Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13530/2013

THE IMMIGRATION ACTS

Heard at: Manchester
On: 11th December 2015

Decision Promulgated
On 14th April 2016

Before

UPPER TRIBUNAL JUDGE MARTIN
UPPER TRIBUNAL JUDGE BRUCE

Between

STB
(anonymity direction made)

Appellant

and

Entry Clearance Officer, Nairobi

Respondent

Representatives
For the Appellant: Ms Mair, Counsel instructed by Montague Solicitors
For the Respondent: Mr Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is agreed to be a national of Ethiopia date of birth [ ] 1997. She appeals with permission[1] the decision of the First-tier Tribunal (Judge Davies) to dismiss her appeal against the Respondent's decision to refuse to grant her entry

1 Permission granted on the 1st October 2014 by First-tier Tribunal Judge Andrew

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clearance. She wishes to settle in the UK with her maternal aunt, who has adopted her in accordance with Ethiopian law.

2. The application, made on 7th May 2013, requested indefinite leave to enter the UK as the child of a parent, parents, or relative present and settled in the UK under paragraph 297 of the Immigration Rules. The application was refused on the 21st May 2013. The Respondent was not satisfied that the Appellant was related as claimed to her Sponsor, nor that she had been adopted by her in accordance with Ethiopian law. The Appellant had claimed that her parents had both died in 2000, and had provided death certificates issued in 2009 as evidence of this; the Respondent was not prepared to attach any weight to these certificates. The evidence going to contact between the Appellant and her Sponsor did not establish that there was any relationship of dependency between them. Entry clearance was refused and the Appellant appealed to the First-tier Tribunal.

The Decision of the First-tier Tribunal

3. When the matter came before Judge Davies he agreed that the Appellant could, in addition to advancing her case under paragraph 297 of the Rules, rely upon paragraph 310 and Article 8 ECHR.

4. Paragraph 310 reads:

> '310. The requirements to be met in the case of a child seeking indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join an adoptive parent or parents in one of the following circumstances;
>
> > (a) both parents are present and settled in the United Kingdom; or
> >
> > (b) both parents are being admitted on the same occasion for settlement; or
> >
> > (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
> >
> > (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
> >
> > (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
> >
> > (f) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations

which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; or

(g) in the case of a de facto adoption one parent has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is seeking admission to the United Kingdom on the same occasion for the purposes of settlement; and

(ii) is under the age of 18; and

(iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(iv) can, and will, be accommodated and maintained adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and

(v) DELETED

(vi) (a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident, being a country whose adoption orders are recognised by the United Kingdom; or

(b) is the subject of a de facto adoption; and

(vii) was adopted at a time when:

(a) both adoptive parents were resident together abroad; or

(b) either or both adoptive parents were settled in the United Kingdom; and

(viii) has the same rights and obligations as any other child of the adoptive parent's or parents' family; and

(ix) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and

(x) has lost or broken his ties with his family of origin; and

(xi) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the United Kingdom; and

(xii) holds a valid United Kingdom entry clearance for entry in this capacity; and

(xiii) does not fall for refusal under the general grounds for refusal.'

The First-tier Tribunal was not satisfied that the Appellant could meet these requirements. At paragraph 33 of the determination it is correctly noted that Ethiopia is not a party to the Hague Convention, and that its adoption procedures are not recognised as valid in England and Wales.

5. The relevant parts of paragraph 297 read:

> '297. The requirements to be met by a person seeking indefinite leave to enter the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he:
>
> (i) is seeking leave to enter to accompany or join a parent, parents or a relative in one of the following circumstances:
>
> …
>
> (f) one parent or a relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child is seeking to join without recourse to public funds in accommodation which the parent, parents or relative the child is seeking to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents, or relative the child is seeking to join, without recourse to public funds; and
>
> (vi) holds a valid United Kingdom entry clearance for entry in this capacity; and
>
> (vii) does not fall for refusal under the general grounds for refusal.'

