Upper Tribunal
(Immigration and Asylum Chamber)

SG (child of polygamous marriage) Nepal [2012] UKUT 00265(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 July 2012	

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Before

MR JUSTICE BLAKE, PRESIDENT

UPPER TRIBUNAL JUDGE DAWSON

Between

ECO NEW DELHI

Appellant

and

SG

Respondent

Representation

For the Appellant: Ms B Asanovic, instructed by Howe and Co

For the Respondent: Miss C Gough, Senior Home Office Presenting Officer

i) Educational advantages and economic betterment, which might be enjoyed by a child, if admitted to the United Kingdom, are not compelling considerations to make that child's exclusion undesirable, where the biological mother has cared for the child, and will continue to do so, in the country of origin.

ii) There is a legitimate aim in excluding from admission to the United Kingdom a woman who is a party to an actually polygamous marriage and that aim justifies the indirect effect of that exclusion on the child of such a marriage, in that it will be more difficult for the child to satisfy the immigration rules relating to sole responsibility and circumstances making exclusion of the child undesirable.

iii) The policies adopted by the Secretary of State to facilitate admission of Ghurkha former soldiers and their dependants were not intended to give more favourable treatment to children born of an actually polygamous marriage.

iv) Paragraph 296 of HC 395, as presently applied, does not prevent the admission of such children and would probably be contrary to Articles 8 and 14 ECHR if it did.

v) In these circumstances it is not unreasonable to expect a sponsor to choose between coming to the United Kingdom with part of his family or remaining in Nepal with all its members, where there has been no previous residence and establishing of family life in the United Kingdom.

vi) The wishes of the child and both parents are relevant to ascertaining what her best interests are in the context of an application for admission to the United Kingdom but are not decisive of the proportionality balance.

vii) The proportionality balance in such cases is a fact sensitive one rather than determined by the rules.

DETERMINATION AND REASONS

Introduction

1.
SG is a child born on 9 January 2003 in Nepal. She was the appellant below and the respondent before us. We shall refer to her as the claimant. Her father is SB Gurung and her mother is his third wife P Gurung. Her father's first marriage was terminated by divorce. His second marriage to S Gurung is still subsisting and there is a son born to that marriage. At the time of the determination of this appeal the father, both wives, the claimant and her step sibling are all residing together in the father's house in Nepal.

2.
The father served in the Brigade of Ghurkhas from 1969 to 1985. At the time he completed his military service there was no opportunity for him to settle in the United Kingdom. As a result of various changes in policy in recent years, there are now immigration rules providing for a right of settlement in the United Kingdom for members of the Brigade of Ghurkhas who were decommissioned after 1997 and various policies that make provision for those who were decommissioned before that date.

3.
In 2009 the father applied for entry clearance to come to the United Kingdom. The application was successful and he subsequently came to the United Kingdom briefly in July 2010. His wife S Gurung and their son have also been granted entry clearance, in the latter case following an appeal against an earlier refusal.

4.
The claimant's application was refused on 29 October 2010, in the following terms:

"You are living with both of your parents under the same roof in Nepal. In considering your application I am not satisfied that your sponsoring parent has been able to show that he has been solely responsible for exercising parental care of you for a substantial period. Therefore I am not satisfied that your father has sole responsibility for you or that you meet the requirements of the (Rules). Your mother has not applied for settlement. Your decision to apply to settle in the United Kingdom was one of choice, not necessity. You live with both of your parents and your step mother and step brother. You attend school and there is no evidence to suggest that you do not have a reasonable standard of living. You have (?) cited or provided evidence of any medical condition. You have not demonstrated serious and compelling family or other considerations which would make your exclusion from the United Kingdom undesirable. … I have also taken account of the provisions of Article 8 of the Human Rights Act I consider that refusing this application is justified and proportionate in the

exercise of the immigration control. I note that refusing this application will not interfere with family life for the purposes of Article 8.1 which you can enjoy in Nepal."

