Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09795/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 10 June 2014	**On 1 July 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE ENTRY CLEARANCE OFFICER - NAIROBI

Appellant

and

S H H
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr G Hodgetts, instructed by South West Law

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

2. In this case, the Entry Clearance Officer appeals a decision of the First-tier Tribunal (Judge M J Waygood) allowing SHH's appeal against a refusal to grant her entry clearance under Art 8 of the ECHR.

3. For convenience, I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Somalia who was born on 15 July 2008. I will refer to her as "SHH". Her grandmother ("FG") is the sponsor who was granted leave on humanitarian protection grounds on 3 December 2010. She is also a citizen of Somalia.

5. The sponsor lived in Somalia until she came to the UK on 20 November 2009. Her (then) husband and FG had a daughter ("K") who was born in Somalia on 1 December 1994. In 1998, the sponsor's (then) husband was killed. From about 2001, the sponsor and K were held captive on a militia farm in Somalia. In 2005, the sponsor remarried. Her husband ("IBA") also lived on the militia farm. Whilst on the farm, the sponsor's daughter (K) was raped and, as a result, on 15 July 2008 the appellant (SHH) was born. The sponsor is her grandmother. In August 2008, the family escaped captivity and the sponsor fled Somalia. The others did not come to the UK. The sponsor lost contact with her husband and daughter. Eventually, the sponsor arrived in Italy where she claimed asylum under a false name. Thereafter, the sponsor travelled to the UK, arriving on 20 November 2009. Whilst in the UK, as a result of a 'one-night stand' with her cousin, the sponsor became pregnant and gave birth to a child. On 3 December 2010, the sponsor was granted humanitarian protection until December 2015.

6. In May 2011, the sponsor regained contact with her husband and her daughter in Somalia. In May 2011, the sponsor's husband, her daughter and her granddaughter, the appellant (SHH) went to Nairobi. On 14 July 2011, the sponsor's husband, her daughter and the appellant applied for entry clearance to join the sponsor in the UK. On 19 September 2011, the sponsor's husband was refused entry clearance. On 17 November 2011, the sponsor's daughter was granted entry clearance under the family reunion provision in para 352FA of the Immigration Rules (HC 395 as amended) as the minor child of a person granted humanitarian protection. The appellant (SHH) was refused entry clearance. The sponsor's husband and the appellant appealed to the First-tier Tribunal but the decisions were withdrawn on the day of the hearing on 29 May 2012.

7. On 3 April 2013, the Entry Clearance Officer issued new decisions refusing entry clearance to the sponsor's husband and the appellant. The ECO was not satisfied that they met the requirements of para 352FA and para 319X respectively.

The Appeal

8. Both the sponsor's husband and the appellant appealed to the First-tier Tribunal. The appeal was heard by Judge M J Waygood on 24 January 2014. He found that the sponsor's husband met the requirements of the family reunion rule in para 352FA and allowed his appeal. The judge was satisfied that the sponsor was validly married to her husband; that the marriage had taken place pre-flight; and that their relationship was a genuine one and that they intended to live permanently together as husband and wife. I need say no more about that decision as the ECO has not sought to appeal it to the Upper Tribunal.

9. In relation to the appellant (SHH), it was accepted before Judge Waygood that she could not meet the requirements of para 319X, in particular she could not show that she would be maintained and accommodated without recourse to public funds. Nevertheless, Judge Waygood found that the appellant's exclusion from the UK would be a breach of Art 8 of the ECHR and he allowed her appeal on that basis.

10. It is against that decision that the ECO now appeals to the Upper Tribunal. Permission to appeal was granted by the First-tier Tribunal (DJ Woodcraft) on 28 February 2014.

The Submissions

11. The grounds set out a single arguable error of law, namely that the judge failed to take into account that the appellant could not meet the accommodation and maintenance requirements in paras 319X(vi) and (vii) of the Immigration Rules in carrying out the balancing exercise and finding that the appellant's exclusion would be disproportionate and a breach of Art 8. The grounds state:

> "In assessing proportionality, the judge failed to weigh the appellant's inability to satisfy the accommodation and maintenance requirements in paras 319X(vi) and (vii).
>
> The judge conducted his Article 8 analysis without reference to the Immigration Rules an approach deprecated by Cranston J in *Gulshan* [2013] UKUT 640 (IAC) at [27]."

