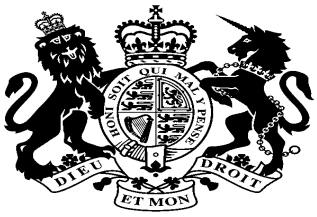

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal number:** HU/16203/2018

THE IMMIGRATION ACTS

Heard at Glasgow
On 2 August 2019

Decision and Reasons Promulgated
On 13 August 2019

Before

UT JUDGE MACLEMAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

NAGAT ABDELWHAB ADALLA ELAAGIB
(anonymity direction not made)

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr S Winter, instructed by Maguire, Solicitors

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this decision refers to them as they were in the FtT.

2. The appellant is a citizen of Sudan. Her date of birth for record purposes is 1 January 1960. On 4 June 2018 she applied for entry clearance to the UK. She stated her type of application as "family reunion under part 11, asylum, immigration rules".

3. The ECO refused the application because (i) refugee family reunion extends only to spouses, other partners, and minor children; (ii) the appellant had not paid the fee for consideration as an adult dependent relative under appendix FM of the rules, and, even if she had, she did not meet those requirements; and (iii) there were no exceptional circumstances to warrant a grant of leave, outside the rules, under article 8 of the ECHR.

4. The appellant appealed to the FtT. Judge Green allowed her appeal by a decision promulgated on 22 March 2019.

5. The SSHD's grounds of appeal to the UT are set out in an application for permission dated 4 April 2019. Permission was granted on 14 May 2019.

6. Mr Govan relied on the grounds. The main points I noted from his submissions were these:

   (i) The case disclosed compassionate factors, the appellant having disabilities and living alone, but no strong and compelling features which might constitute exceptional circumstances outside the rules.

   (ii) The applicant was not within the eligible group of core family members who benefit from rules designed for refugee cases, without payment of a fee, and regardless of financial and other considerations.

   (iii) The appellant's case was governed by the rules for adult dependent relatives, which are designed to comply with article 8. She did not assert that those rules are not compliant.

   (iv) The judge might have described the appellant's circumstances correctly in Sudan, but he said nothing on the other hand about her lack of financial support, and the burden she was likely to impose on the taxpayer.

   (v) On family life, the judge at [29] did not specify anything which took the case beyond the normal ties between parent and adult child.

   (vi) The judge did not specify anything which gave the appellant a right to enter the UK, without meeting the rules designed for adult dependent relatives.

   (vii) There was nothing in the decision which justified the outcome, and it should be reversed.

7. The appellant filed a response under rule 24 to the grounds, going through each of their 17 paragraphs. Mr Winter relied upon that response and made further submissions. The main points I noted were these:

   (i) The judge finally at [30] found there to be very compelling circumstances outside the rules, the correct legal threshold, having conducted a balancing exercise.

   (ii) The grounds were only a disagreement with that assessment.

(iii) The grounds were misleading in their heavy reliance on *Kugathas* [2003] EWCA Civ 31, which should no longer be taken as setting out the test for family life among adults.

(iv) The correct approach is to be found in *Ghising* [2012] UKUT 160 and *Gurung* [2013] 1 WLR 2546.

(v) The sponsor lived with the appellant until 2016 [or 2017, according to the decision]. The narration of the circumstances was enough to justify the finding of family life.

(vi) There was also a psychological report about the impact of separation on the sponsor, to which the judge had not referred

(vii) The grounds at [12] were "something of a rant".

(viii) *MA (Somalia)* [2011] Imm AR 292 at [45] was instructive, "The court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts". The grounds were an example of such disagreement.

(ix) The UT should not interfere with primary findings of the FtT; *YZ* [2017] CSIH 41.

(x) A decision did not need to rehearse every detail or issue; *Budhathoki* [2014] UKUT 00341.

(xi) The judge had not made the mistake of embarking on a freewheeling exercise, but had noted the ambit of the rules for adult dependent relatives. The finding that family life existed led to the appellant having a right in terms of article 8 to enter the UK.

(xii) The decision should stand.

8. I reserved my decision.

9. It was common ground between representatives that to succeed the appellant had to prove both the existence of family life within the ambit of article 8, and exceptional circumstances, as explained in the case law.

10. As both sides said their position was supported by *Agyarko*, it may be useful to look at authority on the general approach to be taken to article 8.

11. R*azgar* [2004] UKHL 27 and *Huang* [2007] UKHL 11 are now to be read in light both of the amendment of the immigration rules to reflect article 8 (effective from 9 July 2012) and of the setting out in Part 5A of the 2002 Act of public interest considerations (effective from 28 July 2014).

12. In *Agyarko and Ikuga* [2017] UKSC 11 two applicants challenged decisions of the SSHD that there were no "insurmountable obstacles" to family life being carried on outside the UK, in terms of the rules, and no "exceptional circumstances" to warrant leave outside the Rules. Lord Reed, giving the judgement of the court, considered

the decisions of the European court and the approach approved in deportation cases in *Hesham Ali* [2016] UKSC 60, and continued:

> "[57] That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State's policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are "insurmountable obstacles" or "exceptional circumstances" as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paras 51-52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life, a very strong or compelling claim is required to outweigh the public interest in immigration control.
>
> [58] The expression "exceptional circumstances" appears in a number of places in the Rules and the Instructions. Its use in the part of the Rules concerned with the deportation of foreign offenders was considered in *Hesham Ali.* In the present context, as has been explained, it appears in the Instructions dealing with the grant of leave to remain in the UK outside the Rules. Its use is challenged on the basis that the Secretary of State cannot lawfully impose a requirement that there should be "exceptional circumstances", having regard to the opinion of the Appellate Committee of the House of Lords in *Huang*.
>
> [59] As was explained in para 8 above, the case of *Huang* was decided at a time when the Rules had not been revised to reflect the requirements of article 8. Instead, the Secretary of State operated arrangements under which effect was given to article 8 outside the Rules. Lord Bingham, giving the opinion of the Committee, observed that the ultimate question for the appellate immigration authority was whether the refusal of leave to enter or remain, in circumstances where the life of the family could not reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudiced the family life of the applicant in a manner sufficiently serious to amount to a breach of article 8. If the answer to that question was affirmative, then the refusal was unlawful. He added:
>
> > "It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar* [*R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368] , para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test." (para 20)

> [60] It remains the position that the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions in issue in the present case do not depart from that position. The Secretary of State has not imposed a test of exceptionality, in the sense which Lord Bingham had in mind: that is to say, a requirement that the case should exhibit some highly unusual feature, over and above the application of the test of proportionality. On the contrary, she has defined the word "exceptional", as already explained, as meaning "circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that the refusal of the application would not be proportionate". So understood, the provision in the Instructions that leave can be granted outside the Rules where exceptional circumstances apply involves the application of the test of proportionality to the circumstances of the individual case, and cannot be regarded as incompatible with article 8. That conclusion is fortified by the express statement in the Instructions that "exceptional" does not mean "unusual" or "unique": see para 19 above."

13. *KO (Nigeria) and others* [2018] UKSC 53 was a case mainly about the treatment of qualifying children and their parents under part 5A. Under the heading "general approach" Lord Carnwath, giving the judgement of the court, said:

> "[12] This group of sections needs to be looked at in the context of the history of attempts by the Government, with the support of Parliament, to clarify the application of article 8 in immigration cases. In *Hesham Ali* … this court had to consider rule changes introduced with similar objectives in July 2012. The background to those changes was explained by Lord Reed (paras 19-21), their avowed purpose being to "promote consistency, predictability and transparency" in decision-making, and "to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck …" (para 21).
>
> [13] In a case heard shortly afterwards, … *Agyarko* … paras 8-10, Lord Reed referred to the previous law as established in *Huang* … where it was held that non-compliance with the Rules, not themselves reflecting the assessment of proportionality under article 8, was "the point at which to begin, not end" consideration of article 8. The new Rules, as he said by reference to government policy statements, were designed to change the position comprehensively by "reflecting an assessment of all the factors relevant to the application of article 8" (para 10).
>
> [14] Part 5A of the 2002 Act takes that process a stage further by expressing the intended balance of relevant factors in direct statutory form. It is profoundly unsatisfactory that a set of provisions which was intended to provide clear guidelines to limit the scope for judicial evaluation should have led to such disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges. Rather than attempt a detailed analysis of all these impressive but conflicting judgments, I hope I will be forgiven for attempting a simpler and more direct approach.
>
> [15] I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions

> are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge)."

14. (The court went on to hold held the misconduct of a parent was not a balancing factor, and that the reasonability of the departure of a child was to be approached in "the real world" of where the parent was expected to be; which of course has no bearing on this case.)

15. Mr Winter derived some support from *MA (Somalia)* on the need to distinguish between error of law and disagreement with an assessment of the facts. I remind myself that to apply the correct test and reach a generous conclusion is not erroneous in law.

16. In *MM (Lebanon)* [2017] UKSC 10 the Court said:

> "[107] It is no doubt desirable that there should be a consistent approach to issues of this kind at tribunal level, but as we have explained there are means to achieve this within the tribunal system. As was said in *Mukarkar v Secretary of State for the Home Department* [2006] EWCA Civ 1045, para 40 (per Carnwath LJ):
>
> > "… It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case … The 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 … Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.""

17. *MA (Somalia)* and *Mukarkar* date from before amendment of the rules in 2012 but *MM* makes it clear that the principle continues to apply. However, the extent of "generosity" or discretionary judgment available to tribunals lies within the limits explained in *Agyarko* and *KO*.

18. Parts of the grounds are only disagreement and insistence. While they begin in moderate terms, there was justification in the criticism of [12], which should not have appeared in the terms it did. However, there are propositions of legal error in the grounds.

19. The grounds begin at paragraph 2 with the appellant's inability to meet the rules, in particular financial requirements, bringing into play "the ability to maintain oneself without recourse to public funds, an essential … public interest consideration under s.117A-D of the 2002 Act, which the judge fails to [consider]".

20. The appellant's response is that paragraph 2 is irrelevant, because the [appellant] "was granted entry clearance outside the rules".

21. That part of the response is wrong. Although the appeal is on human rights grounds, it is abundantly clear that the rules are the starting point, and that part 5A of the 2002 Act applies in all cases.

22. The grounds properly raise the two points on which Mr Govan focused: whether there is anything in the decision to justify the finding of family life, or the finding of exceptional circumstances.

23. *Kugathas* is to be read with other decisions, but it has not, as Mr Winter submitted, been overturned. Whether family life exists among adult relatives is not governed by a blanket rule or a presumption but by the facts of each case. The question is fact-specific, but there is a need to show some inter-dependence beyond the normal.

24. The appellant obviously has family life, in the broad sense rather than the strict sense required to qualify for consideration under article 8, with the sponsor and his family. It was not suggested that she has lesser links with her other two sons, her daughter, and their families. The fact that she is now in another country from them all is emotive but it is not an indication of stronger ties with the appellant and his family than between any mother and an adult son and his family. The judge mentions the strong and genuine display of feeling by the sponsor in evidence, but that does not take ties beyond the normal.

25. The single feature specified as going beyond the normal is that the appellant "is financially dependent upon the sponsor in providing her with the essentials of life" in Sudan. The evidence, recorded at [18], is that he sends £10 - 35 per month. It is said that his brothers have helped only twice because they are unemployed, but that explanation and distinction is obscure. The sponsor is unemployed and, with his wife and children, dependent entirely on UK public funds, from which he manages to spare something each month. So far as disclosed in evidence, his siblings are no worse off than he is. It is unlikely that the appellant can have ongoing family life within article 8 with all her descendants, at several possible locations in various countries.

26. The reason given by the judge implies that before the sponsor made any remittances, the relationship did not go beyond the norm.

27. The decision fails to explain how the remittances of the sponsor so strengthen his ties with his mother that she is brought within the core protection of article 8, from which she would not otherwise benefit. In my view, his remittances are not capable of doing so, and this aspect of the decision is not supported by legally adequate reasons.

28. The decision at [23] sets out the requirements of the adult dependent relative rule, and at [28] the several significant respects in which the appellant falls short.

29. The rule is part of a wider scheme, designed to comply with the UK's obligations under both the Refugee and the Human Rights Conventions. Core family members of refuges are admitted automatically, without an application fee, and without

regard to matters such as disability, need for care, availability and affordability of care where they are living, and ability to maintain, accommodate and care for themselves in the UK without recourse to public funds. Outside the family core, the rules provide for admission of an adult dependent relative, but subject to clear criteria. That is public policy, which has not been challenged as incompatible with the UK's obligations.

30. I return to the issue raised at [2] of the grounds, and further developed at [11 – 13]. Although some of the language used in the grounds is, as I have observed, intemperate, it is a point properly made that the appellant would almost inevitably impose substantial long-term cost on public funds. Mr Govan submitted that the decision glosses over matters on the public interest side.

31. At [28] the judge, under the heading of the rules, is unable to see "how the appellant could survive in this country without recourse to public funds". His conclusion at [30], beyond the rules, is reached "notwithstanding that the appellant cannot speak English and is not financially independent". That rather understates the factors of the "economic well-being of the UK" and the "burden on taxpayers" to which he was bound by statute to have regard. However, decisions are to be read as a whole, and this line of criticism is not strong enough by itself to set aside the decision.

32. The judge did not have to identify something unusual or unique, but he had to find something very strong and compelling, such that the appellant, unlike other parents and extended family members of refugees, had a right of entry to the UK, not subject to the rules.

33. The decision at [30] I also find lacking in legally adequate reasons. The UK has a positive obligation to facilitate family reunion, as the judge says, very generally, but that obligation lies within the limits of the rules, rather than overriding them. The judge considers the prospect of the sponsor's wife returning to Sudan, with or without her children, which would break up the family, and would not be in the children's best interests. Enforcement of such an outcome probably would be disproportionate, but there was no evidence that it was likely to happen. The sponsor and his wife see their future with their children together in the UK. I do not see in [30] any very strong and compelling feature which might, within the scope open to the tribunal, take the appellant beyond the rules.

34. The decision of the First-tier Tribunal is set aside.

35. In remaking the decision, the evidence does not disclose that the appellant has family life with the sponsor and his family for article 8 purposes.

36. The evidence discloses no very strong or compelling claim, such that the appellant has a right to enter the UK, other than in compliance with the rules for admission of adult dependent relatives.

37. The appeal, as brought to the FtT, is dismissed.

38. No anonymity direction has been requested or made.

Dated 5 August 2019
UT Judge Macleman