



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/00029/2016
OA/00030/2016
OA/00083/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 June 2018

Decision & Reasons Promulgated
On 9 July 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

DO (1)

SO (2)

AD (3)

(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, NAIROBI

Respondent

Representation:

For the Appellant:

Mr R Toal, instructed by Wilsons LLP

For the Respondent:

Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge C H Bennett promulgated on 10 November 2017 in which he dismissed their appeals against the decisions of the respondent to refuse them entry clearance.

2. DO and SO (the first and second appellants) are the children of Mrs HS; AD (the third appellant) is the daughter of another of Mrs HS' daughters and so DO and SO are AD's maternal aunt and uncle.
3. At some point in 2014, the appellants applied for Entry Clearance to join HS in the United Kingdom. As at that date, Mr DO was 27; Miss SO 23 and Miss AD 10. They were living together as a family unit in Addis Ababa. It is the applicant's case that the older two had been forced to leave Somalia as a result of the Civil War; that the conditions in which they live very poor, and that
4. The applications were refused under the Immigration Rules, and at the hearing before the First-tier Tribunal, Mr Toal conceded that the appellants could not meet the requirements of the rules – see paragraph 8 of the decision.
5. The judge found [31], after an analysis of the evidence of the appellant's circumstances in Ethiopia, that the conditions in which the appellants live in Ethiopia did not involve them in substantial hardship, or that any such hardship was of such severity that, consistently with the United Kingdom's obligations under article 8, discretion to grant them leave to enter outside the Immigration Rules should be granted. Those findings are not challenged
6. The judge also found [42], after considering in detail the circumstances which the appellants would find themselves were they to return to Mogadishu, that they would not suffer substantial hardship, or that any such hardship was of such severity that, consistently with the United Kingdom's obligations under article 8, discretion to grant them leave to enter outside the Immigration Rules should be granted. Those findings are not challenged either.
7. The judge then found [43], having directed himself in line with Kugathas v SSHD [2003] EWCA Civ 31, that despite the financial dependency of the First and Second Appellants on HS, even coupled with their mutual wish to be together, there was no family life between them sufficient to support an application for entry clearance. He reached those conclusion on the grounds that:
 - (i) The dependency on the part of the first and second appellants is no more than financial, despite the phone calls and emails;
 - (ii) The factual situation was far from Kugathas in that there was no current co-habitation, nor had there been since 20014; it was not a situation where there had been a hiatus in family life which had been resumed;
 - (iii) The dependency was not of the sort where an elderly or frail parent was physically or emotionally dependent on the adult child
8. The judge also concluded [44] that, even were that not correct, there would not be family life between the first and second appellants and HS and her family on the other, for any significant length of time, as:

- (i) The appellants' intention was to find work and not to remain financially independent, there being not evidential basis for concluding that, absent financial dependency, anything more than the normal emotional ties would exist, and thus, there would be no family life
 - (ii) The appellants would not for long be dependent on HS for their accommodation, nor would there be a situation where HS or her family would be financially dependent on the appellants; and,
 - (iii) Accordingly, the refusals of entry clearance did not amount to a significant or serious interference with their and HS' rights to family life.
9. The judge did not accept the Third Appellant was related as claimed, noting the absence of any DNA testing, and the absence of documentary evidence to support the relationship, and thus was not satisfied that there is family life between HS and the third appellant [45], or with the first and second appellants. On that basis, he concluded that the refusal of entry clearance was a breach of article 8
10. Permission to appeal was granted by First-tier Tribunal Judge Brunnen on 18 April 2018.
11. The appellants case is that the judge erred:-
 - (i) In finding that there was no family life and that the dependency was nothing more than financial without taking into account the psychiatric evidence from Professor Katona that the separation of HS from DO and SO was having a deleterious effect on HS's mental health, the judge having accepted Prof Katona's conclusions;
 - (ii) In failing properly to apply Kugathas v SSHD [2003] EWCA Civ 31 as, having accepted that there were normal emotional ties, and financial dependency, he was bound to conclude that there was real, committed and effective support, and that thus, family life existed; or, alternatively, erred in failing to give adequate reasons for finding that there was no family life notwithstanding the relationship of dependency;
 - (iii) In concluding [44] that if any family life did exist, its duration would not be significant, the judge failing properly to take into the account of Professor Katona's evidence of HS's dependence, and in proceeding on the basis that there would need to be an intention on the part of the appellants to remain dependant, his finding that financial dependency would be reduced not being sufficient;
 - (iv) Further, even were those findings at [44] sustainable in respect of SO and DO, they could not apply to AD;
 - (v) In concluding that AD was not related to SO, DO or HS as claimed, improperly requiring corroboration in the form of DNA evidence and disregarding the evidence of the witnesses, yet accepting that AD formed part of the household of SO and DO; and, a finding that there was no biological relationship was insufficient to show no family life;

