

## ASYLUM AND IMMIGRATION TRIBUNAL

### THE IMMIGRATION ACTS

Heard at Field House  
On 20 February and 12 March 2007

Before

Mr Justice Hodge (President)  
Senior Immigration Judge Gill

Between

Appellant

and

**Entry Clearance Officer, Addis Ababa, Ethiopia**

Respondent

Representation:

For the appellant: Mr A. Pretzell and Mr J Collins (Counsel, instructed by Sheikh & Co. Solicitors)

For the respondent: Ms R. Brown and Mr Ouseley (Home Office Presenting Officers)

1. *Third party support is not permitted under paragraph 281(v) of The Rules. Arman Ali should no longer be followed. The case of MK (Adequacy of maintenance – disabled sponsor) Somalia [2007] UKAIT 00028 is reaffirmed. Where a sponsor has disabilities it should be assumed that enhanced benefits, such as a higher rate of Income Support, or Disability Living Allowance, have been awarded out of necessity and are not available to support dependants coming from abroad. 2. Although, after Huang v Secretary of State for the Home Department [2007] UKHL 11 exceptionality is not the criterion for success in Article 8 cases, it is likely that it will be rare for a claimant who does not meet the requirements of the Immigration Rules to succeed under Article 8. In assessing the issue Immigration Judges should take care to weigh all relevant considerations, giving due and considerable weight to the factors supporting the decision appealed against.*

## DETERMINATION AND REASONS

1. In 2003 the appellant, a citizen of Somalia born in 1930, applied for entry clearance to the UK as the dependant of his wife now a UK citizen but formerly a Somali national. The application was made in about May 2003. It was refused on 30 November 2005. An appeal was lodged on 20<sup>th</sup> December 2005. The appellant's appeal was allowed by Immigration Judge Gibb in a determination promulgated on 13 September 2006. The respondent's application for a reconsideration of the successful appeal was granted by a senior immigration judge on 26 September 2006.
2. The appellant had fled Somalia and at the time of the application was living in Ethiopia with his son. The appellant's appeal was considered with the appeal of his son, then aged 37, who had also been refused entry clearance. At the hearing before the immigration judge it was indicated on behalf of the sponsor that that appeal was to be withdrawn. The immigration judge properly pointed out that the sponsor had no power to withdraw the appeal but, having considered the matter, the son's appeal was dismissed on the papers. No application is before this tribunal in relation to the son's case.

### **Factual background**

3. At the time of the application in April 2003, it appears the appellant's wife (here called the sponsor) was in receipt of income support. By the time of the hearing, and to date, she also became entitled to disability living allowance. It is not entirely clear precisely when the sponsor began receiving disability living allowance but Mr. Pretzell confirmed that this must have happened at some time between the date of the decision and the date of the hearing before the immigration judge. At the date of the decision, the sponsor was in receipt of £91 per week. At the date of the hearing before the immigration judge, she was in receipt of social security payments including disability living allowance of £211 per week. In addition to disability living allowance and income support, the sponsor currently receives housing benefit and council tax benefit. She lives in a property of which she is the sole tenant, owned by a housing trust. There have been conversion works to the property to provide for the sponsor's disabilities.
4. The appellant has health problems and also suffers from a disability. The medical evidence before the immigration judge (paragraph 14 of the Determination) shows that the appellant suffered from a peptic ulcer, "external thrombosed hemorrhoids", depression and chronic pain in his leg secondary to an amputation below the left ankle joint. The evidence does not suggest that either the appellant or his sponsor is able to work, and indeed no such suggestion has been made.
5. The immigration judge accepted that the sponsor sent to her husband and son in Ethiopia between US\$200 and US\$300 per month. This equated to between £123 and £184 per month, depending on the exchange rate. The sponsor and

the appellant have a daughter who is in well-paid employment in London earning in 2005 £41,000 and now after promotion £50,000. The daughter gives her witness statement says £600 a month to support her father and brother in Ethiopia monthly and the judge accepted she pays £500 into an account for support of the family.

6. A cousin of the appellant who also lives in England supports the appellant and his son in amounts which vary between £100 and £400 per month. The evidence accepted by the immigration judge suggests that the appellant and his son are maintained in Ethiopia by monthly remittances from the UK which at their lowest total £723 per month and at their highest £1184 per month. The son, who is a partial beneficiary of this support, is, as indicated, in his thirties.

### **The first Tribunal decision**

7. One apparent basis for the refusal by the respondent of the appellant's application was that the marriage between the appellant and the sponsor was not subsisting. The immigration judge gave full and clear reasons for rejecting that view. He made a finding that the marriage was subsisting.
8. Before the immigration judge, the respondent's representative conceded that there was adequate accommodation.
9. The immigration judge noted that the application had been made in 2003 on the basis that, although the sponsor (the appellant's wife) would not be able to support the first appellant, there was additional sponsorship from the daughter. He said that at the hearing emphasis was placed on the sponsor's benefit, income and disability living allowance and her ability to support the appellant. However, he took the view that "the correct approach is to look at the resources of the family as a whole. This was the way that the application was originally put forward and it is also the reality of how the family have been supporting the first appellant in Ethiopia". The immigration judge concluded that the benefit income, the support from the daughter and some further support from a cousin taken together met the test for adequate maintenance in the Rules and so allowed the appeals.

### **Paragraph 281 of the Rules**

10. The respondent refers in the refusal of entry clearance to paragraph 317 and 352 of the Rules. With the consent of all parties the appeal proceeded before the immigration judge and before us on the basis that the applicable rules relating to this appeal are contained in paragraph 281 Rules (HC 395 as amended). The paragraph is as follows:

281. *The requirements to be met by a person seeking leave to enter the United Kingdom with a view to settlement as the spouse [or civil partner] of a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement are that:*

- (i) (a) *the applicant is married to [or the civil partner of] a person present*

*and settled in the United Kingdom or who is on the same occasion being admitted for settlement; or*

*(b) the applicant is married to [or the civil partner of] a person who has a right of abode in the United Kingdom or indefinite leave to enter or remain in the United Kingdom and is on the same occasion seeking admission to the United Kingdom for the purposes of settlement and the parties were married [or formed a civil partnership] at least 4 years ago, since which time they have been living together outside the United Kingdom; and*

*(ii) the parties to the marriage have met; and*

*(iii) each of the parties intends to live permanently with the other as his or her spouse [or civil partner] and the marriage [or civil partnership] is subsisting; and*

*(iv) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and*

*(v) the parties will be able to maintain themselves and any dependents adequately without recourse to public funds; and*

*(vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.*

11. For the purposes of this reconsideration, so far as relevant, it was accepted by all parties that the only requirement of paragraph 281 in issue was paragraph 281(v).

12. It is common in the Rules to require a person seeking entry clearance in various circumstances to show that they can be adequately maintained without recourse to public funds. The wording of this provision in relation to children joining their parents or relatives has been considered by the Tribunal in AA (3rd party maintenance R297 (v)) Bangladesh [2005] UKAIT 00105.

13. Paragraph 297 provides so far as relevant:

297. *The requirements to be met by a person seeking indefinite leave to enter the United as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom are that he: [...]*

*(v) can, and will, be maintained adequately by the parent, parents or relative the child is seeking to join, without recourse to public funds;...*

14. The Tribunal in AA Bangladesh concluded in relation to paragraph 297(v):

*“It requires that the applicant for entry clearance ‘can, and will, be maintained adequately by **the parent** (emphasis added) the child is seeking to join...without recourse to public funds’. We are satisfied that the use of the definite article limits the class of person who can provide the maintenance. We regard the formulation as pointing clearly to a requirement that where a child is joining a parent under paragraph 297 it is that parent who must maintain that child. Third party support by relatives or otherwise cannot satisfy the rule as it now is.”*

15. Ms. Brown submitted that the immigration judge made an error of law in the

manner in which he analysed the requirement for maintenance in this case. She submitted that the immigration judge was wrong to “look at the resources of the family as a whole” when deciding, as he did, that the appellant can be maintained adequately without recourse to public funds. Ms Brown argued by analogy with AA Bangladesh that the maintenance has to be by “the parties” alone. Hence, third party support cannot be relied on. The immigration judge was wrong to accept that the monies from the daughter and the cousin could be taken into account. The sponsor, it was argued, only had her social security benefits. They were provided for the sponsor alone. This was not adequate for the maintenance of two persons, here the appellant and the sponsor.

16. Ms Brown further relied on KA (and others) Pakistan [2006] UKAIT 00065 where the Tribunal said at paragraph 21:

*“The view that the wording of paragraph 194, and other similar paragraphs in the Rules, excludes third party support appears to be implicit in decision of the Tribunal in [AA Bangladesh]. For this reason we should have found that the support offered by the third party could not be taken into account as assisting the first appellant who satisfied the requirements of the Rules, even if we had found that such support were realistically available.”*

17. We were also referred to the Immigration Directorates’ Instructions (IDIs) under Chapter 8, sections 1 and 2, in relation to spouses and civil partners, where at Annex F 5.1 it is said that maintenance from members of the families of spouses is not acceptable as “the rules require the couple to be able to support themselves and any dependents from their own resources”. This IDI is of course in no way binding on the Tribunal but it is an indication of the way in which paragraph 281(v) has been applied by the Secretary of State and entry clearance officers.

18. Mr Pretzell on behalf of the appellant argued that the wording of paragraph 297(v) and 281(v) is different. Paragraph 281(v) only refers to “the parties will be able to maintain themselves”, whereas paragraph 297(v) provides that the child “can, and will, be maintained adequately by the parent”. There must, it was contended, be some reason for the difference in the wording. That reason, it was contended, is that paragraph 281(v) is intended to allow support by third parties in addition to support that “the parties”, i.e. here the appellant and the sponsor, can provide for themselves. Reliance is placed on AK and others (Bangladesh) [2006] UKAIT 0069. There the Tribunal reached no conclusion as to whether AA Bangladesh ought to be applied in that case, which also concerned paragraph 281(v). In the particular case they said at paragraph 51:

*“Vague and unquantified expressions of goodwill are inadequate to enable an applicant for settlement to show the availability of adequate maintenance (or indeed accommodation) even if the rules allow third party support in principle.”*

(our emphasis)

Mr. Pretzell relied on the final (underlined) phrase in that sentence to argue that the Tribunal in AK and others left open the possibility that third party support may be permitted under paragraph 281 of the Rules.

19. We do not accept that third party support is permitted under paragraph 281 of the Rules. The phraseology of paragraph 281(v) is widely used throughout the Rules (see paragraphs 284, 290, and 295A). In our judgment, the phrase “the parties will be able to maintain themselves” refers to the individuals themselves and does not permit of the importation of third party support to satisfy the requirement of the rule. The use of the definite article “the” relating that to the parties reinforces our view and is supported by this Tribunal’s reasoning in AA Bangladesh with regard to paragraph 297.
20. The Rules make specific provision for a very wide range of circumstances under which individuals seeking entry clearance may be granted such clearance. Paragraph 281(v) and paragraph 297(v) both require, in our view, that the resources referred to must be those of the parties alone in 281(v) and of the parents alone in 297(v). There are additional and sound child protection reasons why 297(v) is properly interpreted as held in AA Bangladesh. Under paragraph 281(v), as here, the purpose of the rule is to facilitate the reunion of spouses who are expected to maintain themselves from their own resources.
21. Indeed, the structure and wording of paragraph 281 of the Rules focuses the requirements of the Rules on the two individuals who wish to benefit from them; the spouse or civil partner with rights to be in the UK, and the spouse or civil partner who seeks to join that person. The parties must have met (281(ii), they must intend to live permanently with each other and the marriage must be subsisting (281(iii). The accommodation must be adequate and owned and occupied exclusively by one or other of the parties to the relationship (281(iv). This all points clearly to the need for the two persons involved to satisfy the Rules personally without reference to any third parties. So with maintenance. Paragraph 281(v) in our judgement requires the resources to be those of the parties alone.
22. We are aware of the view, widely supported by those representing appellants, that because the Rules are silent on whether third party support is permissible, it must necessarily be so. We take the opposite view. The issue of maintenance is of importance in many of the immigration Rules. Had it been intended that third party support should satisfy a maintenance requirement we would expect the rules to say so and to set out the way in which such maintenance might satisfy the requirement. Mr. Pretzell also relied on paragraph 21 of KA (and others), suggesting that the Tribunal appeared to accept in that paragraph that third party support may be permitted under paragraph 281. We do not agree. When read properly, it is clear that the Tribunal did not think it necessary to decide the issue in that case, because it was able to decide the case on other grounds – i.e. that, even if third party support was permitted under paragraph 281, the Tribunal found that it was

not realistically available in that case.

23. Reliance is also often placed on the following remarks of Collins J in R v Secretary of State for the Home Department ex parte Arman Ali [2000] INLR 89 at 101 and following)

**“..... Accordingly, the Rules would not in my view be in accordance with Article 8 if they were construed so as to exclude a spouse when his or her admission would not affect the economic well-being of the country because there would be no recourse to public funds or any other detriment caused by it.**

*I come finally to the construction of the relevant Rules, namely H.C. 395. Since it is clear that their implementation can, given circumstances which are not likely to be particularly unusual, produce a breach of Article 8, they should, if possible, be given a construction which will avoid such a breach.*

*The wording of Rule 281(vi) does not in terms suggest that the ability to maintain must be from the parties' own resources. Other rules do.*

*If a rich relation, or a benefactor is willing and able to maintain a family in this country so that there is no need to have recourse to public funds, I see no reason in principle why that family should be kept apart. The purpose of the rule is quite clearly met and the natural meaning of the language used is consistent with the construction I have espoused.*

*I do not doubt that it will be rare for applicants to be able to satisfy an Entry Clearance Officer, the Secretary of State or an adjudicator that long term maintenance by a third party will be provided so that there will be no recourse to public funds. But whether or not such long term support will be provided is a question of fact to be determined on the evidence.”*

