Neutral Citation Number: [2008] EWCA Civ 1453

Case No: C5/2008/0890

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
REF NO: 0A113692006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2008

Before :

LORD JUSTICE WALLER
LORD JUSTICE THOMAS
and
LORD JUSTICE MAURICE KAY

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Between :

MK(SOMALIA) & ORS (by their guardian and litigation friend AH)	**Appellants**
- and -	
ENTRY CLEARANCE OFFICER	**Respondent**
JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS	**Intervener**

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Mr Nigel Pleming QC and **Mr Eric Fripp** (instructed by **Messrs Pickup & Jarvis**) for the **Appellants**
Miss Lisa Giovannetti (instructed by **Treasury Solicitors**) for the **Respondent**

Mr Simon Cox (instructed by **Simons Muirhead & Burton)** for the **Intervener**
(written submissions only**)**

Hearing date : 3 December 2008

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Judgment

Lord Justice Maurice Kay :

1. The three appellants are female children who are nationals of Somalia. They are now aged 14, 12 and 11. Their history is harrowing. They and their family belong to the Ashraf, a minority group which does not possess an armed militia for its protection. Members of the group have been accepted by the Asylum and Immigration Tribunal (AIT) as being at risk of persecution in Somalia. The appellants' mother was killed by tribal militia men in Somalia in 1997 when the eldest girl was aged 3 and the youngest was only 5 days old. Their mother drowned after being thrown into a well as punishment for resisting the attempts of the militia men to rape her. The appellants' father is missing in Somalia and has not played a parental role since before the death of his wife. After her death the appellants were taken into the household of their maternal aunt (the Sponsor) in which she lived with her husband and two children - a girl Hodan (now aged 12) and a boy Abdulrahman (now aged 11). A further girl, Hodo, was born to the Sponsor and her husband in 2000 and is now aged 8. From 1997, the appellants were raised as part of the Sponsor's household, the Sponsor becoming the only mother figure within their recollection. They were treated equally with her natural children.

2. In 2003 the Sponsor and Hodo became separated from the family group when they were kidnapped. The Sponsor was forced into slavery by militia men, along with another child (a son younger than Abdulrahman but older than Hodo) who was killed when the Sponsor and Hodo escaped from the militia men's camp during fighting. The Sponsor and Hodo ultimately travelled to the United Kingdom where, on 25 July 2005, the Sponsor was recognised as a refugee with Hodo as her dependent. In the meantime, after the Sponsor and Hodo had separated from the rest of the family, the remaining children including the appellants were cared for by the Sponsor's husband. Eventually the Sponsor traced the rest of the family and her husband took them to Ethiopia in order to seek reunion with the Sponsor. In January 2006 applications for entry clearance to join the Sponsor were made by the Sponsor's husband, her two children and the appellants. The entry clearance officer at Addis Ababa granted clearance to the husband and the natural children of the Sponsor and they are all now reunited with her in this country. However, clearance was refused in the case of the appellants. It seems that the appellants remain in Ethiopia under the care of the mother of the Sponsor's brother's wife.

3. Following the adverse decision of the entry clearance officer, the appellants appealed to the AIT. Their appeals were dismissed by an Immigration Judge and they were further unsuccessful before a Senior Immigration Judge on reconsideration.

4. In a nutshell, the appellants are unable to secure entry pursuant to the Immigration Rules. They cannot satisfy paragraph 297, the general provision for children seeking reunion with a relative, because they could not be maintained and accommodated by the Sponsor without recourse to public funds. More importantly, they do not qualify under the Refugee Family Reunion provisions of the Immigration Rules because their status in the family amounts to no more than de facto adoption. Their primary case is that they are entitled to entry clearance pursuant to a concessionary policy which is said to exist outside the Immigration Rules and to accrue for the benefit of children "who formed part of the family unit prior to the time the Sponsor fled to seek asylum". Their secondary case is that, if they are not entitled to entry clearance pursuant to such a policy, it would nevertheless breach their rights under Article 8 of

the European Convention on Human Rights and Fundamental Freedoms if they were to be denied entry clearance. They failed by reference to both cases before the AIT. It is common ground that the decisions of the AIT on Article 8 were vitiated by legal error and that the Article 8 case will have to be remitted for further reconsideration. The live issue on this appeal relates to the policy which is claimed to exist outside the Immigration Rules. In order to establish or interpret it, the appellants seek to rely on customary international law but also on domestic arguments which are not dependent on that.

