Asylum and Immigration Tribunal

MK (Family reunion policy: scope) Somalia [2008] UKAIT 00020

THE IMMIGRATION ACTS

Heard at Field House
On 8 November 2007

Before

Senior Immigration Judge Allen

Between

Appellant

and

ENTRY CLEARANCE OFFICER – ADDIS ABABA

Respondent

Representation:
For the Appellant: Ms S Love, Counsel, instructed by Pickup & Jarvis Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DETERMINATION AND REASONS

The wording of paragraph 16.2 of Diplomatic Services Procedures on family reunion is clear with regard to the family members who are entitled to family reunion under that policy. There is no scope for arguing that other family members fall within it.

1. The appellant, together with her sister MM (appeal no. OA/11372/2006) and her sister MH (appeal no. OA/11378/2006) appealed to an Immigration Judge against the Entry Clearance Officer's decision of 16 March 2006 refusing to grant entry clearance under paragraph 297 of HC 395. The appellants are the nieces of AG, who has been recognised as a refugee. Her husband applied for entry clearance to join her together with their own children, and that application was successful. The evidence, which it seems the Immigration Judge accepted, was that the three appellants lived with the sponsor and her husband from July 1997 when they were aged respectively three, one and five days old, when their mother was killed, until 2003. The sponsor came to the United Kingdom in 2003 and, as I have noted above, was recognised as

a refugee. She did not ever officially adopt the children in Somalia but looked after them until the time when she left there. The sponsor's husband was interviewed by the Entry Clearance Officer in Addis Ababa and he said that his wife still had a mother and brother living in Somalia. As regards other siblings, there was a brother in the United Kingdom and he was aware of the whereabouts of two others and another sister was in Kenya. He said that the three girls had been living with him since July 1997 in the house next door, and his wife had been sending US$100 since December 2005 and prior to that his brother had been sending vegetables to help to support the family.

2. In cross-examination at the hearing before the Immigration Judge the sponsor confirmed that the children were being looked after by her brother-in-law's mother and they had been living there for about three months since her husband had come to the United Kingdom. She said that she was only there on a temporary basis. Her husband had made the arrangements for them all to travel to Ethiopia together.

3. Counsel before the Immigration Judge conceded that the appellants could not come within paragraph 352D of HC 395 as they were not the blood children of the sponsor. He also accepted that paragraph 297 was not the strongest part of his argument, given difficulties with regard to maintenance and accommodation, but he argued that because of the Diplomatic Service Procedures Policy (DSP) at paragraph 16.2 the decision made by the Entry Clearance Officer was not in accordance with the law as it was inconsistent with the DSP. It was said that the evidence showed that they had all been living as a family unit and this left a difficulty for the three young children in Ethiopia now living with the mother of an in-law.

4. The Immigration Judge found that the appeal could not succeed under the Immigration Rules as the children were neither the blood children of the sponsor nor was she their stepmother, and they could not succeed as dependants as the maintenance and accommodation test could not be met.

5. She went on to refer to the decision of the Tribunal in H (Somalia) [2004] UKIAT 00027 where consideration was given to the wording of the DSP policy. She noted paragraph 17 of that decision where, as she said, the Tribunal had found in the context of that policy that the reference was clearly to the spouse of the minor children of the sponsor refugee. The appellants therefore could only come within the definition of other members of the family and it was clear that the Entry Clearance Officer had considered them under this part of the policy and had correctly found that there were no compassionate circumstances of a compelling nature to warrant the grant of entry clearance. She also noted paragraph 46 of H (Somalia) where it was said that it would normally be the position that the combination of the provisions of the Immigration Rules and extra statutory policy and discretion would provide a proportionate basis for any interference with a lack of respect for family life. She found the sponsor and the appellant credible in their evidence. She found that there had been family life previously but it could not any longer be said that family life existed between the appellants and the sponsor. Even if it could, she concluded following what had been said in Huang (this must be a reference to the decision in the Court of Appeal, given the date of determination) that the circumstances were not truly exceptional as the appellants were not the sponsor's own children, they were accommodated by extended family, the sponsor was able to fund them from the

United Kingdom and whilst arguably the sponsor might not be able to live legally in Ethiopia, she could indeed visit and in turn the appellants could visit the sponsor. She therefore dismissed the appeal.

6. The appellant sought reconsideration of this decision, arguing firstly that a proper interpretation of the policy should have led the Immigration Judge to conclude that the appellants were minor children who formed part of the family until prior to the time the sponsor fled to seek asylum, and therefore issues of maintenance and accommodation did not have to be satisfied. Secondly it was argued, in the alternative, that the Immigration Judge applied the wrong approach to the policy in that she had erred in limiting her enquiry to whether the policy had been considered by the decision-maker and in this regard a decision of the Tribunal in IA [2006] UKAIT 00082 was cited. Thirdly it was argued that the Immigration Judge erred in finding there was not family life, quoting from paragraph 14 of H (Somalia), referred to above, and fourthly, that as a consequence the Immigration Judge erred in not taking into account the policy with regard to family life, bearing in mind what was said in IA that the substance of a policy was extremely relevant when considering a case under Article 8. Reconsideration was ordered on all grounds.

7. Ms Love relied upon and developed the grounds. She argued that the Immigration Judge had incorrectly applied the policy. The children had been part of the family unit of the sponsor since 1997 when their mother died and had remained so until 2003. She had effectively been their mother for that period. H (Somalia) could be distinguished, as in that case the mother of the children disappeared in the same month as the sponsor fled to the United Kingdom, so the children were never part of the family unit with her and that should be contrasted with the facts of this case. It was not the case that they should have to be legally adopted as the policy did not distinguish between adopted and birth children and would have said so if it was intended to be limited to the birth children of the sponsor.