24. In our view, Arman Ali should no longer be relied upon to support the proposition that third party support is permitted if the underlying purpose of avoiding recourse to public funds is achieved. This case was decided prior to the implementation of the Human Rights Act 1998 when domestic human rights jurisdiction was (in relative terms, when compared with the situation today) in its infancy. The Human Rights Act 1998 now applies. Section 3 provides that, in so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. For the reasons we have given in paragraph 21 above, the wording of paragraph 281 as a whole does clearly indicate that the ability to maintain must be from the parties' own resources. We are of the view that we are unable to interpret words “the parties” in paragraph 281(v) in isolation from the clear meaning of the same words in other parts of the same rule. The words “the parties” in each part of paragraph 281 should be given their natural meaning, which is the proper approach to their interpretation: see the House of Lords' judgment in Alexander v. IAT [1982] IAR 392. Unless the Appellant can establish that paragraph 281 as expressed is inconsistent with a Convention right, section 3 of the Human Rights Act 1998 will not come into play (see paragraphs 34 and 35 of KP (Para

317: mothers-in-law) India [2006] UKAIT 00093). We are aware that there are a number of conflicting Tribunal cases as to whether third party support is permitted in spouse applications (see paragraph 11.54 of the sixth edition of Macdonald's Immigration Law and Practice, to which we were not referred). We did not have the benefit of hearing the parties' submissions on those cases but, as far as we can see, these are old cases, pre-dating Arman Ali and they are also cases which fail to take into account the proper approach to the application of section 3 as set out in KP India.

25. Accordingly, the immigration judge erred in law in taking into account the financial support provided by the sponsor's and the appellant's daughter and the cousin.
26. There was a further error of law in the immigration judge's decision to allow the appeal under the Rules as he took into account the sponsor's receipt of disability living allowance, which she was receiving as at the date of the hearing but not as at the date of the decision at which time she was receiving income support. By taking the sponsor's disability living allowance into account, the immigration judge erred in law because section 85(5) of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act) obliged him to determine the appeal by reference to the "circumstances appertaining as at the date of the decision." The immigration judge's error in taking into account the sponsor's disability living allowance was material to his decision to allow the appeal under the Rules for the reasons we give below.
27. Accordingly, it is necessary for us to consider whether the circumstances appertaining at the date of the decision were such that the appellant satisfied the maintenance requirement in paragraph 281. This requires us to consider the issue of the adequacy of maintenance in this case. We were referred to MN Pakistan [2002] UKIAT 01369. The IAT in that case relied on a passage from Panaich (00/TH/0072) as follows:

*"19. In our judgment, when benefits are paid to a person in respect of a disability, it is simply improper to conclude, without more, that that person would be maintained adequately if he or she made their benefits available to someone else. Of course, it may be the case that if another person is available to share the task of caring, the costs will be reduced...but that simply cannot be assumed; it must be the subject of evidence. Different people will be able to offer different things, from occasional transport (thus perhaps saving taxi fares) upwards. Without such evidence, it appears to us that it should normally be presumed that the adequate maintenance of the recipient of the benefits requires the whole of those benefits."*

28. We agree with that view. In our judgment the benefits a person receives must themselves be deemed to be "adequate maintenance" for that person alone. Parliament decides, in the main on an annual basis, on the adequate level of benefit for those living in this country who are entitled to and require state assistance. It would be wrong in principle, in our judgment, to accept that

benefits which are deemed to be adequate for one person alone ought to be accepted as adequate for the maintenance of two persons in order to facilitate entry into the UK for the second person. The inevitable, and undesirable, result would be two persons living significantly below the poverty line.

29. It was said in KA and others (adequacy of maintenance) Pakistan [2006] UKAIT 0065 at paragraph 8:-

*"It perhaps does not necessarily follow that in order to be adequately maintained one has to have resources at least equivalent to those which would be available to a family on income support. But there are very good reasons for taking that view. A family of British (or EU) citizens resident in this country will not have less than that level. It is extremely undesirable that the Rules should be interpreted in such a way as to envisage immigrant families existing (and hence being required to exist, because social security benefits are not available to them) on resources less than those which would be available through the social security system to citizen families. To do so is to encourage the view that immigrant families need less, or can be expected to live on less....."*

We agree with and support this view.

30. Adequate maintenance and social security benefit levels for the sponsor and the appellant living together in the UK, were they able to claim such benefits jointly as opposed to the sponsor alone, would be significantly above the figure received by the sponsor as at the date of the decision. Two persons living together as husband and wife where there is no restriction on claiming would receive significantly more benefit from public funds than does one person. It is that figure which must be used as the benchmark for deciding whether the sponsor would be able to maintain the appellant adequately without recourse to public funds. In our judgment, the sponsor's income support was not adequate as at the date of the decision to support the appellant and the sponsor within the meaning of paragraph 281(v) of the Rules. We accept (because the immigration judge accepted) that the sponsor was sending her husband and son in Ethiopia between US\$200 and US\$300 per month which equated to an exchange rate between £123 and £184 per month. This is a significant sum. If we were to accept on this basis that the appellant would be adequately maintained in the UK without recourse to public funds, this would result in both the appellant and the sponsor living significantly below the minimum level of income for a couple on income support.
31. Even if it had been open to the immigration judge to take into account the sponsor's disability living allowance (which he was not because of the provisions of section 85(5) of the 2002 Act), he fell into error by equating the money the sponsor sent to the appellant for his support in Ethiopia to the funds properly available in order to satisfy the maintenance requirement. Although disability living allowance is set at what may be seen as a generous level by comparison with income support, the reason for the allowance (which

is not treated as the individual's income for tax purposes) is to enable the individual to provide for his or her needs arising from the disability. Such enhanced benefits are awarded out of necessity so that the needs of the claimant can be met. As the Tribunal said in MK (Adequacy of maintenance - disabled sponsor) Somalia [2007] UKAIT 00028, where a sponsor has disabilities it should be assumed that enhanced benefits, such as a higher rate of Income Support, or Disability Living Allowance, have been awarded out of necessity and are not available to support dependants coming from abroad.

32. We appreciate that the result of our decision may be that very few individuals may be able to satisfy the maintenance requirements where it is proposed that the sponsor's income support or disability living allowance be used to provide maintenance for the applicants. Nevertheless, we are satisfied that this interpretation is not only fair but necessary in order to ensure that all sections of the community have the means to benefit from substantially the same living standards when they have to depend on social security support.
33. Accordingly, in our view, the immigration judge materially erred in law in concluding that paragraph 281(v) was satisfied in this case. Social security benefits provided by the State for the support of one person only cannot be regarded as adequate to support two persons. Nor can third party support be relied on to create an "adequacy" for the reasons set out above.

## Article 8

34. We indicated our view at the end of the first hearing of this reconsideration case that the immigration judge's decision to allow the appeal under the Rules was wrong in law and could not stand. However, after further consideration we invited the parties to attend at a reconvened hearing to make submissions on the Article 8 rights of the appellant in this case. Mr Collins and Mr Ouseley were able to attend in place of Mr Pretzel and Ms Brown and both made further helpful submissions.
35. The immigration judge concluded that he should allow the appeal under the Rules. But he also said (paragraph 23 of the Determination):-

*"In my view there are strong compassionate factors in this case, and there would be strong Article 8 grounds, given the overall circumstances. This is a family that have been separated by war, and that have suffered considerably, both physically and psychologically. As it is, however, it is clear that they succeed under the Rules,..... For these reasons, I base my decision on the Rules, and will say not say more about Article 8. This also reflects the way the appeal was put forwarded on their behalf."*

36. Mr Ouseley argued that there are no factual findings with regard to the appellant's Article 8 claim because the immigration judge considered that it was not necessary for him to consider Article 8. For example, there was no finding as to whether there was family life. Accordingly, Mr. Ouseley submitted that it would be necessary for the Tribunal to reconsider the Article

8 at a second-stage reconsideration so that relevant factual findings on the evidence could be made. In response to this point, Mr. Collins submitted that there was no need for the Tribunal to adjourn this case for a second-stage reconsideration to take place because the Tribunal had the benefit of sufficient findings.

37. In the alternative, Mr. Ouseley argued that the situation of the appellant could not be described as truly exceptional outside the Rules as required by Huang using the judgement of the Court of Appeal in his submissions made before the decision of the House of Lords in that case. The appellant's rights to family life could continue in Ethiopia. The sponsor could travel there and the parties to the marriage can always communicate by phone and letter. Paragraph 281 is Article 8 compliant. Such health problems as there are are not exceptional.
38. In response, Mr Collins submitted that the sponsor wife has been in the UK since 1994 and is now a citizen. Five of her eight children are in the UK. She had been advised by her solicitors to wait until she was granted British citizenship before she applied for her husband to join her and she made the application when that had happened. The appellant, her husband, is not in good health, physically or mentally. He has stomach problems and is depressed and disabled, having lost the lower part of his leg. His daughter is willing to support him for as long as it takes. He needs his wife's support and she herself is not well.
39. We put to the parties the following argument: that, if the appellant were to lodge an application under paragraph 317 as a dependent of his daughter, he might satisfy the maintenance requirement because his daughter's earnings appear to be sufficient. She is in particularly well-paid employment and is prepared to support him indefinitely. She is not married and has no children. Having regard to the Court of Appeal's guidance on the issue of delay in HB (Ethiopia) & Ors v Secretary of State for the Home Department [2006] EWCA Civ 1713 and the appellant's and the sponsor's advanced ages, we questioned whether the appellant ought to be expected to make a further entry clearance application as a dependant of his daughter under paragraph 317 of the Rules. The appellant's application for entry clearance in the instant appeal was made in about May 2003 but the decision was only made on 30 November 2005 - a delay of 2 ½ years. This may be viewed as a substantial delay given the advanced ages of the sponsor and the appellant.
40. We asked Mr. Ouseley whether an entry clearance application under paragraph 317 would succeed. In response, Mr. Ouseley said that he could not assist us because he did not have the file. Mr. Collins agreed with the points we made.

### **Discussion of Article 8**

41. We agree with Mr. Collins that it is not necessary for further oral evidence to be given in order to enable us to determine the Article 8 claim. The

immigration judge accepted the evidence which was before him. We can proceed on the basis of that evidence, and draw our own findings of fact.

42. The first issue we need to decide is whether there is family life within Article 8 (1). We remind ourselves that this must be decided on the basis of the circumstances appertaining as at the date of the decision and on the standard of a balance of probabilities. The circumstances appertaining as at the date of the decision are not different to the circumstances currently existing, other than with regard to the fact that the sponsor began receiving disability living allowance after the date of the decision. This, in turn, reflects upon the difference in the state of the sponsor's health at those times.
43. The immigration judge found that the appellant and his wife have a subsisting marriage and intend to live together permanently. In our view, this is more or less equivalent to a finding that there was family life at the date of the decision. On the balance of probabilities, we draw that finding from the immigration judge's Determination.
44. We now consider whether, in the circumstances as at the date of the decision and on the balance of probabilities, the respondent's decision would have consequences of such gravity as potentially to engage the operation of Article 8. Since the appellant does not have legal status in Ethiopia, it is more likely than not that the sponsor would not be able to live with him permanently there. Accordingly, if the decision is maintained, the probability is that they would not be able to enjoy their family life with each other by living physically together. They were separated because of the civil war in Somalia, as long ago as 1994 and have already suffered hardship. We are satisfied that the probability of the appellant and the sponsor not being able to enjoy their family life with each other by living physically together does amount, in the context of a relationship between a husband and a wife who are already of advanced ages and who were separated by the war, to a consequence of such gravity as potentially to engage the operation of Article 8.
45. We are satisfied, and it is not in dispute, that any interference (or, more correctly, lack of respect) would be in accordance with the law because, apart from the application which is the subject of this appeal, the appellant had no other right to enter this country in the circumstances appertaining at the date of the decision. Any lack of respect would be in pursuit of a legitimate public aim, i.e. the maintenance of a fair and effective system of immigration control.
46. We turn to the main issue of proportionality. We did not consider it necessary to reconvene the parties to address us on the report of the Appellate Committee in Huang UKHL 11 because the Appellate Committee explained that it is still expected that only a very small minority of cases would succeed under Article 8. That was the position before, albeit that the result was achieved through the concept of "exceptionality" as explained by the Court of Appeal in Huang.
47. Accordingly although "exceptionality" is not in itself a legal test, the

evaluation of the evidence in order to answer the ultimate question – i.e. of identifying the relevant factors on each side of the scale – and the mechanics of deciding the importance to be given to considerations in favour of the decision and the consideration on the other side of the scale are the same as they were before the Appellate Committee of the House of Lords delivered its opinion in Huang. In effect, this is because it was always the case that immigration judges were guided to the effect that “decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.” R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27. It is not the case, in our judgement, that applicants will find it easier to succeed under Article 8 than was previously the case. Immigration judges when assessing proportionality must be careful to state clearly that their task is to weigh all the competing considerations and give due and considerable weight to the considerations in favour of the decision appealed against. They should then answer the proportionality question by stating whether they find that the case they are dealing with, although it is not covered by the Rules and supplementary directions, is entitled to succeed under Article 8. The expectation remains that such cases will form a very small minority.

48. We will turn now to consider the issue of proportionality in this particular case. We have given very careful consideration to the argument we posed to the parties and which we have summarised at paragraph 41 above. We have decided, on reflection, that this argument does not assist the appellant. This is for two reasons. Firstly, an application (if made) by the appellant under paragraph 317 as the dependent relative of his daughter could not succeed because he cannot bring himself within 317 (i), which states:

“317. The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:

*(i) is related to a person present and settled in the United Kingdom in one of the following ways:*

*(a) mother or grandmother who is a widow aged 65 years or over; or*

*(b) father or grandfather who is a widower aged 65 years or over; or*

*(c) parents or grandparents travelling together of whom at least one is aged 65 or over; or*

*(d) a parent or grandparent aged 65 or over who has remarried but cannot look to the spouse or children of the second marriage for financial support; and where the person settled in the United Kingdom is able and willing to maintain the parent or grandparent and any spouse or child of the second marriage who would be admissible as a dependant; or*

*(e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; or*

*(f) the son, daughter, sister, brother, uncle or aunt over the age of 18 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom; and .....*"

49. As the appellant is over 65 years of age and not a widower, he does not fall within paragraph 317(i) (b), (c), (d) or (f). On the face of it, he does not fall within paragraph 317(i)(e) either because of his age, although the guidance in the IDIs (Chapter 8, Section 6, Annex V, paragraph 1) may well mean that his age is not in fact a bar under paragraph 317(i)(e). We express no concluded view on this as we did not hear any argument in this respect. However, paragraph 3 of the Determination shows that, as at the date of the appellant's application for entry clearance in May 2003, he was living with his son who was taking care of him on a daily basis. The appellant's daughter's witness statement which was before the immigration judge dated 4 September 2006 (paragraph 12 on page 25 of the appeal's bundle) shows that the appellant's son was continuing to look after him on a daily basis at the date of the hearing before the immigration judge. Accordingly, the appellant is not "living alone". We take further support from paragraph 8 of the Determination which shows that Mr. Pretzell informed the immigration judge that one of the reasons why the appellant's son's appeal was not pursued before the immigration judge was that, even if it could be shown that the appellant's son would be left living alone if the appellant were to join the sponsor in the United Kingdom, there was still insufficient evidence that the son would be living in exceptional compassionate circumstances. Whilst Counsel's submissions are not evidence, it is indicative of the circumstances remaining the same at the date of the hearing before the immigration judge (i.e. that the appellant and his son were living together at that time).

50. Secondly, and in any event, the bundle of case-law relied upon by Mr. Collins on the second hearing date before us includes the Court of Appeal's judgment in SB (Bangladesh) v. Secretary of State for the Home Department [2007] EWCA Civ 28 in which Lord Justice Ward said (at paragraphs 21 to 24 and paragraph 36):

**"21. ... whether or not the applicant would satisfy the requirements for entry clearance was not a matter which the [Tribunal] ought to have taken into account". Although there are arguments (and first instance decisions) which support the opposite view, that statement seems to be right as a matter of principle, in terms of fairness and good practice, and in the light of authority.**

22. *So far as principle is concerned, the issue of whether the applicant satisfied the requirements of paragraph 246 of the Immigration Rules would be*

*for an entry clearance officer in Bangladesh to determine, if and when an application under that paragraph is made. In the absence of a requirement to that effect, it is not an appropriate issue for determination, when no such application has been made, by a tribunal deciding a different question, at a different time, in a different country, and in different circumstances. It would also seem somewhat paradoxical if the stronger an appellant's perceived case for entry clearance under the Immigration Rules the more likely he or she is to be removed. Yet, subject to the first point mentioned in paragraph [20] above, on the basis of the reasoning of the Tribunal in this case, that would be the inevitable consequence.*

23. *As to practicality, it would be unfortunate, in terms of time effort and expense, if a tribunal, when deciding whether a claim for leave to remain was truly exceptional, had to consider, almost as a matter of course, how likely an appellant, if removed from the United Kingdom, would be to succeed on a subsequent putative application for entry clearance to come back to this country. Yet, as we see it, such an exercise would have to be carried out in many, possibly most, appeals of the present type, if that issue was potentially relevant. And, if such an exercise is carried out, it is hard to see how a tribunal is to decide the weight or effect of such a factor if it decides that the prospects of success of such an application to enter are debatable or speculative.*

2. *There is also a real risk of unfairness to an appellant if such a factor is taken into account. Thus, the views expressed in paragraphs [66] and [67] by the Tribunal in this case may turn out to be wrong, either because an entry clearance officer takes a different view of the facts or the law, or because the Immigration Rules change, or because the facts change."*

51. The effect of the SB (Bangladesh) case is that we would err in law by taking into account an irrelevant matter if we were to take into account, when deciding proportionality, whether the appellant would succeed if he were to make a further entry clearance application on another basis. This principle survives notwithstanding the reliance in the case on the Court of Appeal's guidance on the issue of proportionality in Huang. By the same analogy, it would be an error of law for an immigration judge, when deciding proportionality, to take into account the possibility of the appellant being unsuccessful if he/she were to make an entry clearance application from abroad.

52. The only reason the appellant's appeal under the Rules must be dismissed is because third party support is not permitted. However, the fact that the appellant "nearly qualified" under the Rules or "just missed" qualifying under the Rules does not mean that his is one of the small minority of cases entitled to succeed under Article 8. Such a conclusion (without more) would lead to insufficient weight being given to the need to maintain effective immigration control. It is now no more than a relevant factor. In the case of applications under paragraph 281 of the Rules, the spouse or civil partner is expected to satisfy the maintenance requirement from their own resources. Article 8 cannot be used as a means to get around that requirement.

53. Whilst the respondent's delay of 2 ½-years in reaching a decision in this case is a relevant factor, it must have very substantial effects if it is to influence the outcome - see paragraph 24 (v) of the Court of Appeal's judgment in HB (Ethiopia) and others v Secretary of State for the Home Department [2006] EWCA Civ 1713 - because the appellant does not have a potential substantive right of entry under the Rules or any policy. Since he was not entitled to succeed under the Rules, the delay will have deprived him of nothing, other than that his Article 8 claim would have been determined earlier. This guidance in HB (Ethiopia) survives notwithstanding the reliance in the case on the Court of Appeal's guidance on the issue of proportionality in Huang.
54. Immigration judges are often urged to take into consideration, and give weight to in the applicant's favour, the fact the individual's living conditions are poor, with poor accommodation, little or no medical facilities, no education, no legal status etc. With the exception of legal status which has a bearing on the enjoyment of family life (because the lack of status would generally mean that the sponsor and the applicant are unable to enjoy family life in the country of residence of the applicant) the general living conditions of applicants will carry very little weight. In entry clearance cases, the state's obligation is a positive one to facilitate family life. It is difficult to see how an individual's living conditions can have any real bearing on the ultimate question which needs to be answered - i.e. whether family life will be prejudiced in a manner sufficiently serious as to amount to a breach of fundamental right protected by Article 8. Any argument to that effect must be properly supported by clear and cogent evidence showing precisely how the applicant's living conditions prejudices the enjoyment of family life, or that it does so sufficiently seriously as to amount a breach of Article 8. Suggestions that the applicant's living conditions distress the family in the UK in such a way as to prejudice the enjoyment of family life should be supported by medical evidence if it is said that the distress felt is so severe as to defeat the state's interest in immigration control.
55. Turning to the other specific facts of this case, the appellant and his family have been separated by war and they have suffered, both physically and psychologically. At the date of the decision, the appellant was already of advanced years. The accepted evidence is that he was in poor health (see paragraph 4 above). The respondent's delay is a relevant factor. The appellant and his son live in poor accommodation, although this factor can only carry little weight. In any event, they receive by way of financial support from the sponsor, her daughter and a cousin a sum between £700 and something over a £1100 a month - which is a not inconsiderable sum. The appellant lives with and has support from his son in Ethiopia. There is telephone contact between the appellant and his wife. The refusal of entry clearance means that he will not, at present, be able to join his wife in the UK. He did not (and presumably still does not) have any legal status in Ethiopia, the consequence of which may be that he and the sponsor are not able at present to enjoy family life by being together on any permanent basis in Ethiopia. On the other hand, the circumstances appertaining as the date of the decision were that the sponsor was able to travel. She was not then in receipt of disability living allowance and (paragraph 15 of the Determination) she had travelled to Kenya and the United Arab Emirates in 2004 before the date of the decision but had not gone

to Ethiopia to see her husband. On the findings of the immigration judge, the circumstances appertaining as at the date of the decision were that, notwithstanding the physical separation, the appellant was enjoying family life with his family in the United Kingdom of sufficient quality as to engage Article 8 (1). In other words, he is not without any family life with them at all. In addition, he was receiving the support and comfort of his son, albeit that he was separated from the rest of his family in the United Kingdom. That fact must help to ameliorate the difficulty experienced by the appellant, the sponsor and the remaining family members in the United Kingdom of continuing separation from the appellant, as must the knowledge that the remaining son / sibling would not be left alone in Ethiopia. We also have regard to the considerations we have described above in favour of the decision – importantly, the maintenance of immigration control which is “workable, predictable, consistent, fair and effective so as to ensure that it is not perceived as unduly porous”. We accord considerable weight to the consideration in favour of the decision of the entry clearance officer being upheld.

56. Having carefully considered all of the competing considerations in this case in the exercise of our judicial task, we have answered the ultimate question in favour of the decision being upheld, and against the appellant. We find that this is not one of the very small minority of cases which, although it is not covered by the Rules and supplementary directions, is entitled to succeed under Article 8.

### Summary

57. We summarise our main conclusions as follows:

- (i) Third party support is not permitted under paragraph 281(v) of the Rules. Arman Ali should no longer be followed.
- (ii) As the Tribunal said in MK (Adequacy of maintenance - disabled sponsor) Somalia [2007] UKAIT 00028, where a sponsor has disabilities it should be assumed that enhanced benefits, such as a higher rate of Income Support, or Disability Living Allowance, have been awarded out of necessity and are not available to support dependants coming from abroad.
  - (ii) If it is proposed that sums paid to a sponsor by way of disability living allowance will be used towards the maintenance of an applicant, evidence must be adduced to show precisely how the sponsor’s funds will be saved by obtaining alternative care, whether the applicant is able and willing to provide the care and whether the funds saved would be adequate for his maintenance without recourse to public funds.
  - (iii) When deciding the issue of proportionality in Article 8 cases:
    - (a) it would be an error of law for an immigration judge, when deciding proportionality, to take into account the likely success or otherwise of a different entry clearance application by the applicant;

(b) in entry clearance cases, the respondent's delay in making a decision is unlikely to carry more than minimal weight, even if it is a relevant factor; and

(c) in general terms, an applicant's poor living conditions abroad will not have any real bearing on the question of whether his article 8 rights will be breached by a refusal of entry clearance.

### **Decision**

58. The original Tribunal made a material error of law.

**The following decision is accordingly substituted:**

The appeal is dismissed on immigration grounds.

The appeal is dismissed on human rights grounds.

**Mr Justice Hodge**  
**President**

**Date: 15.06.07**