5. De facto adoption is of particular concern in cases from Somalia because (1) the institutions of the state are greatly depleted and formal adoption is unlikely and (2) in any event there are religious difficulties surrounding formal adoption based on the Islamic principle of *Nasabiyah* or blood lineage.

Customary international law

6. On behalf of the appellants, Mr Pleming QC prefaces his submissions by seeking to rely on customary international law. At its highest, the suggestion is that, although the Refugee Convention is silent on the subject, customary international law sustains the family reunion policy and imbues it with a generous meaning, sufficient to embrace de facto adoption. It is further suggested that this either provides a subtext for a free-standing domestic policy outside the Immigration Rules or, at the very least, should be deployed as an aid to the interpretation of the policy.

7. The Final Act of the Conference of Plenipotentiaries convened in relation to the Refugee Convention recommended Governments

> "to take the necessary measures for the protection of the refugee's family, especially with a view to (1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for the admission to a particular country, [and] (2) the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

8. In his respected treatise *The Rights of Refugees under International Law,* 2005, at page 533, Professor Hathaway states:

> "Whilst it is possible to dismiss the Conference's recommendations as essentially hortatory, a plausible case can be made that at least the core elements of Recommendation B of the Final Act have ripened into customary international law."

9. As part of the suggested ripening process, he refers to subsequent resolutions of the UNHCR's Executive Committee. However, he is constrained to observe that

> "on close examination, it is clear that while there is continuing insistence that the family members of a primary applicant refugee should be admitted to protection, most refugee-specific formulations fail to define with any precision the content of an

> affirmative dimension of the principle of family unity." (page 545)

10. He therefore limits the scope to "the refugee's opposite-sex spouse and any minor, dependent children" (page 547).

11. In 2001 the UNHCR held a series of consultations with experts. They are recorded in Feller, Türk and Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, 2003. The relevant passage is strong on "respect for the right to family unity" but goes on to state (page 582):

> "There is no one single, internationally accepted definition of the family, and international law recognises a variety of forms … Given the range of variations on the notion of family, a flexible approach is needed. In UNHCR's view, States should adopt a pragmatic interpretation of the family, recognising economic and emotional dependency factors, as well as cultural variations. Families should be understood to include spouses; those in a customary marriage; long-term cohabitants, including same-sex couples; and minor children until at least eighteen …"

12. Do these documents establish or evidence an obligation of customary international law that is positively protective of de facto adopted children? In my judgment they do not. At best they illustrate an increasing awareness of the need for a flexible approach to the concept of family but they do not address in terms the question of de facto adoption which, because of its very lack of formality, presents a receiving state with obvious problems of verification. There is no material referred to by Mr Pleming which demonstrates a clear international consensus about the particular problem of de facto adoption – quite the contrary. Whilst there is a perceptible concern that the concept of family, in the context of family reunion, should not be resistant to social and cultural change, I do not consider that there is a precise, identifiable obligation of customary international law that is prescriptive of the national approach to de facto adoption.

The policy and the Immigration Rules

13. The case for the appellants is that, even without customary international law, they can rely on a free-standing policy, outside the Immigration Rules. Mr Pleming submits that the policy derives from a statement by Mr Nicholas Baker MP, Minister of State, in the House of Commons, on 17 March 1995 (Hansard, col 1215). It was in these terms:

> "The position is entirely different where an asylum seeker has been recognised as a refugee. The principle of family unity for refugees is contained in the Final Act of the instrument that established the [Refugee Convention]. Although family reunion does not form part of the Convention itself, the United Kingdom will normally permit the reunion of the immediate family, as a concession outside the immigration rules.

