Upper Tribunal
(Immigration and Asylum Chamber)

Mohamoud (paras 352D and 309A – *de facto* adoption) Ethiopia [2011] UKUT 00378(IAC)

THE IMMIGRATION ACTS

Heard at: Field House
On 21 April 2011 Determination promulgated

Before

Senior Immigration Judge Gill

Between

Entry Clearance Officer, Addis Ababa

Appellant

And

Master Ahmed Mohamed Mohamoud

Respondent

Representation:

For the Appellant: Mr K Alim, of Step Stones Visas
For the Respondent: Ms F Saunders, Senior Home Office Presenting Officer.

For the purposes of paragraph 352D of the Immigration Rules, an adopted child can include a de facto adoption under paragraph 309A but a parent who is a

refugee will normally not be able to meet the residence and care requirements of paragraph 309A.

DETERMINATION AND REASONS

1. The background to this appeal is as follows: On 15 February 2010, Master Mohamoud applied for entry clearance together with a Mr. Ali Mohamed Wadour, in order to join Maryan Mohamoud Jimale (the Sponsor), who was granted refugee status in the United Kingdom on 6 September 2007. Mr. Wadour, born on 9 September 1965, applied for entry clearance as the spouse of the Sponsor. Master Mohamoud applied for entry clearance as the child or adopted child or nephew of the Sponsor. Their applications were refused by the Entry Clearance Officer on 5 March 2010. Both appealed.

2. The two appeals were heard before the Immigration Judge Vaudin d'Imécourt, who allowed the appeals. The appeal of Mr. Wadour was allowed under paragraph 352A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules). The appeal of Master Mohamoud was allowed under paragraph 352D and on human rights grounds (Article 8 ECHR).

3. The Entry Clearance Officer did not challenge the Immigration Judge's decision to allow the appeal of Mr. Wadour but he sought permission to challenge his decision to allow the appeal of Master Mohamoud under paragraph 352D and under Article 8. I will hereafter refer to the Respondent as the ECO and Master Mohamoud as Mohamoud.

4. Ms. Saunders informed me that she did not intend to pursue the challenge to the Immigration Judge's decision to allow Mohamoud's appeal on human rights grounds (Article 8). Mr. Alim did not pursue any appeal under the Immigration Rules based on Mohamoud being the nephew or step-nephew of the Sponsor. Accordingly, the sole issue before me is whether the Immigration Judge materially erred in law in allowing Mohamoud's appeal under paragraph 352D. This turns on the question whether he qualified under paragraph 352D as a "*child*" of the Sponsor.

5. Mohamoud's case, as presented to the Entry Clearance Officer, was that he was the Sponsor's nephew or step-nephew (according to the answers to questions 7.3 and 7.4 of the visa application form) or her adopted child (according to a letter from Pinidiya Solicitors dated 20 January 2009).

6. Before the Immigration Judge, it was argued on Mohamoud's behalf that he was *"at the very least a de facto adopted child of the family"* and that his appeal should be allowed under Article 8. However, as I have said above, the Immigration Judge allowed his appeal under paragraph 352D of the Immigration Rules as well as Article 8.

7. The relevant provisions are paragraphs 309A, 352D and the definition of "*parent*" in paragraph 6, which I will now quote:

"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) ……,
(c) ……,
(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) [not relevant].

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.

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 has been granted asylum in the United Kingdom are that the applicant:
  (i) is the child of a parent who has been granted asylum in the United Kingdom; “

8. The Immigration Judge's determination records that the letter from Pinidiya Solicitors states that Mohamoud was adopted by the Sponsor from the time he lost his parents in the civil war as a child and that the Sponsor said in answer to question 5.1 of her screening interview in connection with her asylum claim that she had one child. At question 5.2 of her screening interview, she was asked the question: “*Have you had responsibility for any other children? For examples nieces, nephews etc”* and she replied “*No*”. At the hearing before the Immigration Judge, the Sponsor said that Mohamoud was her nephew (paragraph 7 of the determination). She said her brother died in 1996 and that she has taken care of Mohamoud since he was one year old and that he regarded her as his mother. She gave evidence of her contact with Mr. Wadour and Mohamoud and of monies remitted to them.

9. The ECO was not satisfied that Mohamoud was related as claimed to the Sponsor. The Immigration Judge gave his reasons for allowing Mohamoud's appeal at paragraphs 14 to 17, which read:

> "14. With regards to the second appellant I was satisfied that the appellant qualified as a de facto adopted child in that I was satisfied that at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents had been living abroad 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 eighteen months, of which the twelve 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 eighteen month period, so that there has been a genuine transfer of parental responsibility.
>
> 15. I was satisfied that the second appellant had been a member of the first appellant and sponsor's family since he was aged 1. I was satisfied that both his parents were deceased and that he has been brought up by the first appellant and his wife until the sponsor left Kenya in 2005. I was satisfied that he remained a family member of the first appellant's family through this time. I am satisfied that he is under the age of 18 and I am also satisfied that he has not been living an independent life.
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> 16. Given that I was satisfied that the second appellant was an adopted child of the sponsor and her husband, I am satisfied also that he qualifies for entry clearance under the provisions of paragraph 352D in as much as I do not distinguish between an adopted child and a child for the purpose of paragraph 352D and construe that paragraph as applying equally to an adopted child.
>
> 17. Alternatively, if I am wrong regarding my interpretation of paragraph 352D of the Immigration Rules, I find that for the purpose of Article 8 the second appellant has family life with his adoptive father in Ethiopia and I also find that he was a family member of the sponsor's family prior to her departure and that she has remained caring for that child and that she has continued to have family life with him. I find that to exclude him from entry clearance would breach his rights to respect for his family life with his parents or adoptive parents and would breach the sponsor's right to family life with him and the first appellant's family life with him applying the decision in the case of Beoku-Betts –v- SSHD [2008] UKHL 39. In the alternative, therefore, I would also allow this appeal under Article 8."

10. The grounds of application for permission to appeal contend that the Immigration Judge erred in law in finding that Mohamoud was a *de facto* adopted child under paragraph 309A because (it is contended) the requirement in paragraph 309A(b)(i) could not be met. This, in turn, was because the "*adoptive parent*" (the Sponsor) had not been living with Mohamoud for 12 months immediately preceding the application.

11. At the hearing before me, Mr. Alim reminded me that the Sponsor arrived in the United Kingdom in June 2005, having already entered into a marriage with Mr. Wadour on 7 February 2005. She was granted refugee status on 6 September 2007. He submitted that there was *de facto* adoption of Mohamoud by the Sponsor when he was one year old (i.e. in

1996), albeit that paragraph 309A was not satisfied. This is the form of *de facto* adoption relied upon in the instant case.

12. If it is accepted that Mohamoud was *de facto* adopted by the Sponsor in 1996, then Mr. Alim submitted Mr. Wadour was his stepfather. If this is accepted, then the care provided by Mr. Wadour can be taken into account in order to decide whether paragraph 309A(a) and (b) are satisfied. Mr. Alim submitted that the words in brackets in paragraph 309A(a) do not cause a difficulty because the instant application only involved one parent, not two. Mr. Alim submitted that the words in brackets only apply when two British citizens wish to adopt a child. In those circumstances, the parents have to show that they have both resided abroad with the child for the relevant period.

13. Mr. Alim submitted that, in any event, Mohamoud qualified under paragraph 352D as the child of the Sponsor, because he was a *de facto* adopted child as this term is normally understood. This is because paragraph 352D is not mentioned in the definition of "*adoptive parent*". Mr. Alim submitted that a *de facto* adoption "*in the old sense*" would qualify under paragraph 352D.

14. In response, Ms. Saunders submitted that, given that paragraph 352D requires a child to be the child of a parent, the definition of "*parent*" in paragraph 6 becomes relevant. Notwithstanding the fact that the opening line of the definition of "*parent*" states that "*a parent includes...",* Ms. Saunders submitted, in order to satisfy the definition of *"parent"* in paragraph 352D, the Sponsor had to satisfy one or more of the alternatives in the definition of *"parent"* in paragraph 6. She submitted that this was an exhaustive list of the ways in which an individual can be regarded as a *"parent"* for the purposes of the Immigration Rules, including paragraph 352D. The Immigration Rules were meant to protect children. Accordingly, Ms. Saunders submitted that the definition of "*parent*" and "*adoption*" should not be widely interpreted. She accepted that *a de facto* adoption will qualify under paragraph 352D but she submitted that paragraph 309A had to be satisfied before an adoption is regarded as a *de facto* adoption for the purposes of paragraph 352D.

15. Ms. Saunders submitted that the relevant adoptive parent was the Sponsor. She is the person who was granted refugee status. Accordingly, in order for Mohamoud to succeed under paragraph 352D, it had to be shown that he was the adopted child of the Sponsor. This meant that it had to be shown that the Sponsor satisfied the residence and care requirements set out in paragraph 309A. She submitted that the care provided by Mr. Wadour did not qualify because he was not the person who had been granted refugee status.

16. Ms. Saunders submitted that the term "*stepfather*" should be given its natural meaning. She submitted that a stepparent is one who is married to the parent of the child. Accordingly, she submitted that, for Mr. Wadour to be regarded as Mohamoud's stepfather, it had to be shown that the Sponsor was the adoptive parent, which meant that paragraph 309A had to be satisfied.

17. Ms. Saunders submitted that, if it was possible for a genus of *de facto* adoption to satisfy the requirements of paragraph 352D even if paragraph 309A was not satisfied, it would have been necessary for paragraph 352D or paragraph 309A to say so. It would otherwise set a dangerous precedent.

18. In response, Mr. Alim submitted that the fact that paragraph 352D is not mentioned in the words in brackets in paragraph (d) of the definition of "*parent*" means that paragraph 352D is a stand alone provision, with the result that an adoption can come within paragraph 352D if it is a *de facto* adoption even if it does not satisfactory paragraph 309A. Mr. Alim submitted that it was necessary to bear in mind the purpose of paragraph 352D. It was to reunite families that were separated due to persecution. If, as in this case, it was accepted that Mohamoud enjoyed family life with the Sponsor before she fled Somalia to seek asylum, then he should succeed under paragraph 352D, if he was *de facto* adopted and even if the *de facto* adoption did not fulfil the requirements of paragraph 309A.

19. Mr. Alim requested me to issue a direction, given that Article 8 was conceded on the ECO's behalf and that the Sponsor was not well, that Mohamoud be granted entry clearance in line with the Sponsor's leave, so that he would not need to make another application for leave after 6 months.

20. I reserved my decision.

Assessment

21. Unfortunately, neither Mr. Alim nor Ms. Saunders referred me to the judgment of the Court of Appeal in MK (Somalia) & Ors v Entry Clearance Officer [2008] EWCA Civ 1453, paragraph 17 of which reads:

> "17. 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."

22. Although paragraph 17 was not the *ratio* of the case and is therefore not binding upon me, it is, of course, very persuasive. It is consistent with the reasoning in SK ("adoption" not recognised in UK) India [2006] UKAIT 00068 and MN (Non-recognised adoptions: unlawful discrimination?) India [2007] UKAIT 00015, albeit that the issues in those cases were not the same. I have concluded that paragraph 17 of the judgment in MK (Somalia) sets out the correct answer to the instant case. In giving my reasons, I shall deal with the submissions of the parties before me, to which I now turn.

23. The starting point is the wording of paragraph 352D. This makes it clear that it is necessary for it to be shown that Mohamoud is "the child of a parent *who has been granted asylum in the United Kingdom*". Mr. Wadour has not been granted refugee status. It is the Sponsor who has been

granted refugee status. Accordingly, in my view, it must be shown that Mohamoud is the child of the Sponsor, for him to succeed under paragraph 352D. In other words, the relevant parent, for the purposes of paragraph 352D, is the Sponsor.

24. The next point to consider is the meaning of the word *"parent"*. This is defined in paragraph 6. This sets out five different ways in which an individual can be regarded as "a parent" under the Immigration Rules. Mr. Alim relied on paragraph (d) of the definition of *"parent" in paragraph 6.* In my judgment, the words in parenthesis in paragraph (d) of the definition of *"parent"*, which read:

> "(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)"

do not have the effect of changing the meaning of an "*adoptive parent*". The effect these words have is that any application made under paragraphs 297 to 303 by an adopted child (whether one who 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 who is the subject of a de facto adoption in accordance with the requirements of paragraph 309A) cannot be successful. There is a simple reason for this. It is that paragraphs 297 to 303 are intended to set out the requirements to be met by biological children. Applications for entry clearance or leave by biological children are to be considered under paragraphs 297 to 303 and those by adopted children or children to be admitted for adoption are to be considered under paragraphs 310-316C. In other words, it is not possible to circumvent the protection afforded to children who are adopted by lodging applications under paragraphs 297 to 303.

25. Since paragraph 352D is not mentioned in the parenthesis of the definition of "*parent*" in paragraph 6, an adopted child (whether one who 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 who is the subject of a de facto adoption in accordance with the requirements of paragraph 309A) is not precluded from the ambit of paragraph 352D. Accordingly, in my view, Ms. Saunders rightly accepted that "*child*" in paragraph 352D includes adopted children.

