Michaelmas Term
[2013] UKSC 81
On appeal from: 2012 EWCA Civ 563

JUDGMENT

AA (Somalia) (FC) (Appellant) *v* Entry Clearance Officer (Addis Ababa) (Respondent)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

18 December 2013

Heard on 21 November 2013

Appellant	*Respondent*
Manjit Gill QC S Chelvan (Instructed by South West Law)	James Eadie QC Jonathan Hall (Instructed by Treasury Solicitors)

LORD CARNWATH (WITH WHOM LADY HALE, LORD WILSON, LORD REED AND LORD HUGHES AGREE)

1. Para 352D of the Immigration Rules provides for the grant of leave to enter to the child of a parent who has been admitted to the UK as a refugee. The issue in this case is whether the Para extends, or should be treated as extending, to a child for whom a family member has taken parental responsibility under the Islamic procedure known as "Kafala" (described in the agreed statement of issues as "a process of legal guardianship akin to adoption").

2. The facts are fully set out in the judgment of Davis LJ in the Court of Appeal. The following is a sufficient summary for present purposes.

i) AA was born in Somalia on 21 August 1994. Her family was "torn apart" by events in Somalia. Her father was killed in the mid 1990s.

ii) An elder sister, Ms A, married Mohamed on 10 January 2001. In 2002 she came home to find that he, her daughter Fadima, and her step-daughter Amaani had been abducted. She eventually left Somalia and came to the United Kingdom in October 2002. She was later granted indefinite leave to remain, on compassionate grounds. Her husband had in the meantime escaped from his abductors and had gone to live elsewhere in Mogadishu.

iii) AA became separated from her mother and other siblings during the fighting. Around the end of 2002 she went to live with Mohamed, Fadima and Amaani and was accepted as a family member.

iv) In October 2007 Mohamed left Somalia, and came to the United Kingdom in November 2007, where he was reunited with Ms A. He was granted asylum on 21 July 2008. The three girls – AA, Fadima and Amaani – were left with a maternal aunt in Mogadishu.

v) At the end of 2008 the three girls went to live with neighbours. Contact with Ms A and Mohamed was renewed in March 2009. Applications for entry into the UK were made for all three girls. Entry clearance was granted to Fadima and Amaani, who came to the United Kingdom on 22 January 2010. (I shall refer to them for convenience, and

without legal implications, as AA's "adoptive siblings.") It was refused for AA, who remained in Addis Ababa pending her appeal.

vi) Her appeal was heard in the First-tier Tribunal on 3 September 2010. Expert evidence, accepted by the tribunal, was to the effect that, although adoption as such does not exist under Islamic law, under the legal institution known as Kafala, a person may become a "protégé and part of the household of an adult"; and that this "only falls short of a full blown adoption in that such adoptee does not enjoy a right of inheritance under Islamic law" (FTT para 21).

vii) The tribunal allowed the appeal both under para 352D and article 8 of the European Convention on Human Rights, the former on the basis that AA

> "falls into a specific category of persons who have been taken into guardianship or the care of others under a transfer of responsibility such that Islamic law would recognise the legal status of the appellant in relation to [Ms A and Mohamed] as their child for all purposes and in the circumstances in which the appellant was an orphan." (para 31)

viii) On 23 May 2011, the Upper Tribunal (Judge Grubb) allowed the Secretary of State's appeal in respect of para 352D, but confirmed the tribunal's decision under article 8. On 14 May 2012 AA was given entry clearance and she arrived in this country on 4 June 2012.

3. The Court of Appeal accepted that notwithstanding the grant of entry clearance under article 8, the appeal was not academic.

> "The answer provided is that if entry is permitted under the Immigration Rules the entitlement of AA to remain thereafter will in effect align with the sponsor's entitlement, whereby indefinite leave to remain can be expected to be granted after the expiry of the five-year period: whereas grant of leave to remain under article 8 is discretionary and not necessarily so linked to the sponsor's position."