> Under that policy people recognised as refugees immediately became eligible to be joined by their spouse and minor children, provided that they had lived together as a family before the sponsor travelled to seek asylum. Families of refugees are not required to satisfy the maintenance and accommodation requirements that normally apply when families seek admission to join a spouse here. Other dependant relatives may be admitted if there are compelling compassionate circumstances."

14. In October 2000, the Immigration Rules were amended so as to include provision for family reunion. The initial amendment was paragraph 352. It has been further amended in order to extend to civil partnerships and informal unmarried and same-sex partners: paragraphs 352A, 352B and 352C; and paragraphs 352AA, 352BA and 352CA. The children of refugees are the subject of paragraph 352D-F. Paragraph 352D provides:

> "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; and
>
> (iii)is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and
>
> (iv)was part of the family unit at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
>
> (v)[not relevant]; and
>
> (vi)if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

15. "Parent" is defined in paragraph 6 of the Rules so as to include

> "(a)an adoptive parent, where a child was adopted in accordance with a decision taken by the competent administrative authority or court in a country whose adoption orders are recognised by the United Kingdom or <u>where the child is the subject of a de facto adoption in accordance with the requirements of paragraph 309A of these Rules</u> …"

16. Paragraph 309A provides:

> "For the purposes of adoption under paragraphs 310-316C a de facto adoption shall be regarded as having taken place if:
>
> (a)at the time immediately preceding the making of the application for entry clearance under these Rules the adoptive parent or parents have been living abroad (in applications involving two parents both must have lived abroad together for at least a period of time equal to the first period mentioned in sub-paragraph (b)(i)) and must have cared for the child for at least a period of time equal to the second period material in that sub-paragraph; and
>
> (b)during their time abroad the adoptive parent or parents have:
>
> (i)lived together for a minimum of 18 months, of which the 12 months immediately preceding the application for entry clearance must have been spent living together with the child; and
>
> (ii)assumed the role of the child's parents, since the beginning of the 18 month period, so that there has been a genuine transfer of parental responsibility."

17. In the present case (and, I accept, many others), this test of de facto adoption is not satisfied because it requires that both adoptive parents have spent at least 18 months living with the child immediately prior to the child's application for entry clearance, whereas in an asylum case at least one of the parental figures will usually be in the United Kingdom, having successfully sought asylum.

18. This is the context of the present dispute. Although it is common ground that the appellants cannot succeed by reference to the Immigration Rules, Mr Pleming submits that they can still rely on the policy as originally articulated by the Minister in 1995, whereas Miss Giovannetti submits that (1) the 1995 policy, which lacked clarity, has been replaced by the Immigration Rules and (2) protection of de facto adoptive children who fall outside paragraph 309A is provided by either leave outside the Rules on the basis of compelling compassionate circumstances or Article 8 of the European Convention on Human Rights and Fundamental Freedoms. As I have said, it is common ground that the AIT fell into material legal error in relation to Article 8 and that, if the appellants fail in their appeal by reference to a free-standing policy, the case will have to be remitted for a further reconsideration of the human rights claim.

19. It is necessary to refer to a further document. At the time of the applications in the present case, it was known as *Diplomatic Service Procedures*, Chapter 16, although it has now been superseded by United Kingdom Border Agency Entry Clearance Guidance – General Instructions, Chapter 16. I shall refer to the former as DSP and the latter as ECG. Paragraph 16.2 of the ECG, which is substantially similar to its DSP predecessor, provides:

> "Eligibility of applicants for family reunion

> Only pre-existing families are eligible for family reunion, ie the spouse, civil partner and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum. Other members of the family (eg elderly parents) may be allowed to come to the UK if there are compelling compassionate circumstances (see below)."

