



**Upper Tribunal  
(Immigration and Asylum Chamber)  
OA/07103/2013**

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On July 22, 2014**

**Determination  
promulgated  
On August 4, 2014**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE ALIS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME  
DEPARTMENT**

Appellant

**and**

**MRS AMNA IDRIS MUSA ZAKARIA**

Respondent

Representation:

For the Appellant: Mr McVeety (Home Office Presenting  
Officer)

For the Respondent: Mr Dohkia (Legal Representative)

**DETERMINATION AND REASONS**

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born July 7, 1940, is a citizen of Sudan. On November 26, 2013 she applied for entry clearance

under paragraph 319V(i)(a) of the Immigration Rules. She claimed that she was over the age of 65 and wholly dependent on her son, Noorraddin Musa, for financial support and she had nobody else to turn to.

3. The respondent refused her application on February 19, 2013 on the basis the appellant did not meet the Rules.
4. On March 15, 2013 the appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
5. The matter was listed before Judge of the First-tier Tribunal Simpson (hereinafter referred to as “the FtTJ”) on March 7, 2014 and in a determination promulgated on March 21, 2014 she allowed the appellant’s appeal finding the appellant was at least 65 years of age. Having allowed it under the Rules she also allowed it under article 8 ECHR for the same reasons.
6. The respondent appealed that decision on April 4, 2014. Permission to appeal was granted by Judge of the First-tier Tribunal Cheales on May 13, 2014. She found the FtTJ may have erred because she did not give adequate reasons for finding the appellant was over the age of 65.

#### **SUBMISSIONS ON ERROR OF LAW**

7. Mr McVeety submitted the FtTJ had given no reasons for accepting the appellant was aged over 65. When the sponsor applied for asylum he told the immigration officer that his father had told him his mother had been born in the early 1950’s. This would have put the appellant at the very most 63 and that was if she was born in 1950. The FtTJ found she was over 65 because her passport had a date that suggested she was born in 1940 that was based on a doctor’s assessment despite the fact the report was not produced. He further submitted the FtTJ made no findings under article 8 and did not consider the approach set out in Gulshan [2013] UKUT 00640 (IAC). He submitted the decision should be set aside.
8. Mr Dokhia submitted the FtTJ allowed the appeal because she accepted the evidence of the passport and she was entitled to do this. He accepted that if there was an error under the Immigration Rules then there was also an error on article 8 ECHR.

#### **ERROR OF LAW ASSESSMENT**

9. The FtTJ was not helped by a paucity of evidence but what she did have was the sponsor's evidence that his mother was born in the 1950's. This evidence was given at a time when he was estranged from his family having fled Sudan and was evidence that should have been given more weight especially as the only evidence to support the date of birth in the passport was not submitted. The date in the passport was not based on what the appellant claimed was her date of birth but was based on a doctor's report. Like any age assessment report it needs to be properly considered and in this case the FtTJ was not provided with it. Her finding in paragraph [17] that she must be at least 65 was without any basis. She concluded she was 65 because-

"... her minimum age was 60 and she could be any age between that and 74. Consequently, it is more likely than not she is over 65."

10. There is no legal or any other reasoning for this conclusion especially in light of the fact the sponsor had told the authorities his mother was born in the 1950's.
11. I therefore find there was a material error both in respect of the decision under the Immigration Rules and article 8 ECHR.
12. Having identified an error in law the parties agreed that if the appellant could not satisfy paragraph 319V HC 395 then she would have to satisfy Section EC-DR of Appendix FM of the Immigration Rules. In particular, the appellant would have to show she satisfied either Section E-ECDR 2.4 or E-ECDR 2.5 of Appendix FM. Alternatively, she would have to show there were good arguable grounds or compelling circumstances not sufficiently recognised under Appendix FM where refusal would result in unjustifiably harsh consequences for the appellant.
13. Mr Musa was called to give oral evidence. He adopted his statements and confirmed:
  - a. The appellant would have no one to look after her or take her to the market.
  - b. Whilst she was not disabled she could not carry out everyday tasks.
  - c. She was living in a temporary apartment in Khartoum whilst her appeal was pending. She was previously living in a refugee camp.

- d. His sister lived in a refugee camp with her husband and culturally her husband had refused to look after appellant
- e. She had given birth late in life, which was why she had only had three children.

### **SUBMISSIONS**

14. Mr McVeety submitted that little weight could be attached to the passport because the date of birth was not based on knowledge but on a doctor's report that had never been produced. The sponsor had told the authorities at a time when his mother's age did not matter that she was born in the early 1950's and there was nothing to undermine that evidence now. If she did not qualify under paragraph 319V then she would have to show she satisfied either Section E-ECDR 2.4 or E-ECDR 2.5. No medical evidence had been supplied to show she was unable to perform everyday tasks and there was no evidence she needed any care with or without financial support. If the application was refused under the Immigration Rules then he submitted there was no reason to consider the case under article 8 because in this appeal the Rules covered the article 8 arguments.
15. Mr Dohkia accepted there was no age assessment report but submitted the passport was good evidence of her age. In the alternative he submitted there was evidence from the sponsor about his mother's living conditions and her ability to look after herself. He submitted there was evidence to show she would be unable to look after herself, cook, shop or clean. Whilst his sister lived in Sudan her husband would not allow her to look after her and consequently she satisfied the Rules. If the Rules were not met then he submitted it would be harsh not to allow her appeal under article 8 because she was likely to be left alone because his wife's appeal had already been allowed.