In respect of this provision the First-tier Tribunal found that the Appellant is related as claimed to her sponsor, DNA evidence having been obtained. It appears to be accepted that the Sponsor has been financially supporting the Appellant in Ethiopia and that she has made decisions regarding her upbringing. As to whether there are any "serious and compelling family or other considerations which make her exclusion undesirable" the determination finds there to be a lack of evidence. The evidence about the "old and infirm" guardians with whom the Appellant presently lives was rejected as discrepant. The Tribunal finds that one of those guardians has income from a business and that the family are in fact living in comfortable circumstances. The appeal is then dismissed, with no reference to Article 8.

Error of Law

6. The Appellant was granted permission to appeal to the Upper Tribunal on the following grounds:

i) The determination fails to address Article 8 ECHR;

ii) There is no consideration given to the best interests of the child appellant;

iii) The Tribunal erred in its approach to paragraph 310, specifically in respect of whether the Ethiopian adoption constituted a "decision taken by a competent authority", a test not defined with reference to the Hague Convention. Reliance is placed on Buama (inter-country adoption – competent court) [2012] UKUT 00146 (IAC);

iv) The Tribunal erred in its approach to the test in paragraph 297(i)(f). It appeared to conclude that there cannot be "serious and compelling family or other considerations" because the Appellant has unrelated guardians in Ethiopia. In making that finding the Tribunal failed to give adequate reasons and failed to take account of the Respondents published policy in the form of the *Immigration Directorates' Instruction* ("the IDI")

v) Failure to give reasons for the finding that the evidence "did not support" the contention that the Appellant's present guardians are unable to care for her; reasons should have been given for this conclusion, particularly where the Sponsors' credibility had not been challenged at the hearing.

7. The matter was first listed on the 9th December 2014 when it came before Judge Bruce, sitting as a Deputy of the Upper Tribunal. At that hearing Mr Harrison for the Respondent accepted that there was an error of law in the determination in that there were no findings at all on Article 8 or the best interests of the Appellant. He accepted Ms Mair's contention that although s55 of the Borders, Citizenship and Immigration Act 2009 extended no statutory obligation to Entry Clearance Officers the obligation to consider the child's welfare nevertheless existed pursuant to Article 3 of the Convention on the Rights of the Child and Strasbourg jurisprudence: T (s55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC).

8. Mr Harrison further accepted that in addressing paragraph 297(i)(f) of the Rules the Tribunal had not given adequate reasons for its findings; nor had the extensive submissions based on the IDI been addressed. These, in summary, were that the IDI suggests that where the child applicant has in her country of residence another *relative* looking after her the high threshold in (i)(f) is unlikely to be met. In this case the guardians with whom she was living were entirely unrelated; the IDI suggests that in such circumstances entry clearance could be granted. The Respondent further accepted that there was a good deal of evidence which is not addressed in the determination.

9. For those reasons and to that extent the determination was set aside by Judge Bruce. Grounds (i), (ii), (iv) and (v) were accepted to have been made out.

10. In respect of ground (iii) Ms Mair relied on the decision in Buama. In that case an order by a Ghanaian Magistrate had been rejected as not in accordance with Ghanaian law by the First-tier Tribunal. On appeal the Upper Tribunal (Judge Warr) held that in the absence of a good reason to so find, the Order of a Ghanaian court should be presumed to be in accordance with Ghanaian law. He held that the court had constituted a "competent court" and the appeal was allowed with reference to paragraph 310 of the Rules. Ms Mair relied upon evidence that in February 2011 the Federal First Instance Court of Ethiopia had approved an 'adoption contract' drawn up in respect of the Appellant. She submitted that paragraph 310 of the Rules made no reference to the Hague Convention and that the First-tier Tribunal had therefore erred in treating the fact that Ethiopia is not a party to that agreement as determinative.