20. Paragraph 16.3 (as recently updated) is headed "Eligibility of Sponsoring Family Members" and provides:

> "(i)Where the sponsor has refugee status (Rules 352A)
>
> Pre-flight spouses, civil partners and children
>
> If a person has been recognised as a refugee in the UK, family members are normally recognised in line with them … The sponsor is not expected to meet the maintenance and accommodation requirements of the Immigration Rules, but the spouse/civil partner and dependants must show an intention to live together permanently … "

21. The paragraph then proceeds to deal with "other dependant relatives", referring to "Dependant children over the age of 18 and other dependant relatives (eg mother, father, brother, sister etc)" who are admitted if there are "compelling compassionate circumstances".

Discussion

22. Mr Pleming, whilst accepting that the Immigration Rules do not avail the appellants, contends for a free-standing policy outside the Rules. He submits that it predates the amendments to the Rules in 2000 and can be traced back to the Ministerial statement in 1995. He further submits that its continued existence was acknowledged in the DSP and remains so in the ECG. The Minister's reference to "minor children … [who] had lived together as a family before the sponsor travelled to seek asylum" is reflected in the language of paragraph 16.2 of the ECG: "minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum". That (it is submitted) carries the normal meaning of the words, which extends to de facto adoptive children. Moreover, the contrasting reference in paragraph 16.3 to "Dependant children over the age of 18 and other dependant relatives" assumes that all children under the age of 18 have been dealt with in paragraph 16.2 and, as those in the position of the appellants fall outside the treatment of adoptive children in the Immigration Rules, it follows that they come within paragraph 16.2 because of the free-standing policy.

23. These are ingenious submissions, going far beyond those in the not dissimilar case of *AS(Somalia) v Secretary of State of the Home Department* [2008] EWCA Civ 149, and they benefit from the obvious attraction that, if correct, they avoid distinctions between formal and de facto adoption, and between de facto adoption within the meaning of paragraph 309A and other forms of de facto adoption which may appear to be no less deserving. In this context, I accept that the nature of asylum will very often mean that the person who is fleeing persecution will be unable to satisfy

paragraph 309A. However, in my judgment the submissions are not correct. I reach this conclusion for a number of reasons. First, I do not believe that, at the time of the Ministerial statement in 1995, de facto adoption was specifically considered. The language of the statement does not call for a construction of such latitude. Secondly, when the issue came to be addressed in the Immigration Rules 2000 and afterwards, de facto adoption was given a specific and restrictive meaning. It would be very odd if that existed side-by-side with a vaguer and less demanding policy. Thirdly, and following from that, I accept Miss Giovannetti's submission that the amendments to the Immigration Rules in 2000 superseded the previous, more loosely expressed concession and that the DSP and the ECG took the form of guidance to entry clearance officers on how to apply the Immigration Rules, whilst expressly identifying current concessions which fall outside the Rules. Thus, the passage dealing with "other dependant relatives" and "compelling compassionate circumstances" is expressed in terms that make clear that it relates to a category of leave outside the Rules. It requires an entry clearance officer to carry out a screening test which, if satisfied, results in his referring the case to the Home Office for a definitive decision on "compelling, compassionate circumstances": ECG, paragraph 25.3 and 4.

24. It follows from all this that I consider that the AIT was correct to find that there is no free-standing policy operating outside the Immigration Rules which accrues to the particular advantage of de facto adoptive children who fall outside paragraph 309A. The submissions on this appeal are more extensive and more sophisticated than those in the AIT and, consequently, the decision of the AIT on reconsideration was less complex. However, I am satisfied that its conclusion on this issue was correct.

The Consequences

25. As I have related, it is common ground that the appellants still have a case by reference to Article 8, which case did not receive adequate consideration by the AIT. The parties are agreed that the case must now be remitted for further reconsideration of the Article 8 case. Although Mr Pleming was originally minded to attack the negative finding of the AIT on "compelling, compassionate circumstances", he eventually chose not to do so, on the sensible basis that that aspect of the case provides the appellants with no greater protection than does Article 8. I express no final view on the appellants' Article 8 case but merely observe that, on the facts as found, it strikes me as a compelling case. However, Miss Giovannetti does not have instructions to concede it at this stage.

Lord Justice Thomas:

26. I agree.

Lord Justice Waller:

27. I also agree.