It would appear that the word "not" should be inserted between "have" and "cited" as no such evidence was submitted.

5.
The claimant appealed against this decision. On 22 June 2011 Judge Radcliffe allowed her appeal with considerable misgivings because he concluded that on the facts the father did have sole responsibility for the child for the following reasons:

"The fact is that he is the only person who has an income. His two wives and two children ... are entirely dependant on him. He is the person who makes all the important decisions in the household. He decides what schools they go to and which religious beliefs are appropriate for them. He guides them, no doubt, in a number of ways and he is his daughter's mentor until she gets married... The sponsor says that he cannot leave his daughter behind because the emotional and financial dependency on him by his daughter has created a tie between them that goes beyond that of a normal adult child and parent relationship."

6.
The entry clearance officer appealed to the Upper Tribunal against this decision on the basis that the judge had failed to apply the decided case law on the meaning of sole responsibility summarised in the decision of GD (Paragraph 297 (i) (e): "Sole responsibility") Yemen [2006] UKAIT 49.

7.
On the 23 October, 2011 a differently constituted panel of this Tribunal concluded that there was indeed an error of law because the judge had recognised that the claimant's mother must "play a significant and loving part in the upbringing of her daughter, even though the sponsor may made the strategic decisions effecting the life style of his daughter." That being so there was clearly shared responsibility between the parents even though the sponsor is the sole bread winner and takes all the major decisions in the child's life. However, it also concluded that a further hearing was necessary to examine whether Article 8 required the appeal to be allowed having regard in particular to the best interests of the child and the impact on Article 8 decision making of section 55 of the Borders, Citizenship and Immigration Act 2009 and the decision of the Supreme Court in ZH (Tanzania) [2011] UKSC 4.

8.
Supplementary witness statements were signed in January 2012 the effect of which may be summarised as follows:-

i.
The claimant regards S Gurung as her "big mother" and P Gurung as her "little mother".

ii.
The claimant wishes to live in the United Kingdom with her father and big mother.

iii.
P Gurung understands that she is not eligible for settlement in the United Kingdom as the second wife is the one chosen by her husband for settlement.

iv.

P Gurung agrees and approves her husband's decision to settle in the United Kingdom. She says:

"It is in the appellant's best interest to continue her education in the United Kingdom. She is a bright child and would benefit from a better standard of education such as in the United Kingdom. I want the best for my daughter".

v.
It would be detrimental to the claimant's development to remain in Nepal with her mother because education and employment opportunities are extremely limited and the options for her education and standard of living in Nepal are not as good.

vi.
P Gurung envisages that her contact would be maintained with the claimant by visits by her to the United Kingdom and by the appellant to Nepal during the school holidays.

vii.
The claimant's father stresses that the cultural norms in Nepal mean that it is perfectly acceptable for one husband to have two wives. Fathers take the important decisions in daughters' lives and he sincerely wishes his daughter to be raised in the United Kingdom where she would have a better standard of living.

viii.
There is supporting evidence from the local school teacher at the claimant's school in Kathmandu that she would benefit from receiving a better education and quality of life in the United Kingdom.

9.
Before us Ms Asanovic submitted in summary:-

i.
Even where a non-sponsoring mother was caring for her child there could be exceptional circumstances justifying the conclusion that responsibility for the child's welfare was the sole prerogative of the father.

ii.
Having regard to the cultural context which the family had lived since the claimant's birth and the fact that the majority of those she enjoyed her family life with were entitled and intending to come to the United Kingdom, there were compelling reasons why her exclusion from the United Kingdom was undesirable within the meaning of the Immigration Rules.

iii.
The wishes of both parents reflected the best interests of the child.

iv.
The decision was a disproportionate and unjustified interference with the right to respect for that families life and therefore contrary to Article 8 ECHR.

Sole Responsibility

10.
There is no substance to the claimant's first submission, for the reasons given by the Upper Tribunal in setting aside decision of Judge Radcliffe. Where a child's natural parent has cared for and continues to care for the child, responsibility must be considered joint between the parents. The exceptional

circumstances referred to in the authorities would normally be where such responsibility can no longer be satisfactorily provided for by the non-sponsoring parent through sickness, remarriage or other circumstances. That is not this case here.

Exclusion undesirable

11.
We further consider that the Entry Clearance Officer was fully entitled to conclude that there are “no serious and compelling family or other considerations which make exclusion of the child undesirable”. It is plain from the case presented to the Entry Clearance Officer and on appeal to us that the factors relied upon are the economic and educational betterment of the child in the United Kingdom. Such betterment is not the kind of factor that makes exclusion undesirable or within the meaning of the rule.

12.
We agree with the Secretary of State’s statement of policy in SET 7.9 which provides:

“The ECO should consider all the evidence as a whole, deciding each application on its merits:

•
Are the circumstances surrounding the child exceptional in relation to those of other children living in that same country?

•
Are there emotional/physical factors relating to the sponsoring parent in the United Kingdom?

•
Are there mental/physical factors relating to the non-sponsoring parent? Where the physical/mental incapability of the non-sponsoring parent has been established, an entry clearance should normally be granted.

But not considered acceptable as a serious and compelling reason under this provision:

•
that the UK offered a higher standard of living than in the child’s own country”.

13.
Nor does it follow, as Ms Asanovic submitted, that the child’s best interests required her admission because the majority of the family members that she was living with were coming to the United Kingdom. Of course, we recognise that the consequence of her father’s migration is that the claimant will grow up in a household with fewer family members than at present and recognise that would be an unwelcome change in her life. The wishes of the parents and the child herself are a factor in the assessment of what the child’s best interests but will rarely be decisive in the immigration context. We are not persuaded that her best interests require her to be separated from her biological mother who is well able to care for her. This is an aspect we consider in further detail below.

14.
If her father were to come to the United Kingdom with his second wife and son, he would still support the claimant and her mother financially in the home that they continue to live in and the father would continue to be able to make the important decisions in his daughter’s life albeit from abroad. There are no medical factors in the case. The claimant would continue to have her mother to turn to for support and guidance as she grew up. She is attending a good school by local standards and would

have a good standard of living based upon remittances from the United Kingdom and the Ghurkha pension to which her father is entitled. She has never been to the United Kingdom nor established links here.

15.
Whilst the claimant would lose the presence of her father and the extended family in which she has grown up, this is a consequence of the father's decision to come to the United Kingdom with his second wife and son, a factor that we give further consideration to when we consider Article 8.

16.
We reject the proposition that the "exclusion undesirable" rule requires the UK to admit a young child simply because the head of the household wants her to join him irrespective of her care arrangements in the country of origin.

17.
We, therefore, conclude that the claimant has not made out a case for admission to join her father under the Immigration Rules.

Ghurkha policies

18.
Nor indeed is there any case for her to be admitted under the terms of the various policies supplementing the rules for the admission of Ghurkha soldiers.

19.
The claimant's skeleton argument and submissions refer to appendix A to the March 2010 policy statement:

"That discretion will normally be exercised and settlement granted in line with the main applicants, spouses, civil partners, unmarried and same sex partners, dependant children under the age of 18 years".

However that statement has to be seen in context of the earlier part of section 13 of the policy explaining that where a child's parent is not joining the sponsor in the United Kingdom a child can only be admitted if there is either sole responsibility in the sponsor or compelling circumstances making the child's admission undesirable. We also conclude that the provisions of the polygamous children policy that we examine below make it clear that these requirements must be met before a child is admitted.

20.
We do not find that considerations of historic injustice done to Ghurkhas and remedied by the various policies have any application to this case. There is nothing in the policies to suggest that Ghurkha soldiers and their dependents were being given more favourable treatment than others with respect to the admission of the parties to and the product of polygamous marriages.

21.
In any event, as her father had already been granted indefinite leave to enter at the time of the claimant's application and the decision on it, this is a straight forward rules case rather than a case resting upon policy and requiring a decision to be in accordance with the law by fairly applying that policy.

Article 8 claim to admission

22.
This therefore brings us to the substantive argument deployed before us which was based upon the assumption that if neither the rules nor the policy could assist her nevertheless in the particular circumstances of this case, the refusal of entry clearance was unlawful and contrary to Article 8 ECHR.

23.
Ms Asanovic's submissions proceeded along the following lines:

(i)
Polygamous marriages are lawful marriages under the law of Nepal that is the law of the parents' domicile and consequently gives rise to family life within the meaning of Article 8 (1).

(ii)
Regard should be had to the local cultural norms in deciding that respect should be accorded to such family life and also to the historic wrong that prevented Ghurkha soldiers settling in the UK on completion of their military service by contrast with Commonwealth soldiers recruited abroad.

(iii)
The refusal of entry clearance is an interference with that family life because it requires the father to either give up the residence with his child or give up his right to live in the United Kingdom.

(iv)
There is no legitimate aim promoted by such interference. The economic interests of the United Kingdom cannot be promoted by excluding the appellant as her father can support her, and the Ghurkha policy demonstrates that maintenance requirements are waived in terms of admitting under-age dependants of former Ghurkha solders.

(v)
In any event the interference is not justified and proportionate. It discriminates against children of polygamous marriages. Even if there is a legitimate aim in preventing a party to an actually polygamous marriage from coming to the United Kingdom to form a polygamous household, there is no such aim with respect to the children of such marriages. Further children of a polygamous marriage to which a British citizen is a party will normally be British nationals whose admission cannot be prevented despite their status as the product of such an union.

(vi)
The above points cumulatively demonstrate that there is no pressing need to exclude the children of polygamous marriages who are not such citizens and again the difference in treatment between such children who have or do not have the right of abode is discriminatory and unjustified.

24.
We observe at the outset that although there has been much litigation about admission of former Ghurkha soldiers and their families, most concern the circumstances in which an over-age child will be admitted. This case does not turn upon such matters. We are not aware of any litigation concerned with the children of a polygamous marriage and the present case accordingly breaks new ground.

Discrimination

25.

The claimant puts in the forefront of her Article 8 challenge the proposition that she is being discriminated against on the grounds of her social status because she is the child of a polygamous marriage.

26.
However, the claimant does not mount a challenge to the proportionality of the policy excluding the second or subsequent wives of such marriages. These amendments to the rules date from as long ago as 1988 whereby actually polygamous second wives cannot be admitted for settlement save in the circumstances that do not apply here. They were not amendments specific to Nepal or Ghurkhas and must have excluded without challenge considerable numbers of such wives from across the world.

27.
The legitimate aim here is not limited to considerations of numbers alone, but to deter the formation of polygamous households in the United Kingdom. Such a policy is well within the state's discretionary area of judgment. Both SB Gurung and P Gurung acknowledge it and have made their decisions in the light of it. No application has been made to bring in the claimant's mother despite the policy.

28.
The primary reason why the claimant failed to secure admission is that she did not qualify under "the sole responsibility" or "exclusion undesirable" heads of the Immigration Rules, not because she is the child of a polygamous marriage.

29.
It may be the case that the rules excluding foreign spouses who are party to polygamous marriages have an indirect impact on the admission of a child of such a marriage because it is more likely that the requirement of the Rules will not be met where the excluded wife is available to care for and take responsibility for the child. Nevertheless, if the exclusion of such a parent is justified as an expression of United Kingdom public policy, we conclude that the indirect effect on a child who is being and will continue to be cared for by such a wife is also justified.

30.
Perhaps the high point of this aspect of the case was when Ms Asanovic pointed out the terms of paragraph 296 of the present Immigration Rules which are to the following effect:-

"Nothing in these rules shall be construed as permitting a child to be granted entry clearance, leave to enter or remain or variation of leave where his parent is party to a polygamous marriage or civil partnership and any application by that parent for admission or leave to remain for settlement or with a view to settlement would be refused pursuant to paragraph 7.8 or 278A."

31.
This paragraph was not relied upon by the Entry Clearance Officer to refuse the claimant's admission. Its meaning is not entirely clear: is this provision designed to prevent such a child entering in accordance with any of the rules relating to children or only those rules that give the child a contingent right if being joined by both parents?

32.
In Ms Asanovic's skeleton argument she cites part of another policy instruction (Immigration Directorate Instructions, Chapter 8, Annex C of November 2009):

" 6.2 Children of polygamous marriages

Where the application for leave to enter or remain in the United Kingdom by a wife, who is party to a polygamous marriage is refused, any children that she may have by her husband will not qualify for entry either (paragraph 296 of HC 296 of HC 395 refers). It will rarely be appropriate to grant entry clearance where their natural mother is still alive and still in a position to care for them.

The above paragraph would not apply to a child who has the right of abode, even if he is the offspring of a polygamous marriage. Such a child would be admitted on this basis in his own right."

33.
This instruction does not suggest that the Secretary of State regards paragraph 296 to be an absolute bar on the child's admission. It indicates that the mother's presence in the country of origin and her ability to care for the child mean that it is unlikely that the child will be eligible for admission to the United Kingdom. The policy also accurately notes that children with the right of abode (such as children who are British citizens by descent) will be unaffected by the rule.

34.
Such a construction of the rule would be consistent with the Secretary of State's policy on which Ms Gough relied before us, namely SET 7.17 with the heading "What is the position for children of polygamous marriages?" It states:

"Unless sole responsibility can be demonstrated by the sponsor, paragraph 296 overrides all other provisions in the rules relating to children including:

•
the now withdrawn under 12 concession; and exceptional

•
consideration given outside the Rules.

The child will not normally qualify under paragraph 297 (f) while the natural mother is alive and still able to look after the child, unless there are factors in the child's circumstances which are serious and compelling in comparison with the ordinary circumstances of children in that country and which indicate that the child would not receive adequate care and attention there."

35.
Apart from the approach adopted in present policy statements noted above, we doubt the rule could be used to refuse admission to a child where the father has sole responsibility or whose exclusion is considered undesirable, let alone cases where the Article 8 balance favours the admission of the child. Whilst the exercise of the balance can be informed by the terms of the rules or other relevant policy, the outcome cannot be driven by it. We wonder, therefore, what purposes the rule serves in its present form.

36.
Use of the rule to deny admission to a child whose welfare and best interests suggest should otherwise be admitted would be directly contrary to the principle that the welfare of the child is the primary consideration in any administrative decision. It would therefore be contrary to the assessment of Article 8 cases in the light of the guidance in ZH (Tanzania) [2011] UKSC 4. Further, reliance on the rule would constitute direct discrimination on the grounds of social status contrary to Article 8 taken together with Article 14: see for example the recent finding of a violation of Article 14 in the context of denial of nationality to illegitimate children in Genovese v Malta (Application no. 53124/09), 11 January 2012. Whilst such discrimination might be capable of justification, it is difficult

to see why any different approach should be taken to such children by comparison with illegitimate children.

37.
However, none of these observations assists the claimant. We have already concluded that she does not qualify for admission under the exclusion undesirable limb of the rules. She is therefore being denied admission not because of her status as a child of a polygamous marriage but because she is neither being joined by both her parents nor does she meets the general criteria for joining a sole parent. Her position would be akin to a child of a divorcee who is not admissible because the sponsor does not intend to live with his former spouse and the child is excluded because neither the sole responsibility nor exclusion undesirable test can be satisfied.

38.
Much of the claimant's argument was directed at the difference in treatment between the claimant and a child of a polygamous marriage who is a British citizen by descent from a parent who is party to such marriage. However, the difference in treatment is not an illogical and unjustified difference, but simply a consequence of the principle in international and domestic law that the entry to and residence in the United Kingdom of any British national with a right of abode is not subject to immigration control or the permission of the Secretary of State. The claimant is not comparing like with like. We recognise that in certain circumstances the British citizen and the foreigner may be analogously situated, but this is not the case when comparing the right of entry into the United Kingdom.

39.
Equally the fact that anyone who is lawfully resident in the United Kingdom, whether a British national or otherwise can live in a relationship akin to a polygamous household with more than one partner, does not mean that it is illogical and inconsistent to deny aliens the right to come to the United Kingdom for the purpose of establishing such a household.

Balance of the Article 8 assessment

40.
Once the discrimination element of the Article 8 case is removed from the assessment, the rest of the Article 8 analysis can proceed along familiar lines. We apply the structured approach enjoined in the guidance given in the well known sequence of House of Lords and Supreme Court cases ending most recently in Quila [2011] UKSC 45.

41.
We accept that there is a family life enjoyed between the claimant and her father. This is where respect for diversity and local cultural practice comes into play. We note the information that entering a polygamous marriage is actually illegal in Nepal albeit that the practice is quite widespread and the breach of the criminal law does not nullify the marriage.

42.
We accept that denial of entry clearance to the claimant has an impact on the family life presently enjoyed but we do not accept that the degree of impact is such as can be said to interfere with it or to impose a positive obligation on the state to admit her.

43.

We conclude that it would be reasonable to expect the claimant's father to continue to live in Nepal and there are no obstacles at all to his doing so:-

i.
He has no house, home, employment or existing family ties to the United Kingdom;

ii.
He has never resided here other than for a brief stay in 2010 and has remained in Nepal since then.

We note the significance of the answer to this question in entry clearance cases: see Muse v Entry Clearance Officer [2012] EWCA Civ 10 at [21- 23] and [34].

44.
By contrast to the position in the Strasbourg decisions in Tuquabo-Tekle v Netherlands (Application no. 60665/00), 1 December 2005 and Sen v Netherlands (Application no. 31465/96), 21 December 2001 the father is not being required to make an invidious choice between continued residence in the United Kingdom with a spouse and family who have grown up there and leaving another child of the family behind in the country of origin: see Tuquabo-Tekle at [47] and [48].

45.
Further, we conclude that there is a legitimate aim being pursued in denying admission to a child in the claimant's circumstances who does not comply with the rules on admission. We disagree with the submission that there is only a rational connection with the legitimate aim of the economic well-being of the country if the applicant is likely to be a charge on public funds or otherwise cause cost to the tax-payer. It is perfectly possible for a state to conclude that economic circumstances and good social order require that admission of aliens who have no right of residence is generally restricted to circumstances where they are both self sufficient and meet other qualifying conditions such as both parents be present or exclusion be otherwise undesirable. Thus having a scheme of immigration control and criteria for admission is part of the means of promoting this legitimate aim.

46.
Whilst promoting a scheme of control is a response to a legitimate aim, that does not mean that maintaining the rules is an aim in itself or that the rules themselves strike the balance between individual cases and the state. The application of the rules is subject to the next step in the process. There will be always cases where the rules are not comprehensive and do not cater for every eventuality and where admission is required despite the terms of the rules, but those cases are ones where the proportionality analysis yields a different outcome, particularly where the child's interest requires admission, rather than because there is no legitimate aim promoted by maintaining a tight system of immigration control.

47.
Further, in this case to the extent that the exclusion of the child is the indirect consequence of denying admission to the mother as a party to an actually polygamous marriage, the modest contribution to the discouragement of such marriages in Nepal or elsewhere is a legitimate aim in pursuit of morals and the rights of others particularly the pursuit of gender equality.

48.
We now turn to proportionality. We conclude that the interference is justified, proportionate and represents a fair balance of the competing interests. For the same reasons we have identified in dismissing the case under the exclusion undesirable limb of the rules, the economic and educational

betterment of the child is not a sufficient factor to require her admission. The welfare of the child as identified in ZH (Tanzania) is not simply the material improvement in a new country with which the child has no prior connection. A much more significant factor is that admission would take her out of the continuity of the daily care of her mother who has cared for her and whose care is satisfactory and appropriate.

49.
We agree with the ECO that if the father decides to come to the UK with the family members who have been granted admission, the resulting separation of father and the claimant is a consequence of the father's choice of place of residence rather than the imposition on him of an invidious and intolerable choice. This is because there is no reason why the father needs to live in the UK albeit that he is entitled to do so. It is not unreasonable in his particular circumstances to have to decide whether to stay in Nepal with his family intact or bring part here.

50.
In any event, the claimant's mother envisaged such visits as a means of her maintaining contact with her daughter but the position can apply in reverse as well. This observation is not inconsistent with the conclusions of the Tribunal in LD (Article 8 - best interest of child) Zimbabwe [2010] UKUT 278 (IAC) that family life between parents and minor child is not normally conducted by the internet and Skype and occasional visits. In that case the Home Office was proposing to separate a well established family unit when it would not have been reasonable to expect mother and children to relocate. Here, it is the claimant's father who proposes to separate her from her mother because he chooses to take up the facility of residence in the United Kingdom when it would be reasonable to expect him to continue to reside in Nepal. If this is the course that he proposes to take, then visits home to his third wife, and home, are all part of the mode of life he must have envisaged.

51.
There is no reliable evidence that either mother or child would be socially ostracised if they remained in Nepal and this would be detrimental to their interest. They would continue to be supported by the father. The history of Gurkha migration suggests that many such families grow up without a constant presence of a father who may be on active service or otherwise engaged in employment abroad. By comparison with their neighbours the claimant and her mother will have a considerably higher standard of living from overseas remittances.

52.
We do not accept the submission that the fact that the father normally makes the key decisions in a child's life means that the state should respect his decision to bring in his child despite the failure to comply with the immigration rules. Ms. Asanovic relied in support of this submission on the observations of the European Court of Human Rights in its decision in Osman v Denmark (Application no. 38058/09), 14 June 2011 at [73]. However, there the Court was explaining why the child's admission to Denmark was necessary despite the father's decision that the daughter be removed from Denmark where she had grown up and sent to Kenya. The point being made is that although parents are entitled to make decisions for their children, parental wishes cannot outweigh the best interests of the child objectively construed. In our judgment they cannot by themselves impose a positive obligation on the state to admit a child because the father wants the child to be brought up here.

53.
For reasons given in the decision of T (s.55 BCIA 2009) - entry clearance) Jamaica [2011] UKUT 483 (IAC), the statutory duty to have regard to guidance to promote the child's welfare does not apply to

children who are located outside the United Kingdom, but the exclusion undesirable rule, the principles of the Article 8 case law and the direction in the Secretary of State's guidance that the spirit should be applied in entry clearance cases are all relevant. We have had regard to this authority and the principles of the Code of Guidance but we are not persuaded they assist the claimant in the particular circumstances of her case.

54.
In consequence, without addressing further each of the contentions in the skeleton argument we are quite satisfied that on the facts of this case and the evidence relied on, the claimant has not established that the denial of entry clearance was an interference with family life and even it were, it is a proportionate and justified interference in pursuit of legitimate aims and not arbitrary or discriminatory. In the circumstances the Article 8 case fails also.

Conclusion

55.
Accordingly we re-make the decision in this case by dismissing the claimant's appeal on all grounds: the decision is in accordance with the rules; it is in accordance with the law and it is does not infringe the human rights of the claimant and her family.

Signed

Mr Justice Blake

President, Immigration and Asylum Chamber of the Upper Tribunal

Date

6 July 2012