



**Upper Tier Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/10367/2013  
OA/10368/2013  
OA/10369/2013  
OA/10370/2013

**THE IMMIGRATION ACTS**

**Heard at North Shields  
On 19 May 2014**

**Determination Promulgated  
On 13 June 2014**

**Before**

**Deputy Upper Tribunal Judge Pickup  
Between**

**Secretary of State for the Home Department  
[No anonymity direction made]**

**and**

**Mashida Bibi  
Emerby Bakwanamaha Yambuya  
Salnody Kakule Yambuya  
Patricia Bouwe Lisasaya Yambuya**

Appellant

Claimants

**Representation:**

For the claimants: Mr C Boyle, instructed by Halliday Reeves  
For the appellant: Ms H Rackstraw, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The claimants, Mashida Bibi, date of birth 2.8.80, and her claimed adopted children, Emerby Bakwanamaha Yambuya, date of birth 19.5.96, Salnody Kakule Yambuya,

date of birth 20.5.00, and Patricia Bouwe Lisasaya Yambuya, date of birth 7.6.03, are DRC nationals.

2. This is the appeal of the Secretary of State against the determination of First-tier Tribunal Judge Caswell, who allowed the claimants' appeals against the decisions of the respondent, dated 21.3.13 and 7.11.13, to refuse their applications made on 9.3.13 for entry clearance to the United Kingdom for family reunion under paragraph 352A of the Immigration Rules. The Judge heard the appeal on 5.3.14.
3. First-tier Tribunal Judge Cheales granted permission to appeal on 1.4.14.
4. Thus the matter came before me on 19.5.14 as an appeal in the Upper Tribunal.

### **Error of Law**

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Caswell should be set aside.
6. The relevant background to the appeal may be summarised as follows. The first claimant sought family reunion with her spouse, Joachim Afongo Yambuya, who was granted limited leave to remain in the UK as a refugee on 16.8.11. It is claimed that they were married in a customary marriage on 5.8.06. Her application was considered under paragraph 352A of the Immigration Rules but the Entry Clearance Officer was not satisfied on the limited evidence that the claimant was married as claimed, or that a marriage took place before the sponsor left his home country.
7. The other claimants are alleged to be the children of the sponsor's brother and to have been adopted by the sponsor and the first claimant. It is alleged that the family rejected their mother, when she was found to be pregnant by another man, and their father developed serious mental illness so that he could no longer look after the claimants. The first claimant and the sponsor in the DRC then looked after the three claimants, until the sponsor fled the DRC in 2009. Their applications were considered under paragraph 352D and 319X of the Immigration Rules, the first being as the child of a parent with limited leave to remain as a refugee and the second being as the child of a relative with limited leave to remain as a refugee. However, the Entry Clearance Officer noted that 352D does not apply to de facto adopted children. Further, the Entry Clearance Officer was not satisfied that the relationship between these claimants and the sponsor was as claimed. A supplementary refusal decision dated 11.11.13 did not accept submitted adoption papers and noted that in any event the adoption would not be recognised in the UK.
8. Judge Caswell accepted the sponsor's evidence as credible and reached the conclusion that he and the first claimant were validly married as claimed and that their marriage subsists with each of them intending to live with the other. In the circumstances, the judge found that all the requirements of paragraph 352A were made out in her case.

9. It appears to have been conceded at the First-tier Tribunal hearing that the three child claimants could not meet the requirements of paragraph 319X of the Immigration Rules. The judge also found that the claimants failed to demonstrate that the formal or alternatively de-facto adoptions by the sponsor and the first claimant is recognised in the UK.
10. However, having found that the child claimants could not meet the requirements of Appendix FM in relation to family life, the judge went on to conclude that there were arguably good grounds for going on to consider article 8 outside the Immigration Rules on the basis that there were compelling circumstances not sufficiently recognised under the Rules. The judge then applied the Razgar steps. Contrary to the submissions of the Secretary of State's representative, the judge found on the evidence of the sponsor that he and the first claimant had been an effective family unit since 2005 and thus family life which would be interfered with if not granted entry clearance. Taking into account the best interests of the children, the judge reached the conclusion that the decision was unlawful as being incompatible with the child claimants' Convention rights. The judge thus allowed the first claimant's appeal under the Immigration Rules and that of the child claimants on human rights grounds.
11. The grounds of application for permission to appeal first argue that the First-tier Tribunal Judge had failed to provide adequate reasons for finding that the sponsor and the first claimant are in a genuine and subsisting marriage and intend to live together permanently. Secondly, it is submitted that the Tribunal erred in law in its approach to article 8. It is asserted that the judge failed to comply with MF (Nigeria) and Gulshan, to the effect that the Immigration Rules are a complete code and article 8 ECHR outside the Immigration Rules should only be considered if there are arguably good grounds for finding that there are compelling circumstances not sufficiently recognised in the Rules which, exceptionally, justify granting the application outside the Immigration Rules because the result would otherwise be unjustifiably harsh.
12. In granting permission to appeal, Judge Cheales noted, "In her grounds for onward appeal, the respondent asserts that the judge failed to give reasons or adequate reasons for findings on material matters and has erred in law in her approach to the Article 8 assessment, taking into account the guidance in MF (Nigeria) [2013] EWCA Civ 1192, Gulshan [2013] UKUT 00640 and Nagre [2013] EWCA 720. It is arguable that the judge has failed to give adequate reasons in her findings on proportionality, taking into account the best interest of the children."
13. For the reasons set out herein, I find that there was no error of law in the making of the decision of the First-tier Tribunal such that the decision should be set aside and remade.
14. I find that the First-tier Tribunal Judge gave clear and cogent reasons for finding that the claimant and the sponsor are in a genuine and subsisting marriage and intend to live together permanently. As the judge stated at §12 credibility was at the core of the appeal. Between §12 and §17 the judge set out her reasons. The sponsor was found to

be credible. The judge accepted evidence of contact, financial support, and reasons for absence of documents. It is highly significant that on his first arrival in the UK he gave the name and date of birth of his wife, which is the same as that of the first claimant. The conclusion reached was one which the judge was entitled to come having been able to assess the sponsor's oral evidence and credibility. I find no error of law in this regard.

15. In relation to the child claimants, the judge found that they had failed to demonstrate that adoption, whether legal in DRC or de-facto adoption, is recognised in the UK so as to qualify under paragraph 352D. The judge also found that they failed to meet the requirements of Appendix FM.
16. Accepting that the child claimants did not meet the requirements of the Rules, Mr Boyle relied on the authority of AA (Somalia) (FC) v Entry Clearance Officer (Addis Ababa) [2013] UKSC 81, where the Supreme Court reached the conclusion that whilst a de-facto adoption is not covered by the definition of parent within 352D, as the adoption has to be recognised in the UK, the Immigration Rules were not exhaustive of the UK's obligations under international law. In that case AA had been allowed entry under article 8 ECHR and much of the debate was about the lesser rights in comparison to someone qualifying under 352D. At §24 Lord Carnwarth accepted that it appeared harsh that under the Rules the de-facto adopted child was treated less favourably.
17. The judge was directed to Gulshan and invited to consider whether there were here compelling circumstances not sufficiently recognised in the Immigration Rules to as to justify a consideration of article 8 ECHR outside the Immigration Rules. At §22 the judge noted factors which mitigated against the claimants. However, between §23 and §26 the judge set out her reasons for reaching the conclusion that the claimants' circumstances were compelling. In doing so, the judge reached views on the submitted documents and the sponsor's credibility which she was entitled to and for which she has given cogent reasons.
18. Ms Rackstraw submitted that the judge had not analysed the evidence carefully enough and should have paid more attention to other or absent evidence. It was suggested that the judge's reasons were 'flimsy' and her findings brief.
19. It is not necessary for the judge to set out every part of every finding of fact, provided it is clear that a careful assessment has been made of the evidence and a conclusion reached which is within the margin of appreciation open to the judge, i.e. a conclusion which she was entitled to reach on the evidence and for which the reasons are clearly set out. Much of Ms Rackstraw's submissions centred on the argument that the concerns of the Entry Clearance Officer were grave and that there was a risk of child trafficking, in respect of which the judge had not given adequate consideration or weight. However, based in large part as it was on a finding as to the credibility of the sponsor, much of the criticism in the grounds of appeal is in reality a disagreement with the findings of the judge. I also note that the sponsor was found credible in his asylum claim, which also touched on his family circumstances.

20. In all the circumstances, I find that the First-tier Tribunal Judge was entitled to reach the conclusion that there were on the facts of this case compelling circumstances justifying consideration of article 8 outside the Immigration Rules. In undertaking that exercise, and in particular the proportionality balancing exercise between on the one hand the legitimate aim of the Secretary of State to protect the economic well-being of the UK through immigration control and on the other the right to respect for private and family life, the judge has set out the factors taken into account and reached a decision which I am satisfied she was entitled to make and for which cogent reasons have been given.

**Conclusion & Decision:**

21. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeals remain allowed.



Signed:

Date: 12 June 2014

Deputy Upper Tribunal Judge Pickup

**Anonymity**

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

**Fee Award**

**Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee has been paid in this case.



Signed:

Date: 12 June 2014

Deputy Upper Tribunal Judge Pickup