirement of the Rules was met, the maintenance requirements in respectively para 281(v) and 297(v) were not met. Further, the Judge found that the respondent's decision to refuse each of the appellants entry clearance did not breach Article 8.

2. The appellants sought permission to appeal to the Upper Tribunal against the First-tier Tribunal's decision to dismiss the appeals under Article 8. The Judge's decision in respect of the Immigration Rules was not challenged. On 14 May 2013, the First-tier Tribunal granted each of the appellants permission to appeal. Thus, the appeals came before me.

The Background

3. The background facts to the appeals maybe summarised as follows. The sponsor married his first wife in 1985 and had two children. In 1999 he came to the UK and was recognised as a refugee and is now a British citizen. His first wife and children went to Ethiopia and their applications to join him were refused and they returned to Somalia. His first wife was killed in 2008 during a grenade attack and his son was also killed in another attack. His daughter is now married and living in the Yemen but he has no contact with her.

4. In April 2011, the sponsor went to Ethiopia for a holiday. During that holiday he met the appellant at a family member's house. Before returning to the UK, the appellant and sponsor agreed to marry. The Judge accepted that the first appellant's husband had been killed in Somalia in 2007 and, on the basis of DNA evidence, also accepted that the second appellant is her son. At the date of the ECO's decision the second appellant was 12 years of age. The evidence was that the sponsor kept in touch with his wife after his return to the UK. He went back to Ethiopia on 19 January 2012 and he and the first appellant were married on 24 February 2012.

5. The sponsor is a self-employed minicab driver earning, after expenses, about £14,900 per year. He lives in a two bedroomed flat for which he pays £700 rent per month. He sends the first appellant $200 per month and more if necessary. The evidence before the Judge was that the first appellant is entirely dependent on the sponsor financially. She lives with the second appellant outside Addis Ababa.

The Judge's Decision

6. The Judge dealt with the appellants' claims under Article 8 at paras 36-46 of her determination as follows:

> "36. The only question here is article 8. As this is an entry clearance case the question is not so much one of interference but whether the respondent is in breach of her positive obligation to respect family life. The standard of proof is the balance of probability and I take into account the situation at the date of decision (Shamin Box [2002] UKAIT 02212 as confirmed in SS v ECO (Malaysia) [2004] UKAIT 91).
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> 37. In A (Afghanistan) [2009] EWCA Civ 825 the Court of Appeal acknowledged that the 5 stage approach set out in Razgar [2004] UKHL 27 should still be followed in entry clearance cases. Each case depends upon its own facts and is highly case sensitive.
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> 38. In Huang [2007] UKHL 11 the House of Lords held that where the question of proportionality is reached the ultimate question for the Tribunal is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all the considerations weighing in favour of refusal, prejudices the family life of the appellant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8.
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> 39. The legitimate aim being pursued here is the maintenance of the economic interests of the UK through effective immigration control.
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> 40. Article 8 is not an opportunity to re-write the immigration rules, although since Huang it has been recognised that they are not necessarily human rights compliant.
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> 41. The sponsor is now a British citizen. I accept that it would be unreasonable to expect him to go to Ethiopia where he is not a citizen and there is no evidence he would be allowed to stay there. It is probably also unreasonable to expect the whole family to return to Somalia. Although the situation is improving there and Mogadishu is being held up as an example, the sponsor has been recognised as a refugee.
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> 42. I have accepted that this is a genuine marriage. I accept there is some family life with which the decision could potentially amount to such interference as to potential engage article 8. I have therefore considered the question of proportionality.
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> 43. Parties cannot necessarily choose where to carry on married life; the parties must have been aware of this when they married. Family life has never been carried on in the UK. The marriage is of short duration and they have spent little time together although I accept they have kept in touch. The 2nd appellant is not the sponsor's son and they have not spent a great deal of time together.
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> 44. As far as the 2nd appellant is concerned, it is established that s 55 of the Borders Act does not apply to entry clearance cases unless the ECO has grave concerns for the safety of the child in which case they are required to apply the principles of that legislation. (See T (s.55 BCIA 2009) (entry clearance) Jamaica [2011] 00483 (2011). This is not the situation in this case. The 2nd appellant does not have the right to be educated in the UK as the sponsor implies.

> 45. This is not necessarily the end of the road for the appellants. The appellant can arrange to take an English language course and the sponsor may be able to increase his earnings; he is obviously well respected as a mini cab driver.
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> 46. I find that the decision does not disproportionately interfere with the article 8 rights of the appellants or the sponsor."

7. As those paragraphs make clear, the Judge accepted that the sponsor could not be reasonably expected to live with his wife and stepson in Ethiopia and further that as a family they could not be expected to live in Somalia. Nevertheless, the Judge found that, even given the inevitable separation, the interference with their family life was not disproportionate. The Judge noted at para 45 that the appellants could make future applications if the first appellant undertook an English language course and if the sponsor increased his earnings.

The Appellants' Submissions

8. On behalf of the appellants, Mr Hersi made a number of submissions arguing that the Judge had erred in law. First, he submitted that the Judge had applied the wrong standard of proof, namely the balance of probabilities, when the correct standard of proof in determining Article 8 was that of "real risk". Secondly, he submitted that the Judge had failed to give adequate reasons for finding that the respondent's decisions were proportionate. Thirdly, he submitted that the Judge had failed to take into account adequately or at all the "best interests" of the second appellant.

Discussion and Analysis

9. First, I deal with the issue of the standard of proof. In paragraph 36 of her determination, the Judge stated that the standard of proof was that of a "balance of probabilities". Mr Hersi submitted that that was inconsistent with a passage in the judgement of Lord Wilson in the Supreme Court decision of R (Quila) v SSHD [2011] UKSC 45 at [44]. Mr Hersi also referred me to a grant of permission to appeal by the Court of Appeal in a case Abdul Abdi Noor Ibrahim v SSHD dated 23 October 2012 which raised the question of the standard of proof under Article 8. Mr Hersi provided a copy of the Upper Tribunal's determination in that case which was subject to appeal where the Upper Tribunal (C M G Ockelton, Vice President and UTJ Hanson) had concluded that the civil standard of proof, namely a balance of probabilities, applied in Article 8 appeals where "no protection issues" arose.

10. I do not accept Mr Hersi's submissions. Mr Hersi readily accepted that the Upper Tribunal's decision in Ibrahim was contrary to his submissions. That is undoubtedly correct. The Upper Tribunal set out the position at paras 23-27 of its determination as follows:

> "23. We do accept that in cases where there are protection issues and in which the Tribunal may be considering asylum, humanitarian protection and Article 3 issues, in addition to Article 8, that the

lower standard is applicable. It would not be practicable to have differing standards of proof in such cases.

24. In a protection case the Tribunal is also looking at what might happen in the future and so the same standard is applied to common facts. The use of the term 'might' in relation to the issues before the Tribunal in a protection case also illustrates the need for a different approach to cases with no protection element. The majority of such cases in which the protection issue arises will be appeals from within the United Kingdom where the consequences of the decision will be the appellant's removal and in which the impact of the same upon the rights of the individual appellant are being considered.

25. An appeal under the Rules or involving Article 8 with no protection issues requires the Tribunal to consider a different question, namely whether, on known facts, there will be a breach of an individual's rights or it has been shown that the criteria of the rules are satisfied. It is this fundamental difference between the past and the future basis on which the relevant issues have to be considered which is why differing standards are required when considering protection and non-protection cases.

26. It is also impractical for a Tribunal to be required to consider differing standards in relation to common facts where there are issues to be decided under the Rules and Article 8. Is for example the question of whether a person is a family member under the Immigration Rules to be considered on the balance of probabilities and the same issue in relation to Article 8 to be considered to a lower standard? What happens if the evidence is insufficient to satisfy the former but not the latter? Uncertainty is not in the interest of justice."