### **CONSIDERATION OF SUBSTANTIVE APPEAL**

16. The issues in this appeal were as follows:-
  - a. Was the appellant aged 65 or over?
  - b. Was the appellant able to care for herself?
  - c. Did she have any disability or illness that required long-term personal care to perform everyday tasks?

- d. Even with the sponsor's practical and financial support was the appellant unable to obtain the required level of care in Sudan because it as either not available or unaffordable.
17. If the appellant could show she was 65 or over then the remaining questions became irrelevant because she would be entitled to entry clearance under paragraph 319V HC 395.
  18. Unfortunately, there was no evidence to support the appellant's claim she was over 65 or born in 1940 as claimed. If the appellant's evidence was she knew her exact age then some weight could be attached to the passport but the evidence presented to both myself and the FtTJ was that she went to see a doctor who provided a report to support her claim to have been born in July 1940. This report was not produced and in order to place any reliability on the age in the passport that report would have to be considered and balanced against any other evidence. The only other evidence was the sponsor's evidence that she was born in the early 1950's, which of course made her under 65. Although the sponsor's latest witness statement asks me to place no weight on what he had been told I find I am unable to do that. He is not an expert and he gave the best evidence he could when questioned. In the absence of any other evidence I find the appellant is under the age of 65 and she cannot therefore succeed under paragraph 319V HC 395.
  19. In paragraph [17] above I set out what the appellant needed to show in order to meet either Section E-ECDR 2.4 or E-ECDR 2.5 of Appendix FM.
  20. Sadly, no medical evidence has been produced to show the appellant is unable to care for herself. I would expect in such an application medical evidence to support the contention she was unable to care for herself or perform everyday tasks. She produced no evidence to show she had a disability and in fact the sponsor confirmed she did not have a disability in his oral evidence to me.
  21. Just because the appellant is over 60 does not mean she would be unable to care for herself or perform everyday tasks. She was currently being financially supported and living in Khartoum. I accept her daughter-in-law would provide support and perhaps she will not remain there but the burden of proof is on the appellant to demonstrate on balance that she comes within either Section E-ECDR 2.4 or E-ECDR 2.5.

22. The only evidence I have is written statements of witnesses and the oral evidence of the sponsor. If I had been provided with some medical evidence then the appellant may well have been able to satisfy the aforementioned Rules. I do not find the sponsor's evidence or written statements demonstrate the appellant could meet the Rules.
23. The appellant cannot satisfy Section E-ECDR 2.4 because she has failed to demonstrate she requires long-term personal care to perform everyday tasks.
24. The appellant has also failed to show she is in need of care and consequently the appellant cannot meet Section E-ECDR 2.5.
25. I dismiss the appeal under the Immigration Rules.
26. I am invited to consider the appeal under article 8 ECHR. The Courts in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 considered the approaches in Gulshan [2013] UKUT 00640 (IAC) and Nagre [2013] EWHC 720 Admin and confirmed the approach to be taken.
27. The Court of Appeal in MM examined numerous authorities and stated:

"128. ... In Nagre the new rules were themselves attempting to cover, generally, circumstances where an individual should be allowed to remain in the UK on Article 8 grounds... Nagre does not add anything to the debate, save for the statement that if a particular person is outside the rule then he has to demonstrate, as a preliminary to a consideration outside the rule, that he has an arguable case that there may be good grounds for granting leave to remain outside the rules. I cannot see much utility in imposing this further, intermediary, test. If the applicant cannot satisfy the rule, then there either is or there is not a further Article 8 claim. That will have to be determined by the relevant decision-maker.

134. Where the relevant group of Immigration Rules, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing


exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to “exceptional circumstances” in the code will nonetheless entail a proportionality exercise. But if the relevant group of Immigration Rules is not such a “complete code” then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

159. ... It seems clear from the statement of Lord Dyson MR in MF (Nigeria) and Sales J in Nagre that a court would have to consider first whether the new MIR and the “Exceptional circumstances” created a “complete code” and, if they did, precisely how the “proportionality test” would be applied by reference to that “code”.

162. ... Firstly, paragraph GEN.1.1 of Appendix FM states that the provision of the family route “takes into account the need to safeguard and promote the welfare of children in the UK”, which indicates that the Secretary of State has had regard to the statutory duty. Secondly, there is no legal requirement that the Immigration Rules should provide that the best interests of the child should be determinative. Section 55 is not a “trump card” to be played whenever the interests of a child arise...”

28. I have to consider whether a refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate.
29. I have found the appellant is under 65 years of age and I have also found the appellant has failed to demonstrate any of the needs set out in the Rules. In reality there is nothing else to consider that would make the appellant’s claim exceptional. If she met the Rules her appeal would be allowed.
30. Based on the evidence presented I am unable to find good arguable grounds or compelling circumstances not sufficiently recognised under Appendix FM where refusal would result in unjustifiably harsh consequences for the appellant.
31. In these circumstances I find there is no basis to allow this appeal under article 8 ECHR.

## **DECISION**

32. There is a material error of law and I set aside the original decision.
33. I have remade the decision and I dismiss the appeal under both the Immigration Rules and Article 8 ECHR.
34.  Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the appeal did not succeed.

Signed:

Dated:

Deputy Upper Tribunal Judge Alis