12. In Jitendra Rai v SSHD [2017] EWCA Civ 320, the Court of Appeal held:

- "16. The legal principles relevant to this issue are not controversial.
17. In *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents ... the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors ... include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not ... essential that the members of the family should be in the same country". In *Patel and others v Entry Clearance Officer, Mumbai* [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment, with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children ... may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".
18. In *Ghising (family life – adults – Gurkha policy)* the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in *Kugathas* had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

"61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. ...".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in *Gurung* (at paragraph 45), "the question whether an individual

enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in *Ghising (family life – adults – Gurkha policy)*, including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

"24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

13. In his report, Prof Katona set out what HS told him about her worries about her children at [4.g]:

"HS told me that since she has been in the UK she has worried constantly about those of children who are not living with her. She has lost contact with several of them. She added that she found it particularly distressing that 'my family was together but they started to disappear After I left they started making their own decisions. If I knew [where they were] I'd worry less'

HS remains in contact with a son and a daughter (who are in Ethiopia), with her daughter's child and with a son who lives in Sudan. She explained that 'I don't sleep at night. I don't eat right. I just think about my children. I want to bring them here.' She told me that 'as a mother you are in a difficult position'. Though she sends money to her children 'they keep calling me to tell me the problems they are having..."

14. At [7 e.] Prof Katona wrote:

“HS’ PTSD with associated depressive symptoms is in my opinion the result of her multiple traumatic experiences in Somalia. However other factors are preventing her mental symptoms from resolving. This include the burdern of caring for her blind and frail husband, her own multiple physical problems and (most importantly) her continued worry about the children with whom she has not been able to reunite. HS’ continued separation from her children is in my opinion making a particularly significant contribution to the maintenance both to her PTSD symptoms (by acting as a continual reminder of the traumas the left to her own flight from Somalia and to her associated depressive symptoms.”

15. I do not consider that this is, contrary to Mr Toal’s submission, evidence of emotional dependency. It is evidence of worry, and the judge was entitled to conclude, as he records at [44 (a)] that this is not evidence of anything more than normal emotional ties.
16. It is not arguable that the judge misapplied Kugathas. It is not authority for the proposition that the existence of family ties plus financial dependency is sufficient to show family life. On the contrary, it is sufficiently clear from the decisions of Arden LJ and Sedley LJ, and more importantly the cases that follow on from it, that there are other factors to be taken into account. If that were the case, then any adult dependent financially on parents (or siblings) would, even if not in the same household, have a family life with the supporting relative. There is no authority for that proposition either in Kugathas, or in the cases cited in Jitendra Rai. On the contrary whether or not family life exists is a fact-sensitive issue.
17. Here, the judge set out the evidence and reached a finding of fact in respect of the relationships between SO, DO and HS which is well-reasoned and sustainable; and, which was not vitiated by any error of law.
18. As the findings at [44] are in the alternative that there was family life, then any error in those findings cannot be material and so the challenges to them in the grounds of appeal must fail.
19. With regard to AD, the judge was entitled to note [45] that DNA testing was the obvious manner to prove the relationship. That is hardly a controversial statement, not least where there is no reliable documentary evidence. The judge was also entitled to take into account that, in such circumstances such as these, it was not inherently improbable that a child could be passed off. It does not follow from that observation, that he closed his mind to the rest of the evidence, or directed himself that it was only DNA evidence was acceptable. Properly considered in the context of the decision as a whole, it is in effect the judge explaining why less weight can be attached to unsupported oral evidence of the paternity of a child, and it was open to him to require, in the circumstances, corroboration. It is implicit in the fact that he required it, that he attached less weight on this point to the evidence of the witnesses. That AD is part of the household is not a sufficiently weighty concern such as to show that the judge’s conclusion on this issue was irrational. This is, at best, a reasons challenge, and

comes nowhere near showing that the decision was not one open to the judge on the evidence.

20. Further, in the light of the findings that there was no family life between SO and DO and HS, and that AD was not related as claimed to HS, there is no rational basis on which it could be said that a family life exists between HS and AD. They do not live together, nor have they ever formed part of the same household. They are not related and there is no proper basis on which it could be argued that a family life exists in these circumstances.
21. In the circumstances, the submission [6] that the judge erred in not giving a separate reasoned conclusion as to the issue of family life between AD and relatives in the United Kingdom cannot succeed.
22. In conclusion, the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome.
23. I should also add that it must be borne in mind that it was accepted in this case that the requirements of the Immigration Rules could not be met. There was also no challenge to the findings made at [46 (c) and (d)] that the appellants' circumstances were not so severe either in Ethiopia or in Mogadishu were they to relocate there such that discretion to grant entry clearance should be exercised in order to meet the United Kingdom's obligations pursuant to article 8. In the circumstances, it is difficult to see how it could be argued that, bearing in mind section 117B of the Immigration Rules that even had family life been found, the appeals could succeed.

Notice of Decision

- (1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.
- (2) I am satisfied that it would be appropriate to make an anonymity direction in this case, given that it refers to a child and to significant health problems.

Signed

Date 5 July 2018



Upper Tribunal Judge Rintoul