



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/27442/2012

THE IMMIGRATION ACTS

**Heard at : Field House
On : 26th April & 16th October 2013**

**Determination Promulgated
On : 18th October 2013**
.....

Before

Upper Tribunal Judge McKee

Between

YUSUF ADAN ABDI JAMA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss N. Manyarara & Miss Keelin McCarthy, instructed by Duncan Lewis & Co. Solicitors

For the Respondent: Mrs Monica Tanner & Mr Chris Avery of the Specialist Appeals Team

DETERMINATION

This appeal first came before me on 26th April 2013, when I found that an error of law had been made by the First-tier Tribunal. My 'Decision & Directions' were issued shortly afterwards, and are appended below as part of this determination.

DECISION AND DIRECTIONS

1. On 8th November 2012 a decision was finally taken on the application which Yusuf Jama had made eight years previously, for leave to remain under paragraph 352D of the Immigration Rules as the child of a refugee. According to his representatives, a firm called Law For All, he arrived in the United Kingdom with an agent around 21st June 2004, and on 4th October that year, three days before his 18th birthday, an application was submitted under what the representatives called the "*family reunion concession*" ~ something of a misnomer, as the concession had been absorbed into the Rules on 2nd October 2000. The application was also considered, quite unnecessarily it would seem, under paragraph 298, as if Mr Jama's mother were an 'ordinary' settled person. In respect of the application under rule 352D, it was noted that if, as Mr Jama's mother, Halimo Isse, averred, Mr Jama had been separated from the rest of the family shortly before they fled Mogadishu in 1991, when he was not yet 5 years old, and was believed to have been killed, she would have mentioned that as part of the asylum claim which she made here in September 2001. She did mention that her own parents had been killed during the unrest in 1991. But she only referred to her husband and four children, those children being subsequently admitted under the Family Reunion Policy after Mrs Isse had been recognised as a refugee.
2. The mother-son relationship was further doubted in the Notice of Refusal of Leave to Remain. Only a photocopy of the Cellmark DNA test taken in September 2004 had been provided, and it was possible that Mr Jama's photograph had been substituted at a later date. It partially covered over the date written underneath ("1.9.04"), which suggested that the photo was affixed to the page after the date had been written, and raised the possibility that the sample might have come from one of Mrs Isse's other children. The other objection raised in the refusal letter does not seem to me to have much substance, namely that the DNA evidence is not sufficient to prove the claimed relationship, because the Cellmark report says that "*in the absence of a sample from the child's father ... the results cannot be as conclusive as when the father is also tested.*" Nevertheless, the report concluded that Mrs Isse's "probability of maternity" was 99.9999%, which would seem to satisfy the civil standard of a balance of probabilities.
3. When the appeal came before the First-tier Tribunal on 14th February 2013, Judge Geraint Jones QC accepted, without mentioning the objections in the refusal letter, that Yusuf Jama and Halimo Isse were related as claimed, but went on to find that it was "*plain beyond doubt that the appellant was not part of Mrs Isse's family unit at the time that she left her country of habitual residence so as to seek asylum.*" That was not Mrs Isse's evidence. She insisted that Yusuf had been living with her and the rest of the family until just before they fled from Mogadishu to Ethiopia in 1991. Judge Jones seems to have taken the date when Halimo left Somalia not as 1991 but as 2001, which was when she left Ethiopia and claimed asylum here. This misunderstanding was not picked up in the grounds seeking leave to appeal to the Upper Tribunal, which focused instead on the possibility that a parent can be

separated from her child for a long period before she flees from her own country, because of the situation in that country, such that she and the child can still be regarded as living in the same family unit. Judge Landes gave permission to appeal to the Upper Tribunal on this basis, but it seems to me that Judge Jones simply misunderstood the evidence about when Halimo left Somalia.

4. Judge Jones also raised a ground which had not been mentioned in the refusal letter, namely the requirement at rule 352D(iii) that Yusuf should not have been leading an independent life. But he stopped short of dismissing the appeal on that ground. He went on to dismiss the appeal under Article 8, and then went on to dismiss it separately – in a reversal of the usual order – under Appendix FM. The grounds drafted by Duncan Lewis did not challenge the decision under Article 8, but did contend that it was not open to “the Defendant” (meaning the Secretary of State) “to base his (*sic*) decision on Appendix FM.” This ground appears to me to be completely misconceived. The refusal letter did not mention Appendix FM at all, but considered Yusuf’s private life under paragraph 276ADE. According to Judge Jones, it was actually the wish of the appellant’s representative that he should consider the appeal under Appendix FM. Unsurprisingly, Judge Landes could see little merit in this ground. Nevertheless, she did not preclude it from being argued, in case there was something she had missed. I can see nothing in it at all.
5. When the matter came before me today, it was agreed on all hands that the First-tier determination was infected by error of law, and would have to be set aside. Mrs Tanner submitted that, in order to remake the decision on the appeal, the Upper Tribunal would need to consider evidence bearing upon the two principal objections in the refusal letter, namely that Yusuf may not be the son of Halimo, and that he may not in any event have been part of her family unit before she left Mogadishu. Miss Manyarara was fairly sure that the original of the Cellmark DNA report can be made available, although she was reluctant to let go of Judge Jones’ favourable finding on the claimed relationship. In my view, however, the First-tier determination is so fundamentally flawed that it must now be determined *de novo* whether the requirements of rule 352D were met at the time when Yusuf Jama made his application.
6. Although Judge Jones’ findings on Article 8 were not actually challenged by Duncan Lewis, it seems to me that the appellant should not be debarred from arguing that he has an Article 8 claim to be permitted to remain in the United Kingdom. The strength of that claim will no doubt be affected by the Tribunal’s findings in respect of the mother-son relationship and membership of the family unit.

RE-MAKING THE DECISION

7. The ‘second stage’ hearing was twice listed and, unfortunately, twice adjourned, before reaching a conclusion before me today. In the meantime, another DNA test was conducted, this time by Eurofins Medigenomix, and like Cellmark Diagnostics they found the probability of Halimo Isse and Yusuf Jama being mother and son to be 99.9999%. One of the respondent’s objections having thus fallen away, the hearing today was concerned with establishing whether the appellant was a member of his mother’s family unit at the time when she left Somalia, as required by paragraph 352D(iv) of the Immigration Rules. Witness statements had been taken from the

appellant, his mother, and three brothers, and four of those statements were tested in oral evidence today.

8. In his earlier statement, signed on 11th May 2012, the appellant said that, after being separated from his parents and siblings, he was taken in by the couple next door, Asha and Mohamed, and moved with them to Belet Hawa. He believed Asha to be his mother, and only after living for some years with his adoptive family, when he was 7 or 8 years old, was he told that this was not so. Asha said that she had decided to adopt him as her own child, when she found him crying for his missing parents. Mohamed continued to look after the appellant after Asha died, and eventually arranged for him to be taken to the United Kingdom. The agent dropped him off in Southall, with instructions to stop Somali passers-by and ask if they knew his family. Fortunately, a lady called Hawa passed by and, being told Yusuf's name and clan, led him to his family.
9. In his statement signed on 25th June 2013, the appellant is unable to say why his mother did not mention him when claiming asylum. *"On the one hand she says I was lost for such a long time and she believed me to be dead. On the other hand she says she never gave up the search for me and was always asking about me within the Somali community."*
10. In his oral evidence, the appellant said that he had never been under the impression that Asha was his real mother. He called her "aunty" or "mother" out of respect, as a young child would to an older woman. He did not recall her ever having to tell him that she was not his real mother. As for Hawa bringing him to his family, he was "so, so lucky" that he accosted her in Southall.
11. When making her asylum claim in 2001, Halimo Isse gave many 'Family Details'. She gave the names of her husband, four children, her parents and three siblings. Her parents were deceased and the whereabouts of her siblings unknown, but her husband and children were in Ethiopia, at Jigjiga. The children were, in order of age, Abdirahman, born in 1985, Asha, born in 1986, Essa, born in 1987, and Hamza, born in 1988. The family moved from Budhole to Mogadishu in 1988, but at the beginning of 1991 the family home was looted by Hawiye militiamen, who killed Halimo's parents and grandmother, and terrified the children. In March 1991 Halimo fled to Ethiopia with her husband and four children, and more than ten years went by before she was able to come to the United Kingdom and claim asylum.
12. In her statement signed on 11th May 2012, Halimo says that her second child, Asha, has a twin, Yusuf. She does not say why she did not mention Yusuf when claiming asylum, but says that she did include him in her application for family reunion, after she had been recognised as a refugee, *"for practical reasons. He was not physically together with his siblings and I did not know where he was."* She goes on to say that she never stopped looking for him and never gave up hope of finding him, but had to accept the real possibility that he was no longer alive. She was overcome with joy therefore when her friend, Hawa Haji, brought Yusuf to her house in June 2004.
13. In her statement signed on 25th June 2013, Halimo is unable to say why she did not mention Yusuf's name in the course of her asylum interview, but then says that she omitted to mention him because she believed him to be dead. However, *"I spent*

many years yearning for him and longing to see him again. Many nights I was awake just wondering what had happened to him. I would not under any circumstances have given him away willingly."

14. In her oral evidence, Halimo reiterated that she would never have given Yusuf to someone else to look after. Asha was not a relative or even a close friend, although she was a neighbour. She must have taken Yusuf in, because she felt sorry for a vulnerable young child. Halimo did not list Yusuf among her children when claiming asylum, because she thought he was dead. She did not try to find out what had happened to him, because she believed him to be dead, and so forgot about him. She therefore had no idea that Yusuf would be coming to the UK. When her neighbour, Hawa Haji, brought him, she was overcome with joy.
15. In his witness statement signed on 25th June 2013, the appellant's elder brother, Abdirahman, says that he was 6 years old when Yusuf went missing, and he remembers how sad he felt at letting his mother down, because he was supposed to take care of Yusuf. Abdirahman did not attend the hearing. I was told he was at university that day.
16. In his witness statement, signed on 25th June 2013, the appellant's younger brother, Essa, says that his mother never stopped talking about Yusuf, and would ask the children every morning to pray for Yusuf. In his oral evidence, Essa confirmed that his mother never stopped talking about Yusuf. But she did not try to find him, although she had a feeling that he would come back.
17. In his witness statement signed on 25th June 2013, the appellant's youngest brother, Hamza, says that he was only 1 year old when Yusuf was missing, so he has no memory of that happening. But his mother never stopped talking about him, and he does not believe her capable of giving any child of hers away. Hamza was not asked to give any oral evidence, apart from adopting his statement.
18. In his closing submissions, Mr Avery drew attention to a number of inconsistencies in the evidence, which I shall refer to below. The inference must be that I had not been told the truth about how the appellant came to be separated from his birth-family or how he came to be looked after by a different family. On the contrary, argued Miss McCarthy, there was no contradiction between his mother believing the appellant to be dead, and at the same time hoping against hope that he would come back. Why would she give him away to someone else? Asha was not a relative, so this could not be a case of intra-family adoption.
19. As for Article 8, Mr Avery asked me to give weight to the fact that the appellant does not fall within paragraph 276ADE of the Immigration Rules, and that he is not only an illegal entrant but someone who has put forward a false account in order to try and bring himself within the Immigration Rules. Miss McCarthy acknowledged that her client could not succeed under Article 8 as confined by the Immigration Rules, but asked me to find that, unusually, family life subsisted in *Kugathas* terms between this mother and her adult children, who all live together at the same address. The appellant also, she contended, had a particularly strong private life. He had come here as a minor, and had applied for leave to remain in October 2004. He did not get a decision until November 2012, over eight years later. This delay implied that the

Secretary of State did not consider there to be a pressing public interest in removing him. Mr Avery reminded us that the appellant has a conviction for assault, but Miss McCarthy contended that this was not serious criminality, and that the appellant would not be able to fend for himself in Somalia, where he no longer has any contacts, and where his long residence in the UK might expose him to danger.

20. The chief obstacle in the way of the appellant's claim to have belonged to the family unit of his parents and siblings, before they moved to Ethiopia, is of course the absence of any mention of him by his mother, when she made her claim for asylum. Her explanation is that she believed him to be dead. That does not sit well with the fact that, when giving 'Family Details' on the asylum application form, she named her parents, both of whom were deceased, and her three siblings, whose whereabouts were unknown. If she had a child whose whereabouts were unknown, why should she not include him among the 'Family Details'? If he went missing during the mayhem and carnage which triggered the flight of Halimo and her family from Mogadishu, why did Halimo not include that among the terrible events, such as the murder of her parents and grandmother, which had forced the family to seek refuge abroad?
21. If Yusuf did not go missing in the circumstances claimed, there must be another reason why he did not accompany his parents and siblings on their journey to Ethiopia. One obvious alternative is that he was voluntarily entrusted to someone else's care, a possibility which the witnesses in their evidence, and Miss McCarthy in her submissions, have been at pains to deny. It is not uncommon, however, in many parts of Africa, for other people to play a much greater role in the upbringing of children than is envisaged by the 'nuclear family' of the modern West. Over the years, the appellate authorities have dealt with many 'sole responsibility' cases, where mothers have entrusted the day-to-day care of their children to relatives or friends, while they themselves toil overseas to provide financial support. Informal intra-family adoptions are also not uncommon in Muslim countries. Miss McCarthy points out that Asha was not a relative, and Halimo insists that she was not even a close friend, although in his earlier witness statement the appellant recalls that he would often play in her compound and that "*she would mind me whilst my mother was out so I knew her well before I got separated from my family.*" We know nothing about Asha, of course, except what we are told by Yusuf and Halimo, and while Halimo tries to distance herself from Asha, Yusuf emphasizes her closeness to the family.
22. In his earlier statement, Yusuf refers to Asha and Mohamed as his adoptive parents, and says that Asha "*decided to adopt me as her own child*", although of course he places this after the involuntary separation from his birth family. But there is a serious discrepancy between the witness statement, in which Yusuf says that he believed Asha to be his real mother ~ "*It was only after we had lived there for some years that Asha told me she was not my mother*" ~ and his oral evidence, in which he insisted that he was never under the impression that Asha was his real mother. Indeed, he called her 'aunty', later adding that he called her 'mother' as well. But both these modes of address were terms of respect which a young child might use to an older woman.

23. The appellant's elder brother, Abdirahman, did not attend the hearing, at which he might have been questioned about the rather unlikely account in his witness statement that he was expected, at the age of 6, to take care of his younger brother, and that he felt very sad when upbraided for dereliction of his duty. The reason given for Abdirahman's non-attendance today was that he had classes at university, but one might have thought he could take the morning off without serious consequences for his education. Curiously, Yusuf's twin sister, also called Asha, has given no evidence at all, not even a written statement, about the appellant. Added to these omissions is another discrepancy, which the appellant himself identifies in his recent witness statement (see paragraph 9 above). On the one hand we are told that Halimo had a profound hope that Yusuf would one day come back, that she made the children pray for him every morning, that she never ceased making inquiries about him. On the other hand, Halimo thought there was no point in mentioning him when she claimed asylum, because he must be dead. Indeed, in cross-examination today she said that she did not try to find out what happened to Yusuf. She thought he was dead, and so "*forgot about him.*"
24. On top of these inconsistencies comes the sheer implausibility of the appellant's account of how he found his long-lost family after a separation of 13 years. He was abandoned by the agent in the middle of Southall, with instructions to stop Somali passers-by and ask them if they knew his family, giving them his name and clan. As luck would have it, a lady whom he accosted in this manner, Haji Hawa (from whom we have not heard), lived right next door to the family, and was able to take the appellant there. This story stretches credulity too far. 'Abdi' and 'Jama' are very common names in Somalia. Someone bearing those names could hardly expect total strangers to direct him to his particular family. It is far more likely that Halimo was well aware that Yusuf was coming to the United Kingdom. It was not a matter of chance that he was able to locate his family.
25. The burden is on the appellant to demonstrate that it is more likely than not that he was a member of his mother's family unit at the time when she left her own country to seek asylum. He has not discharged that burden. Has he, on the other hand, established family and/or private life in the United Kingdom, such that it would breach Article 8 of the Human Rights Convention for him to be removed from the United Kingdom in accordance with the decision made on 8th November 2012?
26. Miss McCarthy points out that the appellant is living at home with his mother and siblings, and contends that this arrangement evinces an unusual degree of dependency between parent and adult children, such as to constitute 'family life' for the purposes of Article 8. I do not agree. The appellant is a healthy young man of 27, well able to stand up for himself, as his conviction for common assault tends to suggest. But he has certainly established private life in the United Kingdom, with which removal would interfere sufficiently to engage Article 8. Whether removal would be a disproportionate interference is, of course, the ultimate question which the tribunal has to resolve. His strongest point, which Miss McCarthy rightly emphasizes, is the delay of over eight years between his application for leave to remain and the respondent's decision on that application. By her delay the respondent has herself allowed the appellant to build up the Article 8 claim with which he now resists removal.

27. I cannot, however, accept Miss McCarthy's submissions about the dire consequences of removal to Somalia, where the appellant is said to have no connections and where he would not be able to fend for himself. He may well have connections in Somalia. We have not been told the truth about how the appellant was brought up and how it was that, on the threshold of adulthood, he came to the United Kingdom. Mr Avery makes the point that the appellant does not satisfy the 'private life' requirements at paragraph 276ADE of the Immigration Rules, and that his Article 8 claim outside the Rules is weakened by his lack of credibility. I agree. The interests of the individual claimant and his family must be balanced against the public interest in maintaining effective immigration control, and when the Article 8 claim is founded upon an account of his circumstances which is not credible, the public interest may assume preponderant weight. That, I find, is how the balance falls in the instant case.

DECISION

The First-tier determination is set aside, and the decision on the appeal is re-made by the Upper Tribunal.

The appeal is dismissed under the Immigration Rules and under Article 8 of the ECHR.

Richard McKee
Judge of the Upper Tribunal

17th October 2013