11. Judge Bruce did not find any merit in that submission. Ms Mair was correct to say that the recognition of an overseas adoption is not contingent upon the country in question being party to the Hague Convention. That does not however mean that an adoption order from any court in the world is recognised as valid for the purpose of the Immigration Rules, or indeed the applicable UK law and practice relating to overseas adoptions, see for instance the Adoption (Recognition of Overseas Adoptions) Order 2013 ("the Order")the Adoption and Children Act 2002 ("the Act") and The Adoptions with a Foreign Element Regulations 2005 ("the Regulations"). Ethiopia does not appear in the schedule of countries set out in the Order; nor in its predecessor The Adoption (Designation of Overseas Adoptions) Order 1973. The Act, read in conjunction with the Regulations, sets out clear procedures that must be complied with before an overseas adoption can be recognised. These include, for instance, the requirement to apply to an adoption agency for assessment of his, her or their suitability to adopt, and obtaining from the Secretary of State a 'Certificate of Eligibility to Adopt' confirming that a positive assessment has been made. Buama does not address any of these issues; it was limited to consideration of the approach that the First-tier Tribunal took to the court order. As such it is not authority for the proposition that approval of adoption by any foreign court is sufficient to meet the requirements in paragraph 310. Since Ethiopia is not a country recognised in the Order, and that the Sponsors in this case have complied with none of the requirements in the Act and Regulations, it follows that the decision of the Ethiopian court is not a sufficient basis to conclude that the requirements of paragraph 310 (vi) are met. Ground (iii) was not made out.

Adjournment of Proceedings

12. Given Judge Bruce's indication in respect of paragraph 310, and the possible ramifications it could have for the case under 297(i)(f) and Article 8, the matter was adjourned to enable the Appellant (or rather her Sponsors) to contact the relevant authorities to enable an assessment of their suitability as prospective adopters to take place.

13. On the 18th May 2015 the matter came back before Judge Bruce. Ms Mair explained that those instructing her had contacted Manchester City Council with a view to

arranging an assessment. They were referred to Nugent Care Adoption Service, a registered and approved voluntary adoption agency. They also spoke with a representative of an alternative agency, Adoption Matters. Both informed the Appellant's solicitors that a full assessment would take 6 months and cost between £7,000 and £10,000. For the Sponsors, this was "not feasible or viable". Consideration had been given to the idea of obtaining a less expensive, and quicker, report from an independent social worker; the Tribunal indicated that if this were to consist of a report prepared after very limited contact with the family this would be of very limited value. The matter would therefore proceed to re-making without any assessment of the Sponsors.

14. The decision in respect of paragraph 297(1)(f) and Article 8 was re-made by this Tribunal following a hearing on the 11th December 2015 when both Sponsors gave oral evidence.

The Evidence

GT

15. GT is the Appellant's maternal aunt. Her evidence, set out in her statements[2] and oral evidence, is as follows.

16. GT was born in Asmara in 1966. She had one brother and one sister.

17. On the 25th September 1997 GT's sister gave birth to the Appellant. In her witness statement GT states that she left Eritrea shortly thereafter and came to the United Kingdom to claim asylum. Her sister, brother-in-law and the Appellant went to live in Ethiopia. In her oral evidence GT stated that in fact the Appellant was born after she had left for the UK.

18. On the 12th May 2000 the Appellant's father died. He was an alcoholic who died of liver failure. In the weeks following his death GT's sister complained of feeling unwell; as a person of Eritrean origin living in Ethiopia she was unable to receive medical treatment and on the 28th May 2000 she also died.

19. GT states that when she was contacted and told about her sister's death she immediately undertook responsibility for the Appellant. She made arrangements for her to live with GAG and his wife WGG, described as "family friends on the Appellant's father's side of the family". They agreed to care for her as long as GT paid and took responsibility for any major decisions. GT provided for the Appellant financially by transferring money and sending money and gifts with friends visiting Ethiopia. GT took decisions regarding her medical care, for example by asking her carers to arrange visits to the dentist. As the Appellant grew older GT kept in touch with her by telephone and now speaks with her on a regular basis. This has included providing tutoring to her over the phone. GT has paid for her education.

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2 The first statement is undated but came under cover of letter dated 21st March 2014, the second, also undated, came under cover of letter dated 13th June 2014. For the purpose of this appeal GT submitted a further statement dated 8th December 2015.

20. GT states that she endeavoured to regularise her status in the UK as soon as possible so that she could bring the Appellant to join her here. GT was granted indefinite leave to remain on the 29th June 2005. At some point after this she was granted British citizenship.

