Neutral Citation Number: [2010] EWCA Civ 1236
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT Nos. OA/19807/2008; OA/19802/2008; OA/17362/2008]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 11 October 2010

Before:

LORD JUSTICE LAWS
LORD JUSTICE LLOYD
AND
LORD JUSTICE GROSS

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Between:

(1) MS (SOMALIA) AND OTHERS	**First Appellant**
(2) KI (SOMALIA) AND OTHERS	**Second Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

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Mr Stephen Knafler QC & Mr Colin Yeo (instructed by Messrs Lawrence) appeared on behalf of the **First Appellant.**

Mr Philip Nathan (instructed by Lupin Messrs Hersi & Co) appeared on behalf of the **Second Appellant.**

Mr Daniel Beard & Mr Colin Thoman (instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

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Judgment

Lord Justice Laws:

1. These conjoined appeals are brought with permission granted by Longmore LJ on 16 March 2010 (MS) and 12 May 2010 (KI) against a determination of the Asylum and Immigration Tribunal to the effect that the appellants did not have a right to enter the United Kingdom under paragraphs 352A and 352D of the Immigration Rules. The appeals require specific consideration of the terms of those paragraphs. Broadly, they concern the question: in what circumstances will family members coming to the United Kingdom to join a sponsor, who is said to be a refugee, be permitted to enter under the rules?

2. I turn to the facts. For convenience I will adopt the nomenclature used in respondent's skeleton argument and refer, if I may, to the appellants in the MS case as S1 to S3 and the appellants in the KI case as I1 to I5. I intend no discourtesy.

3. S1 and K1 are the wives of sponsors settled here and their claim to enter or remain in the United Kingdom, together with their dependant children, S2 and S3, and I2 to I5 respectively, is advanced by reference to the status of their sponsor husbands. They are Somali nationals, respectively aged 27 (S1) and 36 (I1).

4. I deal first with the MS appeal. The sponsor, SAA, fled Somalia in 1991 at the outbreak of the civil war. On 13 January 2002 he married his first wife, LD, in Ethiopia. LD came to the United Kingdom in August 2002 and on 8 January 2004 the Secretary of State recognised her as a refugee and granted her indefinite leave to remain.

5. On 24 December 2002 SAA married S1 in Ethiopia. On 17 May 2005 SAA was granted entry clearance as the spouse of a refugee, namely LD. On 28 May 2005 he travelled to the United Kingdom and was granted indefinite leave to remain. By this time S1 had given birth to S2 and become pregnant with S3. On 4 December 2007 SAA divorced LD. Three days later, on 7 December 2007, S1 applied for entry clearance to join SAA as the spouse of a refugee. That was refused on 1 February 2008.

6. S1's appeal against that refusal was dismissed by Immigration Judge Devittie on 23 October 2008. Reconsideration was ordered, but on 15 December 2009 the reconsideration appeal was dismissed by the Asylum and Immigration Tribunal, Deputy President Ockelton, Senior Immigration Judge Grubb and Senior Immigration Judge Kekic. That is the decision now under appeal, with permission granted by Longmore LJ.

7. I turn to the facts of the KI appeal. In this case also the principal appellant, I1, was not the first wife of the sponsor, to whom I shall refer as HMA. HMA had two children by his first wife, respectively born in 1989 and 1990. He lost contact with her, however, and on 17 September 1990 married his second wife in Mogadishu. In 1996 he lost contact with her. On 2 January 1997 he married I1 in Mogadishu. Four children, I2 to I5, were born to the marriage between 1998 and 2002.

8. On 19 October 2003 HMA's second wife, not I1, arrived in the United Kingdom. She was granted asylum. On 22 March 2005 HMA applied for entry clearance to join her, relying on provisions in the Immigration Rules concerning refugee family reunion and denying, as I understand it, that he was in any other relationship. His first two children born to his first wife were permitted to join him. He was granted indefinite leave to remain on 3 January 2006. He was at length divorced from his second wife.

9. In November 2007 I1 to 5 left Somalia for Uganda. They applied for entry clearance to come to the United Kingdom. That application was refused on 16 October 2008 on the footing that they did not meet the requirements of the refugee family reunion provisions. Their appeal was dismissed on 7 July 2009. On 18 August 2009 Senior Immigration Judge Spencer ordered a reconsideration. A full second stage reconsideration was conducted before Immigration Judge Wellesley-Cole, who dismissed the appeal on 19 January 2010. That is the decision now appealed to this court with permission granted by Longmore LJ.

10. None of the appellants claims to be a refugee within the meaning of that term given by Article 1A(2) of the 1951 United Nation Refugee Convention (I need not set out the definition); nor is it said that the sponsor in either case fell within the Convention definition. In both cases it is claimed, however, that the sponsor is to be taken to be a refugee and that the appellants are entitled to enter the United Kingdom as the sponsor's family members.

11. It is convenient at this stage to set out the material rules. These are paragraphs 352A and 352D of the current Immigration Rules. 352A:

> "352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse civil partner of a refugee are that:
>
> (i) the applicant is married to or the civil partner of a person granted asylum in the United Kingdom ; and
>
> (ii) the marriage or civil partnership did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and
>
> (iii) the applicant would not be excluded from protection by virtue of article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and

(iv) each of the parties intends to live permanently with the other as his or her spouse civil partner and the marriage is subsisting; and

(v) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity."

352D:

"The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who has been granted asylum in the United Kingdom are that the applicant:

(i) is the child of a parent who has been granted asylum in the United Kingdom; and

(ii) is under the age of 18."

I need not set out the balance of the paragraph.

12. It is important to have in mind that the case for S1 and I1, the wives of the sponsors, depends entirely on the application and scope of paragraph 352A of the rules. The case for the children depends on the application of 352D, but the points are the same and no separate argument has been addressed relating to 352D.

13. There were certain grounds advanced in both appeals in reliance on the Qualification Directive 2004/83/EC and on the principle of legitimate expectation. These have been abandoned. In order for S1 or I1 to succeed in her appeal, she must show that her case falls within the terms of rule 352A. Its first requirement is at 352A(i); it is that "the applicant is married to or the civil partner of a person granted asylum in the United Kingdom." It is also to be noted that the term “refugee” is used in the opening words of 352A.

14. The primary question then for this court is whether, on the proved or agreed facts, either sponsor was a refugee or a person granted asylum in the United Kingdom. Neither sponsor has ever been granted asylum in the United Kingdom as a person falling within the definition of refugee in Article 1A(2) of the Convention: that is, of course, a person entertaining a well-founded fear of persecution on stated grounds. As I have shown, SAA, the sponsor in the MS case, obtained indefinite leave to remain as the spouse of a refugee, his wife LD. HMA, the sponsor in the KI case, also obtained indefinite leave to remain as the spouse of a refugee, his second wife, not I1. The essence of the appellant's argument is that the treatment of the sponsors by the Secretary of

State in accordance with long established policy constitutes the grant of asylum or the conferment of refugee status.

15. Reference was made first by Mr Knafler QC for the MS appellants to a concession made by the Secretary of State at paragraph 15 of the determination of the AIT now under appeal. That reads:

> "On behalf of the Respondent, Mr Deller did not seek to argue to the contrary. He accepted that it was the Secretary of State's policy normally to recognise a family member as a refugee in line with the person in the UK who was a refugee by virtue of his fear of persecution. That indeed is the terms of the guidance to ECOs [Entry Clearance Officers] and the relevant IDI [standard departmental instructions] (set out at paragraphs 5.6 and 5.7 of Mr Yeo's skeleton argument). He also accepted that the Sponsor in these appeals had been recognised as a refugee on that basis. Further, he accepted, in light of DR (DRC) that the phrases in paragraphs 352A and 352D of 'refugee' and 'a person granted asylum' were synonymous."

16. In light of those concessions, the case proceeded before the AIT on the basis of an argument concerning paragraph 352A(ii). It would appear that arguments to the effect that the sponsor in the MS case was not a refugee or had not been granted asylum were no longer pursued before the tribunal by Mr Deller. However, they have been resurrected by a respondent's notice for which my Lord, Lloyd LJ, has given leave, and indeed the burden of argument in this case has focused upon the terms of 352A(i).

17. Mr Knafler referred to AB (DRC) [2007] EWCA Civ 1422 as showing that a family member refugee, so-called, is to be treated and has been treated as entirely equivalent to a primary Convention refugee for the purposes of Article 8 of the European Convention on Human Rights. Mr Knafler's overall submission was that a family member refugee obtains the status, and not only the rights, of a Convention refugee. It is said with some force that there is nothing on the face of paragraph 352A to disapply that paragraph from deemed refugees or family member refugees so far as the identity and status of the sponsor is concerned.

18. Mr Knafler referred in the course of his reply to certain policy documents. I may note in particular the Asylum Policy Instructions issued by the Home Office relating to family reunion. They are in fact no longer in force and may not have been in force at the time of some relevant events in this case, but that is perhaps of minor importance given that Mr Knafler's reference to material of this sort is really to demonstrate what has been an ongoing policy in the Home Office and indeed amongst many other State authorities who have to deal with refugees. Paragraph 3 of the document is headed "Eligibility of

Sponsoring Family Members". 3.1, “Where the sponsor has refugee status”, provides:

> “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 – e.g. 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.”