4. In this court, Mr Gill has provided further details of the differences, legal and practical, between clearance under the rules and discretionary leave to remain (DLR) under article 8. For example, under policies current at the time a person admitted under article 8 would take longer to reach the point of claiming indefinite

leave to remain (ILR) than a person admitted under the rules. Mr Gill submits that DLR status is not easily understood by employers, educational institutions and others with whom the holder will need to have dealings in ordinary life. He pointed to other practical disadvantages, such as in relation to travel documents. Some of his points were contentious. However, it was not in dispute as I understand it that AA's status, following admission under article 8, might be materially less advantageous than that of someone (such as her adoptive siblings) admitted under Para 352D.

The Rules

5. The critical provision is Para 352D, in Part 11 of the Immigration Rules which relates to asylum:

> "352D. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom are that the applicant:
>
> (i) is the child of a parent who is currently a refugee granted status as such under the immigration rules in the United Kingdom; 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) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum;…"

6. The principal issue which arises in AA's case is whether her relationship with her brother-in-law Mohamed can be regarded as that of "the child of a parent" (under (i)). For that it is necessary to turn to the interpretation provision, Para 6, which defines "parent" as follows:

> "'a parent' includes:

(a) the stepfather of a child whose father is dead and the reference to stepfather includes a relationship arising through civil partnership;

(b) the stepmother of a child whose mother is dead and the reference to stepmother includes a relationship arising through civil partnership and;

(c) the father as well as the mother of an illegitimate child where he is proved to be the father;

(d) an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or where a child is the subject of a de facto adoption in accordance with the requirements of Para 309A of these Rules (except that an adopted child or a child who is the subject of a de facto adoption may not make an application for leave to enter or remain in order to accompany, join or remain with an adoptive parent under Paras 297-303);

(e) in the case of a child born in the United Kingdom who is not a British citizen, a person to whom there has been a genuine transfer of parental responsibility on the ground of the original parent(s)' inability to care for the child."

7. Thus an "adoptive parent" under a "de facto adoption" is included, but subject to the requirements of Para 309A. This is underlined in turn by the definition of "adoption":

"'adoption' unless the contrary intention appears, includes a de facto adoption in accordance with the requirements of Para 309A of these Rules, and 'adopted' and 'adoptive parent' should be construed accordingly."

8. Para 309A is in Part 8 of the Immigration Rules relating to Family Members (in the particular group relating to children). Its present form dates from 2003. It provides so far as relevant:

"309A For the purposes of adoption under Paras 310-316C a de facto adoption shall be regarded as having taken place if:

> (a) at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together) for at least a period of time equal to the first period mentioned in sub-Para (b)(i) and must have cared for the child for at least a period of time equal to the second period material in that sub-Para; and
>
> (b) during their time abroad, the adoptive parent or parents have:
>
> > (i) lived together for a minimum period of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and
> >
> > (ii) have assumed the role of the child's parents, since the beginning of the 18-month period, so that there has been a genuine transfer of parental responsibility."

Paras 310-316C (referred to in the opening words) form a group of Paras under the general heading "Adopted Children", dealing with the general requirements for entry as an adopted child, unconnected with circumstances which might lead to an asylum claim.

9. We were given little information about the thinking behind these rules, either in the present form, or as introduced in 2000. Before 2000 a more flexible approach had been applied. In *R v Immigration Appeal Tribunal Ex p Tohur Ali* [1988] 2 FLR 523, the Court of Appeal considered rule 50 as it then stood, under which "parent" was defined as including –

> "an adoptive parent, where there has been a genuine transfer of parental responsibility on the ground of the original parents' inability to care for the child…"

The court, by a majority, held that this expression was not confined to adoption under a "legally recognizable adoptive process".

10. Para 352D was originally introduced in October 2000, at the same time as the Human Rights Act 1998 came into effect. At that time the relevant part of the definition of "parent" in Para 6 included an adoptive parent –

> "but only where a child was adopted in accordance with a decision taken by a competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom (except where an application for leave to enter or remain is made under Paras 310-316)".

HC 538 of 31 March 2003 altered the definition of "parent" to its present form and introduced Para 309A. We were not given any explanation for these changes, but neither side relies on them as throwing any light on the issue we have to decide.