12. In his oral submissions, Mr Wilding, on behalf of the Entry Clearance Officer adopted the ground and submitted that the judge had failed properly to carry out the proportionality exercise.

13. First, he submitted that the approach in Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC) at [24] applied. The judge was required to consider whether there were any arguably good grounds for granting leave outside the Rules and only if there were, then to consider whether in fact there were any "compelling circumstances" based upon non-standard features of the appellant's case which resulted

in an "unjustifiably harsh" effect if the decision were upheld. Mr Wilding submitted that the approach in Gulshan was applicable as the new Immigration Rules applied. He relied upon the Court of Appeal's decision in Haleemudeen v SSHD [2014] EWCA Civ 558 that the new Rules apply even to a pre-9 July 2012 application decided on or after that date. He, in effect, invited me not to follow the earlier decision of the Court of Appeal in Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402 which, despite reaching an opposite conclusion to Haleemudeen, should be distinguished.

14. Secondly, Mr Wilding submitted that Judge Waygood had engaged in a "freewheeling" assessment of proportionality and he had failed to take into account the important fact that the appellant would be a burden upon the public finances. That, he submitted, was an important factor and he relied upon what was said by Sir Stanley Burnton in FK & OK (Botswana) v SSHD [2013] EWCA Civ 238 at [11]. In addition, he drew my attention to [49] in AAO v ECO [2011] EWCA Civ 840 in which the Court of Appeal had stated that a requirement that an entrant to the UK be maintained without recourse to public funds was a "fair and necessary" limitation on entry to the UK.

15. Thirdly, Mr Wilding submitted that the judge was required to engage in a 'close analysis of the facts' (see Muse v ECO [2012] EWCA Civ 10 at [24]) and here, he submitted, the judge had merely set out those factors in favour of the appellant rather than dealing with them holistically in the context of the public interest.

16. On behalf of the appellant, Mr Hodgetts submitted that the Entry Clearance Officer's challenge was essentially a perversity challenge which could not succeed.

17. First, he relied upon a detailed skeleton argument which he developed in his oral submissions. He submitted that following Edgehill this was a case where the application arose before 9 July 2012 and so was governed by the 'old Rules', namely para 319X.

18. Secondly, in any event, he submitted that the judge had fully taken into account that the appellant could not meet the requirements of the Rules, namely be maintained and accommodated without recourse to public funds. He pointed out that the judge had reminded himself on a number of occasions that the appellant could not meet the requirements of the Rules (see paras 25, 61 and 62). Mr Hodgetts submitted that the judge had set out at para 64 that the justification relied upon was the "economic wellbeing of the country and effective immigration control". The judge's reference to the appellant not meeting the requirements of the Rules was, in context, a clear recognition of the 'opposite side of the coin', namely that if she came to the UK there would be recourse to public funds. Mr Hodgetts submitted that the judge had carried out the balancing exercise under Art 8.2. This was, he submitted, after all a case where the appellant's circumstances were the central issue and the judge had concluded at para 79 that they were "sufficiently serious and compelling

to require admission". The judge was, Mr Hodgetts submitted, not required to do any more.

19. Thirdly, Mr Hodgetts submitted that none of the judge's factual findings were challenged and it could not be said that his conclusion was irrational or perverse. Mr Hodgetts relied upon the facts found by Judge Waygood, in particular the appellant's circumstances if entry clearance were refused, namely that she was 5 years old, her grandmother lived in the UK as did her mother, having already been granted entry clearance, and her grandfather with whom she lived in Somalia and more recently Nairobi had, as a result of Judge Waygood's decision, been found to be entitled to entry clearance as the pre-flight spouse of a person granted humanitarian protection in the UK.

20. In response, Mr Wilding submitted that it was not sufficient for the judge simply to state what the public interest was at para 64 of his determination. He was actually required to engage in the balancing exercise and factor it in, weighing it against the appellant's individual circumstances.

Discussion

21. I begin with the obvious observation of anyone who has read Judge Waygood's determination that it is a most thorough and detailed assessment of the evidence with clear and unchallenged factual findings made both in relation to the appellant's step-grandfather (the sponsor's husband) and the appellant herself. None of the judge's findings are challenged; the only challenge is to his ultimate conclusion that the refusal of entry clearance to the appellant was not proportionate.