19. Mr Knafler also referred to the United Nations Refugees Handbook. In a section headed "Chapter 6, The Principle of Family Unity" a number of propositions are set out, in particular at paragraph 184:

> "If the head of a family meets the criteria of the definition [the Refugee Convention definition], his dependents are normally granted refugee status according to the principle of family unity."

And other paragraphs in the same chapter use like language. Mr Knafler submits that the language of refugee status, in the context of measures dealing with family unity, is the genesis of the terms of the Asylum Policy Instructions. Overall his case is that there is no space to be found between a Convention refugee in the primary sense of the term and a person granted refugee status as a family member.

20. Mr Nathan in the KI appeal for his part adopts Mr Knafler's submissions, but referred also to his client's travel document, which has endorsements bearing a heading "United Nations Convention of 28 July 1951 [Refugee Convention]" and then a reference to the Council of Europe agreement on the abolition of visa requirements for refugees of 20 April 1959. He referred to another document (which is I think) a specimen). It bore words which, as I understand it, also appear in the passport issued to his client as follows:

> "United Nations Convention of 28 July 1951. The holder is authorised to return to the United Kingdom without a visa within the validity of this document."

21. The significance of this, says Mr Nathan, is that it shows that his client was exempted from the restrictions imposed on returning residents by paragraph 18 of the Immigration Rules. Those restrictions apply in the ordinary way to persons granted indefinite leave to remain; but the circumstances of their

exemption in this case, says Mr Nathan, shows that his client was indeed being treated as having the status of a refugee.

22. The essence of the argument for the Secretary of State is that the grant of refugee status, certainly the grant of refugee rights to a family member of a Convention refugee, does not constitute that person a Convention refugee; nor does it demonstrate that a sponsor within the meaning of paragraph 352A(i) of the Immigration Rules may include a family member refugee as opposed to a primary refugee or a Convention refugee properly so called. Reference was made to the recent decision of the Supreme Court in ZN & Ors V Entry Clearance Officer [2010] UKSC 2, where Lord Clarke says at paragraph 29:

> "29. In para 19 [a reference to my judgment in this court in the same case] Laws LJ made the point that it is apparent from Article 1A(2) of the Refuge Convention that it is no part of the definition of 'refugee' that the subject be formally recognised as such. He added that it was plain that those who drafted the rules did not intend that persons seeking entry to the United Kingdom might have the benefit of the especially advantageous provisions of the rules relating to the family members of a refugee in cases where there was only an assertion that the sponsor was a refugee, but no authoritative finding or confirmation to that effect. The Court entirely accepts that that is so. It further accepts that the term "has been granted asylum" is used in para 352D so as to confine the rule's operation to circumstances where the sponsor has been recognised as a refugee by the Secretary of State before an application for family reunion under the paragraph can be made. Finally, it accepts that the expression 'person granted asylum' in sub-paras 352A(i) and (ii) has the same effect.
>
> 30. However, these conclusions are not inconsistent with the appellants' case. As the Court understands it, it is accepted that a person is not granted asylum until the Secretary of State has formally granted it."

23. It is right to say that the Supreme Court in ZN were dealing with a different issue from that which falls to be decided here. However, Mr Beard's submission is that the language and context of these observations of Lord Clark point strongly to the proposition that the court is accepting that a paragraph 352 sponsor must be a primary refugee recognised as such in the Convention sense. It is worth noticing also, with respect, a further observation made by Lord Clarke at the end of paragraph 35 in the same case:

> "Moreover, the risk of persecution may be such that the need for protection for family members is particularly stark."

24. In my judgment paragraph 352A contemplates that the sponsor referred to is to be a Convention refugee as such. The policy relating to family members, as it seems to me, hangs on the particular circumstances of a Convention refugee. So much is supported by the observation of Lord Clarke at the end of paragraph 35 in ZN. The policy is to allow the refugee to bring in family members, for sound humanitarian reasons. There may be further ancillary reasons to do with the State's own convenience; but essentially this is a humanitarian policy arising from the circumstances in which a Convention refugee finds himself. There is nothing in such a policy to say that the family member, granted entry into the United Kingdom, may in his or her turn introduce into this country other family members. That, in my judgment, is not within the contemplation of the rule 352A or 352D, nor within the contemplation of the policy documents to which Mr Knafler has perfectly properly referred us.

25. In all these circumstances, it seems to me that the Secretary of State's respondent's notice is well founded and, that being so, I would dismiss these appeals.

Lord Justice Lloyd:

26. I agree.

Lord Justice Gross:

27. I also agree.

Order: Appeals dismissed