11. Para 352D was considered by the Court of Appeal in *MK (Somalia) v Entry Clearance Officer* [2009] Imm AR 386. It had been argued that, notwithstanding the introduction of the new rule, reliance could be placed on a free-standing policy, outside the rules, expressed in a Ministerial Statement dated 17 March 1995, under which following grant of asylum status to a parent "reunion of the immediate family" would be permitted as a concession outside the rules. The court held that this policy had been supplanted by the rules in their amended form.

Discussion

12. As I understand them, Mr Gill's submissions, carefully and fully developed in his printed case and in oral argument, have three main strands:

> i) *Construction* To make sense of Para 352D in the context of the family of a refugee, the definitions must be interpreted broadly so as to include a child in the position of AA.
>
> ii) *International obligations* Effect must be given to the UK's international obligations relating to the treatment of children, including a broad approach to the recognition of adoptive children.
>
> iii) *Discrimination* Children who are members of a family unit should not be put at a disadvantage because they come from countries which have no formal system of adoption.

Construction

13. I would accept that the requirements of Para 309A (b)(i) and (ii) seem ill-adapted to the purposes of Para 352D. They assume a degree of stability in the

home country which is likely to be wholly inappropriate to those like AA seeking refuge from war-torn Somalia, and indeed for most asylum-seekers. Mr Eadie did not argue otherwise, although he suggested some theoretical scenarios in which the requirements might be achievable. As appears from its introduction the definition seems to have been designed principally to deal with ordinary applications to enter by adopted children, covered by the immediately following Paras. It finds its way into Para 352D by a somewhat circuitous route, which suggests that careful thought may not have been given to its practical implications. If there were any way in which we could legitimately rewrite the rule to produce a fairer result, I could see a persuasive case for doing so. Unfortunately I do not think this possible.

14. The correct approach to construction of the rules is well settled, as explained by Lord Brown in *Mahad v Entry Clearance Officer* [2010] 1 WLR 48:

> "The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy… the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended… that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations." (para 10)

15. Read in accordance with those principles, it is clear to my mind that Para 352D does not cover AA's case, and cannot be rewritten in order to do so. Whether or not Kafala could be treated as a form of "adoption" for other purposes, the definition of "adoptive parent" in Para 6 is more restricted. It extends to "de facto adoption" only within the limitations laid down by Para 309A, which do not cover this case. Although in terms directed to the succeeding provisions, the definition is also incorporated specifically into the general definition of "adoptive parent" and hence into that of "parent" in Para 6.

16. Mr Gill sought to make something, first, of the fact that the definition of "parent" is expressed as inclusive, and, secondly, of the words "unless the contrary intention appears" in the definition of "adoption". Neither point assists. The word "includes" in the definition of parent is readily explicable, having regard to the fact that the particular Paras do not include a biological parent. They are rather designed to extend the natural meaning of the term. The specific treatment of adoption in Para (d) excludes any intention to cover other forms of de facto adoption outside the definition. Similarly, the reference to "contrary intention" in the definition of adoption, in context, cannot be read as designed to extend the scope of the definition, but rather to indicate that there may be contexts in which

the extension to de facto adoption does not apply. On this aspect, I cannot usefully add to the reasoning of Davis LJ said in the Court of Appeal. As he said, the wording of the rules is "plain and unambiguous".

International obligations

17. Mr Gill has referred us to a number of international instruments which call for a broad approach to the protection of the interests of children. As he rightly says, the "best interests" principle is now, in appropriate areas of law, recognised both by domestic and international law (see *ZH(Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166).

18. Without in any way detracting from the importance of the principles affirmed in those instruments, I do not find it necessary to review them in any detail. Taking them at their highest, Mr Gill is unable to point to any specific obligation covering the position of someone in the position of AA in the present case.

19. In response to similar submissions in *MK (Somalia)* (above), Maurice Kay LJ concluded:

> "Do these documents establish or evidence an obligation of customary international law that is positively protective of de facto adopted children? In my judgment they do not. At best they illustrate an increasing awareness of the need for a flexible approach to the concept of family but they do not address in terms the question of de facto adoption which, because of its very lack of formality, presents a receiving state with obvious problems of verification. There is no material referred to by Mr Pleming which demonstrates a clear international consensus about the particular problem of de facto adoption — quite the contrary. Whilst there is a perceptible concern that the concept of family, in the context of family reunion, should not be resistant to social and cultural change, I do not consider that there is a precise, identifiable obligation of customary international law that is prescriptive of the national approach to de facto adoption." (para 12)

I respectfully agree.

