Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/22366/2012
OA/22375/2012

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 1 May 2014	**On 27th May 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - ACCRA

Appellant

and

OLIVE LORAINE TCHOUTA (FIRST RESPONDENT)
JESSIE MBAMEN (SECOND RESPONDENT)

Respondents

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Mr B Hoshi instructed by Ismail & Co., Solicitors

DETERMINATION AND REASONS

1. These are appeals by the Entry Clearance Officer against decisions of the First-tier Tribunal (Judge Andonian) allowing the appeals of Olive Tchouta and Jessie Mbamen under Art 8 of the ECHR against decisions refusing them entry clearance under para 352D of the Immigration Rules (HC 395 as amended).

2. For convenience, we will refer to the parties as they appeared before the First-tier Tribunal.

The Background

3. The background to the appeals is as follows. The appellants are sisters who were born on 24 December 1981 and 11 February 1992. In 2004, the appellants' mother left Cameroon and entered the UK on 13 June 2005 and claimed asylum. On leaving Cameroon, the appellants' mother left both of the appellants, together with their siblings born on 27 July 2001 and 6 June 1998, with a neighbour. On 21 January 2010, the appellants' mother was granted humanitarian protection in the UK. Thereafter, as Judge Andonian found, she sought to be reunited with her four children. As a consequence, the appellants and their two siblings made applications for entry clearance, seeking to be reunited with their mother (the sponsor) who had been granted humanitarian protection in the UK. The appellants' siblings were granted entry clearance on the basis that they met the requirement of para 352FG as they were under the age of 18, not leading an independent life and formed part of the family unit of the sponsor prior to her leaving Cameroon to seek asylum in the UK. The appellants were, however, refused entry clearance by the ECO on 28 September 2012.

4. The decision of the ECO in respect of the first appellant was as follows:

> "You have applied to join your mother, your sponsor in the UK under the Rules for Family Reunion. As evidence of your relationship you submit your birth certificate which confirms the date of birth that you have given in your application as 24/12/1988. At the time of your application you were 23 years of age. I am therefore not satisfied that you are a child under the age of 18 as required by Paragraph 352D(ii) of the Immigration Rules HC395 (as amended)."

5. In relation to the second appellant the refusal was for essentially the same reason:

> "You have applied to join your mother, your sponsor in the UK under the Rules for Family Reunion. As evidence of your relationship you submit your birth certificate which confirms the date of birth that you have given in your application as 11/02/1992. At the time of your application you were 20 years of age. I am therefore not satisfied that you are a child under the age of 18 as required by Paragraph 352D(ii) of the Immigration Rules HC395 (as amended)."

6. As is clear, the refusal of entry clearance was based upon the fact that each of the appellants was not, as required by the Rules, "under the age of 18". Although the ECO refers to para 352D(ii) of the Immigration Rules, in fact the correct rule is para 352FG(ii) as the appellants' mother had been granted humanitarian protection (to which para 352FG applied) rather than granted asylum (to which para 352D applied). The error is, however, immaterial, as the substance of the Rules is the same.

7. On 9 July 2013, the Entry Clearance Manager confirmed the ECO's decision. He confirmed that the appellants did not meet the requirements of the Immigration Rules, again wrongly referring to para 352D. In addition, unlike the ECO, he went

on to consider Art 8 of the ECHR and concluded that any interference with the appellants' family life was proportionate. The ECM's reasons were as follows:

> "The decision to refuse the application has been reviewed by an Entry Clearance Manager in light of the grounds of appeal as detailed by the appellant on the IAFT-2 appeal form. I have reviewed the decision taking into account the grounds of appeal and additional evidence.
>
> The appellants do not meet the Immigration Rules under paragraph 352D.
>
> The appellants are over 20 years old.
>
> Under paragraph 352D the applicant must be biologically related and under the age of 18 to qualify.
>
> The Grounds of Appeal assert that discretion ought to have been exercised in respect of this application. This in itself appears to imply that the appellant cannot meet the requirements of the relevant rule as reliance is being placed on the exercise of discretion. I have carefully reviewed the decision and supporting evidence available to me and I am satisfied that the decision is correct. I am not prepared to exercise my discretion in the appellant's favour.
>
> I have also given careful consideration to your rights under Article 8 of the European Convention on Human Rights. However, I consider that refusal of entry clearance does not interfere with family life for the purposes of Article 8(1). I am satisfied that you could still enjoy family life by virtue of your sponsor's visits. Whilst I acknowledge that family life exists in this case and that refusal of the visa will interfere with it, I consider that the refusal is justified (and proportionate) in the exercise of the immigration control.
>
> The grounds of appeal do not satisfactorily address the reasons for the decision as detailed in the ECO's notice of refusal. No new, original, independent, documentation has been produced as evidence to tip the balance of probabilities in the appellants' favour. I have not been persuaded to reverse the original decision."

