IAC-TH-WYL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/04791/2014
OA/04794/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower (Birmingham)	**Decision & Reasons Promulgated**
On 26th March 2015	**On 15th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

DESMOND NGWEFUNI – FIRST APPELLANT
PROTUS NGWEFUNI – SECOND APPELLANT
(ANONYMITY ORDER NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
ON BEHALF OF ECO ACCRA

Respondent

Representation:
For the Appellants: Miss H Masih instructed by Kausers Solicitors
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are citizens of the Republic of Cameroon, born respectively on 20th March 2001 and 12th August 1999. They appeal with permission against the decision of First-tier Tribunal Judge Crawford to dismiss their appeals against refusal of entry clearance as the brothers of the Sponsor, Goodlove Pekichu Ngwefuni. He is living in the United Kingdom with

refugee status. The Appellants are respectively the Sponsor's half brother and brother.

2. The judge at first instance found that the Appellants could not meet the requirements of paragraph 352D of the Immigration Rules as they were not the Sponsor's children. A guardianship document which had been produced, dated October 2013, postdated the grant of asylum to the Sponsor in July of 2013. He also dismissed the appeals with regard to Article 8 ECHR. The Appellants were not represented at the original hearing although they had the assistance of a Mr Forbes, a Mckenzie friend. Mr Forbes is noted as the Appellants' representative in the application for permission to appeal to this Tribunal, although the Appellants now have professional representation.

3. It is contended in the grounds that the judge appeared to accept at the hearing that the Appellants formed part of the Sponsor's family household in Cameroon but this was not reflected in the determination. It was also stated that the judge failed to refer to information in the Sponsor's substantive asylum interview, which was before him, which indicated that the Appellants lived with the Sponsor in Cameroon. Permission was granted by First-tier Tribunal Judge Ford on 19th January 2015. She commented that she could see no reference in the Record of Proceedings to an acceptance on the part of the judge as to what was said to be in a screening interview but it was the case that he had not referred to the extract from the substantive asylum interview and it was arguable that this evidence had been overlooked. The Respondent filed a brief response under Upper Tribunal Procedure Rule 24 asserting that the findings made were sustainable.

4. At the hearing before me the Appellants were represented by Counsel, Miss Masih, who handed in a skeleton argument. I also had before me the original documents, including the Respondent's core bundle and a bundle of documents submitted by the Appellants' current representatives. Miss Masih said there appeared to have been doubt as to what had actually been before the judge at first instance and I was able to confirm that the notes of the substantive asylum interview, questions 12 to 16 and replies, and the guardianship documents had indeed been before the Tribunal at the time of the first hearing. She relied upon her detailed skeleton argument.

5. Briefly in that skeleton she sought to rely upon Article 8 ECHR, in addition to the grounds as pleaded, submitting that the grounds should be interpreted liberally and that in any event the Article 8 issue was "**Robinson** obvious" (**R v SSHD ex parte Robinson [1998] QB 929**). She did not now seek to rely upon one paragraph in her skeleton argument which referred to the lack of reference in the decision under appeal as to what documents had been before the judge; she accepted, now having seen a copy of the screening interview, that the living arrangements for the Appellants were not mentioned. Those arrangements were however mentioned in the substantive interview to which the judge had not

referred. He appeared to have attached no weight to the fact that he had accepted that the Appellants had been living with the Sponsor in Cameroon. The judge had failed to have proper regard to or properly reflect the Sponsor's oral evidence on relevant factors and there had been only a passing reference to the guardianship documents. It was arguable that there was a *de facto* adoption. The fact that the guardianship documents post-dated the grant of refugee status was not relevant to the Article 8 element of the claim, which was to be assessed as at the date of decision. It was said that the judge had not followed a structured approach to the Article 8 considerations in accordance with the **Razgar** steps and had not considered the welfare and best interests of the Appellants, given that he accepted that the Sponsor and the Appellants had lived together in the Cameroon. Finally, it was said that the hearing, which took place on 15th September 2014, post-dated the introduction of Sections 117A-C of the Nationality, Immigration and Asylum Act 2002 and the judge's failure to apply the provisions of that Section amounted to a material error of law. She continued that the original Grounds of Appeal had raised Article 8, albeit obliquely.