20. Mr Gill also referred us to *Secretary of State for Home Department v Abdi* [1996] Imm AR 148. The Court of Appeal noted a Home Office letter dated 17

May 1990 relating to "Somali Family Reunion Applications", which included the following:

> "8.1.1 If the United Kingdom sponsor has been recognised as a refugee here under the terms of the 1951 United Nations Convention relating to the Status of Refugees then, like most countries, we follow the policy on family reunion agreed by the Conference which adopted the Convention. We will agree to the admission of the spouse and minor children of the refugee. However given the nature of the Somali family we are prepared to be flexible and if a refugee is able to show that a person not covered by the policy was a dependent member of the refugee's immediate family unit before the refugee came to the United Kingdom, then we would be prepared to consider exceptionally extending the refugee family reunion provision to cover that person."

Although this is a clear recognition of the importance attached internationally to family reunion, it is equally clear that the more flexible approach proposed for Somali applicants is not treated as a matter of legal obligation, but as a matter for "exceptional" consideration.

21. In that respect Mr Gill faces a further difficulty. It is accepted by the Secretary of State that the rules on this issue are not exhaustive of this country's obligations under international law. Hence the decision to allow AA entry under article 8 of the European Convention on Human Rights. Subject to the issue of discrimination, to which I will come, Mr Gill is unable to point to any international obligation which goes further in practical terms than the protection which has been afforded to AA under human rights law.

Discrimination

22. Mr Gill relies on what he calls the "principle of non-discrimination" as recognised in a number of international instruments, for example:

> i) UN Convention on the Rights of the Child article 2, under which states parties are required to ensure the rights in the Convention "to each child within their jurisdiction without discrimination of any kind…"
>
> ii) The Refugee Convention, the preamble of which reaffirms the principle that "human beings shall enjoy fundamental rights and freedoms without discrimination…"

iii) The European Convention on Human Rights article 14, under which the rights set out in the Convention are to be secured "without discrimination" on any of the grounds there set out.

23. Mr Gill submits that the discrimination in this case arises on a number of grounds under article 14, including race, religion and nationality, and also (as he puts it in his printed case) –

> "other status (the statuses of being a child of a refugee and/or of being a 'de facto adopted' child, ie a child who is not a biological child nor a child adopted in accordance with procedures recognised by the UK.)"

24. I accept that it appears harsh, to put it no higher, that under the rules AA is treated less favourably than her adoptive siblings, largely because of the tragic circumstances in which parental responsibility passed to her brother-in-law, taken with the lack of any functioning legal system allowing for formal adoption in the country from which she comes. It is however unnecessary to decide in the context of the present appeal whether or not such treatment could give rise to a claim for unlawful discrimination under article 14 or otherwise. This is because any rights which AA has in that respect would apply equally to her position in this country, regardless of the basis of her admission. Mr Gill did not suggest otherwise. In exercising any discretion in relation to the grant or extension of DLR, the Secretary of State is obliged to act in conformity with the Convention, including article 14. It is not necessary to reinterpret the rules to achieve that result.

25. I would add one comment. As I have made clear, I see great force in Mr Gill's criticisms of the use of the Para 309A definition in the context of a rule which is concerned with the treatment of refugees and their dependants. Mr Eadie's only answer, as I understood him, was that clear definitions were needed to establish "bright lines". That answer loses most of its force if the bright lines are drawn so restrictively that they have in practice to be supplemented by the much fuzzier lines drawn by article 8. In the interests of both applicants and those administering the system, it seems much preferable that the rules should be amended to bring them into line with the practice actually operated by the Secretary of State, including that dictated by her obligations under international law.

Conclusion

26. For these reasons, which substantially follow those of the Court of Appeal, I would dismiss this appeal.