26. I agree with Ms. Saunders that (a) to (e) of the definition of "*parent*" represents an exhaustive list of the ways in which an individual can be regarded as a parent under the Immigration Rules, notwithstanding the word "includes" at the beginning of the definition. I also agree with Ms. Saunders that the meaning of *"de facto adoption"* set out at paragraph 309A applies to paragraph 352D, as well as paragraphs 310-316C, notwithstanding the fact that paragraph 309A does not specifically say so. To decide otherwise would be to put into jeopardy the objective of protecting children from the risk of being passed from the control of one adult to another without appropriate safeguards and, further, the risk of

being trafficked into another country. Given that "*de facto adoption*" has been given a specific and restrictive meaning for the purposes of paragraphs 310 to 316C, it would be very odd if this existed side-by-side with a less demanding meaning for other purposes under the Immigration Rules. If it were possible for a different genus of *"de facto adoption*" to satisfy the requirements of paragraph 352D, this would mean that refugees would be able to circumvent the protection afforded to children by paragraph 309A but non-refugees would not.

27. For all of these reasons, I have concluded that there is only one meaning of a *"de facto adoption"* under the Immigration Rules, and that is the meaning given to this term in paragraph 309A, which applies to paragraph 352D as well as paragraphs 310 to 316C, notwithstanding the fact that paragraph 352D is not mentioned in paragraph 309A. Whilst it may well be the case that adoptive parents who are refugees may find it difficult to satisfy the residence and care requirements in paragraph 309A, this does not justify departing from these requirements, given that Article 8 is available in appropriate cases.

28. Given that the parent in respect of whom the requirements of paragraph 352D must be satisfied is the parent who has been granted asylum in the United Kingdom, it does not help the case advanced for Mohamoud to rely upon paragraph (a) of the definition of "*parent*", that is, to say that Mr. Wadour is his stepfather. It is not possible, in my view to get around paragraph 352D in this way.

29. Accordingly, the Immigration Judge was correct to apply paragraph 309A when deciding whether Mohamoud was a *"child"* who qualified under paragraph 352D. However, since the Sponsor was the relevant *"parent"* under paragraph 352D, the definition had to be shown to be satisfied in relation to her. I do not accept that the care provided by Mr. Wadour can be taken into account to satisfy the definition of paragraph 309A, even if he could properly be regarded as an adoptive parent under paragraph 309A. The rule clearly provides that both parents must have lived abroad together and there is no basis for restricting that requirement to British citizens as Mr. Alim sought to argue. The only sensible interpretation of paragraph 309A is that it had to be shown that the refugee adoptive-parent satisfied the requirements for residence abroad with the child and care of the child, as set out in paragraph 309A(a) and (b).

30. The Immigration Judge found, at paragraphs 14 to 16, that Mohamoud was a *de facto* adopted child within paragraph 309A. However, he did not explain how it is that he found that the Sponsor satisfied the residence and care conditions of paragraph 309A. It is impossible to see how the Immigration Judge could have been satisfied that the Sponsor and Mohamoud had lived together for the period of 12 months immediately preceding the application for entry clearance. In reaching the findings he did, that this condition of residence abroad was satisfied, he must have considered the residence of Mr. Wadour as being sufficient to satisfy paragraph 309A. In doing so, he misdirected himself in law.

31. For the reasons given above, I have concluded that the Immigration Judge materially erred in law in allowing the appeal under the Immigration Rules.

I have proceeded to re-make the decision. There is no evidence that the Sponsor had lived with and cared for Mohamoud for the periods specified in paragraph 309A. Accordingly, I have concluded that Mohamoud has not shown that he is the subject of a *de facto* adoption, as this term is defined in paragraph 309A. Accordingly, he has not shown that he is a *"child"* of a parent who has been granted refugee status.

32. As I have said above, the Immigration Judge also allowed the appeal under the Article 8. Ms. Saunders did not pursue the Respondent's challenge to that decision. Accordingly, the Immigration Judge's decision to allow the appeal on human rights grounds, with respect to Article 8, stands.

33. I have considered Mr. Alim's request for a direction that Mohamoud be granted entry clearance in line with the Sponsor's leave. Section 87(1) of the Nationality, Immigration and Asylum Act 2002 (as amended) confers on the Tribunal a discretion to issue a direction for the purpose of giving effect to its decision. I do not consider it necessary to issue a direction to give effect to the decision to allow Mohamoud's appeal on human rights grounds. The period for which entry clearance is granted is a matter for the ECO.

34. Decision:

The decision of the Immigration Judge insofar as it related to the decision under the Immigration Rules involved the making of an error on a point of law such that it falls to be set aside. I have proceeded to remake the decision. My decision is that the appeal under the Immigration Rules is dismissed.

Accordingly, the Appellant's appeal to the Upper Tribunal fails.

Signed

Senior Immigration Judge Gill
Judge of the Upper Tribunal

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