11. In my judgment, the Upper Tribunal in Ibrahim was correct. Whilst the lower standard applies in cases where protection issues arise, largely because those issues will involve a judicial assessment of what "might" happen in the future, that standard has no application where a decision maker is assessing evidence and making factual findings about, for example, whether a person has family life with another individual, is related to them as claimed or whether their marriage is genuine. In those circumstances, the correct standard of proof is the civil one, namely a balance of probabilities (see e.g., Ali v SSHD [2006] EWCA Civ 484 *per* Keene LJ at [12] in the context of EU law). It is not clear from the grant of permission to appeal to the Court of Appeal what likelihood there is of the Upper Tribunal's decision being overturned on this issue. The grant indicates no more than that the point is arguable and, in fact, it may not even indicate that, as the Court of Appeal may have granted permission in order to resolve the point at the level of the Court of Appeal. The grant itself does not offer any view on the likelihood of success of this ground and, in granting permission to appeal, Sedley LJ himself noted that: "I suspect the answer may depend on what the specific Article 8 issue is".

12. That observation in my view presages the second reason why Mr Hersi's submissions on this issue cannot succeed. The point is this and it is, in fact, made by Lord Wilson in [44] of Quila which was relied upon by Mr

Hersi. In [44] Lord Wilson (with whom Lords Phillips and Clarke and Lady Hale agreed) reiterated that the burden was upon the Secretary of State to establish that any interference with an individual's rights under Article 8 was justified. Lord Wilson continued:

> "but in an evaluation which transcends matters of fact it is not in my view apt to describe the requisite standard of proof as being, for example, on the balance of probabilities."

13. The point that Lord Wilson is making is this. The standard of proof is a forensic tool used by courts or tribunals when assessing evidence and reaching factual findings. It indicates the level of assuredness that the court or tribunal must have before reaching any finding. Where the judicial exercise involves, not making factual findings, but rather exercising discretion or reaching a judgement albeit on the basis of facts found, the concept of a "standard of proof" has no place. In other words, a discretion is exercised in a particular way or a judgment is made or it is not. It does not assist, in fact it makes no sense, to speak of a standard of proof informing the judicial process of exercising discretion or judgement one way or another. That latter process is precisely the "balancing exercise" undertaken in determining whether a particular decision is proportionate for the purposes of Article 8.2. That is, in my judgment, what Lord Wilson had in mind in [44] as "an evaluation which transcends matters of fact". Of course, that judgement will be informed by factual findings in most if not all, cases but the balancing exercise itself involves no standard of proof as such.

14. In this appeal, the Judge made a number of factual findings in making an assessment of the proportionality of the decisions. For example, the Judge found that it would not be reasonable to expect the family to live in Ethiopia or Somalia. Likewise, the Judge accepted that the marriage of the sponsor and first appellant was a genuine one. The Judge also had found that the sponsor had insufficient income to maintain himself and the appellants in the UK without recourse to public funds. All those findings had to be made on the basis of the evidence and the Judge was correct to apply the balance of probabilities test. The appellants do not challenge these findings which, apart from the maintenance issue, were in the appellant's favour. The appellants' challenge in these appeals to the Judge's decision under Article 8 is not to the factual basis upon which he found that Article 8 was not breached but rather to his assessment that the legitimate aim of the economic well-being of the country, reflected in effective immigration control, outweighed any interference with the family life of the sponsor with the appellants. That was an evaluative exercise which, in the words of Lord Wilson, "transcends matters of fact". No standard of proof applied and the appellants' argument that the Judge erred in failing to apply the "real risk" test applicable in international protection cases has no purchase.

15. As I have already indicated, in reality the factual matters, apart from the maintenance requirement which is no longer challenged, were resolved in

the appellants' favour. Even if, therefore, a lower standard of proof applied (which it does not) any error did not prejudice the appellants.

16. Turning to Mr Hersi's second submission, he contended that the Judge had failed to give adequate reasons for finding that the respondent's decisions were proportionate. Mr Hersi submitted that where it was unreasonable to expect the UK based party to relocate then the authority showed that it would normally be disproportionate. Mr Hersi referred me to the Supreme Court's decision in Quila where, he submitted, a separation for three years for a married couple, as a result of the change in the Immigration Rules raising the lower age for entry clearance from 18 to 21 years, was considered disproportionate. He relied upon the Court of Appeal's decision in Muse v Entry Clearance Officer [2012] EWCA Civ 10 at [33] where Toulson LJ stated, citing Lord Brown at [26] in South Bucks District Council v Porter(2) [2004] UKHL 33, that reasons need to show what conclusions were reached and how they were reached on the essential issues.

