**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/20534/2011
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A/20535/2011

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
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| **On 16 May 2013** | **On 8 July 2013** |

**Before**

**UPPER TRIBUNAL JUDGE CONWAY**

**Between**

**MISS S. M. S**
**MISS M. M. A.**
**(ANONYMITY DIRECTION CONTINUED)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER - NAIROBI**

Respondent

**Representation:**

For the appellants: Mr. Cheng
For the respondent: Mr. Hayes

**DETERMINATION AND REASONS**

1. The appellants are citizens of Somalia born in 1999 and 2005. In July 2011 they made application for entry clearance for the purposes of settlement as the children of Ms. S.M.A. (the sponsor) who had obtained indefinite leave to remain in the UK under the family reunion provisions of paragraph

352A of the Immigration Rules as the spouse of Mr. S.H.F. who had been granted asylum in the UK.

2. The applications were refused on 20 July 2011. The ECO gave reasons as follows:

*"You have applied to join your mother in the UK who was granted indefinite leave to enter as the spouse of a refugee. A person who has obtained their status as the result of being the dependent of a sponsor who was recognised as a refugee is not entitled to sponsor an application for family reunion. The family reunion rules in paragraphs 352A – 352F clearly state that only a person who has fled their country of formal habitual residence, then has been recognised as a refugee in the UK is entitled to have their family members apply to join them. A family member granted entry clearance into the UK under the refugee family reunion rules may not in their own turn sponsor into the UK other family members under part 11 of the Immigration Rules. This is because they are not deemed to be refugee for the purposes of the 1951 Convention. Therefore I am not satisfied on the balance of probabilities that you meet the requirements of paragraph 352D(i)-(iv)".*

3. The ECO went on to refuse the applications on the basis that he was not satisfied that the appellants were related to the sponsor as claimed or that they formed part of the sponsor's pre-flight family.

4. They appealed. Following a hearing at Hatton Cross on 13 March 2012 First tier Tribunal Judge Hembrough dismissed the appeals under the Immigration Rules and on human rights grounds (Article 8).

5. The background to the appeal is as follows. The sponsor arrived in the UK on 12 June 2009 under the family reunion provisions. She had become separated from her children in Somalia in late 2007 and had fled to Ethiopia in 2008. Her husband, who she had come to join, left her soon after her arrival. She found out in March 2011 that the appellants were living in Ethiopia with her brother. Since making contact she speaks to them regularly. She has been unable to travel to Ethiopia to see them because of a shortage of funds. She has sent between $150 – 200 per month to provide for them.

6. Neither her brother nor the children have status in Ethiopia and fear removal. They live in poor conditions in one room in a shared house. They do not attend school. Her money pays for the rent and buys food. She told the judge that they 'sometimes' have access to water and electricity. Her brother is unable to work having no status. She is unemployed and is dependent on public funds at the moment. She has been looking for a job.

7. The judge found her to be credible 'as regards the matters in issue in the appeal' (at [24]). They had become separated in Somalia for reasons beyond her control in November 2007. The judge found that they did form

part of her pre-flight family. The judge found that the appeals had to be dismissed under the Rules, including paragraph 297 (iv) and (v).

8. The judge then considered their claims under Article 8 and was satisfied that a family life continues to exist between them and their mother. The decisions interfere with that family life [29].

9. In considering the issue of proportionality regard was had to the fact that they were children. The judge stated at [31] that although section 55 of the Borders, Citizenship and Immigration Act 2009 relates to children in the UK, international obligations entered into by the UK provided that their welfare continues to be a primary consideration.

10. The judge had regard to **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011] UKUT 00483 (IAC)**. Section 55 was held not to apply to children who are outside the UK. In that case the Tribunal held at paragraph 27 that in making an assessment under Article 8(1) the child's best interests are a primary consideration. Reference was made to the sequence of decisions in Strasbourg and the higher courts to this effect applying Article 3 of the UN Convention on the Rights of the Child to all administrative decision making.

11. These duties can be directly enforced by the Tribunal judges in determining appeals. It is for the judge to decide on all the relevant evidence what the best interests of the child are in the particular circumstances of the case, whether there are compelling circumstances requiring admission and whether if the case fails under the rules, there remains a lack of respect for family life Article 8(1). – paragraph 28.

