Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16057/2012

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 10 February 2015	**On 12 February 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MERDI KASONGO

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A J Bradley, of P G Farrell, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The sponsor in these proceedings is Guelord Kisongo, born on 20 September 1982. He and his relatives are all citizens of the DRC. He was recognised as a refugee in the UK in 2010. His household in the DRC included his wife, Shella Mbelu, born on 6 January 1986; his brother, Jizreel Kisongo, born on 1 August 1997; his daughter, Gracia Kisongo, born on 10 December 2002 of an earlier relationship; and his nephew (his brother's son), Merdi Kisongo, born on 9 January 2002, the appellant.

2. All four of those relatives sought entry clearance for family reunion in the UK. The application by Gracia was granted, and she has been here with the sponsor for about two years. Jizreel did not appeal.

3. Appeals to the First-tier Tribunal by Shella Mbelu (OA/14464/2012) and Merdi Kisongo were heard by Judge D'Ambrosio on 13 May and 4 July 2014. In his determination promulgated on 29 July 2014 he found that the relationship between

the sponsor and his wife was as claimed, and allowed her appeal under the Immigration Rules. At paragraph 138 he said that because he had allowed the appeal under the Rules it would be disproportionate and unlawful for the respondent to continue to refuse entry, so he allowed her appeal also under Article 8 of the ECHR. The Judge found that Merdi's case failed under the Immigration Rules, an outcome which is not disputed, and dismissed it also under Article 8.

4. The grounds of appeal to the Upper Tribunal are as follows:

> 2. … the FtT allowed Gracia and the sponsor to resume family life with Shella following her entry to the UK …. The effect of refusing [the appeal of Merdi] was that a twelve year old boy is now living in Congo with the prospect of his mother figure leaving him, following his father figure having been separated from him through fear of persecution [and] disappearance of his natural mother who is presumed dead … the sponsor confirms that Shella … cannot leave a twelve year old boy in Congo … the situation borders on the perverse.
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> 3. … the FtT was referred to *Mohamoud* (paras 352D and 309A – *de facto* adoption) [2011] UKUT 378 … similar in its facts … the appeal was allowed under Article 8 … the Rules are meant to protect children, and from the risk of being passed from one adult to another without appropriate safeguards. Despite the difficulties of refugee families meeting the terms of the Rules this does not justify departing from the Rules *given that Article 8 is available* …
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> … the FtT refused the case under Article 8 *inter alia* on the basis that failure to maintain and accommodate without recourse to public funds tipped the balance … such reasoning is wholly inadequate … it was wholly unlawful … to fail to consider the protection of the child in such a balancing exercise.
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> … the FtT erred by considering whether or not [Jizreel] would apply to join the family unit …
>
> 4. … the findings on Article 8 are inadequate.

5. Mr Bradley stressed that the appeal of Shella (who is now in the UK) had been allowed not only under the Rules but also under Article 8. If family life interests were such that it would be disproportionate to deny her entry, it must have followed that the same interests required the appellant's entry. *Mohamoud* suggested that such cases, where it was practically impossible to prove a *de facto* adoption in terms of the Rules, should succeed under Article 8. The best interests of children were to be respected also in entry clearance cases, and the respondent was obliged to promote refugee family unity. The Judge had not thought through the consequences of his two Article 8 decisions, and should not unnecessarily have worsened the family situation.

6. Mrs O'Brien said that if the other appeal had succeeded "genuinely" under Article 8, it would have been odd to have different outcomes for the two appellants; but the true situation was that having succeeded under the Rules, she had no case requiring consideration under Article 8. The Judge's finding that respect was not even on any alternative basis. He said specifically that he was allowing it under Article 8 only *because* it succeeded under the Rules, which was otiose. The Judge did not say why in Merdi's case he was looking outside the Rules at all. *Mohamoud* did not require him to do so. Although the case did disclose an anxious family situation, the Judge had not reached inconsistent outcomes in the two appeals but had recognised there would be a difficult choice to make (see paragraph 159). Accommodation,

maintenance and general public funds considerations were not irrelevant but an important part of the public interest reflected in the Rules. The SSHD was entitled through the Rules to set the considerations by which some family members would be permitted entry and others not. The Judge had undertaken a balancing exercise outside the Rules, although he had not said why the case called for that. Assuming that the Judge should have engaged in a proportionality assessment, there was no error in the outcome reached.

7. Mr Bradley in reply said that the SSHD had not "cross-appealed" the Article 8 outcome for the other appellant, and it must have followed that both appeals should succeed. He accepted that the appellant has a route under the Rules, which includes financial requirements. Those were not met in this case, although the sponsor has since started work, and the situation might be different on a future application. He said that economic considerations could not trump the best interests of a child.

8. I reserved my determination.

9. It would be very strange for Article 8 to require the entry of Shella but not of Merdi, both being members of the family unit and both failing to meet the requirements of the Rules. However, and although there has been no cross-appeal, the determination is badly framed on that point. Although the Judge was bound to determine all matters raised as grounds of appeal (section 86(2)(a) 2002 Act), once it is found that a case meets the requirements of the Rules there is no Article 8 interference to consider. There is no scope for allowing under Article 8 because the respondent might "continue to refuse entry" after an appeal under the Rules has reached a successful conclusion. The reason the Judge gave for success under Article 8 was simply success under the Rules. That is a misconception and of no benefit to Merdi. Although that is at first sight his best point at this stage, an unappealed technical error in her case cannot be the foundation for substantive success in his.

10. *Mohamoud* is not authority for generally allowing under Article 8 appeals by *de facto* adopted children who fail to meet the requirements of the Rules.

11. The correct approach on the interaction of Article 8 and the Rules in family life cases is established by a series of cases. When the First-tier Tribunal is sitting in Scotland it should begin with *MS* [2013] CSIH 52 where Lord Drummond Young, giving the opinion of the Court, said:

> It can be expected that the new rules will cover most cases where an applicant seeks to rely on his or her Convention right to private and family life. If an official or tribunal or court is asked to consider leave outside the rules, an applicant must put forward a reason for doing so. Such a reason will usually consist of circumstances "in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate" (in the words of paragraph 3.2.7d of the Home Secretary's guidance). We are of opinion that in considering whether such circumstances have been demonstrated by an applicant, the criterion that should be used is that of a "good arguable case", as suggested by Sales J in the passage quoted above. The decision maker should examine the circumstances put forward by the applicant and determine whether they disclose a good arguable case that the rules would produce an unfair or disproportionate result such that the applicant's article 8 rights would be infringed. It is only if that test is satisfied that there is any need to go on to consider the application of article 8 in detail.

12. The Presenting Officer correctly pointed out that in this case the Judge went straight into a proportionality assessment.

13. Whether or not the Judge was right to embark on that assessment, it has not been shown to suffer from any material legal flaw. There is an apparent inconsistency in the outcome of the two cases, but not a real one. The first appellant met the requirements of the Rules and the second did not. Such outcomes are exactly what the Rules are designed to produce. That family members are put to hard choices, are separated, and face financial requirements is an inevitable part of legitimate immigration control. The Judge at paragraphs 147 – 160 carefully weighed the factors on both sides. He did not take into account any irrelevant factors and did not fail to take into account any relevant factors. He was entitled to strike the balance as he did. The Upper Tribunal is not entitled to interfere with his decision.

14. The determination of the First-tier Tribunal shall stand.

15. No anonymity direction has been requested or made.

11 February 2015
Upper Tribunal Judge Macleman