17. As regards the Judge's obligation to give reasons the Chamber President summarised the correct approach in the Upper Tribunal decision of Shizad (Sufficiency of Reasons: Set Aside) [2013] UKUT 0083 (IAC) at [10]:

> "10. We would emphasise that although there is a legal duty to give a brief explanation of the conclusions on the central issue on which the appeal is determined, such reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. Although a decision may contain an error of law where the requirements to give adequate reasons are not met, this Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance is taken into account, unless the conclusions that the judge draws from the primary data before him were not reasonably open to him."

18. As Lord Brown stated in the case of South Bucks District Council v Porter (2) [2004] UKHL 33 at [26]:

> "26. The reasons for a decision must be intelligible and they must be adequate. They must enable to reader to understand why the matter was decided as it was and what conclusions were reached on the 'single principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision."

19. I set out above the Judge's reasoning at para 36-46 of her determination and, in particular at paras 41-46. The Judge had, of course, already set out in her determination the background evidence and made positive findings in the appellant's favour in respect of the validity of the parties' marriage and also the relationship between the first and second appellants. Apart from the issue of maintenance, none of the facts were essentially in dispute. The Judge's adverse finding in relation to

maintenance has not been challenged. The Judge found, therefore, that the appellants could not meet the requirements of the Immigration Rules, in particular the maintenance requirement but also, in the case of the first appellant, the English language requirement. The Judge found that there would be an interference with the family's private life as it would not be reasonable to expect the sponsor as a British citizen and refugee either to live with his family in Ethiopia or, alternatively in Somalia. The Judge recognised the inevitability of the split in the family. At para 38 the Judge directed herself in accordance with the House of Lords' decision in Huang [2011] UKHL 11 at [20] that:

> "20. The ultimate question…is whether the [immigration decision], in the circumstances where the life of a family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Art 8."

20. In my judgment, the Judge grasped the essentials of the parties' situation. As Mr Avery pointed out in his submissions, the parties had been married for only a short period of time and they had not lived together in the UK. The appellants could not meet the requirements of the Immigration Rules, in particular the maintenance requirements. Mr Avery submitted that was the crux of the Secretary of State's case before the Judge, namely that the interference was justified principally on the basis that the parties could not support themselves without recourse to public funds. He referred me to the Court of Appeal's decision in AAO v Entry Clearance Officer [2011] EWCA Civ 840 at [49] where Rix LJ (with whom Lloyd LJ and Lewison J agreed) stated that:

> "49. As Strasburg and domestic jurisprudence has consistently emphasised…, states are entitled to have regard to their system of immigration control and its generally consistent application, and a requirement that an entrant should be maintained without recourse to public funds is an ultimately fair and necessary limitation on what would otherwise become a possibly overwhelming burden on all of its citizens. It is an unfortunate reality of life that states, especially one like the United Kingdom which is generally accessible and welcoming to refugees and immigrants cannot undertake to allow all members of a family to join together here, even those members who can show emotional and financial dependency, without creating supportable burdens."

21. AAO was a case in which a dependent adult relative sought entry clearance. Mr Hersi submitted that the approach in [49] in AAO had no application here where entry was sought by a spouse and a child. Some support for that can be found in [36] of Rix LJ's judgement where he stated:

> "36. I can find no support in the jurisprudence, however, for a positive duty to permit entry of a parent (*spouses and minor children may present different problems*) to join an adult child even where the parent would require support by public funds." (my emphasis)

22. Despite that tentative caveat, the general point, in my view, remains good, namely that the fact that a person or persons seeking entry to the UK would be a burden on the public purse in the UK is a relevant and, in my view, important factor when carrying out the balancing exercise inherent in the issue of proportionality. It was a factor that the Judge had well in mind in reaching her finding on proportionality (see para 38). The Judge, nevertheless, recognised that the failure to comply with the Immigration Rules was not, in itself, determinative of Article 8 (see para 40).