12. The Tribunal in **T** stated at paragraph 29 that it was difficult to contemplate a scenario where a section 55 duty was material to an immigration decision and indicated a certain outcome but Article 8 did not.

13. Judge Hembrough found that the appellants, although separated from their mother are living in Ethiopia, a party to the 1951 Refugee Convention. They have reached a place of relative safety. There is a tolerant government attitude towards refugees.

14. The appellants have access to housing, water, electricity and a telephone and there was no evidence of their suffering from any medical condition or in want of care or particularly vulnerable or at risk. They have a male protector and are maintained by their mother by remittances. Although it is asserted that they did not go to school there was no evidence as to whether this was because they were being denied access or was a matter of choice [34].

15. At [36] Judge Hembrough stated that whilst their life chances would undoubtedly be improved if they were admitted to the UK '… I have not been satisfied that their welfare is likely to be jeopardised by exclusion as I

understand the term "welfare" to be used in this context. The test is not one of "best interests" '.

16. The appellants sought permission to appeal which was granted on 12 April 2012. Following the error of law hearing at Field House on 17 August 2012 Deputy Upper Tribunal Judge Mailer (having narrated the background of the application and First tier judge's findings), continued: '...

> 15. Mr. Cheng submitted that there was an error of law with regard to the judge's statement at paragraph 36 in particular. The test was clearly their "best interests" and not simply welfare. Regarding was had to **T (s.55 BCIA 2009 – entry clearance) Jamaica [2011]UKUT 00483 (IAC)** as well as the Court of Appeal's decision in **Muse and others v ECO [2012] EWCA Civ 10**. That was similarly an entry clearance application in respect of Somali nationals considered under Article 8. Toulson L.J. at paragraph 25, in referring to Article 8 claims in this context stated that in all such circumstances the best interests of the children involved are a consideration of high importance, but are not necessarily determinative of the outcome. He referred to decisions such as **ZH (Tanzania) v SSHD [2011] UKSC 4.**
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> 16. Mr. Parkinson submitted that the judge properly directed himself in accordance with **T**. In substance the judge has considered the relevant factors in the proportionality exercise and has had regard to the relevant interest of the children.
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> 17. Having considered the competing submissions I find that there have been errors of law for the reasons stated in the decision granting permission to appeal.
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> 18. The judge was referred to the decisions in **T** as well as **Muse** to which I have referred. In both those decisions Tribunals are enjoined to consider the best interests of the children in this context as well. There was specific reference to the UN Convention on the Rights of the Child. That was part of the written submissions before the judge set out at paragraphs 11 et seq. In particular considerations relating to their mental, social, physical and moral integrity must also be considered.
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> 19. It is accordingly incorrect to state as the judge did that "the test is not one of best interests". It is evident from the judge's analysis at paragraph 36 that there is a distinction between "welfare" and "best interests", which he has not articulated. As Mr. Cheng submitted the lack of clarity and reasoning betrayed by that statement is itself an error of law.
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> 20. The judge has thus not properly had regard to or applied the duties set out at paragraph 28 of **T**.
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> 21. In the circumstances the determination of the judge is set aside. The parties agreed that in the event that I so concluded there should be a Case Management Review hearing in order to give consideration to the future conduct of the case. In particular consideration will have to be given as to whether the Appellants should be interviewed so as to take account of their views as well.'

17. Following further procedure on 31 January 2013 at Field House DUT Judge Mailer gave Directions which included:

> '1. The following facts are preserved and accepted from paragraph 24 of the determination of the First tier Tribunal: the Appellants are the sponsor's children; they formed part of her pre-flight family.
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> 2. Paragraph 34 of the determination is preserved subject to the qualification regarding water and electricity referred to at paragraph 19…'

18. Following a Transfer Order the matter came before me for rehearing.

19. In brief proceedings it was agreed by Mr. Cheng and Mr. Hayes that the First tier Tribunal Judge's dismissal of the appeals under the Immigration Rules stood. Also that the only issue was Article 8 and the consideration therein of section 55.

