

Court/Tribunal: House of Lords: United Kingdom
Case: *AS (Somalia) v. Secretary of State for the Home Department*
Date: June 17, 2009
Written by: Harrison Barrow

In July of 2003, Ahmed and Hadaya, two Somali war orphans, applied for entry clearance to the United Kingdom to live with their cousin, Ms. Omar. Ahmed and Hadaya's parents were killed in the Somali Civil war in 1998, and Ms. Omar's mother had taken them in. In 2000, the cousin's mother, father, and husband were killed, leaving Ms. Omar to take care of Ahmed and Hadaya. Ms. Omar remarried, and was soon thereafter imprisoned in a detention camp. Her mother-in-law assumed responsibility for the children, along with Ms. Omar's own child. Ms. Omar eventually escaped the detention camp and sought refuge in the United Kingdom, where her child, Hafsa, eventually joined her.

A year and a month after applying, Ahmed and Hadaya were refused entry clearance. While awaiting appeal, their situation worsened. They were left to fend for themselves, as Ms. Omar's husband had left her and her mother-in-law left the children with someone who failed to properly care for them. When the Asylum and Immigration Tribunal eventually heard the appeal almost three years after the initial application, the judge considered the changed circumstances since their initial appeal and granted entry clearance, citing Article 8 of the European Convention on Human Rights and the disheartening circumstances. This decision was overturned, the court citing section 85(5) of the United Kingdom's Nationality, Immigration and Asylum Act of 2002 ("Act"), suggesting that it was improper to account for changed circumstances. Section 85(5)(b) of the 2002 act provides that "the adjudicator may consider only the circumstances appertaining at the time of the decision to refuse."

After Ahmed and Hadaya's case was defeated in the Court of Appeals, the House of Lords took their case. In the meantime, Ahmed and Hadaya were granted entry clearance and joined their cousin. Despite the case seeming to be moot, the House of Lords entertained this appeal, as it highlighted an issue expected to affect other applicants for entry clearance.

The applicants argued that section 85(5) of the Act was incompatible with the protections in article 8 of the European Convention on Human Rights. The Act itself distinguishes between those applying for entry clearance (those outside of the United Kingdom) and those applying for leave to enter (those people already in the United Kingdom), and specifically disallows the consideration of changed circumstances for entry clearance. The applicants argued that this was an illogical distinction to make. One remedy, it was argued, was to "read down" this section in accordance with section 3 of the Human Rights Act of 1998 which states, "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Article 8 of the European Convention on Human Rights provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The applicants further suggested the significant delay in the proceedings was incompatible with article 8 protections. As to this count, the Court pointed to the Home Department's General Instructions, which suggested that nothing prevents an applicant with an outstanding appeal from applying anew for entry clearance without withdrawing the appeal. Lord Phillips of Worth Matravers noted that the delay was an apparent anomaly and not endemic to the system of entry clearance applications. Furthermore, while Lord Hope of Craighead admitted the delay was deplorable, he suggested that it was not a product of section 85(5) of the Act.

The court held that the distinction between those applying for leave to enter and those applying for entry clearance was rational in that it allowed an entry clearance officer, the person with better knowledge of the circumstances, to

evaluate the change in circumstances. However, a person applying for leave to enter is liable to deportation if the appeal is unsuccessful, and so it is logical to account for changed circumstances. Because these distinctions affected a legitimate purpose and did not inherently cause undue delay, section 85(5) of the Act did not necessarily conflict with the rights provided in article 8 of the Convention.

However, as suggested by Lord Hope of Craighead and Baroness Hale of Richmond in a concurring opinion, this does not prohibit a later case from presenting facts that show specific actions by authorities which are incompatible with the Convention rights.