23. Mr Hersi also submitted that the Judge had failed to take into account the "best interests" of the second appellant and the impact upon him as set out in the sponsor's witness statement in particular at paras 11-14. Mr Hersi relied upon passages in the sponsor's statement at paras 13 and 14. In the former, the sponsor says that his son (that is a reference in fact to his stepson) goes to a community school in Ethiopia run by the Somali community for two hours a day. He says it is not a proper school; he has no proper structured education and sometimes his teacher does not turn up. He states that his son needs a proper education which is not available in Ethiopia. At para 14 the sponsor states that his family has no status in Ethiopia and they would be prisoners in their own home and the first and second appellants rarely leave their house as his wife lives in constant fear that the second appellant will be taken away and be accused of being part of Al Shabab.

24. It is far from clear to what extent these matters were relied upon before the Judge. At para 44, she notes that "the second appellant does not have a right to be educated in the UK as the sponsor implies". That clearly is correct. The situation of the first and second appellants in Ethiopia does not seem to have been central to the appellants' case before the Judge. It is not clear how long the appellants have lived in Ethiopia. They have certainly done so since the middle of 2011 when the sponsor met the first appellant there. Nothing in the evidence before the Judge suggested that the appellant did not have a home or that anything untoward had become of either of them living in Ethiopia. The second appellant was receiving schooling and they were financially supported by the sponsor. The sponsor's stated fears for his wife and son contrast with the sponsor's evidence (at para 7 of his statement) that when he was in Ethiopia he and the second appellant went out and played football and went shopping together with the first appellant. This was not a case where the evidence demonstrated that the second appellant's best interests required that he live in the UK with his step-father rather than with his mother in Ethiopia.

25. In my judgement, although the Judge's reasons are relatively brief they are adequate. They identify the essential features of the appellants' cases and the Judge makes a number of factual findings in their favour. The Judge had well in mind that she was concerned with a situation where the parties would inevitably be separated. She took into account the genuineness but short duration of the parties' marriage and, correctly,

noted that the second appellant is not the sponsor's son and they had not spent a great deal of time together. The separation of spouses is not necessarily disproportionate: each case must turn upon an assessment of the individual circumstances. In Quila Lord Wilson at [43], having noted that the separation of a married couple "must *a fortiori* represent…an interference", went on to state that the: "only sensible enquiry can be into whether the refusal [that gave rise to the interference] was justified."

26. On the facts of Quila, the Immigration Rule that caused the interference was found not to be proportionate. There, unlike here, the justification rested upon a need to prevent forced marriages which the Supreme Court found could not justify that interference. Here, as Mr Avery submitted, the justification is the economic wellbeing of the UK as the appellants cannot be maintained without recourse to public funds. That was the balancing exercise which the Judge undertook. The parties had no expectation of living in the United Kingdom without compliance with the Immigration Rules which they could not establish. There was limited evidence of any adverse consequences to the second appellant if he remains in Ethiopia living with his mother, which he has done for sometime in their own home, financially supported by the sponsor. Again, this was not a case where the second appellant's best interests require that he lives in the UK with his step-father rather than with his mother in Ethiopia. As the Judge noted, those circumstances might change in the future if the appellant could meet the language requirement and the sponsor increased his earnings in the UK.

27. In my judgement, the Judge gave adequate reasons for her finding that the respondent's decisions were proportionate. In reaching that finding the Judge took into account the circumstances of the sponsor in the UK and the appellants in Ethiopia and the inevitability of their separation if entry clearance was refused. Her ultimate finding that, in the particular circumstances of these appeals, the interference with the family life of the appellants and sponsor was proportionate and was a decision that was properly open to her on the evidence.

28. For these reasons, the First-tier Tribunal did not err in law in dismissing the appellants' appeals under Article 8 of the ECHR.

29. The First-tier Tribunal's decision to dismiss each of the appellants' appeals stands.

Signed

A Grubb

Judge of the Upper Tribunal

Date: