ASYLUM AND IMMIGRATION TRIBUNAL

SS (Jurisdiction – Rule 62(7); Refugee's family; Policy) Somalia [2005] UKAIT 00167

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 18 October 2005

Date of Promulgation: 24 November 2005

Before:

Mr C M G Ockelton (Deputy President)
Mr P R Lane (Senior Immigration Judge)
Miss B Mensah (Senior Immigration Judge)

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Symes, instructed by Wilson & Co
For the Respondent: Mr C Avery, Home Office Presenting Officer

1. The restriction on grounds of reconsideration imposed by Rule 62(7) cannot be taken to enlarge the Tribunal's statutory jurisdiction by enabling an appellant to succeed on a ground of appeal not open to him. 2. The terms of any policy upon which the claimant relies must be read as a whole. 3. It is only in very rare cases that the terms of a policy will allow the Tribunal to give a substantive direction in allowing an appeal.

DETERMINATION AND REASONS

1. The Appellant is a citizen of Somalia, now aged nearly nineteen. He arrived in the United Kingdom on 8 December 2002. He claimed asylum. On 20 April 2004, he was served with notice of the Secretary of State's decision to refuse him asylum but grant him limited leave to enter. He appealed, and his appeal was heard by an Adjudicator, Mr D Taylor, and allowed in a determination sent out on 10 November 2004. The Secretary of State applied for and was granted leave to appeal to

the Immigration Appeal Tribunal against that determination. The Appellant sought unsuccessfully to have the grant set aside on Statutory Review. Following the commencement of the appeals provisions of the 2004 Act, the grant of permission now takes effect as an order for reconsideration by this Tribunal of the Appellant's appeal.

2. We should say at the outset that in a number of respects the Secretary of State's paperkeeping in respect of this appeal has been rather unsatisfactory. We do not know the reason for the delay in determining the Appellant's claim. What we do know is that when it was determined, although the refusal of asylum is clear, the grant of limited leave is not. The notice of decision indicates in a paragraph headed "*Right of appeal*" that the grant is "*for a period exceeding one year (or for periods exceeding one year in aggregate)*" but does not state for what period leave has been granted. The Appellant's representatives wrote on 23 April and 30 April 2004 asking for the period of the grant to be indicated. We have not seen any reply to those letters, but it appears from the Adjudicator's determination that the Appellant has leave to remain in the United Kingdom until 13 April 2007. Secondly, it appears that the Appellant is one of three brothers. At his interview, he said that one brother had arrived with him and another earlier. He thought that they had all asked to stay on the same basis that he had. At the hearing before us, neither party was able to tell us anything about the current status of the other brothers.

<u>The Appellant's claim and his appeal</u>

3. The Appellant's claimed history is as follows. He says that he is from Bakaraha, Mogadishu, Somalia. He lived there with his mother, father, three brothers and sister. His mother is of the minority Ashraf clan. His father is of the Lugayare sub-clan of the Hawiye clan. When the Appellant was aged about nine his father's brother was killed and, soon afterwards, there was a raid on his house and the Appellant was taken away. He says that he was trained as a child soldier but, before engaging in any fighting, he happened to come across his father who took him back home. Then he and all his siblings went by lorry to Ethiopia. They lived there for about seven years. When the Appellant was about sixteen, he was brought to the United Kingdom by a man called Abdi.

4. In the Appellant's witness statement, he says that he is rather vague about dates particularly of things that happened a long time ago when he was very young. He says also that he was not really aware of what was happening around the time that he left Ethiopia. He says that he did not know his mother was still alive and did not know very much about the departure of his brother Shamarke. That may be so; but the documents before us show that the Appellant's mother, having left Somalia in 1999 and spent two years in Kenya, appears to have arrived here some time in 2001. She was refused asylum on 24 October 2001 but, following a successful appeal, was granted asylum and given

indefinite leave to remain on 5 September 2002. That is just three months before the Appellant and his brother travelled to the United Kingdom.

5. The Appellant's grounds of appeal against the Secretary of State's refusal of his asylum claim were as follows:

> "1. The Appellant's removal of the Appellant [sic] from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention.
> 2. The Appellant has a well-founded fear of persecution based on race (perceived and actual) as the son of a minority clan member."