6. Mr Smart for the Respondent opposed the widening of the appeal now to include Article 8 ECHR. He referred to the decision of the Upper Tribunal in **Ved and Another (Appealable decisions; permission applications; Basnet) [2014] UKUT 150 (IAC)** and to the judgment of the Court of Appeal in **Sarkar v SSHD [2014] EWCA Civ 195**. He submitted that Article 8 in this case was not a **Robinson** obvious matter. It had not been obvious to the judge who had granted permission and he said it was not obvious to him. The challenge before the First-tier Tribunal Judge appeared to be to a finding that there were no exceptional circumstances. The witness statement now provided contended that the judge had not dealt properly with the evidence, implying that the judge had mischaracterised the evidence. At this point I read out the Record of Proceedings which was on the Tribunal file and Mr Smart submitted that paragraph 6 of the decision was a fair record of what had been said. Matters of weight were for the judge. In reality his consideration of the documents had been correct. Mr Smart said it was difficult to see how an Article 8 claim could succeed. The Sponsor had come to the United Kingdom in June of 2013. By the date of decision he had been here for over twelve months and the Appellants, his brother and half brother, were being cared for by someone else. He was not in a position to maintain them in this country.

7. Finally in reply Miss Masih said that there was evidence of a *de facto* adoption in the documents, which the judge had not properly considered. The guardianship documents were issued by a legally recognised authority. She continued to rely upon paragraph 352D, in addition to Article 8. Mr Smart commented that the Supreme Court had indicated a strict approach to *de facto* adoptions in **AA (Somalia) v ECO (Addis Ababa) [2013] UKSC 81**.

8. I will deal first with the appeal as regards paragraph 352D of the Immigration Rules. The judge set out this paragraph in his decision. He found that the Appellants could not meet the requirements of the paragraph as they were not the Sponsor's children (see paragraph 11 of the decision). At the hearing Miss Masih for Appellants sought to rely upon the concept of *de facto* adoption. I find that the point has no substance having regard to the judgment of the Supreme Court in **AA (Somalia)**. As is pointed out in that judgment the provisions of paragraph 352D relating to *de facto* adoptions have to be considered having regard to paragraph 309A (see paragraph 15 of the judgment). The current Appellants were not able to meet the requirements of paragraph 309A as they had not lived with the Sponsor for the period of twelve months immediately preceding their applications, he having been in the United Kingdom since May of 2013 and the applications being made in December of that year. The appeals therefore could not potentially have succeeded under the provisions of the Immigration Rules as relied upon. There was no material error on the part of the judge.

9. I turn now to the matter of Article 8. Miss Masih sought to rely upon this; Mr Smart contended that as it had not been an expressed part of the application for permission to appeal, and had not been mentioned in the grant of permission, it should not be entertained. I note that the initial refusal did not refer expressly to Article 8 but it was mentioned in the Entry Clearance Manager's review. In the Grounds of Appeal to the First-tier Tribunal (which had been drafted by the Sponsor in person) Article 8 was again not expressly mentioned but there are references to the Appellants forming part of the Sponsor's family unit. Article 8 was addressed by the judge at first instance. Mr Smart referred me to various authorities. In **Sarkar** the reality was that the Appellant was regarded as having abandoned the Article 8 element of the appeal. That is a position distinct from that of the current appeal where there has been no expressed abandonment.

10. In **Sarkar** the Upper Tribunal had refused to grant permission on the Article 8 ground. That again is not the case here. Lord Justice Moore-Bick stated (at paragraph 17 of his judgment):

> "… I also accept that in an appropriate case the Tribunal has jurisdiction to consider new points that had not been included in an appellant's original grounds of appeal – see **DL-H v Devon Partnership NHS Trust [2010] UKUT 102 (AAC)** at paragraph 3 – but that is not the same as saying that the Tribunal can re-open a decision refusing permission to appeal on a particular ground …"

My view is that the judgment in **Sarkar** does not preclude me at this stage from hearing submissions in respect of Article 8. This is consistent with the overriding objective as expressed at Rule 2 of the Upper Tribunal Procedure Rules to avoid unnecessary formality and seek flexibility in the proceedings. This is particularly relevant in the case of minor Appellants, the more so when they have not been professionally represented. Mr Smart also relied upon the judgment in **Virk**. The core of that judgment

was whether jurisdiction could be conferred by agreement. In that case the deciding judge found that there was no right of appeal but the point was not put to the Appellant and there was procedural irregularity. The current appeals are quite distinct in their issues. The third case he referred to was **Ved** but that case concerns validity of appeals. In all the circumstances I find that it is appropriate for me in these appeals to have regard to the issues arising under Article 8 on the basis outlined by Miss Masih.

11. To decide whether there was an error of law in respect to the above matters it is necessary again to look at the judge's decision. The judge noted at paragraph 10 of his decision that the Sponsor's evidence was that the Appellants had been part of a family unit in Cameroon. He accepted that the Sponsor had mentioned at the screening interview that he lived with the Appellants. In the following paragraph he noted that the guardianship document, dated October 2013, postdated the grant of asylum. In fact the screening interview (which was not before the judge) makes no mention of the Appellants living with the Sponsor but the extract from the substantive interview (which the judge did have) did state this. The concept that the Appellants lived with the Sponsor was clearly appreciated by the judge, even if he did not refer to the correct documentary evidence.

12. The judge accepted (at paragraph 13) that the Appellants did live with the Sponsor in Cameroon and went on to state that they now had family and private life with their mother, uncle and elder brother and their sisters were also living there. I have to consider whether, bearing in mind the points now made on behalf of the Appellants, the judge could arguably have come to a different conclusion. At the hearing I did read through the Record of Proceedings. I found there was nothing to persuade me that the judge had mischaracterised the evidence and I agree with Mr Smart that the judge had adequately summarised it. There was no statement or other commentary from Mr Forbes to contradict this view.

13. In order for Article 8 to be engaged it was necessary for it to be established that there was family life, of a magnitude to engage the Article, or a breach of private life of sufficient gravity. As to family life on the evidence before the judge the Sponsor had not lived with the Appellants since at least May of 2013. The Sponsor was living on benefits and had not been in a position to send any remittances to the Appellants. They were living with other members of the family in Cameroon. However the judge approached Article 8, those were the circumstances he was faced with.

14. Although there are guardianship documents dated October 2013 those were clearly not in place whilst the Sponsor was living in Cameroon and it is noticeable that in the application forms the Appellants described the Sponsor as their brother, not as their father, and they gave details of a legal guardian in Cameroon, Gladys Pekwefah Ngwana. None of this is indicative of the Appellants having continuing family life with the Sponsor

now that he is in the United Kingdom with his immediate family. So far as private life is concerned there would be no interference with private life that is currently enjoyed by the decisions under appeal. On the evidence before him the judge at first instance could well have found that Article 8 was not in fact engaged.

15. If the matter of proportionality was in issue he did make findings which were open to him on the evidence that the Appellants were living with other family in Cameroon and were not in exceptional circumstances of poverty or hardship. It is correct that he did not make express findings as to their welfare and best interests but given the requirements of paragraph 117B of the Immigration Rules, notably the importance of immigration control and of parties being self-supporting and the Sponsor's accepted lack of means whereby he and his family are currently living on benefits, there was no realistic prospect of the Appellants succeeding under Article 8.

16. In these circumstances I find that although the judge could with advantage have expressed things more fully and approached Article 8 differently nonetheless there was no material error of law in the decisions he reached. Accordingly those decisions stand.

17. There was no request for an anonymity order and I make none.

Decision

18. There was no material error of law in the original decisions at first instance and those decisions, that the appeals be dismissed both under the Immigration Rules and with respect to Article 8 ECHR, therefore stand.

Signed Date 09 April 2015

Deputy Upper Tribunal Judge French