20. The sponsor S.M.A. was presented for examination. In chief she adopted her three witness statements (6 March 2012, 18 June 2012 and 26 February 2013).

21. There was no cross examination and no other witnesses.

22. In brief submissions Mr. Hayes accepted that the best interests of the children were to be with their parent. However, whilst there was an unmet need for their mother there was no evidence that they were suffering neglect or abuse in Ethiopia. Stable arrangements had been met for their care.

23. In reply Mr. Cheng also submitted that the best interests of the children were to be with their mother. The sponsor's evidence was that the uncle did not want to have care of the children. Whilst there was no indication of neglect, amenities where they were staying appeared to be basic. It was not an environment for young girls to be brought up in. Were it not for the maintenance provision the appellants would satisfy the child dependency rules. Looking at all the circumstances the decision to refuse was disproportionate.

24. In relation to Article 8 I approach this in stages by reference to the five questions which have to be asked as set out in paragraph 12 of **Razgar [2004] UKHL 27**, an approach confirmed in paragraph 7 of **EB (Kosovo) [2008] UKHL 4.**

25. I also remind myself that I am not solely concerned with the rights of the appellants but I must consider the direct impact of the refusal on their family members which in this case includes the sponsor **(Beoku-Betts [2008] UKHL 39)**.

26. As indicated there was no attack on the sponsor's evidence and I see no reason why I should not find her account credible on all material matters.

27. In summary, I find that the appellants are the sponsor's children and formed part of her pre-flight family. I find that the second appellant is the result of the rape of the sponsor in Somalia. The sponsor and the appellants were separated for reasons beyond her control in late 2007 and she did not know of their whereabouts until 2011. The appellants have been living in Ethiopia with their uncle, the sponsor's brother. I find also that the sponsor's third child was murdered in Somalia in 2010.

28. The sponsor has wanted to return to Ethiopia to see her children but has not had the funds to travel. Whatever money she has she sends to them. She buys telephone cards to speak to them which she does several times a week. She misses them greatly and worries about them.

29. As for the appellants' circumstances in Ethiopia, they and the sponsor's brother share a house with other Somalis in Addis Ababa. They live in one room with her brother. Her money pays for the rent and buys food. They sometimes have access to water and electricity. They are living illegally in Ethiopia. The girls do not attend school. They do not leave the house as they feel they will be caught and could be removed to Somalia at any time. Their uncle does not leave the house much as he feels that if he is caught by the authorities there would be no one to look after the children. He does not work having no status.

30. I also see no reason to disbelieve the evidence that her brother, who is 25 years old, is tired of looking after the children as it is a lot of responsibility for him and he cannot live his own life.

31. I now apply the law to these facts. The first question is whether there is family life for the purposes of article 8 between the appellants and the sponsor. I think it is clear that article 8 is engaged in its family life aspect. The European Court of Human Rights has consistently held that, from the moment of birth and by the very fact of it, there exists a bond between a child and his or her parents amounting to 'family life'.

32. The effect of the decision to refuse the appellants entry clearance amounts to an interference with the right to respect for enjoyment of family life. The Court of Appeal has clarified that the question of significant interference must not be read as meaning the minimal level of severity required is a special or high one (see **AG (Eritrea) [2007] EWCA Civ 801**, paragraph 27). There is clearly an interference of sufficient gravity to require consideration to be given to the remaining steps.

33. The decision is clearly lawful in the sense that it was made within the legal framework of the Immigration Acts and the Immigration Rules and it was made in pursuit of the legitimate aim of maintaining immigration controls.

34. The real issue for determination in this case is whether the refusal strikes a fair balance between the competing interests of the appellants and

the community as a whole, and was therefore proportionate to the legitimate aim pursued, or whether the appellants' circumstances demand that a departure be made from the rules given that they cannot be met at present.

35. My approach to the question of proportionality is guided by the House of Lords' opinion in **Huang and Kashmiri [2007] UKHL11** as follows:

> '20. In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.'

36. The House of Lords confirmed the correctness of the test that a fair balance must be struck between the rights of the individual and the interests of the community.

37. Section 55 of the 2009 Act does not apply to children overseas (**T (Jamaica)**). However, as explained in **ZH (Tanzania)**, the best interests of children are a primary consideration. In paragraphs 27 and 28 of **T (Jamaica)** the President explained that the child's best interests are a primary consideration in the assessment of article 8 in an overseas appeal.

38. Lady Hale explained in **ZH**:

> '23. For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3(1) of the UNCRC:
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> > "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
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> This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".
> .....

> 26. Nevertheless, even in those decisions, the best interests of the child must be a primary consideration. As Mason CJ and Deane J put it in the case of *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273, 292 in the High Court of Australia:
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> > "A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it."
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> As the Federal Court of Australia further explained in *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568, para 32,
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> > "[The Tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."

This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first. That seems, with respect, to be the correct approach to these decisions in this country as well as in Australia." '

39. I have therefore treated the appellants' best interests as a primary consideration in my assessment. In line with the findings of fact which I have made, I think it is clear that the best interests of the appellants require them to be brought up in a stable home with a loving parent (*per* **Mundeba (s55 and para 297(i)(f) [2013] UKUT 88 (IAC)**). I have no reason to doubt the claim that their separation in November 2007 was not voluntary but resulted from an escalation of fighting locally which led to the appellants fleeing while their mother was away fetching water from a nearby village. I have no doubt that they enjoyed each others company until that time. Having suffered the trauma of losing their mother they have at least been looked after by a male blood relative, namely their uncle.

40. However, they have no legal status in Ethiopia and do not appear to have any prospect of obtaining it. The only relative they are in day to day contact with is the uncle who also has no legal status. I have no doubt that he does his best for them and there is no indication of neglect or abuse or of health issues, but I accept he is tired of the responsibility and finds it difficult dealing with young girls who are growing up and who need a mother figure at close hand. They do not appear to be in education and have no prospects of such. As they have no legal status they rarely go out. In these circumstances their social and mental development is stagnating. They appear to be living in poor housing with, at best, limited amenities and dependent on remittances from the sponsor, evidence of which has been provided. Their situation could not be described as stable. I conclude from the evidence that they are, by any standard, vulnerable.

41. The ECO does not appear to have interviewed them but their wishes are manifestly to join their mother with whom they remain in frequent telephone contact. The sponsor is willing and able to provide them with a loving home. The sponsor is a woman who I accept has suffered the further trauma of rape which resulted in the birth of the second appellant and that such led to her husband leaving her when she disclosed it soon after her arrival in the UK. Also the murder of her other child, a boy, in Somalia in 2010. It would be unreasonable to expect the sponsor with her history to return to live in Ethiopia or Somalia.

42. This is not therefore a case of mere preference as to which country the appellants reside in. It is appreciated also that there are many children who have fled Somalia and are living in Ethiopia in difficult circumstances. However, in this case there is a mother who cannot return. There are two young girls who are without their mother. I do not see that it can seriously be put that the girls be deprived for perhaps the entirety of their childhood from contact, other than by telephone, with their mother.

43. In my judgement the circumstances of this particular case point firmly towards an outcome favouring family reunion, which would be in accordance with the spirit of the Refugee Convention. The ordinary considerations of immigration control, such as the need to show maintenance without additional recourse to public funds, are waived in cases concerning the close family members of refugees. Whilst the appellants do not meet the requirements of the family reunion rules because their mother is a dependent of a refugee rather than a refugee, the combination of circumstances behind this case are sufficiently serious and compelling and compassionate to require admission. This is a family of dispersed Somalis who have no prospect at present of resettling in their homeland. As such, I do not give decisive weight to the issue of maintenance in the proportionality balancing exercise.

44. Looking at all the circumstances and balancing the respective interests of the parties, while treating the best interests of the appellants as a primary consideration, I find that the decision to refuse entry clearance amounts to a disproportionate interference with family life and I therefore allow the appellants appeals on Article 8 grounds.

**DECISION**

**The decisions dismissing the appeals under the Immigrations Rules stand.**

**The appeals are allowed on human rights grounds (Article 8).**

**Anonymity direction continued.**

Signed Date 8 July 2013

Upper Tribunal Judge Conway