Neutral Citation Number: [2012] EWCA Civ 563

Case No: C5/2011/2102

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Immigration and Asylum Chamber)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 May 2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE TOULSON
and
LORD JUSTICE DAVIS

- -

Between :

AA(Somalia)	**Appellant**
- and -	
Entry Clearance Officer (Addis Ababa)	**Respondent**

- -
- -

Mr Manjit Gill QC and Mr S. Chelvan (instructed by **South West Law**) for the **Appellant**
Mr Jonathan Hall (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 2 April 2012

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Judgment

Lord Justice Davis :

Introduction

1. This appeal from a determination of the Upper Tribunal promulgated on 23rd May 2011 raises an issue of interpretation of paragraph 352D of the Immigration Rules (HC 395). The issue involves consideration of the interaction (if any) between paragraph 352D, paragraph 6 and paragraph 309A of the Immigration Rules in determining the entitlement to entry clearance of a child seeking entry into the United Kingdom as a de facto adopted child of a sponsor who has previously been granted asylum as a refugee.

2. A further issue is whether the respondent was precluded, by a policy alleged to be contained in a letter dated 6th August 2007, from refusing to treat the appellant as entitled to entry clearance.

3. The appellant AA was represented on the appeal by Mr Manjit Gill QC and Mr S. Chelvan. The respondent was represented by Mr Jonathan Hall.

The background facts

4. The facts as found by Immigration Judge Hall in the First-tier Tribunal were to this effect.

5. AA was born in Somalia on 21st August 1994. She had six sisters and one brother. One of her sisters was Ms A who was born in Mogadishu on 1st October 1979. She married a man called Mohamed on 10th January 2001.

6. Sadly, the family was torn apart by events in Somalia. The father of AA and of Ms A, and one of the sisters, had been killed in the mid 1990s. In 2002 Ms A came home to find that her husband (Mohamed) and her daughter Fadima and her step-daughter Amaani had been abducted. She could not locate them. Ms A eventually left Somalia and came to the United Kingdom in October 2002. Subsequently she was granted indefinite leave to remain, on compassionate circumstances grounds.

7. Her husband, Mohamed, had in the meantime escaped from his abductors and had gone to live elsewhere in Mogadishu. As for AA, it was said that she had herself become separated at around that time from her mother and other siblings during the fighting. She was in due course put in touch with Mohamed by neighbours and at around the end of 2002 went to live with him and Fadima and Amaani. Mohamed left Somalia in October 2007 and arrived in the United Kingdom in November 2007. He was reunited with Ms A. He was granted asylum on 21st July 2008. The three girls – AA, Fadima and Amaani – were left with a maternal aunt in Mogadishu.

8. At the end of 2008 the three girls went to live with neighbours. Thereafter, in order to escape the fighting, they travelled to Addis Ababa and were initially cared for by a former neighbour. Contact with Ms A and Mohamed was renewed in March 2009. Applications for entry into the UK thereafter were made on behalf of the three girls. Entry clearance was granted to Fadima and Amaani, who travelled to the United Kingdom on 22nd January 2010. But entry clearance in respect of AA was refused by

decision dated 5th October 2009 and she remained in Addis Ababa. Most recently she has been living there with a carer, as we were told.

9. The appeal from the decision of the Entry Clearance Officer eventually was the subject of a substantive hearing in the First-tier Tribunal on 3rd September 2010. Ms A gave evidence. Mohamed also gave evidence, in accordance with a short witness statement, to the effect that from 2002 until he left Somalia in 2007 AA had come to live with him on a permanent basis. He was responsible for her (as well as Fadima and Amaani) and he came to look upon her as his own daughter. It was ultimately not disputed at the hearing that AA had lived with Mohamed as a family member in that period.

10. There was expert evidence before the Tribunal in the form of written statements from Dr Virginia Luling (whose principal field of study was South Somalia) and from Dr Shah, a senior lecturer in law at Queen Mary College, University of London and a specialist in Islamic law. Neither statement was challenged by the Home Office Presenting Officer and the respondent put in no expert evidence of his own. The expert evidence was adduced on behalf of AA with a view to establishing that AA primarily was the de facto adopted child of Mohamed (as well, of course, as being his sister-in-law through marriage).

11. Dr Luling, in the course of her report, stated that there was no concept of formal adoption, in the western sense, under Sharia Islamic law because of the fundamental principle of blood lineage. Children can be part of a family unit in all senses but will never share the lineage. As she put it: "Thus the people who assume the care of a child are its legal guardians rather than adoptive parents in the European sense. The relationship can rather be considered a transfer of responsibility…." She said that in Somalia many households contain children of different parentage, particularly in modern times with so much family disruption and loss of life. She said that raising orphan children is highly recommended in Islam.

12. In the course of his report, Dr Shah confirmed that there was no adoption as such in Islamic law but said that there was a system "akin" to it. He referred to a legal institution known as Kafala whereby an individual may become a protégé (as he put it) and be part of the household of an adult. He said that the system only falls short of full adoption in that the individual can have no right of inheritance under Islamic law by reason of the primacy given to blood lineage. There was no formal state mechanism giving effect to Kafala but the operative law was essentially a fusion of Somalian customary law and Islamic law. He said that force of circumstances prevailing in Somalia make it "all the more likely that the members of a kin group rely on informal mechanisms to adjust their family lives". He further stated his view that improvised mechanisms may extend to adoption "even though it may be frowned upon from the perspective of the religious law of Islam".

13. It was common ground before us first that AA's relationship with Mohamed fell within the concept of Kafala and second that AA had not been adopted by means of any legal process recognised by the United Kingdom as adoption.

The proceedings below

14. In the First-tier Tribunal, Immigration Judge Hall by his determination promulgated on the 8th September 2010 summarised the factual background and assessed the evidence. Having done so, he concluded that AA was the child of a parent who had been granted asylum in the United Kingdom. He considered that AA was clearly a family member of the family unit of Mohamed and that the expert evidence indicated 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". In the alternative, the Immigration Judge in any event concluded that refusal of entry was, in the circumstances, in breach of Article 8 of the Convention; and so allowed the appeal on that ground also.

15. In the Upper Tribunal, on the respondent's appeal against those conclusions, Senior Immigration Judge Grubb took a different view on the first ground. On the appeal it was argued on behalf of AA that Mohamed was to be regarded as the (adoptive) parent of AA. Senior Immigration Judge Grubb noted the concession of (different) counsel then appearing for AA that Mohamed did not meet the requirements of being a de facto adoptive parent under paragraph 309A of the Immigration Rules. The argument nevertheless was, in the light of the expert evidence, that Mohamed was AA's "parent" for the purposes of paragraph 352D. The Senior Immigration Judge rejected that. He took the view that a transfer of parental responsibility was not enough in itself; that it was far from clear on the evidence that a relationship (Kafala) variously described by the experts as "akin to adoption" or "guardianship" connoted recognition in Islamic law of the relationship of parent and child; and that authority was also against the argument. He thus concluded that the Immigration Judge had erred in his interpretation of the phrase "child of a parent" as used in paragraph 352D. However, the Senior Immigration Judge upheld the determination of the First-tier Tribunal on the Article 8 ground. The appeal was therefore dismissed.

16. Given that the appellant succeeded on the Article 8 ground (and the respondent has not sought further to challenge the findings and conclusion reached) it may be queried what the purpose of this further appeal is. This was a matter raised by Sir Stephen Sedley in considering the grant of permission to appeal. 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 5 year period: whereas grant of leave to remain under Article 8 is discretionary and not necessarily so linked to the sponsor's position. Permission to appeal thus was granted; and it is not now said by Mr Hall that the points raised are academic only.

The Rules

17. Paragraph 6 of the Immigration Rules sets out interpretations which are to apply to the Immigration Rules. The opening words "In these Rules the following interpretations apply" prima facie indicate that such interpretations are to apply generally to all the Rules.

18. The following are the relevant interpretations for present purposes:

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

19. The interpretation applicable to "a parent" thus expressly incorporates, in relation to an adoptive parent, reference to paragraph 309A. That paragraph (which is contained in Part 8 of the Immigration Rules relating to Family Members and which is in the particular group of paragraphs in that Part relating to the immigration of children) provides as follows:

> "309A. For the purposes of adoption under paragraphs 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-paragraph (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-paragraph; 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. ”

Paragraph 310 then provides as follows:

> “310. The requirements to be met in the case of a child seeking indefinite leave to enter the United Kingdom as the adopted child of a parent or parents present and settled or being admitted for settlement in the United Kingdom are that he:
>
> > (i) is seeking leave to enter to accompany or join an adoptive parent or parents in one of the following circumstances;
> >
> > > (a) both parents are present and settled in the United Kingdom; or
> > >
> > > (b) both parents are being admitted on the same occasion for settlement; or
> > >
> > > (c) one parent is present and settled in the United Kingdom and the other is being admitted on the same occasion for settlement; or
> > >
> > > (d) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and the other parent is dead; or
> > >
> > > (e) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and has had sole responsibility for the child's upbringing; or
> > >
> > > (f) one parent is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling

family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; or

(g) in the case of a de facto adoption one parent has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is seeking admission to the United Kingdom on the same occasion for the purposes of settlement; 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) can, and will, be accommodated and maintained adequately without recourse to public funds in accommodation which the adoptive parent or parents own or occupy exclusively; and

(v) DELETED

(vi) (a) was adopted in accordance with a decision taken by the competent administrative authority or court in his country of origin or the country in which he is resident, being a country whose adoption orders are recognised by the United Kingdom; or

(b) is the subject of a de facto adoption; and

(vii) was adopted at a time when:

(a) both adoptive parents were resident together abroad; or

(b) either or both adoptive parents were settled in the United Kingdom; and

(viii) has the same rights and obligations as any other child of the adoptive parent's or parents' family; and

(ix) was adopted due to the inability of the original parent(s) or current carer(s) to care for him and there has been a genuine transfer of parental responsibility to the adoptive parents; and

(x) has lost or broken his ties with his family of origin; and

> (xi) was adopted, but the adoption is not one of convenience arranged to facilitate his admission to or remaining in the United Kingdom; and
>
> (xii) holds a valid United Kingdom entry clearance for entry in this capacity"

20. Paragraph 352D is contained in Part 11 of the Immigration Rules which relates to Asylum. It is in these terms:

> "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; and
>
> (v) would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
>
> (vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

The Submissions on the first issue

21. Mr Gill submitted that paragraph 352D was to be construed according to its ordinary and natural meaning, having regard to the context and to such purpose as is implicit in the language used. In this regard, he cited the observations of Lord Brown and Lord Kerr in *Mahad v Entry Clearance Office Addis Ababa* [2009] UKHL 16; [2010] 1 WLR 48 at paragraphs 10 and 51 and Lord Clarke in *ZN (Afghanistan) v Entry Clearance Officer* [2010] UKSC 21; [2010] 1 WLR 1275 at paragraphs 34 to 36. He further submitted that the rules were to be interpreted on the basis that it is to be presumed that the Secretary of State would be seeking to comply with international

human rights obligations and so as to achieve consistency and to avoid discrimination as between individuals.

22. Mr Gill went on to submit that there was a strong policy objective in promoting family reunion and in promoting the best interests of children. He drew our attention to a considerable number of materials in this regard. Thus in Article 2 (h) of the Refugee Qualification Directive 2004/83/EC "family members" is defined so as to extend to minor children of a couple in the circumstances there provided "regardless of whether they were born in or out of wedlock or adopted as defined under the national law". He also referred to Article 23 which emphasises the obligation to ensure that family unity can be maintained. It may be noted that Article 23(5) provides that Member States may decide that the Article also applies to other dependent close relatives who lived together as part of the family at the time of leaving the country of origin.

23. Mr Gill further referred to the rights of the child set out in Article 24 of the Charter of Fundamental Rights of the European Union (2000); to Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 1951, whereby it is recommended that the necessary measures be taken for the protection of a refugee's family especially with a view (among other things) to the protection of refugees who are minors, in particular unaccompanied children and girls, "with special reference to guardianship and adoption"; and to the UN Convention on the Rights of the Child 1989. In Article 20 of that Convention, as Mr Gill noted, it is stated that care for a child could include Kafala among other possibilities (which possibilities also expressly included, as Mr Hall in turn noted, adoption). Mr Gill also referred us, in this general context, to other materials, including various General Comments or Conclusions by various Committees of the UN or the UNHCR, which emphasise the best interests of the child and the importance of preserving the family unit.

24. All these materials and the objectives they exemplify, he submitted, should "drive the construction" of paragraph 352D.

25. Turning to the wording of the Immigration Rules themselves, Mr Gill made two overall submissions:

    1) First, he submitted that any child who has (pre-flight) become a child of the family should be regarded as an adoptive child of the parent who has been granted asylum. Thus paragraph 352D relates – apart from biological children or children of step-parents – not only to children who have been adopted de jure and to children who have been adopted de facto within the ambit of paragraph 309A; it also extends to those who can be styled as "adopted" (even if not within paragraph 309A) by reason of having become a child of the family.

    2) Secondly, he submitted that paragraph 6 (which he stresses in this respect uses the words "includes", not "means") was not attempting to be exhaustive of the notion of what a child of "a parent" may be. Set in the context of Part 11 of the Immigration Rules (relating to asylum) and the international obligations and conventions, paragraph 352D is not to be confined or governed by paragraph 6 or paragraph 309A at all; and the (non-exhaustive) definition of "a parent" in paragraph 6 is not relevant to paragraph 352D. Rather, paragraph 352D is to be

read by reference to a "broader concept of family", as he put it: to achieve the objectives of promotion of family reunion and the best interests of a child and to reflect what he says is the modern reality: that a "parent" can cover a wide range of persons. Accordingly, the relationship of Kafala as found on the facts to subsist here justified the conclusion that AA is the child of Mohamed for the purposes of paragraph 352D. The Senior Immigration Judge was wrong to conclude otherwise.

26. Mr Hall, on the other hand, advanced a primary argument, by way of respondent's notice, to somewhat different effect from the approach adopted by the Senior Immigration Judge. Mr Hall submitted that it would be wrong to allow resort to wider considerations of policy to subvert the plain and ordinary meaning of paragraph 352D. On the contrary, the Secretary of State has, he submitted, declared by the terms of paragraph 352D what the policy is to be. The various Conventions and Charters had left it to Member States to decide how to deal with such matters; and the way in which the Secretary of State had elected to deal with the matter was the way set out in the Immigration Rules.

27. Moving on from that, he says that paragraph 6 is expressed to be of general application to the Immigration Rules. The interpretation to be applied to "a parent" clearly is not strictly definitional – it does not expressly mention biological parents – but otherwise comprehensively covers those who are to be taken as "a parent". The reference to "adoptive parent" expressly, in the case of a child who is the subject of a de facto adoption, requires the adoption to be "in accordance with the requirements of paragraph 309A of these Rules". Paragraph 309A indicates that a de facto adoption is to be regarded as having taken place if each of the matters then set out in (a) and (b) of that paragraph are satisfied. In this case they are not so satisfied. There is simply no basis, he submitted, for not incorporating the interpretative provisions of paragraph 6, and hence paragraph 309A, into the provisions of paragraph 352D which expressly refer to the situation of the child of "a parent".

28. Accordingly, whether or not the Senior Immigration Judge was right to conclude on wider grounds that the nature of Kafala was such that it could not amount to adoption in the sense used in the Immigration Rules, the short point in this particular case is that AA on any view could not satisfy the requirements for de facto adoption as set out in paragraph 309A.

Decision on first issue

29. I am in no real doubt that the purposive interpretation to paragraph 352D advanced (with care and elaboration) by Mr Gill cannot be sustained. It is in my view contrary to the plain and unambiguous language of the Immigration Rules.

30. I can see no proper basis for saying there can be some notion of adoption applicable to entry clearance applications under paragraph 352D which can operate separately from and outside the meaning otherwise given to it for the other purposes of the Rules. Indeed, adoption, whether de jure or de facto, is a very serious and sensitive matter. It cannot readily be expected, for some purposes but not others, to be left, in the modern immigration and asylum context, in an undefined state.

31. The interpretation to be applied under paragraph 6 to "adoption" (and "adopted" and "adoptive parent") itself expressly brings into play, unless the contrary intention

appears, the requirements of paragraph 309A. It is true that paragraph 352D is contained in the Part relating to asylum and itself makes no reference to adoption. But it does refer to the child of a parent: and it is inevitable that one then looks back to the general interpretation provisions of paragraph 6 to see what that connotes – indeed, absent that, it is difficult to see how de facto adopted children could otherwise fall with paragraph 352D at all. In the context of an adoptive parent that therefore connotes either (a) adoption in accordance with a decision taken by the competent administrative authority or court in a country whose adoption order are recognised by the United Kingdom; or (b) de facto adoption in accordance with the requirements of paragraph 309A. That is what it says. There is no other category.

32. Moreover, the requirements of paragraph 352D are cumulative; and being a part of the family unit at the relevant time, as required by (iv), is not in itself enough to give entitlement to entry: rather, it is just one of the six requirements that have to be met. It is also to be noted that under requirement (i) of paragraph 352D the requirement is that the applicant "is" the child of a parent granted asylum in the United Kingdom; not that the applicant is regarded as or treated as the child of a parent so granted asylum. It may further be recalled that, under (e) of the interpretation provisions of "a parent" contained in paragraph 6, a "genuine transfer of parental responsibility" only expressly comes into play in the context of a child born in the United Kingdom who is not a British citizen.

33. In all these circumstances, I can see no basis for the assertion that the interpretative provisions of paragraph 6 (and thereby the provisions of paragraph 309A) do not apply to paragraph 352D. In my judgment, they clearly do. That paragraph 6, with regard to "a parent", uses the word "includes" and not "means" is, in my view, of no real significance in this context. The interpretation is plainly setting out exhaustively who is to be regarded for the purpose of the Rules as an "adoptive parent": and there is nothing either in that paragraph or in paragraph 352D itself to indicate a contrary intention for the purpose of entry clearance applications under paragraph 352D.

34. Mr Gill objected that paragraph 309A is expressed to apply for the purposes of adoption under paragraphs 310 – 316C. It does not say that it applies to paragraph 352D. That is so. But the point has no real weight, in my view, given that the provisions of paragraph 309A are expressly brought into play for the Rules generally by the interpretative provisions of paragraph 6. Indeed, the words of exception contained in brackets in (d) of the interpretative provision relating to "a parent" in paragraph 6 would on one view seem to be otiose on Mr Gill's approach, if this approach were correct. It is, at all events, the case that no exception with regard to paragraph 352D is contained in this interpretative provision of "a parent". Nor do the interpretative provisions specifically applicable to Part 11 under paragraph 352G indicate any different position with regard to the meaning of "a parent" for the purposes of Part 11.

35. The most powerful point advanced by Mr Gill, as it seems to me, is the point that if the requirements of paragraph 309A have to be met for applicants such as AA under paragraph 352D then it is likely, in practice, that there will be very few cases indeed (Mr Gill even suggested no cases: although I do not think one can necessarily go that far) whereby – given realities relating to asylum claims – a child seeking entry into the United Kingdom as a de facto adopted child could satisfy those requirements. I would agree that it appears to be likely that most of such applicants would not satisfy

those requirements. But that, as I see it, is the balance the Secretary of State has struck. There were and are very difficult issues relating to entry of children claimed to be de facto adopted children (as the case – antedating the amended Immigration Rules – of *R v Immigration Appeal Tribunal ex parte Tohur Ali* [1988] 2 FLR 523 illustrates). It was, as I see it, a matter for the Secretary of State as to how to define "the child of a parent". Nothing in the various Conventions or other materials referred to us by Mr Gill precluded the Secretary of State from adopting such a definition. It also has to be borne in mind that the Secretary of State will inevitably have had to consider the possibility of abusive applications and the dangers of child trafficking and the like. To say this is not to set up an extraneous policy consideration to support a restricted interpretation: it is simply to show that the natural and ordinary meaning conveyed by the words actually used does not yield a senseless conclusion; and that in deciding how to set out the required approach in the Immigration Rules the Secretary of State will have had a number of differing, and competing, considerations to take into account. The balance struck is thus that expressly set out in the relevant Immigration Rules, in determining who is to be regarded as "the child of a parent" for this purpose.

36. Such a conclusion is supported, moreover, by authority. In *AS (Somalia) v Entry Clearance Officer Addis Ababa* [2008] EWCA Civ 149; [2008] Imm AR 510 it was common ground, in the context of an argument based on paragraph 352D, that "parent" had the meaning given to it by paragraph 6: and that children by adoption, including de facto adoption, were included so long as there was conformity with paragraph 309A: see paragraph 21 of the judgment. The argument of Mr Gill (who also appeared in that case) thus was in that case not that paragraph 309A did not apply to paragraph 352D but that it operated so unjustly that it should be overridden or read down (an argument which did not prevail: see paragraph 22). The Court of Appeal, comprising Waller LJ, Sedley LJ and Moore-Bick LJ, did not query what was stated to be common ground; although Mr Gill is before us at least entitled to say that the point was not argued but was conceded.

37. In *MK (Somalia) v Entry Clearance Officer* [2008] EWCA Civ 1453; [2009] Imm AR 386 – the case referred to by Senior Immigration Judge Grubb – that position was again assumed to be correct by all the (very experienced) counsel involved. In the course of giving his judgment, however, Maurice Kay LJ, with whom Thomas LJ and Waller LJ agreed, plainly considered the matter and plainly considered that to be the correct approach.

38. In paragraph 12 of his judgment, he pointed out that the question of de facto adoption, because of its very lack of formality, presented a receiving state with obvious problems of verification; that there was no international consensus about the problem of de facto adoption; and that there was no identifiable obligation of customary international law prescriptive of the national approach to de facto adoption (points which have resonance in the present case, in view of Mr Gill's reliance on the various Conventions and other materials deployed before us). After considering the provisions of paragraph 352D, paragraph 6 and paragraph 309A of the Immigration Rules Maurice Kay LJ said this at paragraph 17 of his judgment:

> "In the present case (and, I accept, many others), this test of de facto adoption is not satisfied because it requires that both adoptive parents have spent at least 18 months living with the

> child immediately prior to the child's application for entry clearance, whereas in an asylum case at least one of the parental figures will usually be in the United Kingdom, having successfully sought asylum."

He went on to deal with counsel's argument for the existence of a free standing policy outside the Rules. He said this (among other things) at paragraph 23:

> "These are ingenious submissions, going far beyond those in the not dissimilar case of *AS(Somalia) v Secretary of State of the Home Department* [2008] EWCA Civ 149, and they benefit from the obvious attraction that, if correct, they avoid distinctions between formal and de facto adoption, and between de facto adoption within the meaning of paragraph 309A and other forms of de facto adoption which may appear to be no less deserving. In this context, I accept that the nature of asylum will very often mean that the person who is fleeing persecution will be unable to satisfy paragraph 309A. However, in my judgment the submissions are not correct. I reach this conclusion for a number of reasons. .... *Secondly*, when the issue came to be addressed in the Immigration Rules 2000 and afterwards, de facto adoption was given a specific and restrictive meaning. It would be very odd if that existed side-by-side with a vaguer and less demanding policy. *Thirdly*, and following from that, I accept Miss Giovannetti's submission that the amendments to the Immigration Rules in 2000 superseded the previous, more loosely expressed concession and that the DSP and the ECG took the form of guidance to entry clearance officers on how to apply the Immigration Rules, whilst expressly identifying current concessions which fall outside the Rules. Thus, the passage dealing with "other dependant relatives" and "compelling compassionate circumstances" is expressed in terms that make clear that it relates to a category of leave outside the Rules. It requires an entry clearance officer to carry out a screening test …."

Maurice Kay LJ went on to conclude, in paragraph 24 of his judgment, that "there is no free standing policy operating outside the Immigration Rules which accrues to the particular advantage of de facto adoptive children who fall outside paragraph 309A".

39. Mr Gill objects that, as in *AS (Somalia)*, the points of interpretation which he now raises were not argued in *MK (Somalia)*: it was common ground in that case that the appellants could not succeed by reference to the Immigration Rules. But as I see it Maurice Kay LJ, as part of his reasoning, considered that was indeed correct and that de facto adoption had a specific meaning, by reference to paragraph 309A, which meant that many would not be able to satisfy the test. In any case, even if *MK (Somalia)* were not binding on us on this point, I agree with it and would follow it as to the applicability to paragraph 352D of the requirements for de facto adopted children laid down by paragraph 309A. It seems to me that any contrary conclusion would involve a distortion of the words actually used in the Immigration Rules.

40. Mr Hall, also referred us to, and adopted as part of his Respondent's Notice the reasoning in, the determination (post-dating that of Senior Immigration Judge Grubb) of Senior Immigration Judge Gill in the case of *Entry Clearance Office Addis Ababa v Mohammed* [2011] UKUT 00378 (IAC). There, on the basis of arguments much the same as – even if not as detailed as – the arguments advanced before us, Senior Immigration Judge Gill concluded that there was only one meaning of de facto adoption under the Immigration Rules and that was the meaning given to it under paragraph 309A, which applied to paragraph 352D as well as to paragraphs 310 to 316C. It will be gathered that I agree with that conclusion.

41. Nor, in my view, does this interpretation of the Immigration Rules lead to any great lacuna. It must not be forgotten that Article 8 of the Convention is always available to be relied on in an appropriate case - indeed AA in the present case succeeded on precisely that ground. Further, it may be, for example, that applicants in corresponding circumstances may in some cases be able to claim eligibility for family reunion on compelling compassionate grounds.

42. Each of Mr Gill and Mr Hall – although more particularly Mr Hall – placed some reliance on paragraphs 319V and 319X as lending support to their arguments. We were told that those rules were introduced variously by amendment on 16th March 2011 and 13th June 2011, subsequent to the events and decisions in question, and I do not think they cast any real light on the issue of interpretation before us.

43. Mr Gill further objected in his written submissions in reply that if the interpretation advanced by him on behalf of AA was wrong then the result was effectively discriminatory, did not accord with the spirit of the Refugee Convention and unfairly disadvantaged children coming from Islamic countries where there is no system of adoption as such and/or where there are no functioning relevant state institutions. He said that there was "clear discrimination" in the Immigration Rules and that the court should so "declare". But no claim for a declaration of incompatibility with the Convention to this effect was ever pleaded or previously argued. In any event, as I see it, the balance has been struck in the Immigration Rules by the Secretary of State in a way open to her; and, further, applicants such as AA are able to invoke their rights under Article 8 in an appropriate case.

44. In such circumstances, and given my conclusions, I think that it is unnecessary further to consider whether in any event (and leaving aside paragraph 309A) cases of Kafala, even if established on the facts, can never fall within some broad concept of de facto adoption (as Senior Immigration Judge Grubb seems to have thought: although cf *Tohur Ali* (supra)); or whether they always will (as perhaps Immigration Judge Hall seems to have thought). Because of the requirements of paragraph 309A the point will, I suspect, arise relatively rarely in a context such as the present. It may in fact perhaps be the case that there is a middle position whereby – depending on the particular facts and circumstances – some cases of Kafala could constitute what is said to be de facto adoption and some not (that, I think, perhaps being the view to which each of Mr Gill and Mr Hall ultimately inclined). Possibly, too, expert evidence on this topic will not always take the same form as in the present case, where there was no cross examination and no exploration of (for example) issues such as the permanence or revocability of Kafala arrangements. I prefer, for myself, to express no concluded view on such matters.

The second issue

45. I can deal with the second issue very shortly.

46. The letter said to contain the policy in question was dated 6th August 2007 and was from the Entry Clearance Manager based at the British Embassy in Addis Ababa. It was sent to a firm of solicitors (experienced in asylum and immigration matters) called Wilson & Co, and was in response to a letter from that firm dated 31st July 2007 (and there had also been previous correspondence). That letter had described the three Somalian applicants who were the subject of the correspondence as adopted children of the sponsor. It was asserted that they were de facto adopted children entitled to entry under paragraph 352D: the particular issue raised was whether it was appropriate to charge fees for their entry clearance applications.

47. The letter of 6th August 2007 stated as follows:

> "Thank you for your letter of 31 July to UKvisas, copied to the British Embassy here in Addis Ababa. I am replying as Entry Clearance Manager here at the Visa Section.
>
> Upon receipt of your letter I consulted the Diplomatic Service Procedures (DSPs) chapter 16.2 and I accept that this guidance does not make a distinction between biological and adopted minor children. In light of this, I have sought advice from UK visas and as a result can confirm that as all three children are minors, they are entitled to apply under Paragraph 325D of the Immigration Rules and therefore their applications will be processed gratis.
>
> They should now lodge their applications at the Visa Section in order for them to be processed.
>
> I apologise for any inconvenience caused to your sponsor or the applicants but hope that this letter clarifies matters. …"

48. This letter was among the materials referred to the Immigration Judge, as he recorded in the opening paragraphs of his determination. But he recorded no argument, and no decision, that the letter constituted a policy of the Secretary of State extraneous to the Immigration Rules. Mr Gill noted that at the end of his determination the Immigration Judge had said that the respondent's decision to refuse entry was "not in accordance with the law or the applicable Immigration Rules". Mr Gill's suggestion was that the phrase "not in accordance with the law" connoted that the Immigration Judge had accepted that the decision was contrary to the policy allegedly contained in the letter of 6th August 2007. That is untenable. As the Immigration Judge's remarks in the immediately preceding paragraph of the determination show, he was ruling the refusal as "unlawful" because he found that it breached Article 8.

49. Accordingly, if AA wished to renew the asserted policy argument based on the letter of 6th August 2007 in the Upper Tribunal it was incumbent on her to do so. She never did.

50. In any event, the letter of 6th August 2007 cannot possibly, in my view, be promoted into a statement of general policy intended to apply extraneously to the Immigration Rules. It was, self-evidently, the statement of opinion of an Entry Clearance Manager on the facts of a particular case and where the question of fees was being debated. There was no express reference to paragraph 309A and no indication that the letter was to be taken as having a wider import other than by reference to the particular case being discussed.

51. I therefore would also reject the second ground of appeal advanced.

Conclusion

52. I would for my part dismiss the appeal.

53. Finally, Mr Gill complained that, notwithstanding AA's success on the Article 8 ground, entry clearance apparently still has not been granted to AA. Concerns about this were expressed by Sir Stephen Sedley at the permission stage. I am not aware of any reason why entry clearance should not be granted forthwith, to enable AA to be reunited with the members of her family in the United Kingdom.

Lord Justice Toulson :

54. I agree.

Lady Justice Arden :

55. I also agree.