8. The appellants appealed to the First-tier Tribunal. The appeal was heard by Judge Andonian.

The First-tier Tribunal's Decision

9. Judge Andonian heard oral evidence from the sponsor, the appellants' mother and also from the appellants' brother. The sponsor, and the appellants' two siblings also made written statements. It is clear that Judge Andonian accepted the evidence as to the family's circumstances including the existing circumstances of the appellants.

10. In his determination, Judge Andonian set out the background to the appellants' claims. Their mother, the sponsor, had been given to a woman (called Jeanne) when she was 6 and taken from the Ivory Coast to the Cameroon. The appellants and their siblings were born as a result of multiple rapes by different men. At para 1 of his determination, Judge Andonian set out the circumstances as follows:

> "Whilst the younger siblings had been granted entry clearance they were refused. As a result the appellant's younger siblings were torn away from them who had looked after them as their own children whilst their sponsor mother was in the UK. The mother

> appeared before this tribunal and gave evidence. Her children were as a result of multiple rapes by different men. This happened in the Cameroon. She was traumatised and fled to the UK. This was a most compelling case, the sponsor and her children had suffered a great deal of abuse at the hands of 3rd parties. All 4 children were born as a result of rape, the sponsor is in the UK but her mind will not be at rest until she is reunited with her children."

11. At para 2, the judge referred to the evidence given by the appellants' siblings as follows:

> "The younger children are 15 and 12 and they were before this tribunal to give evidence. After hearing the young 12 year old boy give his evidence in which he broke down in tears recounting how, when he was in Cameroon his sisters used to sing him to sleep and used to tell him stories so he could sleep. I informed counsel that I did not consider it appropriate for this boy to give any further evidence; counsel agreed not to pursue any further questioning. The same is true of his 15 year old sister, she merely appeared to give her name and confirm that she had made a statement."

12. Then, at para 6 the judge dealt with the appellants' circumstances in the Cameroon and, noting that they had not formed an independent life, concluded that they had established family life for the purposes of Art 8.

> "The sponsor is an Ivory Coast national who was given to a woman called Jeanne when she was 6 and taken to the Cameroon. The applicants have been living a hand to mouth existence in harsh conditions. They live in a shanty town in Edea and would be homeless if not allowed to stay with a lady called Marie. Although the applicants have not formed an independent family unit they have established family life in an Article 8 sense, although there is no presumption of family life between adults and their siblings, case law has established that whether there is indeed family life is a question of fact. See the case of Semthuran v SSHD 2004. What is required in such a case is evidence of dependency which goes beyond normal emotional ties. The applicants in this case clearly have more than a normal relationship between siblings. Indeed they suffered mistreatment at the hands of Jeanne and have had to survive in difficult conditions. They have been missing their mother, only receiving telephone calls and some financial support. This has forged the applicants into a close unit unlike most normal sibling relationships. They have established a family life to the extent that Article 8 would be engaged if they were to be separated. Consequently their applications had to be considered together and the ECO did not give proper consideration to this application.

13. Then, at paras 7-8 the judge continued:

> "7. The sponsor did not consider that the children had any fathers. The children themselves do not know their fathers. Unfortunately they were all conceived as a result of various incidents of rape during the sponsor's time in Cameroon. The sponsor left Cameroon in 2004, she left her children with a neighbour and entered the UK on 13.6.2005 and claimed asylum immediately. She was granted humanitarian protection in the UK on 21.1.2010. It took 4½ years for her to obtain humanitarian protection on 21.1.2010. Since that time she has been trying to reunite with her children.
>
> 8. Neither of the elder children are married nor do they lead any independent lifestyle. They are destitute but have been allowed to stay with an elderly lady, Marie in the shanty town. They are part of a family unit with the sponsor granted humanitarian protection. The appellants were part of the sponsor's family unit before she left to seek asylum in the UK, therefore they are not post flight children

> in any respect. The sponsor left them with one of her friends as it was not possible to take them with her. None of the children have any criminal convictions or have engaged in any conduct which could affect Article 1F."

14. At para 9, the judge dealt with the issue of whether the appellants had established their relationship with the sponsor, concluding that they had:

> "It is important to note that none of the children have identity documents; they have been living in this shanty town and it was important for the ECO to have regard to this in granting them Entry Clearance and considering their papers. They have lived in harsh conditions and it has not been possible for them to get any identification. Indeed they have been living a hand to mouth existence in abject conditions. All resources they had went towards feeding and clothing themselves. ID documentations should not be an issue in this case, this particularly so as the sponsor has consistently referred to the children throughout her asylum process. They are mentioned in her screening interview, witness statement, appeal statement, medico legal report, psychiatric report and letter from her occupational therapist. It is not simply the volume of references with regard to identification, indeed this is not a case where there has only been a obscure reference to the children in the screening interview. Paradoxically, the children's existence from creation form an integral part of the sponsor mother's account. For example the sponsor has been consistent about harrowing facts about how her children were conceived following rapes. There are references to the sponsor in view of making preparations for suicide. It was only the thought of her children and that one day being reunited with them that prevented her from taking this step. This is best demonstrated in paragraph 8 of the psychiatric report dated 30.6.2009 which I have read and which states inter alia *'she had bought drugs from a pharmacy. She had the drugs ready and went to the kitchen to get a glass of water to take them. Another woman in the house saw into her room and saw the drugs and asked her what she was doing. This woman said to her 'do you want to see your children again'? Then stayed with her to make sure that she did not take the drugs.'* Another powerful identification point again shrouded in tragedy related to Jessie. In paragraph 7 of the sponsor's asylum application statement the account of her being burnt with cooking oil and being pushed to the ground is given. The sponsor describes the fact that Jessie still has scarring from the incident. She has very bad scarring on her arm, to her elbow and around the side of her face near her eyes. When Jessie presents herself to the High Commission the ECO will note that she still has these scars which match the account given in the asylum statement nearly 6 years ago. In the light of all these matters, the identification is not an issue in this case. If the ECO is still in doubt they would be invited to arrange DNA testing which has not been discussed before to determine the issue. The sponsor has confirmed that she and her children are willing to co-operate with a DNA test if required."

15. The judge's reasons for finding a breach of Art 8 are, in large part, contained in paras 3-4 and 10-11 of his determination. At para 3-4 he said this:

> "3. It is very concerning that the siblings have been split up in this way. The ECO did not attach any weight whatsoever to the delay in the sponsor being granted humanitarian protection in the UK and the fact that she had been granted the same within a reasonable period it is likely that at least one of the elder children would have been under 18 at the time of the decision; this is the proportionality in assessing whether to split the family up and interfere with their Article 8 rights.
>
> 4. The decision maker did not appear to have considered the best interest of the sponsor's younger when refusing the elder children splitting up the family. Neither did the decision maker appear to have considered the principles of the

> family unity when making a decision that allowed half the family permission to travel to the UK whilst preventing the other half from doing so."

16. Then, at paras 10-11 he concluded that the appellants had discharged the burden of proof upon them in establishing that the ECO's decisions breached Art 8.

> "10. There are certainly compassionate elements in this case that go over and above the normal Article 8 claim. This is a most compelling case, the sponsor and her children have suffered hugely. Since the sponsor was granted humanitarian protection she has been working towards a reunion with her children. She has been most unfortunate in a short supply area for public funded legal advisors and it took some time to secure representation. She has been worried about her children's condition and the poor condition in which they are living.
>
> 11. In the above circumstances the Burden of proof is on the appellants to satisfy this tribunal on the civil balance of probabilities that they ought to be reunited with their 2 younger siblings. I believe that this is a most compelling case and there is family life that goes beyond the normal relationship between siblings generally. The appellants have discharged that burden of proof. I have also considered that the 2 younger children's Human rights have not been taken into account, their best interest have been taken into account in the way the decision was made. The respondent has not taken into account section 55 of her Borders, Citizenship and immigration Act 2009, neither has she assessed proportionality under article 8 in the way that it should be reduced (see EB Kosovo), has not taken into account the rights of third parties in an article 8 situation (see Beoku-Betts); has failed to do anything by her decision to foster and promote family life where practicable, see Sisojeva, and has failed to consider the significance of maintaining the ties between the appellants and their two younger siblings and that they are strong enough to constitute family life, see Nasri v France, Beldjoudi v France and Advic v UK."

The Appeal to the Upper Tribunal

17. On 10 January 2014, the First-tier Tribunal (DJ Dearden) granted the ECO permission to appeal to the Upper Tribunal against Judge Andonian's determination.

18. The ECO's grounds essentially raise three points. First, the judge had failed to determine whether the appellants were related as claimed and, in para 9 of his determination, he was wrong to invite the ECO to arrange DNA testing if there was any doubt. Secondly, the judge had failed to have regard to the Immigration Rules and that the appellants could not meet the requirements of the Rules in determining whether there was a breach of Art 8. Thirdly, the judge had failed to give adequate reasons for concluding that the refusal of entry to the appellants was disproportionate and not in their best interests.

Discussion

19. In his oral submissions, Mr Richards who represented the ECO relied upon the grounds although he did not directly refer to the first ground concerning the establishment of the relationship between the appellants and sponsor. We are in no doubt that he was correct not to press this point on behalf of the ECO. First, the Entry Clearance Officer in her decisions of 28 September 2012 (which we have set out above) did not raise this issue at all. The refusals were solely on the basis that the

appellants were not under the age of 18 and so could not meet the requirements of the Rules. The Entry Clearance Manager's decision does make reference to the issue. We have already set out the ECM's decision above. The only reference to the issue of the appellants' relationship with the sponsor is the single sentence: "Under para 352D the applicant must be biologically related and under the age of 18 to qualify." No further reasoning is offered and it is far from clear that the ECM was seeking to raise this issue which had never been raised by the ECO in her decisions. It may well be that the Presenting Officer at the First-tier Tribunal hearing did seek to argue that the appellants had not established their relationship with the sponsor and that may explain why Judge Andonian dealt with the matter at para 9 of his determination which we have set out above.

20. In our judgment, Judge Andonian gave entirely adequate reasons at para 9, based upon the evidence, for concluding that the appellants have established that the sponsor is their mother. We do not read the judge's comment that DNA testing could be organised by the ECO if the latter was still in doubt as undermining the judge's clear finding and reasons for concluding that the appellants had established that the sponsor is their mother. For these reasons, we reject the first ground upon which Judge Andonian's decision was challenged.

21. Turning now to the remaining grounds, Mr Richards submitted that the judge had made a wholly inadequate assessment of Art 8. He submitted that the judge had failed to engage in any balancing exercise in relation to proportionality taking into account the public interest in effective immigration control and that the appellant could not meet the requirements of the Rules because of their ages. Mr Richards submitted that the appellants were adults and had been separated from their mother for a number of years. The decision to separate them from their younger sibling was made by the sponsor. He submitted that the appellants' inability to comply with the Immigration Rules weighed heavily in the case and the judge had failed to do so. He acknowledged that it was possible to say that their claims were exceptional but the judge had come nowhere near carrying out the balancing exercise prior to coming to such a conclusion. Consequently, Mr Richards submitted that the judge's decision could not stand.

22. Having carefully read Judge Andonian's decision, there is no doubt that his decision could have been better structured in considering Art 8. However, Judge Andonian does deal with the essential elements of the appellants' Art 8 claims. He clearly found that the appellants have established a family life together based upon dependency which goes "beyond normal emotional ties". That is a finding which undoubtedly applied to the relationship between the appellants and their two siblings prior to the younger siblings coming to the UK having obtained entry clearance. Judge Andonian recognised that they formed a "family unit" living together. The evidence was (and Judge Andonian accepted the evidence before him) that the appellants looked after the younger siblings. Judge Andonian also found that the appellants (again together with the younger siblings) formed a "family unit with the sponsor" prior to her coming to the UK. Given the language used, it is difficult to argue that Judge Andonian was not well aware that the appellants could

not meet the requirements of the Immigration Rules (namely para 352FG) but only to the extent that they were not "under the age of 18". Although his reasons could perhaps have been more clearly expressed, we are in no doubt that he concluded that the separation of the appellants from their younger siblings was not in the latter's best interests. At a number of points in his determination, Judge Andonian referred to the fact that the ECO's decisions split up the four children who had formed a "family unit" initially with the sponsor and then together following her flight to the UK. Likewise, Judge Andonian clearly made a number of positive findings which led him to conclude that the appellants' circumstances were "most compelling". Whilst Judge Andonian made no specific reference to the legitimate aim of the economic well-being of the country and preventing disorder or crime, we are in no doubt that this experienced First-tier Tribunal Judge must have had in mind the rather obvious public interest upon which the appeals were premised, namely that the appellants could not meet the requirements of the Immigration Rules because of their ages.

23. That said, there are shortcomings in Judge Andonian's determination. However, given his very positive finding in relation to the appellants' circumstances and relationships with their siblings in the UK, we do not see any real basis for supposing that if Judge Andonian had set out a more structured analysis of the issue raised in relation to Art 8 and had expressly referred to the public interest and more clearly engaged in the balancing exercise involved in proportionality, that the outcome of the appeals would have been any different. The circumstances of the appellants were, as Judge Andonian put it, "most compelling", given their history and the dislocation produced with their younger siblings by the ECO's decisions. It is clear that he considered the case so exceptional or compelling that it went beyond any need for a delicate balancing exercise. We would have reached precisely the same decisions on the evidence ourselves. For these reasons, we see no good reason to set aside the determination despite any shortcomings.

Decision

24. For these reasons, the decisions of the First-tier Tribunal allowing the appellants' appeals under Art 8 stand.

25. The ECO's appeals to the Upper Tribunal are dismissed.

Signed

A Grubb
Judge of the Upper Tribunal