21. In 2007 GT travelled to Sudan in order to get married to HZ.

22. On the 30th September 2009 GT travelled to Ethiopia to visit the Appellant. She describes this meeting as "emotional". She began proceedings to formally adopt her in accordance with Ethiopian law. She set about trying to obtain official confirmation of the deaths of the Appellant's parents.

23. GT states that she has been unable to have children herself and that this has only increased her wish to have the Appellant here with her and her husband.

24. In respect of the possibility of adopting the Appellant in accordance with UK law GT recognises that certain checks need to be made. She points out that both she and her husband work in the NHS and that they are therefore subject to annual criminal record checks. They are both in full time employment and have plenty of room in their two bedroomed property. She has already gone through the assessment process in Ethiopia and found it to be "very expensive and mentally exhausting". GT also understands that people looking to be approved as adoptive parents are expected to attend preparation classes. Since she has acted as the Appellant's parent since the girl was two years old she does not consider that she would benefit from such classes. Similarly she does not believe that she needs to discuss her parenting skills with a social worker during a 'homestudy' visit. She has always viewed the Appellant as her own child and therefore does not need any further preparation to be a parent. She states that she and her husband have "supported her and cared for her as our own". She does not therefore wish to undertake the assessment process in the UK because it will result in further delay, cost between £7000 and £10,000 and even after that would not guarantee the Appellant would gain entry.

25. In her most recent statement GT claims that the "elderly" couple who are caring for the Appellant are increasingly unwell. The gentleman, GAG, is suffering from oedema which was caused by heart failure. He has not been able to get treatment in Ethiopia and plans to travel to the USA to receive this. He would have travelled before but did not wish to leave the Appellant alone in Ethiopia. He and his wife do not have the same emotional bond with the Appellant who has always looked to GT as her mother. In her oral evidence GT stated that GAG has previously travelled to Italy and Indonesia to receive medical treatment. At this time the Appellant had been left staying with neighbours. This prompted Mr Harrison to enquire as to the carers' financial situation. GT stated that she did not know anything about that. She did not know if they owned their own home. They had previously had a corner shop but it was now closed down. She was not sure if they had children of their own, perhaps one or two, but they are adults now and do not live with them. She does not know how GAG funded medical treatment in Italy and Indonesia nor how he

intends to fund such care in the USA. At present GT sends between £1000 and £2000 per year for the Appellant's upkeep.

HZ

26. We heard oral evidence from GT's husband HZ who began by adopting his witness statements[3].

27. HZ states that he was in a relationship with GT prior to their marriage in Sudan in 2007. They had known each other in Eritrea. He therefore knew of the background, about her having lost her sister and taken on care of the Appellant, before he married her. He and GT had discussed on many occasions the Appellant's welfare and the possibility of adopting her. The Appellant enjoys a really good relationship with GT who treated her like her own child. Since their marriage in 2007 he has also treated GT like his daughter. He states that she brings them both joy. Their commitment to her is evidenced by the considerable amount of time and money that they have spent adopting her in Ethiopia and trying to secure her entry to the UK. HZ is looking forward to being a proper father and looking after her in the UK.

28. HZ states that the length of time that this process has taken has had detrimental effects on the Appellant's education. She has always got good grades but the past year she has slipped and he believes that this is because of the stress of this process and the uncertainty about her future.

29. In response to questions from Mr Harrison HZ confirmed that he has never met the Appellant in person but that he has spent a lot of time talking to her on the phone and using social media applications. Asked why his wife had not been to see the Appellant before 2009 he said that she had been sorting out her status. She had prioritised him in organising the trip to Sudan and their marriage.

Documentary Evidence

30. At the outset of the proceedings before us Mr Harrison agreed the following facts: it is now accepted that GT is in fact the biological aunt of the Appellant, and that she has been financially supporting her for a number of years (although the extent of that support cannot be quantified with reference to the documentary evidence). The Respondent further accepts that the Appellant is currently living with GAG and his wife, and that GT has adopted the Appellant in accordance with Ethiopian law. In his closing submissions Mr Harrison further accepted that the Sponsors have some contact with the Appellant by telephone and via social media, and that GT visited her in Ethiopia in 2009. It is not therefore necessary for us to set out in detail all of the documentary evidence relating to these matters.