6. The Appellant was invited to give any additional reasons why he should be allowed to stay in the United Kingdom. He did so in the following terms:

> "1. The Secretary of State has erred in not granting the Appellant indefinite leave to remain as the minor child of a recognised refugee. See the Asylum Policy instruction on family reunion
>
> **3. ELIGIBILITY OF SPONSORING FAMILY MEMBERS**
>
> ***3.1 Where the sponsor has refugee status***
>
> *If a person has been recognised as a refugee in the UK we will normally recognise family members in line with them. If the family are abroad, we will normally agree to their admission as refugees."*

7. In the Appellant's representatives' letter accompanying the notice of appeal appears the following paragraph:

> "You will also know from the statement of additional grounds that we believe that the Secretary of State has erred in failing to grant our client indefinite leave to remain as the minor child of a recognised refugee."

<u>The Adjudicator's determination</u>

8. The Adjudicator's determination begins with the statement that the Appellant's appeal is under section 82(1) of the 2002 Act. After setting out the Appellant's immigration history and the basis of his claim, the Adjudicator asserts that he has taken into account all the documents before him, and notes that there was no oral evidence at the hearing.

9. The determination continues as follows:

> "19. It is not disputed by the respondent that the appellant is, as he claims to be, a citizen of Somalia and I find him so to be.
>
> 20. The appellant's Counsel acknowledged to me that he was in some difficulty under the Refugee Convention. The objective material indicates that the appellant, as a member of the Hawiye clan, is unlikely to face persecution in Somalia and there is no evidence that he was indeed persecuted whilst he was there. I have no alternative

therefore but formally to dismiss his claim under the Refugee Convention.

21. I propose, however, to allow the appeal under Section 86(3)(a) of the Nationality, Immigration and Asylum Act 2002. it is of the essence of the "One-Stop Appeal Procedure' that the appellant must indicate in his appeal all the grounds on which he claims to remain in the United Kingdom. Although the appellant, probably due to poor legal advice, applied for asylum in his own right, he made it clear in his notice of appeal that it was his case that he should have been granted indefinite leave to remain in line with the status of his mother."

10. The Adjudicator then sets out the part of the Secretary of State's policy that is cited in the grounds of appeal, notes that the Appellant came to the United Kingdom to be with his mother, refers to SSHD v Abdi (DS) [1996] Imm AR 148 and to the duty under s86 to allow an appeal if the decision was not in accordance with the law, and continues as follows:

"26. … I am satisfied that the decision of the respondent to grant only discretionary leave to the appellant was 'not in accordance with the law'. The respondent has a clear policy and he has failed to apply it. The appellant under that policy should have been granted indefinite leave to remain.

27. I therefore **allow** this appeal on the basis and, pursuant to the powers given to me by Section 87(1) of the Nationality, Immigration and Asylum Act 2002, for the purpose of giving effect to this decision, I **direct** the respondent to grant indefinite leave to remain to the appellant in line with his mother."

The appeal to the Immigration Appeal Tribunal

11. The Secretary of State sought permission to appeal to the Immigration Appeal Tribunal on the following grounds:

"1. The adjudicator has erred in law by directing that the respondent be granted Indefinite Leave to Remain in line with his mother under the Family Reunion policy where the provisions relating to family reunion, covered in paragraphs 352E, states that limited leave to remain will be granted.

2. The adjudicator has failed to give due consideration to all sections of paragraph 352D when directing that Indefinite Leave to Remain be granted in line with his mother. At paragraph 26 of his determination, Mr Taylor found that, 'It cannot be said that the respondent had any doubts about the relationship between the appellant and his mother …", thereby finding in favour of paragraph 352D(i). However, the adjudicator has failed to give due consideration to 352D(iv). The brief details of this respondent's family life is that 4 years prior to his mother departing Somalia, he and his siblings went Ethiopia to live with their father whilst she stayed in Somalia. Upon leaving Somalia the respondent's mother went to Kenya where she stayed for a further 2 years. The respondent arrived in the UK in 2002, some 7 years after he last saw his mother. In directing that the appellant be granted Indefinite Leave to Remain in line with his mother without full consideration of the Immigration Rules, the adjudicator has erred in law.

3. In giving a direction to grant Indefinite Leave to Remain in line with his mother, the adjudicator has misapplied the case of Abdi, relied upon in paragraph 24 of the determination. It was found in Abdi that, '… it is not inevitable that the application will be refused. To my mind the Tribunal was correct in saying that on the footing that the decision was not in accordance with the law the matter must go back to the Home Secretary for him to reconsider the application …'. Furthermore, the Family Reunion policy is no longer an extra statutory policy but is and has been for the direction of this respondent's claim, part of the Immigration Rules at Paragraphs 352A-D. In misapplying this case the adjudicator has erred in law."

12. Permission was granted on all those grounds. There was, as we have said, an attempt to reverse the grant of permission by Statutory Review. The claim for Statutory Review repeated in greater detail the Appellant's claim to indefinite leave to remain as the child of a refugee. There has been no appeal against the Adjudicator's rejection of the asylum claim.

Jurisdiction: section 83 and Rule 62(7)

13. Thus the appeal comes before us for reconsideration. We must begin our determination with one matter that was not raised at the hearing: we do not know why neither party brought it to our attention. That is that there appears to be, and to have been, no jurisdiction to consider the principal ground advanced on behalf of the Appellant.

14. The notice of decision indicated that the Appellant had a right of appeal under s83 of the 2002 Act. That section is in the follow terms:

> "83. Appeal: asylum claim
>
> (1) This section applies where a person has made an asylum claim and
> (a) his claim has been rejected by the Secretary of State, but
> (b) he has been granted leave to enter or remain in the United Kingdom for a period exceeding one year (or for periods exceeding one year in aggregate).
>
> (2) The person may appeal … against the rejection of his asylum claim."

15. Section 84 is headed "*Grounds of appeal*". Subsection (1) sets out the grounds on which an appeal can be brought under s82 of the 2002 Act. Subsection (3) is as follows:

> "(3) An appeal under section 83 must be brought on the grounds that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention."

16. It is in our view abundantly clear that the wider grounds available in an appeal under s82 are not available in an appeal under s83. Under s82, an appellant can indeed appeal on the ground that the decision against

which he appeals "*is otherwise not in accordance with the law*" (s82(1)(e)); but that ground is not available under s83. If a person has been granted more than twelve months leave to enter or remain, his appeal is on asylum grounds only.

17. The Adjudicator erred in stating that the appeal was under s82: it was not. It was under s83, as the documents before him made clear. He also erred in taking into account grounds which were not open to the Appellant in an appeal under s83. It follows that he had no jurisdiction to allow the appeal, as he did, on those grounds only.

18. It is evidently extremely unfortunate that this point was not taken by the Secretary of State's representative at the hearing before him when the admissible grounds were argued, nor by the Secretary of State's representative in the grounds of appeal to the Tribunal in the hearing before us. It is also regrettable that the Appellant's representatives appear not to have been aware of the position. But mistake or concession cannot give jurisdiction: and they cannot override the restrictions of the statute.

19. This Tribunal is governed by the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230), made under the 2002 Act as amended. Rule 62 is headed "*Transitional Provisions*", and deals in part with appeals such as the present appeal, which were pending before the Immigration Appeal Tribunal at the moment of commencement of the appeals provisions of the 2004 Act. By the operation of Article 5 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 5 and Transitional Provisions) Order 2005 (SI 2005/656) the appeal takes effect as a reconsideration, and by Rule 62(7):

> "… the reconsideration shall be limited to the grounds upon which the Immigration Appeal Tribunal granted permission to appeal."

20. That clear restriction might, if read in isolation, suggest that as the question whether the Adjudicator acted outside his jurisdiction was not raised in the grounds of appeal to the Immigration Appeal Tribunal and was not the subject of the grant of appeal, it cannot be raised now. But Rule 62(7) cannot be read in isolation. The rights of appeal are given to appellants by the 2002 Act. The appellate body is this Tribunal, a creation of the 2004 Act. Procedure rules made under those Acts cannot have the effect of giving the claimant an appellate right which is excluded by the Acts. Rule 62(7) cannot enlarge the statutory jurisdiction; it cannot have the effect that a matter of jurisdiction cannot be the subject of reconsideration if it was not the subject of the grant of permission to appeal. In a statutory Tribunal of limited jurisdiction, matters of jurisdiction must always be amenable to litigation: if it were otherwise, the Tribunal's jurisdiction could regularly be enlarged by the consent of the parties or by simple error.

21. For the foregoing reasons, we hold that despite the terms of the grant of appeal and of Rule 62(7) it is open to us to consider whether the Adjudicator had, under the statute, jurisdiction to do what he did. We hold also that he had no jurisdiction to consider grounds other than those set out in s83 and that, as he had rejected the ground based on the Refugee Convention, he could in law do nothing other than dismiss the appeal before him.

22. That is sufficient to dispose of this appeal on reconsideration: but, in deference to the arguments we have heard, we will give our views on their substantive content.

Rules and policies

23. As the Secretary of State's grounds of appeal indicate, although nothing of the kind appears in the Adjudicator's determination, the Immigration Rules contain provisions relating to the children of refugees. The Rules in question were inserted by Cm 4851 and took effect from 2 October 2000. They were amended on 18 September 2002 by Cm 5597. The present form is that which is relevant for all purposes in relation to this Appellant. They are as follows:

> "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; and
>
> (ii) is under the age of 18; and
>
> (iii) is not leading an independent life, is unmarried, 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.
>
> 352E. Limited leave to enter the United Kingdom as the child of a refugee may be granted provided a valid United Kingdom entry clearance for entry in this capacity is produced to the Immigration Officer on arrival. Limited leave to remain in the United Kingdom as the child of a refugee may be granted provided the Secretary of State is satisfied that each of the requirements of paragraph 352D(i)-(v) are met.
>
> 352F. Limited leave to enter the United Kingdom as the child of a refugee is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival. Limited leave to remain as the child of a refugee is to be refused if the Secretary of State is not satisfied that each of the requirements of paragraph 352D(i)-(v) are met."

24. There are also published statements relating to the family of refugees. As in all cases where policies of this sort are referred to in immigration appeals, there is some difficulty in ascertaining precisely what was current at any particular time. It is also very far from clear in general what is intended to be the relationship between policies and the Immigration Rules.

25. In the present appeal, the Appellant claims that his case falls within the policy and that any restrictions applied by the Immigration Rules have no effect on it. He claims to be entitled to indefinite leave to remain despite the fact that the Immigration Rules appear to preclude that remedy in his case. He further claims that the Adjudicator (disregarding for the moment the question of jurisdiction relating to the grounds of appeal) properly ordered that he be granted indefinite leave to remain because of the terms of the policy.

26. The Immigration Rules are not a statute or a statutory instrument. They are made under ss 1 and 3 of the Immigration Act 1971. That Act provides in s1(2) that those not having the right of abode in the United Kingdom "*may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act*". The Immigration Rules are referred to in s1(4) as "*the Rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode*". The reference to the Rules in s3(2), which details the procedure for making them, is in all material respects identical to that in s1(4).

27. Despite these words, however, and despite Attorney General v DeKeyser's Royal Hotel [1920] AC 508, the regulation of "*the entry into and stay in the United Kingdom of persons not having the right of abode*" is not limited to the Immigration Rules, for by s33(5):

> "This act shall not be taken to subcede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative."

28. Thus the Secretary of State, exercising for these purposes the royal prerogative, has a general dispensing power and is entitled in the exercise of that prerogative to make decisions more generous than would be required by the Immigration Rules. (He cannot effectually make decisions which are less generous, because of the right of appeal on the ground that the decision was not in accordance with the Immigration Rules.) If he publishes a policy that is more generous than the Immigration Rules, general principles of administrative law, as recognised in Abdi, may enable a person who says that the policy applies to him to appeal against an adverse decision on the ground that that decision was "*not in accordance with the law*".

29. The first task for such a claimant would be to establish the terms of the policy at any relevant date. If he cannot do that readily, he may have some difficulty in showing that there was a published policy in the sense intended by Peter Gibson LJ in Abdi. In any event, as we have indicated, it may not be easy to show whether a policy currently available (for example, on the IND website) is relevant to the decision in question.

30. Even if the claimant demonstrates the terms of the relevant policy, however, it does not follow that he is entitled to succeed substantively in an appeal. Most published policies are not in the absolute terms of the Immigration Rules. Most policies contain words like "*normally*". Many policies do not declare that a particular relief will be granted: they provide that the Secretary of State will consider whether it should be. A claimant who has not obtained the substantive grant that he seeks can succeed on the policy only if he shows that the policy itself was not (or was not properly) applied. If the policy says that the Secretary of State (will consider) his case on certain terms, he cannot succeed unless he can show that the Secretary of State did not consider his case on those terms. If the policy says that something will "*normally*" be granted, he is likely to be in some difficulties if the Secretary of State refers to any consideration that shows that the case is less than normal.

31. In any event, unless the policy is expressed in terms that are absolute or have to be regarded as absolute in the individual facts of the case, the effect of a successful appeal will be merely that the decision is found to have been an unlawful one, so that there is outstanding an application before the Secretary of State. If, by use of words like "*consider*" or "*normally*" the policy includes a discretion, that is a discretion which involves the exercise of the royal prerogative, as the provisions of the 1971 Act which we have cited above make clear. It is not for members of this Tribunal to exercise the royal prerogative.

The policy applicable to the present appeal

32. In this appeal, the Adjudicator considered a policy without reference to the Rules and directed that indefinite leave to remain be granted to the Appellant on the basis of that policy as he saw it. In this reconsideration, the Appellant seeks to defend the Adjudicator's determination and his direction, on the ground that the policy entitled the Appellant to indefinite leave to remain and that the direction was an appropriate application of the policy by the Adjudicator.

33. It must be clear from what we have said above, if it was not otherwise obvious, that it is essential always to look at any policy as a whole. In the present case, the Appellant has, in his grounds of appeal, relied only on one short passage from the relevant policy. It is true that the Adjudicator had the whole policy in front of him, but he does not appear

to have been directed to it in full. It looks as though the judge who considered the matter on Statutory Review was not shown the whole policy. In our view, it is extremely dangerous to consider arguments based on policies unless the claimant is able to show the whole of the policy in question and show why it applies to him and why it produces the result that he seeks.

34. In the present case, there is said to be no dispute about the terms of the applicable policy. The Adjudicator had before him a printing of what was on the IND website on 1 November 2004. Mr Avery confirmed to us that it is the one applicable to the determination of the Appellant's claim. We must set it out in some detail.

35. It is headed "*Family Reunion*". The text is as follows:

> "**1. INTRODUCTION**
>
> This instruction gives guidance to caseworkers on the consideration of applications made by family members who want to be reunited with a person in the UK who has been:
>
> - recognised as a refugee;
> - granted exceptional leave to remain (prior to 1 April 2003);
> - granted humanitarian protection;
> - granted discretionary leave.
>
> The family of asylum seekers do not qualify to join them in the UK for family reunion purposes.
>
> Caseworkers should bear in mind when considering family reunion applications that the Human Rights Act 1998 incorporates into domestic law those rights and freedoms guaranteed under the European Convention on Human Rights. Article 8 guarantees that everyone has the right to respect for family and private life.
>
> **A minor is a child aged under eighteen. A spouse is the husband or wife of a principal applicant.**
>
> Caseworkers may also find it helpful to refer to the instructions on Dependants and Marriage Applications, as well as the relevant instructions in the IDIs.
>
> **2. ELIGIBILITY OF APPLICANTS FOR FAMILY REUNION**
>
> Only pre-existing families are eligible for family reunion ie the spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum.
>
> We may exceptionally allow other members of the family (eg elderly parents) to come to the UK if there are compelling, compassionate circumstances.
>
> The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion. Such applications are considered under the criteria above, ie there must be compelling, compassionate circumstances in order for the family to be granted entry to the UK.

Family reunion may be refused if family members fall within the terms of one of the exclusion clauses in the 1951 UN Convention.

3. ELIGIBILITY OF SPONSORING FAMILY MEMBERS

3.1 Where the sponsor has refugee status

If a person has been recognised as a refugee in the UK we will normally recognise family members in line with them. If the family are abroad we will normally agree to their admission as refugees.

It may not always be possible to recognise the family abroad as refugees – eg they may have a different nationality to the sponsor or they may not wish to be recognised as refugees. However, if they meet the criteria set out in paragraph 2, they should still be admitted to join the sponsor. The sponsor is not expected to meet the maintenance and accommodation requirements of the Immigration Rules.

3.2 Where the sponsor has exceptional leave to remain

Family members qualify to join a person granted exceptional leave to remain (ELR) once that person becomes eligible to apply for indefinite leave to remain (ILR), usually after completing four years ELR.

However, if the family are already here (whether port or in country cases) we would normally grant them permission to remain, in line with the sponsor.

Applications may be considered before the four year point but we will only grant entry clearance where there are compelling, compassionate circumstances.

In all cases the sponsor will be expected to satisfy the maintenance and accommodation requirements as set out in the Immigration Rules (paragraphs 240(iii) and (iv) of HC395).

3.3 Where the sponsor has Humanitarian Protection

Family members qualify for family reunion once the sponsor has been granted ILR in the UK, normally after completing three years of humanitarian protection (HP).

However, if the family are already here (whether port or in country cases) we would normally grant them permission to remain, in line with the sponsor.

Applications may be considered before the sponsor has been granted ILR but we will only grant entry clearance in those cases where there are compelling, compassionate circumstances.

In all cases the sponsor will be expected to satisfy the maintenance and accommodation requirements as set out in the Immigration Rules (paragraphs 240(iii) and (iv) of HC395).

3.4 Where the sponsor has Discretionary Leave

Family members are eligible for family reunion once the sponsor has been granted ILR in the UK, normally after completing six years of Discretionary Leave (DL).

However, if the family are already here (whether port or in country cases) we would normally grant them permission to remain, in line with the sponsor.

Applications may be considered before the sponsor has been granted ILR but we will only grant entry clearance in those cases where there are compelling, compassionate circumstances.

In all cases the sponsor will be expected to satisfy the maintenance and accommodation requirements as set out in the Immigration Rules (paragraphs 240(iii) and (iv) of HC395).

4. APPLYING FOR FAMILY REUNION

Family reunion applications must be made at entry clearance posts overseas.

All concessions to this practice have been withdrawn."

36. Mr Symes directed his principal submissions to the first sentence of paragraph 3.1, which is the paragraph upon which the Appellant has relied throughout. He dealt at some length with the question whether the Appellant was entitled to the benefit of the concession in view of the fact that he had not lived with his mother for some seven years before he came to the United Kingdom. On that point, Mr Symes drew our attention to the phrase in paragraph 2: "*minor children who form part of the family unit prior to the time the sponsor fled to seek asylum*". He said that "*prior*" did not necessarily mean "*immediately prior*". The Appellant had lived with his mother until 1995. Mr Symes submitted that it could not be that children who had not lived with the parent who had claimed asylum in the period immediately before that parent's flight were automatically excluded. He invited us to envisage a number of hard cases.

37. In our view, there is nothing in Mr Symes' submissions on that point. Every child forms part of its mother's family unit at the moment of birth. If "*prior to*" meant "*at any time prior to*", as Mr Symes submitted, the paragraph would have no restrictive effect despite its beginning with the word "*only*". Mr Symes' submissions based on the hard cases entirely ignore the next sentence of the paragraph which precisely deals with the possibility of admission of family members who do not come within the category of "*pre-existing families*" if there are compelling, compassionate circumstances.

38. There are, however, two much more serious problems with the Appellant's claim, neither of which Mr Symes appeared to recognise in his submissions to us. We suspect, if we may say so, that he had failed to read the whole of the policy upon which he relied.

39. First, we can see nothing in the policy which suggests that a minor child of a refugee should be granted indefinite leave to remain as the Appellant in this case claims. Paragraphs 3.2, 3.3 and 3.4 each have a reference to "*permission to remain, in line with the sponsor*". There is no such reference in paragraph 3.1. It is paragraph 3.1 alone which

refers to refugees, and the wording of the paragraph deals with their recognition as refugees. That is an international status. It is not in our view to be regarded as equivalent to a grant of leave to remain in the United Kingdom. We recognise that it may be said that there are other provisions that entitled any person recognised as a refugee to indefinite leave to remain in the United Kingdom. But we have not been shown any such provisions. Thus, insofar as the Appellant's claim is that the policy entitles him to indefinite leave to remain, it must fail.

40. Secondly, there is paragraph 4 of the policy. This policy is about family reunion, and paragraph 4 restricts the way in which family reunion can be obtained. That Rule might conceivably be thought to be relaxed in some of the wording in paragraphs 3.2, 3.3 and 3.4; but in the case of a person seeking to join a refugee we can see no conceivable basis for saying that this policy applies to a person who has not made an application for family reunion at an entry clearance post overseas. The Appellant has not done so. Nothing in this policy could entitle him to family reunion as defined in the policy. He is not, and never has been, a person to whom this policy gives any benefits. Even if he could have advanced the relevant grounds of appeal, he could not have succeeded on them.

The Immigration Rules

41. The Appellant's claim throughout has been that the policy which he cited supplemented the Immigration Rules and in his case applied in preference to the Immigration Rules. The grounds for Statutory Review put it in the following way:

> "It is submitted that the reference in grounds 1 and 2 to the Immigration Rules are irrelevant. Rule 352D relates to those persons who are the minor children of refugees and who either require entry clearance (seeking leave to enter), or alternatively the minor child of a refugee who has some other status in the UK, and then wishes to remain in the UK as the child of a refugee (seeking leave to remain).
>
> The claimant is somebody who does not fit into either of these situations, in that at the time of his arrival he neither had entry clearance, nor any other status. The claimant's situation is directly and explicitly covered by the Home Office Asylum Policy Instruction on Family Reunion. This policy is **not part of the Immigration Rules** and covers situations which are not provided for in the immigration rules."

42. It is right to say that at the time of his arrival the Appellant did not have entry clearance, but that does not entitle him to say that he does not seek it. On the contrary: leave to enter is precisely what he does seek. Without it, he cannot pass the immigration authorities into the United Kingdom in any permanent or legal sense. (Leave to remain is, as the Appellant's case accepts, normally appropriate for a person who seeks an extension of existing leave. It is, we would add, also appropriate for a person born here.)

43. In any event, the foregoing analysis of the policy, in particular the reference to paragraph 4, makes it clear that insofar as it concerns the families of refugees, the policy is not an addition to the Immigration Rules but is in line with them. Like the Rules, the policy applies to children under eighteen. Like the Rules, the policy applies to pre-existing families; although the Rules are more precise as to what that means. Like the Rules, the policy excludes those within the Convention's exclusion clauses: but only the Rules specify the relevant clause. Like the Rules, the policy requires application at an entry clearance post overseas; the Rules make it clear that admission in this category is conditional upon the grant of entry clearance. The Rules provide that limited leave to enter is to be granted: the policy says nothing about the grant of any leave to the children of a refugee. The policy adds to the Rules only insofar as it also applies generally to cases where there are compelling compassionate circumstances and specifically to those who seek admission as the family member of a person who has not been granted refugee status. The Appellant falls within neither additional category.

44. The Appellant is not himself a refugee. He is not entitled to admission under the Immigration Rules, because he has no entry clearance and he was not part of his mother's "*family unit*" when she left Somalia. He is entitled to nothing more under the policy. For these reasons, any appeal that he might be able to bring based on the Immigration Rules or the policy could not succeed.

Conclusion

45. Insofar as it depended on asylum grounds, the Appellant's appeal was dismissed by the Adjudicator. There has been no challenge to that and to that extent only we affirm the Adjudicator's determination. The Adjudicator had no jurisdiction to entertain other grounds and accordingly erred in law in dealing with them. For the reasons we have given, however, if he had had jurisdiction he could not properly have allowed the appeal or made the direction he did make.

46. The Appellant's appeal accordingly fails on all admissible or projected grounds and is accordingly dismissed.

C M G OCKELTON
DEPUTY PRESIDENT
Date: