AH (Article 8 _ ECO _ Rules) Somalia [2004] UKIAT 00027

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 17th December 2003
Date Determination notified:
17th February 2004

Before:

The Honourable Mr Justice Ouseley (President)
Miss B Mensah
His Honour Judge N Huskinson

Between:

APPELLANTS

and

Entry Clearance Officer, Addis Ababa
RESPONDENT

For the Appellant: Mr R Toal, instructed by Wilson & Co
For the Respondent: Ms C Hanrahan, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision of an Adjudicator, Mr B M Suchak, who, in a determination promulgated on 16th December 2002, dismissed the appeal of the four Appellants against the refusal of entry clearance by the Entry Clearance Officer Addis Ababa of 4th December 2001, refusing them entry clearance to the United Kingdom. (The date of decision in the Adjudicator's determination of 4th July 2001 is wrong.)

2. The first two Appellants are the siblings of the sponsor. The third and fourth Appellants are her nephew and niece through her sister. The Appellants are citizens of Somalia and were born respectively on 8th February 1985, 5th November 1986, 4th July 1992 and 10th October 1993. The sponsor is a citizen of Somalia but she fled Somalia in December 1999 arriving in the United

Kingdom on 4th January 2000 and made an application for asylum in February 2000. She was granted indefinite leave to remain as a refugee on 26th June 2000.

3. The Entry Clearance Officer refused entry clearance under the Immigration Rules HC 395 paragraph 297 because he was not satisfied that they would be maintained or accommodated without recourse to public funds in accommodation owned or occupied exclusively by the sponsor. There is no dispute about that. The Entry Clearance Officer also said that he was not satisfied that the Appellants' parents were settled in or would be admitted for settlement to the United Kingdom, or that a parent whom they intended to join was the sole surviving parent. That is true. Sadly the parents of the first two Appellants and of the sponsor are dead. The identity and whereabouts of the father of the third and fourth Appellants is unknown and the mother, the sponsor's sister, has no real interest in them and may be unable to care for them in any event.

4. The Entry Clearance Officer also concluded that there were no "*serious or compelling family or other considerations which made the Appellants' exclusion from the United Kingdom undesirable*". Accordingly, the case fell outside the scope of the Immigration Rules.

5. It was accepted by Mr Toal, who appeared for the Appellants both before the Adjudicator and before us, that the Appellants could not satisfy the requirements of paragraph 297 of the Immigration Rules. However, he contended that they did not fail at every hurdle in the way in which the Entry Clearance Officer's decision had suggested. In particular, he submitted that there were serious and compelling family or other considerations which made the Appellants' exclusion undesirable, although that, by itself, was not sufficient to satisfy the requirements of the Immigration Rules.

6. His primary case was that the Adjudicator had failed to make findings of fact arising from the evidence of the Appellants as to their relationship to the sponsor, and as to the circumstances in which the sponsor departed from Somalia as a refugee. He had erroneously approached the assessment of family life on the basis that she had decided to come to the United Kingdom voluntarily and therefore that the family life they led was one of her making. Mr Toal submitted that properly analysed, the evidence showed that the interference with or respect for the Article 8 rights of the Appellants and sponsor had to be judged against the fact that she was a refugee, as to which there was no dispute. This meant that in addition to Article 8 rights, the Respondent's family reunion policy for refugees ought to have been considered, including whether there were compelling

compassionate circumstances for the grant of entry clearance to these Appellants.

7. The sponsor's evidence was that she had lived in Somalia with her parents, siblings, and her nephew and niece (the third and fourth Appellants) as a single family unit. The first Appellant was now, at the date of the hearing before the Tribunal, eighteen and the second Appellant was seventeen. The sponsor's sister had been abducted during the civil war and held against her will and when she had returned to the family home in 1993 she had a child, the third Appellant, and was pregnant with the fourth. Her mental state was not very good when she returned and she required attention all the time. Her children had always been regarded as part of her parent's family; they were now eleven and ten. One of the sponsor's brothers was killed in 1991 and another died due to a heart condition for which he was unable to obtain treatment. Her father was shot dead in the family home in mid-1996 and her mother and her remaining brother were also now dead, probably following a shooting incident in December 1999. The mother of the third and fourth Appellants disappeared from the family home after the shooting of her father in 1996, although contact was re-established in about August 2002. She was in Mogadishu but when the sponsor spoke to her, her sister did not mention her own children. The sponsor was raped by two of the men who shot her mother and brother in December 1999.

8. The sponsor's maternal aunt was concerned for the sponsor's safety and it was decided that, in view of the sponsor's age and the risk to her, the sponsor should be the first to leave. She fled from Somalia via Kenya. Her maternal aunt and the four Appellants left Somalia in around January 2001 and now live in Addis Ababa. The four Appellants have no right to live in Ethiopia. They are there unlawfully, but they live there with the sponsor's aunt, who is now 71. The evidence was that she was "*quite elderly and too ill to work*". They have no relatives in Somalia, save for the mother of the third and fourth Appellants whose position is rather uncertain.

9. The Appellants relied on a remittance of $100 a month sent to them by the sponsor. The evidence from the sponsor and from the first two Appellants was that the remittances were the Appellants' sole source of income and that that money had been provided since 2000. They are in regular contact. The eldest Appellant's evidence at interview was that he regarded the sponsor, his elder sister, as a mother, even though she is only six years older. The sponsor's evidence as to the relationship was "*I am here and I want them to come to live with me. I need them and they need me.*"

10. Most, but not all, of what we have set out above is referred to

one way or another in the Adjudicator's determination. The rest is supported by the Appellants' answers to questions at interview by the Entry Clearance Officer or by material provided to the Adjudicator in a letter to the Entry Clearance Officer on behalf of the sponsor and Appellants.

11. Having set out much of the evidence as we have described, the Adjudicator referred to the Appellants' claim, based on Article 8 of the ECHR. Mr Toal had relied upon the judgment of the Court of Appeal in R (Mahmood) v SSHD [2001] INLR 1, on the recommendations in a report of 15th December 1999 that a refugee's rights to respect for his family life could only be enjoyed through family union in a country where they could lead normal family life, and on the Home Office Practice contained in the family reunion guidelines, exceptionally to allow members of the family other than dependent children to enter if there were compelling compassionate circumstances. Mr Toal had submitted that they all fell within that latter category.

12. The Adjudicator first addressed himself to the question of whether there was family life as between the Appellants and sponsor. He commented that family life may not be static, that disruption and changes can take place through a variety of ways over time. He concluded, in paragraph 28, as follows:

> "I find on the evidence before me that there was no family life in existence as between the sponsor and the appellants at the date of the decision on 4th December 2001. In my view, the family life which they had was disrupted when the sponsor left Somalia in December 1999. It was her decision to leave the family – the arrangements having been made by her aunt who continued to reside with the appellants in Somalia until they all left Somalia to go to Ethiopia in January 2001 and they have continued to live together as a family since their arrival in Ethiopia. Family life between siblings and other relatives is more likely to disrupted as family members grow older and leave home to form their own relationships in order to form a new life for themselves. This is exactly what has happened insofar as the sponsor is concerned. She moved out of the family home in order to form a new life for herself. ... I should state that the appellants do have a family life, but they have this not only amongst themselves but also with their aunt in Ethiopia. There was at the date of decision no family life as between the sponsor and the appellants."

13. Mr Toal's first ground of appeal was that the Adjudicator had failed to make findings in relation to the circumstances in which the sponsor had come to the United Kingdom as a refugee and as to the circumstances in which the disruption to family life had occurred. He had also failed to make findings in relation to the relationship between the sponsor and the Appellants, both at the time she left Somalia and now. Ms Hanrahan did not really contest the failing of the Adjudicator in that respect. Mr Toal was initially inclined to urge that the matter go back before another Adjudicator in order for findings of fact to be made. However, we

took the view that there probably had been an acceptance by the Adjudicator of the evidence given by the sponsor and at interview by the Appellants. There was no suggestion in anything that the Adjudicator said that he had rejected their evidence. In particular, in view of the fact that the sponsor was granted indefinite leave to remain as a refugee and there was no suggestion that that had been an error, it seemed to us that the Adjudicator must have accepted that she had suffered in Somalia in the way in which she had described and that she had left because she was being persecuted. That was the reason why family life had become disrupted as between her and the Appellants. We decided to determine the appeal on the basis that the evidence given by the sponsor and the Appellants was true. It is for that reason that we have set out a little more fully than is in the Adjudicator's determination the factors relied on by the sponsor and the Appellants.

14. Mr Toal's second point was that, viewed against the correct assessment of the evidence, namely that the sponsor came to the United Kingdom as a refugee forced to flee from Somalia, the disruption to the family life that then ensued could not be treated properly in the way in which the Adjudicator had treated it. His comments suggested that it was a voluntary decision which the sponsor had made and which was responsible for the disruption to family life or that it was the natural progression of an older sister leaving the family and her younger siblings behind. Again, and with no real dissent from Ms Hanrahan, we accept that criticism is well-founded. It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up.

15. Additionally, the Adjudicator's determination failed to realise first the nature of the family life and bond which existed after the return in 1993 of the sponsor's sister, which brought her two children into the single family unit, and second the responsibility which devolved upon the eldest child to be a mother figure to the four Appellants after the death of her own parents, probably in violent circumstances.

16. It is necessary now to consider the Immigration Rules and any policy insofar as it applies to the family members of someone who has indefinite leave to remain as a refugee. The Rules make provision for the entry into the United Kingdom of the spouse of a refugee in 352A-C, and for the entry of the child of a refugee in 352D-F. Those provisions are inapplicable to the Appellants because the sponsor refugee is neither their spouse nor their parent. It may well be the case that under paragraph 352D, the

only requirement that was not met at the date of the Entry Clearance Officer's decision was that the Appellants were not the children of the sponsor. It appears from the evidence that the Appellants were under the age of eighteen, were not leading an independent life, were unmarried and had not formed an independent family unit, but were part of the family unit of the sponsor at the time she left Somalia to seek asylum. But it is clear that the Appellants fall outside the scope of the Immigration Rules.

17. Mr Toal submitted, however, that he was entitled to rely on the policy of the Secretary of State, applicable at the relevant time, dealing with the family of refugees who might fall outside the scope of the Rules. The policy reminds caseworkers, when considering family reunion applications, of Article 8 ECHR. The policy says that 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*". Mr Toal, for these purposes, relied upon that exceptional provision. The statement of policy continued under the heading "*Eligibility of sponsoring family members 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."

We have set out the paragraph 2 criteria above. Mr Toal put his argument on the basis that the Appellants met the criteria in paragraph 2, but were not seeking admission as refugees. He submitted that the Appellants were "*other members of the family*" in "*compelling, compassionate circumstances*". He suggested more tentatively that the Appellants were minor children within the scope of "*the spouse and minor children who formed part of the family unit*" when the sponsor fled. We do not accept that latter suggestion; in context, it clearly refers to the spouse of and the minor children of the sponsor-refugee.

18. Mr Toal submitted that in an appeal under Section 59 of the 1999 Act, he could contend that a decision was "*not in accordance with the law*" (schedule 4 paragraphs 21 and 22 of the 1999 Act) where the Secretary of State had a policy which was potentially

applicable to a case but which he had not considered. This is of course different from the exercise of the discretions given by the Rules which are specifically referred to in paragraphs 21 and 22. It is established by Abdi v SSHD [1996] Imm AR 148 that a decision of the Entry Clearance Officer can be "*not in accordance with the law*" where a policy of the Respondent outside the Rules which is potentially applicable has not been considered or has been considered on an erroneous factual basis.

19. We accept that this policy is potentially applicable to the Appellants because they are "*other members of the family*" and their circumstances are capable of falling within the scope of "*compelling, compassionate circumstances*". Their case has however not been considered by the Secretary of State under that head, or if so, has not been considered on the correct factual basis. Accordingly, on that basis, this appeal falls to be allowed, but we would not direct that entry clearance be granted. It is for the Secretary of State to consider whether the Appellants fall within the scope of his refugee family reunion policy, on the basis which we have set out. He is entitled to reach a decision either way on that matter.

20. Mr Toal also referred us to the recommendations of the Council of Europe made pursuant to Article 15 of its statute adopted, he told us, by the United Kingdom and some other member states in December 1999 on family reunion for refugees. The recommendation, in its preamble, says "*Considering that members of separated families can only enjoy their right to respect for family life through the reunion of family members in a country where they can lead a normal family life together;* …". The following recommendation was adopted:

> "(1) Member states hosting refugees and other persons in need of international protection who have no other country than the country of asylum or protection in order to lead a normal family life together, should promote through appropriate measures family reunion taking into account the relevant case-law of the European Court of Human Rights.
>
> (2) Members of the family of the refugee or other person in need of international protection covered by this recommendation are the spouse, dependent minor children and, according to domestic legislation or practice, other relatives."

Mr Toal suggested that the Appellants fell into the category of dependent minor children or other relatives. He also referred to the provisions of the Vienna Convention on the law of treaties which permit subsequent agreements and practice in the application of a treaty to be taken into account in its interpretation.

21. We do not accept that the recommendation itself gives rise to any rights directly enforceable before us by the Appellants. We

doubt in any event that "*dependent minor children*" is intended to be broader than the children of the sponsor-refugee. The Appellants are "*other relatives*" whose position is governed by the Immigration Rules, the Secretary of State's policy on family reunion to which we have referred and to the extent applicable by the Human Rights Act 1998. In reality these recommendations do not advance matters.

22. Mr Toal submitted that the Appellants were not confined however to reliance on the compelling, compassionate circumstances which are part of the Secretary of State's policy. He submitted that they could rely directly upon Article 8 ECHR, and the positive obligations which it contained for respect for family life. He relied on a number of cases which were generally concerned with the effect on family life of the removal of someone from the United Kingdom, rather than with the entry of foreigners, who had no right of entry as such.

23. In submitting that family life continued between the Appellants and the sponsor, notwithstanding that they were now living in different countries, Mr Toal relied on Kugathas v SSHD [2003] EWCA Civ 31, [2003] INLR 170. We accept that a family life can continue though the family members live apart, and that if Article 8 rights are available, it is not necessary that they be enjoyed within the United Kingdom. That case also shows that family life can exist, depending on the particular circumstances, between family members other than spouses, or parents and dependent children. But it suggests in paragraph 14 that for certain other relationships, some degree of dependency beyond normal emotional ties may be required: adjectives such as "*real*", "*committed*" or "*effective*" support convey the flavour of what is required. That support is not necessarily exclusively economic.

24. Other cases to which Mr Toal referred us reflect in contexts other than entry or even immigration-related cases more generally, the range of relationships which can give rise to family life. Moustaquim v Belgium [1991] 13 EHRR 802 shows that relations between siblings can constitute family life, just as Kugathas shows that it may not always do so and is unlikely to do so amongst adults.

25. We accept that in the circumstances of this case, a form of family life existed between the sponsor and the Appellants in Somalia before she left, and that in a disrupted form, family life continued afterwards. Emotional ties, beyond those of normal siblings, continue with the Appellants, even though the older two are at or nearing adulthood; financial dependency continues. They had a quasi-parental relationship with the sponsor, diminishing with their growing ages but some of that still survives, most strongly with the younger two. The Appellants nonetheless still have

family life with their aunt and with each other which centres on their life in Addis Ababa.

26. Mr Toal then submitted that the Appellants were entitled to rely on Article 8 ECHR in order to obtain entry, notwithstanding that they were foreigners with no other right to enter the United Kingdom, and policy and the Immigration Rules notwithstanding. Their exclusion either interfered with or failed to respect their family life. Alternatively, refusal of entry interfered with the Article 8 rights of the sponsor. He appeared to regard it as self-evident that the Appellants had rights enforceable against the United Kingdom under ECHR so as to obtain entry but upon the Tribunal indicating that it did not regard that as self-evident sought and was given time to put in written submissions to which Ms Hanrahan also responded in writing.

27. Article 1 of the EHCR provides:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention."

28. Mr Toal submitted that jurisdiction could be exercised by the State Parties through their acts producing effects outside their own territory and that an extra-territorial jurisdiction was exercised by consular officials and Entry Clearance Officers. This, he said, had been recognised in Bankovic v Belgium [1999] 11 BHRC 435, and provided for in the Vienna Convention on Consular Relations 1963. Thus, the application for entry clearance brought the Appellants within the scope of Article 1 and all the other Convention Rights, including Article 8. The Entry Clearance Officers were exercising jurisdiction over the entry and stay of non-nationals, just as immigration officers did.

29. Section 65(7)(c) included Entry Clearance Officers within the scope of those public authorities, appeals from whose decisions had to be allowed if the decision relating to entitlement to enter the United Kingdom breached an appellant's human rights. Paragraph 2 of the Immigration Rules required Entry Clearance Officers to carry out their duties in compliance with the Human Rights Act 1998. Mr Toal accepted that under a section 65 appeal, the only relevant rights were those of the appellant (R(AC) v IAT [2003] EWHC 389 Admin) and submitted that in consequence, it showed that Parliament must have intended that those outside the territory of the United Kingdom must be able to rely on the ECHR. The legislation would otherwise be pointless in its reference to Entry Clearance Officers.

30. Mr Toal referred to passages in two Court of Appeal decisions which he said supported his approach. In R (Mahmood) v SSHD [2001] 1 WLR 840 at paragraph 65, the Master of the Rolls said

that if the applicant applied for settlement as the spouse of a person settled in the United Kingdom, his application would be considered having regard to his Article 8 rights. In R (Ekinci) v SSHD [2003] EWCA Civ 765, Simon Brown LJ made a similar point, reflecting the position taken by the Secretary of State in relation to the removal of someone enjoying family life in the United Kingdom: his application for entry clearance and any subsequent appeal under sections 59 and 65 would give the Adjudicator jurisdiction to consider the appellant's human rights.

31. Mr Toal submitted that ECtHR jurisprudence also supported him. In Sen v Netherlands [2003] 26 EHRR 7, the ECtHR referred to various criteria which established the extent of the state's obligation to admit to its territory, the relatives of settled immigrants. In that case, the three applicants consisted of the two Turkish parents now legally settled in the Netherlands, and their eldest child, nine years old, who had been born in Turkey but left behind by them aged three. The outcome is immaterial for these purposes.

32. In Ahmut v Netherlands [1996] 24 EHRR 62, the ECtHR, again without drawing a distinction between the rights of the sponsor, who was present in the Netherlands, and the son, who was in Morocco, looked at the family relationship as a whole rather than distinguishing between those within and those outside the parties' territory.

33. Ms Hanrahan for the Entry Clearance Officer conceded, on the basis of the passage from Mahmood to which we have referred, that an Adjudicator or Tribunal had jurisdiction to consider the section 65 appeal of an appellant living outside the territory of the United Kingdom where it was alleged that there was a disproportionate lack of respect shown for the appellant's family life with someone living with the United Kingdom. She submitted that Edore v SSHD [2003] EWCA Civ 716 showed the correct approach to the assessment of proportionality when considering whether a decision was "*in accordance with the law*"; paragraph 21 of schedule 4 to the 1999 Act.

34. Matters at this stage are not advanced by submissions relating to family life in a third country, Ethiopia. It is not necessary that it be proved by the Appellants to be impossible elsewhere. But the nature and degree of the problems which would be experienced are relevant to any consideration of whether refusal of entry would be disproportionate.

35. The starting point, in our view, is the judgment of the Court of Appeal in R (Ullah) v A Special Adjudicator [2002[EWCA Civ 1856, [2003] INLR 74. This pointed out that Article 1 ECHR imposed the same limitation on section 6 of the 1998 Act that it did on the

operation of the Convention itself. The question in that case, as in this, is as to the limit which the words "*within the jurisdiction*" place on the operation of the ECHR and section 6.

36. Second, we accept that there are circumstances in which decisions and actions of diplomats, consular officers and Entry Clearance Officers can be acts of the Parties "*within the jurisdiction*". This is borne out by Abbasi v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 at paragraphs 74-76. It is acknowledged in Bankovic, but that case emphasised the restrictive territorial basis of the ECHR.

37. However, third, we do not accept that this means that the activities of diplomatic and consular agents always constitute the exercise of powers within the jurisdiction for the purposes of ECHR Article 1. Such an approach would extend to non-nationals with no right of entry, a series of rights upon which to base applications for entry clearance simply by virtue of the fact that an Entry Clearance Officer had to consider them and that a right of appeal lay against a refusal. It would create a right of entry based on Article 3, which would include persecution for a non-Geneva Convention reason; it could encompass Article 8 where there was no family in the United Kingdom, on the basis that family life could not be enjoyed in the country of origin because of its domestic laws on divorce or marriage or adoption.

38. This would be a remarkable extension of the scope of the ECHR, particularly as it seems that the Convention was unlikely initially to have been intended to affect the right of a State to control the entry and residence of non-nationals. It has only come to do so in stages and to an uncertain degree as Ullah shows. As Lord Phillips MR pointed out in Ullah, at paragraph 24, the Strasbourg Court has repeatedly emphasised that Contracting States have the right to control the entry, residence and expulsion of aliens, subject to their Convention obligations. It is the extent of those which is far from clear, as Ullah illustrates. But it would take clear authority to show that the mere fact of an application for entry clearance and a subsequent appeal required the Parties to secure all the Convention rights to those who applied and to permit their entry for that purpose. It would stand in marked contrast to the position under the Geneva Convention where would-be refugees who are still in their country of nationality cannot claim the benefit of the Geneva Convention and have no right in international law to receive asylum or to access a country for the purpose of making a claim; European Roma Rights Centre v Immigration Officer at Prague Airport and SSHD [2003] EWCA Civ 666, [2003] INLR 374.

39. Fourth, we do not accept the submission that the obligation on the Entry Clearance Officer under paragraph 2 of the

Immigration Rules to carry out his duties, in relation to those seeking to enter the United Kingdom, in compliance with the Human Rights Act, together with the right of appeal against the acts of public authorities, including Entry Clearance Officers, on the ground that a decision in relation to a person's "*entitlement to enter or remain in the United Kingdom*" was in breach of his human rights, shows that the rights which they might have under that Convention or Act are as extensive as the simple submission that the decision of the Entry Clearance Officer brings the appellant within the jurisdiction would suggest.

40. These are provisions which provide a jurisdiction in relation to human rights without dealing with what rights, if any, are to be secured to those seeking entry as non-nationals and doing so outside the scope of any Rules or policy-based discretion. The duty and jurisdiction exists in relation to whatever rights they may have in the light of their absence from the territory of the United Kingdom and the nature of what they seek. For the reasons which we have given, those rights cannot sensibly be regarded as encompassing all the Convention rights which are available to those within the territory. The same applies in relation to section 6 of the Human Rights Act: it does not help in determining what those rights may be, in this type of case. It can be said that those provisions evidence a Parliamentary assumption that those seeking entry would have some rights which would engage the ECHR, but unless the improbable assumption was made that they enjoyed all the Convention rights, those provisions evidence only a lesser and more uncertain assumption as to those rights, an assumption which may or may not be right. It would be very surprising if, by the language chosen, Parliament had intended to confer on any who might make an application for entry clearance, a right to enter to avoid treatment which breached Article 3, where no such right exists under the Geneva Convention.

41. Nonetheless, fifth, we do not consider that there are words of limitation to be found in the language of "*entitlement to enter or remain*". It is true that one task of Entry Clearance Officers is to deal with certificates of entitlement to enter, under the Immigration Act 1971 and it could be said that that is the limit of the engagement of human rights so far as Entry Clearance Officers are concerned. In other respects, the Entry Clearance Officers are not dealing with entitlement as such and it could be said that in those cases there is no human rights aspect. But that does not sit readily with the notion, inherent in that approach to the statutory language, of an entitlement to remain operating as the basis for a restriction on the applicability of human rights in removal cases. It would also in its turn introduce a degree of arbitrary limitation which might too have been spelt out more clearly if intended by Parliament. It adds also a degree of

circularity because those entitled to enter or remain have no obvious need of human rights provisions; they merely need the law and the Rules to be applied to them correctly. See also Karaharan and Kumarakuruparan v SSHD [2002] EWCA Civ 1102, [2003] Imm AR 163.

42. It seems to us that the answer to the existence of Article 8 rights for those outside the United Kingdom is to be found in the way in which the jurisprudence of the ECtHR has developed over time in relation to various areas of human experience, here the entry of non-nationals to a country. It is not always possible to trace a clear line of reasoning from Article 1 through the various decisions which that Court has reached so as deduce the principles which apply. The decisions are not always consistent nor do they deal with some of the problems which might be thought to stand in the way of the result reached. Ullah illustrates the problems of some of the reasoning in Soering v United Kingdom [1989] 11 HRR 439, and then with the basis upon which Chahal v United Kingdom [1997] 23 EHRR 413 was said to be consistent with it. Similar problems are in respect of the ECtHR approach to entry cases. But, rather than hunting for a clear line of reasoning or principle which deals with the effect of Article 1, a line which seems unlikely to exist, the better solution is the more pragmatic one of looking to see what has been decided by that Court and domestically in relation to this particular area.

43. The issue was discussed in Ullah in paragraphs 41-47 as part of the more general discussion of Article 8. In particular, the Court was of the belief which we regard as well-founded, that Article 8 has been invoked, but only successfully in an immigration case, including refusal of entry, where that "*has impacted on the enjoyment of family life of those already established within the jurisdiction*". The Court referred to its review of the cases in Mahmood. It noted that the basis of the ECtHR decision in Abdulaziz, Cabales and Balkandali v United Kingdom [1985] 7 EHRR 471 was that the applicants were established within the jurisdiction and complained that they were being deprived of the company of their husbands who were not within the jurisdiction; the right of the State to control entry acted as a free-standing restriction on Article 8 rather than being a legitimate aim within Article 8(2). Later ECtHR cases, such as Bensaid v United Kingdom [2001] 33 EHRR 10, [2001] INLR 325, treat immigration control as falling within that qualification. It appears to have been assumed or decided in both Kugathas and Ekinci, that the effective trigger for the existence of Article 8 rights, enforceable against the United Kingdom by non-nationals who are outside it, is the existence of family life with those who are established in the United Kingdom.

44. We have already referred to Sen v Netherlands and Ahmut v Netherlands, both of which are consistent with what the Court of Appeal said in Ullah about the need for the family relationship, of those relying on Article 8 as a basis for entry, to be with someone who was established in the United Kingdom in order for them to have Article 8 rights in respect of family life which are enforceable against the State with which they are seeking entry.

45. Accordingly, we consider, on the basis of ECtHR jurisprudence and Ullah, that the existence of family life with someone who is established in the United Kingdom provides the basis for the existence of Article 8 rights, enforceable against the United Kingdom and is the basis for the examination of whether that life is interfered with or shown a lack of respect. This may reflect a developing ECtHR jurisprudence from the position in Abdulaziz. Such an approach would reflect what the Court of Appeal seems consistently to regard as the position. (We have some reservations about the basis upon which Ms Hanrahan conceded the point because the short comment in Mahmood may have been overtaken by the greater consideration of the issue of jurisdiction in Ullah.) It does, however, represent an ad hoc extension of the Convention, but it is not as wide as that which would arise from full acceptance of the appellant's submissions. But it also makes some sense of the jurisdictional provisions in the 1998 Act, with the Parliamentary assumption seen as having some basis.

46. The consequence of that conclusion is that the four Appellants are entitled to have their Article 8 rights considered by the Secretary of State and are not confined to arguing what for them would be a hopeless case on the Rules, and a deliberately restricted one under the extra-statutory discretion. But it does not follow at all that that leads to much greater scope for them to enter. It would normally be the position that the combination of the provisions of the Immigration Rules and extra-statutory policy and discretion would provide a proportionate basis for any interference with or lack of respect for family life in the light of the well-established right of a state to control entry, whether or not that is to be regarded as a free-standing restriction on the scope of Article 8 or as falling within the qualification in Article 8(2). Those provisions represent what the State, in part with express Parliamentary approval and in part through the executive, have thought fit provisions for the entry into the United Kingdom of those who have some form of family life with someone established here. As Edore v SSHD [2003] EWCA Civ 716, [2003] INLR 361 holds, the question of whether an interference or lack of respect is proportionate to the need for control over immigration and for the maintenance of the system for its enforcement, is a matter for the Secretary of State's judgment in the first place and it is only reviewable if it is outside

the range of responses reasonably open to him. It would be the exceptional case where circumstances fell outside the Rules and the compassionate discretionary policy, and yet were such that exclusion was an unreasonable response by the Secretary of State.

47. It is not necessary in this case to deal with the question of what the Tribunal's approach should be where the issue has not been considered on the proper basis by the Entry Clearance Officer or Secretary of State, because their attention has been confined to the Rules. This appeal is being allowed because he has not considered his discretionary policy. It will be for him, if the appeal is unsuccessful on that ground, to go on to consider whether the exclusion of the Appellants would be disproportionate to the interests of immigration control.

48. Accordingly, this appeal is allowed.

MR JUSTICE OUSELEY
PRESIDENT