31. The Respondent's bundle contains what purports to be the death certificate of the Appellant's father. It was issued on the 7th October 2009 and states that he died on

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3 The first statement is undated but came under cover of letter dated 21st March 2014, the second, also undated, came under cover of letter dated 13th June 2014

the 12th May 2000 of an unspecified "sickness". On appeal the Appellant has produced a letter from a Mr Tsegaye, Chairman of the Parish Council in the Ethiopia Orthodox Tewahdo Church. Mr Tsegaye confirms that the Appellant's father was buried at that church on the the 12th May 2000. The Respondent's bundle also contains a death certificate relating to the Appellant's mother, issued on the same date. This states that she died on the 28th May 2000 in Addis Ababa. A letter from Mr Tsegaye confirms that her burial took place on the same day at the Ethiopia Orthodox Tewahdo Church. The most recent bundle contains photographs of grave stones identified as belonging to the Appellant's parents.

32. The Appellant relies on a letter dated 9th May 2014 from Ephream Geletaw, who states that he is the Principal of Addis Ababa City Government Agazian No 2 Primary School. Mr Geletaw confirms that the Appellant's school fees are paid by the Sponsors in the UK and that they have "followed up her educational status to make sure that she in the good and safe side".

33. The Appellant has produced an original 'statement of consent' signed by WGG and dated 24th May 2014, along with a certified translation thereof. She states that although she has formed a very close relationship with the Appellant, the Appellant prefers to discuss personal matters with GT. She gives the example of when the Appellant was suffering from acne she spoke with GT about how best to deal with this. The statement is accompanied by a copy of WGG's passport, showing her to have been born in 1953. The Appellant further relies on a statement dated 24th May 2015 from GAG. He states that since the death of the Appellant's parents he has been providing all the necessary care required for her. Although he and his wife care for her, they turn to GT to make important decisions about the Appellant's life. GAG has witnessed the Appellant on the phone to GT and HZ and can see for himself how happy she is talking to them. He knows that they are in a good position to give the Appellant the very best of care. He states that now his health and that of his wife is deteriorating they are no longer in a position to look after the Appellant and so consent to her going to live with her aunt in the UK. The appended copy Ethiopian passport shows GAG to have been born in 1942.

34. In respect of the assertion that GAG and WGG are now too ill to look after the Appellant we were referred to two brief handwritten medical certificates in the Appellant's bundle, both dated 17th March 2006 in the Ethiopian calendar; this date was converted to September 2013. Geta Higher Medical Service state that GAG is suffering from hypertension and "type II DM" as well as IHD. We understood the latter to refer to diabetes and heart disease. WGG is described as a "well known case of chronic rheumatoid arthritis". A subsequent certificate issued by the same clinic is dated 28 April 2015. It states that WGG has attended the clinic suffering from Type II diabetes and IHD.

Our Findings

35. We remind ourselves that in respect of the Rules the burden of proof lies on the Appellant, and the standard of proof is the balance of probabilities. In respect of

Article 8 it is for the Appellant to establish all matters of fact that she relies upon. She must first establish that she shares a family life with her Sponsors in the UK and that the decision to refuse her entry clearance to join them amounts to a failure of the state's positive obligations to respect that Article 8(1) right. If Article 8 is shown thereby to be engaged it will be for the Respondent to show that the decision is lawful and proportionate to the legitimate aim pursued, accepted to be the protection of the economy.

Paragraph 297

36. We find that at the date of decision the Appellant was under the age of 18, was not leading an independent life and that her relatives in the UK are able to adequately maintain and accommodate her. The issue of contention arising under paragraph 297 is whether the Appellant is seeking to join GT and that [at (i)(f)]:

> "... there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care"

37. In this case this test involves two related, but distinct, assessments. It must be shown that "suitable arrangements have been made for the child's care", and this is a matter to which we return below, but first consideration must be given to the circumstances that the Appellant faces at home in Ethiopia.

38. The phrase "serious and compelling" has been held to reflect a high test in which all relevant factors must be considered: see for instance TM (Jamaica) v SSHD [2007] EWCA Civ 178. It may involve dire socio-economic conditions, a lack of security or some personal trauma, but not necessarily so. Ms Mair directs our attention to the relevant IDI (Chapter 8, Section 5A, Annex M 'Children'). This directs Entry Clearance Officers to have regard, in making the assessment, to the government's obligations under s55 of the Borders, Citizenship and Immigration Act 2009. It states that the objective of the provision in 297(1)(f) is to allow a child to enter the UK only where that child cannot be adequately cared for by her *parents or relatives* in her own country [emphasis added].

39. Looking at the broad circumstances of the Appellant we make the following findings.

40. We accept, on the balance of probabilities that the Appellant's parents died when she was two years old. Although the death certificates were not issued contemporaneously we have read them in the round with the remaining evidence.

41. We accept that GT is the Appellant's biological maternal aunt.

42. We accept that since the death of her parents the Appellant has been under the care of GAG and his wife WGG. We were told in submissions, indeed it formed a central plank of the appeal to the Upper Tribunal, that these carers are simply family friends, unrelated in any way to the Appellant. We have some reservations about whether this is so, given the peculiar description that they are from the Appellant's "father's

side of the family" but are prepared to accept that assertion for the purpose of this determination. We accept that this couple are now aged 75 and 62. We accept that they are both suffering with various ailments associated with aging, including heart disease, diabetes and arthritis. We find however that the assertion that this means that they are "unable to care" for the Appellant is entirely un-particularised. Whilst it could be readily understood how such conditions might impede the ability of a carer to run around after a toddler, it is not clear to us in what way they would prevent the couple from "looking after" a fifteen-year-old, as the Appellant was at the date of decision. For instance, we were not shown any evidence that the medical conditions of the carers made it more difficult for them to talk to the Appellant, offer her advice or love. We find there to be no credible evidence that, having cared for this young woman since her infancy, they are no longer prepared to do so.

43. We do not accept the unsupported assertion of GT that the Appellant's carers are of "modest means" and that her niece has been wholly financially dependent upon her. We find that GT has helped to support her niece financially, remitting money using money transfer companies such as Western Union and sending gifts and money via friends who were visiting Ethiopia. As her aunt, and in the circumstances of her sister's death, it is only natural that she should do so. Similarly we are quite happy to accept that she has paid her school fees and taken an interest in her education. We consider it however to be unlikely that her carers are facing any kind of financial difficulty given the evidence that they are able to travel to Europe, Asia and America for private medical treatment. On the contrary, this would indicate that they are financially very comfortable.

44. We have no reason to doubt that the Appellant and GT speak to each other regularly and that since GT's marriage the Appellant has started to speak to HZ as well. We accept that in 2009 GT went to visit the Appellant and whilst there instituted adoption proceedings. We note however that in the six years since the Ethiopian courts have recognised the Sponsor as the Appellant's adoptive mother she has not been back to visit her.

45. Having considered all of that evidence we are unable to make a finding that it would be in the Appellant's best interests to come and live in the UK. She has lived in Ethiopia with GAG and WGG since she was a very young child. There is every indication that they have cared for her well, for instance ensuring that she has received an education and healthcare. It is apparent from their statements, and acknowledged by GT, that they have treated the Appellant with love and kindness. Although the Visa Application Form has been signed by the Appellant we note that it was completed by a relative on her father's side of the family (described by the Appellant in the VAF as her "brother") and that she was only 15 when she completed it. We have no direct evidence from her that she actually wants to come to live in the UK. That is a striking omission given that at the date of the appeal before us she is now 18 years old and obviously able to speak for herself. She has never been to the UK, has never met HZ in person and has only ever spent a matter of weeks with GT. We are unable to find that it would be in her best interests to leave her education, home and everything she knows in Ethiopia in order to come to a strange country to

live with a woman whom she did not meet until she was 12 years old and has not seen since.

46. It follows that we do not accept, on this assessment of the facts, that there are any "serious and compelling family or other considerations" which would render a refusal of entry undesirable. In making this finding we have had regard to the terms of the IDI, and the argument presented on behalf of the Appellant. The guidance reads: "the objective of this provision is to allow a child to join his parent or relative in this country only where that child could not be adequately cared for by his *parents or relatives* in his own country". It is suggested that this sentence raises an inverse inference that entry should be given where the day to day carers are *not* relatives. That is a fallacious syllogism. The guidance simply points out to case-owners that entry should not be granted where children are being adequately cared for by relatives. That does not mean that entry must be granted where they are being adequately cared for by someone else. The test is that contained in the Rule, and on the facts, it has not been met.

47. The second limb of the test in 297(i)(f) requires the Appellant to show that "suitable arrangements" have been made for her care in the United Kingdom. At the Error of Law stage Judge Bruce invited submissions on whether the protection regime relating to inter-country adoption should in principle be extended to children in similar circumstances seeking leave to enter under 297(i)(f). We are aware that this provision has in the past been successfully used by children seeking entry to join relatives in the UK where non-recognised adoptions had taken place: see for instance SK ("adoption" not recognised in the UK) India [2006] UKAIT 00068. We have however been shown no authority in which the Tribunal or higher courts have considered whether the test "suitable arrangements have been made for the child's care" should be interpreted to reflect those child protection measures.

48. It appears to us that there would be good reason to do so. As the Upper Tribunal noted in SK, the Immigration Rules should be read as a whole, and should "be constructed in such a way as to be consistent with the rest of English and United Kingdom law on the effects of overseas adoptions". We are not satisfied that there is any justification for drawing a distinction between blood relatives and entirely unrelated adopters: where the latter are always required to produce a Certificate of Eligibility to Adopt[4] it must be the case that the former must reach the same, or substantially similar standard, in meeting the test in 297(i)(f). The Immigration Rules on entry of adopted children reflect the United Kingdom's international obligations (for instance against trafficking) and the domestic legal framework, which sets out

4 See paragraph 308B of the Immigration Rules, inserted by Statement of Changes HC 565 on the 5th September 2012:

'309B. Inter-country adoptions which are not a de facto adoption under paragraph 309A are subject to the Adoption and Children Act 2002 and the Adoptions with a Foreign Element Regulations 2005. As such all prospective adopters must be assessed as suitable to adopt by a competent authority in the UK, and obtain a Certificate of Eligibility from the Department for Education, before travelling abroad to identify a child for adoption. This Certificate of Eligibility must be provided with all entry clearance adoption applications under paragraphs 310-316F.'

the circumstances in which adoptive parents are entitled to bring their adopted children here to join them. That involves, as a bare minimum, an independent professional assessment of whether the UK based carers are suitable persons to adopt a child. GT gave evidence to the effect that she has an annual CRB check at work and that she is willing and able to look after her niece. That is simply not enough.

49. The test of "suitable arrangements have been made for the child's care" is a high one. It cannot be discharged simply by pointing to the fact that a sponsor is employed, has a house, or is related to the applicant. It requires a rigorous assessment of the sponsor's suitability as a carer. The Rules have been put in place as a means of child protection, to prevent children being sent to live for instance with a "family friend" or "aunty" without any oversight into whether such individuals are suitable carers. The consequences of a failure to have such oversight are starkly illustrated by cases such as that of Victoria Climbie, and by the growing number of children found to be trafficked to the UK for the purpose of domestic servitude. Home Office caseowners, ECOs and Tribunal judges are not professional social workers. The application and appeal processes do not in themselves provide the scope for the proper assessment of sponsors, and no matter how pleasant or dedicated a sponsor may appear at a hearing, such fleeting impressions are no substitute for thorough assessment in compliance with the relevant procedures pertaining to 'adopted' children.

Article 8 ECHR

50. Family life can exist between an adoptive parent and an adoptive child for the purpose of Article 8: X v France No 9993/82, 31 DR 241 (1982), Singh v ECO, New Delhi [2004] EWCA Civ 1075. The fact that the adoption is not formally recognised by the UK would not necessarily preclude a finding of family life, since Article 8 requires decision makers to look to the substance of the relationship rather than simply the form: see for instance Johnstone v Ireland (Appl. No 9697/82) [1986] ECHR 17, Kroon v the Netherlands (1995) 19 EHRR 263. We further regard it as uncontroversial that 'family life' could exist between a minor niece and her aunt.

51. In this case there are certainly two formal relationships in play; GT is at once the Appellant's maternal aunt, and by operation of Ethiopian law, her adoptive mother. We are however not satisfied that either or both of these formal relationships are capable of establishing that there is here a family life of substance such that the Article is engaged.

52. GT has given discrepant evidence about when she first 'met' the Appellant. In her witness statement it is said that that she left Eritrea after she was born, but in her oral evidence stated that the first time she met the Appellant in the flesh was 2009. Little turns on this, since the Appellant would have been a tiny baby when she left. We find as fact that the only meaningful face to face contact the Sponsor and the Appellant have ever enjoyed was during a trip in 2009 when the Sponsor stayed in Ethiopia for just short of three months. In her evidence GT said that she had endeavoured to regularise her position in the UK "as soon as possible" so that the Appellant could join her. She secured settled status in June 2005 and yet it was not

until September 2009, over four years later, that she visited the Appellant. The application for entry clearance was not made until May 2013, some eights years after GT was granted ILR. The possible explanations for that delay – financial and practical constraints – do not sit easily with the fact that in 2007 GT decided to travel to Sudan to get married to HZ, and then pursue an application for entry clearance for him. HZ was candid in his evidence when he acknowledged that GT had here "prioritized" the marriage over the Appellant. We do not accept that GT considers the Appellant to be "like her own child"; if she did, there would not have been a long delay in bothering to visit her, a further delay in making the application for entry clearance, and she would not have prioritised anything over seeing her, and bringing her to join her in the UK.

53. We accept that GT has a love and fondness for the Appellant because she is her aunt, and that she feels a sense of increased responsibility for her because her parents have passed away. That responsibility has prompted her to send her gifts and some money over the years, and to keep in regular contact with her. As the Appellant has grown older and approached the age where she will be leaving secondary education GT has made some efforts to bring her to the UK. We have found those efforts to be somewhat perfunctory. Although GT went through the adoption process in Ethiopia it appears to us that the sole reason for that was in order to make an application for entry clearance. We were given no satisfactory explanation as to why the Sponsor had not sought such an Order at an earlier date. There was a substantial delay in the first visit, there has not been one since, and GT has expressly declined to take the opportunity to obtain approval as an adoptive parent in the UK. Her declaration that she does not need any support or advice on being a parent is striking given that she has never looked after a child and has spent only a very short period of time staying with the Appellant. The level of commitment that GT has actually shown to the Appellant is not commensurate with her claim that she has always thought of her as her daughter and that she would do anything to be with her. We do not accept that there is here a parental relationship. Nor do we accept that the fondness and love that GT and the Appellant no doubt have for each other amounts to a relationship of such substance that Article 8 is engaged. This matter can therefore be distinguished on its facts from Singh, in which the accepted facts were that the family in question had adopted a baby at birth, had made immediate attempts for him to gain entry clearance, who had visited him regularly throughout his life and where the child believed his sponsors to be his natural parents.

54. If we are wrong in that assessment and there is a family life, we are not satisfied that the decision betrays a lack of respect for it or that the decision could be said to be disproportionate. It is for the ECO to show the decision to be proportionate, and he does so by pointing to the UKs domestic measures and international obligations in respect of the welfare of the child. For the reasons we have given above in respect of 297(i)(f), these are weighty concerns which we find are not, in this case, displaced by the evidence. There is a substantial public interest in refusing entry to children where it has not been established that they will be living in a safe and caring environment. This sponsor has produced no satisfactory evidence that she is a

suitable person to look after this child, and in those circumstances we find the decision to be wholly justified and proportionate.

Decisions

55. The determination of the First-tier Tribunal contains an error of law and it is set aside to the extent identified above.

56. The decision in the appeal is remade as follows: the appeal is dismissed on all grounds.

57. In view of the fact that the Appellant was a minor at the date of application and decision, and having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders, we make the following direction:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings".

Upper Tribunal Judge Bruce
10th March 2016