22. I was somewhat surprised that Mr Wilding sought to argue that the judge was required to approach the assessment of Art 8 in the way set out in Gulshan on the basis that the so-called 'new' Rules in Appendix FM applied to the appellant. My surprise arises from the fact that the ECO applied the old Rules, namely para 319X and the grounds of appeal to the Upper Tribunal continue to refer to the applicability of para 319X when arguing that the judge failed to give weight to the appellant's inability to meet the maintenance and accommodation requirements in para 319X.

23. Nevertheless, Mr Wilding took me to the transitional provisions in Part 8 of the Immigration Rules at paras A277-A280. There, he identified that, by virtue of para A280(c)(i), para 319X continued to apply where an application was made, for example under para 319X prior to 9 July 2012, but the decision was made on or after that date as in this appeal where the relevant decision challenged was made on 3 April 2013. He sought, nevertheless, to rely on para A277C which allows the Secretary of State, where she deems it appropriate, to apply certain of the new Rules even though, in fact, by virtue of the transitional provisions the old Rules remain applicable. However, as I pointed out to Mr Wilding in the course of his submissions, that provision only applies the parts of Appendix FM which

are concerned with applications by partners or by parents of children who seek leave to be in the UK with their partner or child respectively. It can have no application to this appellant who is a child seeking to join her grandmother (who is the sponsor) in the UK. Her mother, K is of course also in the UK but her application has not been put on that basis. In any event, such an application would also not fall within para A277C.

24. The proper application of the transitional provisions in Part 8 (and also the implementation provisions in HC 194) and whether they require that a pre-9 July 2012 application be considered under the old Rules rather than the new Rules is not without some difficulty. That difficulty becomes even plainer when it is appreciated that, on the face of it, the two decisions of the Court of Appeal (in chronological order) of Edgehill and Haleemudeen appear to reach contradictory positions. In two earlier unreported appeals (IA/33236/2013 and IA/31028/2013), I have sought to identify the effect of the Court of Appeal's two decisions. Had it been necessary to do so, I would have repeated my analysis here that the decision of the Court of Appeal in Haleemudeen is binding upon the Upper Tribunal (and upon the First-tier Tribunal). It will be a matter for the Court of Appeal to seek to resolve the two decisions and to conclude which should be followed and on what basis. In this appeal, however, it is not necessary for me to set out that analysis. First, I am confident for the reasons I shall give that the judge's decision was properly open to him whichever approach is applied. Secondly, at no point has the ECO argued that the appellant's application and appeal should be determined under any of the new Rules who, as I have already pointed out, has assiduously relied upon para 319X. The time has long past to argue otherwise. Indeed, the ECO would be seeking to argue that her own decision was unlawful as she had applied the wrong Immigration Rule. I did not understand Mr Wilding to make that submission. Thirdly, Mr Hodgetts on behalf of the appellant does not seek to argue that latter point but rather seeks to defend the judge's favourable decision under Art 8 on the basis that he has fully taken into account the public interest reflected in the appellant's inability to meet the maintenance and accommodation requirements (without recourse to public funds) under para 319X itself. Consequently, I approach this appeal on that basis.

25. There is no doubt that the public interest takes account of any potential economic burden upon the state by those seeking entry. At [11] of FK & OK (to which Mr Wilding referred me), Sir Stanley Burnton said this:

> "The second reason is that the maintenance of immigration control is not an aim that is implied for the purposes of Article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense (as was the second appellant). All such matters (and I do not suggest that they are the only

> matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of Article 8.2."

26. Further, I accept that in appropriate circumstances the fact that an applicant for entry clearance cannot be maintained without recourse to public funds may be sufficient to outweigh their own personal circumstances such that there will be no breach of Art 8. That was recognised in the case of AAO (again to which I was referred by Mr Wilding) at [49] where Rix LJ said this:

> "As Strasbourg and domestic jurisprudence has consistently emphasised (see above), 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 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 unsupportable burdens."

27. That passage has, however, to be seen in the light of the facts of that particular case. Immediately preceding the passage I have set out from [49], Rix LJ noted the "weakness of the family life in issue in this case"; he noted that the applicant mother had "accommodation, care and support from a near neighbour and old family friend, medical assistance, financial support and no life-threatening or debilitating illness." Whilst, therefore, I accept the importance of the issue of whether an individual may have recourse to public funds as an aspect of the public interest, that can give way in a sufficiently compelling case. That was, perhaps, implicit in Mr Wilding's reference to the Court of Appeal's decision in Muse at [24] where Toulson LJ (as he then was) said this:

> "Where entry is sought for the purposes of family reunion the Immigration Rules, laid before Parliament, represent an attempt by the government to strike a fair balance between respect for family life and immigration control, which includes economic considerations. Different rules apply to a child seeking leave to enter the UK in order to join a parent who has refugee status (352D) and a child who seeks leave to enter the UK as the child of parent or relative in the UK who does not have refugee status (297). The respondent submits, and I would accept, that it is within the state's 'margin of appreciation' to set those Rules; as a matter of generality the requirements are proportionate, but the Rules are the beginning and not the end of the matter. The authorities provide examples of cases which fall outside the Rules where the positive obligation of the state under Article 8 requires the giving of leave to enter. Such cases are often difficult and require close analysis of the facts."

28. At [25], Toulson LJ went on to re-affirm, applying ZH (Tanzania) v SSHD [2011] UKSC 4, that in cases involving children their best interests were "a consideration of high importance" but their interests were "not necessarily

determinative of the outcome". That passage was quoted by Judge Waygood in his determination at paras 76 and 77.

29. In this appeal, I have no doubt that Judge Waygood took into account the public interest represented by the fact that the appellant could not meet the maintenance and accommodation requirements of para 319X without recourse to public funds. As Mr Hodgetts submitted, and I accept, the judge made a number of references to the appellant not being able to meet the requirements of para 319X (see in particular paras 25, 61 and 62). At para 64 Judge Waygood referred to the "interests of the economic wellbeing of the country and effective immigration control". Reading the determination as a whole it is clear to me that the judge had well in mind that the appellant failed under the Immigration Rules because of her inability to prove she could be maintained and accommodated without recourse to public funds. There was no other basis upon which she failed under the Rules. I reject the contention, therefore, that he erred in law by failing to take this aspect of the public interest into account.

30. The judge correctly directed himself in accordance with the five-stage test set out by Lord Bingham in Razgar [2004] UKHL 27 at [17]. He also correctly directed himself that the appellant's best interests were a primary consideration but could be outweighed by the cumulative effect of other considerations (see paras 65-67 of his determination). The judge then went on to deal with the appellant's individual circumstances, including arguments presented by the respondent that the appellant could reasonably be expected to enjoy family life with her mother and grandmother in Kenya. At paras 68-71 he said this:

> "68. On the point of Article 8 it was said by the Respondent there was no reason why the appellant could not enjoy family life with her mother in Kenya. It was said the immigration rules are not in place to satisfy personal family living arrangements. Even if related and is claimed for her mother and sponsor the decision constituted limited interference. There was no apparent bar to her mother continuing to reside with her in Kenya. The Respondent was satisfied the decision was justified and proportionate and in the interests of the operation of effective immigration control.
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> 69. Mr Hodgetts in his skeleton argument referred to the case of **Muse v ECO [2012] EWCA Civ 10**. He said that the principle of whether it is reasonable to expect the UK sponsor to relocate in that case to Ethiopia and in this case to Kenya (in both cases concerning Somalis who have no official basis to remain in the country overseas) applies just as much to entry cases as it does to removal cases. He claimed it was unreasonable to expect the sponsor to live in Kenya.
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> 70. In this case I have found that the first Appellant is the spouse of the sponsor and is entitled to come to the UK as he fulfils the requirements of paragraph 352FA. This would potentially leave him with the stark choice of coming to United Kingdom to join his wife and leave his step grandchild on her own. The other alternative of course would be for the sponsor and her daughter K to move to Kenya to be with them both. However I consider that neither the sponsor nor K have the ability to lawfully remain in Kenya for more than a visit. In addition the sponsor

was granted humanitarian protection in this country because of her situation in Somalia. Her daughter K was granted entry on the basis of family reunion with her mother. I am satisfied that there is a family life between the sponsor and K and her daughter SHH. The decision of the Respondent in this case interferes with that family life significantly in that all family members cannot live together.

71. Neither the sponsor nor her daughter would have accommodation or recourse to any means of support or employment in Kenya. I also find that the sponsor plainly cannot return to Somalia. I also consider that it would not be reasonable for K to return to live on a legally irregular basis in Nairobi, taking into account that she has been granted leave to enter the UK on the basis of family re-union with her mother. In addition Mr Hodgetts drew my attention to a Human Rights Watch paper entitled "you are all terrorists", dated May 2013. It reports that on November 19 2012 Kenyan police from four different units unleashed a wave of abuses, including torture, against Somali and Ethiopian refugees and asylum seekers, including Somalis in Eastleigh where the Appellants currently live. In addition it refers to December 13, 2012 when Kenya's Department of rural affairs announced that the spate of attacks meant 55,000 refugees and asylum seekers living in Nairobi should move to the country's refugee camps near the Somali and Sudanese borders or face forced relocation there. It also refers to Kenya having a history of forcibly returning refugees and asylum seekers to Somalia and they planned to force refugees to camps. In the circumstances I consider that this would be an extremely difficult place for K to return to live with her daughter."

31. At paras 72-75, Judge Waygood dealt with the change in the appellant's circumstances and impact upon her resulting from the fact that her mother had been granted entry clearance (and had indeed come) to the UK on the basis that the sponsor had been granted humanitarian protection. Also, the appellant's step-grandfather had succeeded before the Judge in overturning the refusal of entry clearance for him to come to the UK. The appellant was potentially, therefore, left alone in Kenya. The judge said this:

"72. It was said in **Muse** at paragraph 21 that Strasbourg jurisprudence places a high value on the ability of families to live together. I consider that principle applies in this case. The first Appellant has been looking after his step grandchild and daughter since the sponsor left in 2008 and thus has family life with both his stepdaughter and his step grandchild. Article 8 contains both positive and negative obligations. A positive obligation requires the state to admit to its territory children of settled immigrants who are minors unless there are sufficiently strong countervailing reasons to make it proportionate to refuse entry. I note that reference was made to the case of **Huang [2007] UKHL 11** and what Lord Bingham said about proportionality at paragraph 20 and in stating that principle he drew no distinction between refusal of leave to enter and refusal of leave to remain.

73. I consider the trauma in this case is identical to an exclusion case as the minor children had been living with each other K and her daughter, with the first Appellant. Mr Hodgetts said the admission of K under the rules was correct, I agree. Refusal to permit her to have joined her mother would have been in breach of Article 8. I particularly note in this regard what K and her mother have been through. They were in effectively a slave camp for a number of years where they both suffered repeated

rape at the whim of their captors. As a result of this SHH was conceived. Although the sponsor left her husband, daughter and granddaughter behind in Somalia I find she clearly hoped that they would be re-united in a safe place which they now have the chance to be.

74. The refusal of SHH presents K with a stark choice. She either chooses to break her family ties with her mother, an entitlement of which has been recognised by the Respondent or she remains apart from her daughter. I do not find in the circumstances that it is reasonable to expect K or the sponsor to relocate to Kenya to be with SHH. I therefore consider the entry clearance officer's refusal of SHH disproportionately interferes with K's right to family life and the second appellant's right to family life. The principle of a family reunion within paragraph 352 would be plainly defeated by the refusal of SHH.

75. In addition I have taken into account the conclusions of a report of Diana Jackson, presented as part of the Appellant's bundle. She is an independent social worker. The report is dated the 28th of May 2012. Ms Jackson gives her background in her curriculum vitae. It is clear that she has significant experience in direct work with children and families throughout her career. She stated she had provided over 30 records in immigration appeals in the last four years. She interviewed both the sponsor and her daughter at their home in Bristol on the 26th of May 2012. She conducted the interviews with the assistance of an interpreter. In her opinion having been asked to consider the effects on all family members if the Appellants were not allowed to join the sponsor and her daughter she considered that the child had already suffered harm by the fact that her mother had left and did not understand why. That the loss of her mother before the age of 11 was one of the four life events that most predispose women to depression in adult life. She said that K is showing signs of depression from being separated from her daughter. She was concerned that she was heading for a depressive illness. She coped with a great deal in her young life was 18 at the time of the report and that the loss of her daughter was likely to be something she could not cope with."

32. Then at para 79 he reached the following conclusions leading at para 80 to his decision that the refusal of entry clearance to SHH was not proportionate. He said this:

"79. Taking these points into account. The child is just 5 years old. She is in an unstable environment in Kenya as she has no legal basis to be there. Her mother is in the UK as she is entitled to be. Her mother was her main carer until she had to leave her in November 2011. By the refusal this young child is being denied re-union with her mother her previous carer. The objective evidence about the situation in Kenya currently indicates that she is potentially at risk as is her step grandfather. He has already been arrested, which was not disputed and if anything happened to him in that unstable environment then the child I find it is likely to be at significant risk. Whilst it is not contested that her step grandfather is looking after her to the best of his ability, the child's best interests are clearly to be with her mother. I consider that she currently has unmet needs in terms of having a relationship with her mother and the support of her mother that are not being catered for. The arrangements for the child's physical and emotional care would be best met by her being with her mother. I consider the situation and the circumstances of this child to be sufficiently serious and compelling to require admission. The best interests as a starting point are best served by her being with her mother.

> 80. Having taken into consideration all the above-mentioned matters, I find that taken as a whole, it is not proportionate to deny SHH entry to the UK to be with her mother and grandmother."

33. As the judge made clear in para 79, he considered that the appellant's circumstances were "sufficiently serious and compelling to require admission". That, of course, mirrors the language used in Gulshan in cases concerned with the new Rules. If the 'new' Rules did apply, the judge's reasoning is entirely consistent with the case law dealing with their application in Art 8 cases.

34. Having clearly taken into account the basis upon which the appellant could not meet the Immigration Rules, the judge carried out the balancing exercise required under Art 8.2, including having regard to the best interests of the appellant which were to be with her mother (K). I do not accept Mr Wilding's contention that the judge only considered the positive aspects of the appellant's case or that he failed to engage in a 'close analysis of the facts'. The judge clearly had the public interest in mind and, as the passages from his determination set out above demonstrate, he carried out a most thorough and careful analysis of the evidence and facts.

35. Further, I see no basis, given that none of the judge's factual findings are challenged, for concluding that his ultimate finding that the decision was disproportionate was perverse or irrational. Such a conclusion requires that no reasonable judge could have reached those findings. Perversity or irrationality is a "very high hurdle" to overcome and a "demanding concept" (see, R(Iran) and others v SSHD [2005] EWCA Civ 982 at [11]). Merely to disagree with a finding comes nowhere near overcoming the "very high hurdle" of irrationality or perversity. Indeed, as Carwarth LJ (as he then was) observed in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40] in relation to a challenge to a judge's finding that removal was disproportionate on the ground that it was perverse:

> "[t]he mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law…"

36. There were undoubtedly compelling circumstances in the appellant's case which would, again to use the language of Gulshan, result in unjustifiably harsh consequences for the appellant if she were not granted entry clearance. She would be the sole remaining member of her family unit including her grandmother, step-grandfather and mother, who would not be allowed to live in the United Kingdom. She is a 5 year old girl and the unchallenged finding of the judge was that neither the sponsor nor the appellant's mother could be expected to live with the appellant in Kenya. Given that finding, it is difficult to imagine any decision other than it would be disproportionate to split the appellant from her family unit.

37. For these reasons, I reject the respondent's contention that Judge Waygood erred in law in allowing the appellant's appeal under Art 8 of the

ECHR. The judge's decision was properly open to him whether or not the 'new' Rules applied.

38. I end as I began my discussion of the issues: Judge Waygood's determination is a detailed and comprehensive assessment of the evidence in which he reaches unchallenged findings of fact. The judge sets out in detail the relevant applicable law in respect of Art 8 and the relevance of the appellant's best interests in that assessment. The limited scope of the ECO's grounds, even when expanded by Mr Wilding in his oral submissions, come nowhere near identifying any error of law in the judge's determination.

Decision

39. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 of the ECHR did not involve the making of an error of law. That decision stands.

40. The First-tier Tribunal decision to allow the appeal of the appellant's step-grandfather under para 352FA of the Rules was not subject to appeal.

41. Thus, the ECO's appeal to the Upper Tribunal in respect of the appellant's appeal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

Judge Waygood made a fee award of any fee paid or payable in respect of both applications. I have upheld Judge Waygood's decision allowing the appellant's appeal. His decision to allow the appeal of the appellant's step-grandfather was not challenged. In these circumstances, I also make a fee award of the full fee payable in relation to both applications.

Signed

A Grubb
Judge of the Upper Tribunal