8. In the alternative, it was argued in line with ground 2 that the Immigration Judge had taken the wrong approach and had failed to consider the compelling and compassionate circumstances herself rather than simply relying on the previous decision.

9. At this point it became clear that the representatives had not had the opportunity to read and digest the determination of the Tribunal in AG and Others (Policies; executive discretion; Tribunals' powers) Kosovo [2007] UKAIT 00082, and there was an adjournment to enable them to read and develop submissions on it.

10. In the light of this, Ms Love referred back to ground 1 and argued that paragraph 50 of AG assisted her in this regard. There it had been said that there were cases where if the claimant proved the precise terms of the policy, this created a presumption in the facts of his case in favour of granting leave, and this was such a case. There was DNA evidence to prove the relationship.

11. With regard to ground 2, Ms Love referred to paragraph 43 of AG where it was said that the Tribunal was bound to consider whether a particular decision was proportionate and in so doing had to assess the force of the Secretary of State's claim that the decision was necessary in order to maintain immigration control. That

related to this ground and what was said at paragraph 44 was also of relevance. The appeal should have been allowed with a direction.

12. There was a clear error as regards ground 3 on the basis of the quotation from H (Somalia), and ground 4 was self-explanatory.

13. In his submissions Mr Tarlow argued that it was implicit in the policy that the children had to be blood children or formally adopted children within the laws of the country in which they lived. He referred to MN (India) [2006] UKAIT 00015 where it had been said that whether such an adoption as it might have been argued would have occurred here would have been recognised had been considered. The rules allowed for prospective adoptive children to come to the United Kingdom but no application in that regard had been made.

14. As regards ground 2, it was a question of circumstances. The children were in Ethiopia in accommodation with running water and some money from UNHCR and the sponsor's husband's mother lived there as part of the family unit. There was nothing compelling and compassionate in those circumstances. As regards ground 3, sending the children to live with a relative was a voluntary decision the family had made and they were entitled to do so and there was no error in the finding here. Ground 4 fell away as a result.

15. By way of reply, Ms Love argued that on a careful reading of the policy it envisaged any children who formed part of the family unit and could include stepchildren or children from the civil partner. It did not say who the children had to belong to. There had been a lot of family displacement in Somalia and provision had been made for this in the policy and it was questionable whether any formal adoption from there could ever be carried out.

16. I reserved my determination.

17. It is perhaps helpful if in considering the challenge to the Immigration Judge's decision I deal with it on the basis of the grounds as set out and developed by Ms Love. The first argument is that the wording of the relevant policy is such that the appellants fall within it. Paragraph 16.2 of Diplomatic Services Procedures provides as follows:

> "Only pre-existing families are eligible for family reunion, i.e. 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 (e.g. elderly parents) may be allowed to come to the UK if there are compelling, compassionate circumstances."

18. The Immigration Judge quoted remarks made by the AIT in H (Somalia) in this regard. They are taken from paragraph 17 of the determination in that case. The Tribunal said this:

> "[Counsel] suggested more tentatively that the appellants were minor children within the scope of 'the spouse and minor children who formed part of the family unit' when the sponsor fled. We do not accept that latter suggestion; in context, it clearly refers to the spouse of and the minor children of the sponsor – refugee."

19. I do not think this can be read in the way suggested in the grounds or by Ms Love. The differences between the factual situation in the two cases can in no sense be said to permit the conclusion that this comment relates only to the specific facts in H (Somalia). The wording employed by the Tribunal is clear and it clearly did not envisage anyone other than the spouse and minor children of the sponsor-refugee as falling within the policy.

20. Although the Tribunal did not go on to deal with this point any further, perhaps in light of the way in which the submission was put to it, it is relevant to consider why that limitation would exist. It needs to be borne in mind that this is an extension to the provision made in the Immigration Rules at paragraph 352D clarifying who is eligible for family reunion. The further aspect of the policy is a matter I shall come on to shortly. But this is clearly an exceptional provision since it precludes the need to satisfy the requirements of the Rules that would otherwise exist for maintenance and accommodation, and its potential ambit must clearly therefore be regarded as limited as a result. In my view, as was said by the Tribunal in H (Somalia), in context there is clear reference only to the spouse of and the minor children of the sponsor-refugee and not to other children who formed part of their family unit prior to the time when the sponsor fled the relevant country to seek asylum. A line has to be drawn somewhere, in particular bearing in mind that, where the rules or policies do seek to cover such categories as adoptive or stepchildren, they say so expressly. In my judgment it is at that point that the line is drawn in this case and consequently the appellants cannot be said to fall within part of the policy. Therefore I conclude that the Immigration Judge did not err in this regard in following what the IAT had said in H (Somalia). I do not think that the support which Ms Love suggests can be derived from paragraph 50 in AG in fact assists since this is not a case where the claimant has proved the precise terms of the policy, as in my view the appellants fall outside it.

21. As regards the second ground, the argument is that the Immigration Judge should effectively have applied the policy herself rather than simply noting, as she did, that the Entry Clearance Officer had considered the policy. Ms Love referred to the sentence I have quoted above from paragraph 43 of AG in this regard. However, it is particularly important to look at the first sentence of that paragraph. There the Tribunal said the following:

> "For the foregoing reasons we reject the argument that the Tribunal is bound or entitled to consider or review the exercise of a discretion outside the Immigration Rules."

22. The Tribunal regarded as surprising the argument that the Tribunal might be the primary decision-maker in exercising a discretion outside the rules or might be the reviewer of the exercise of such a discretion. As the Tribunal noted, Section 86(6) of the Nationality, Immigration and Asylum Act 2002 provides as follows:

> "Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection 3(b)."

This relates to the requirement that the Tribunal must allow an appeal insofar as it thinks that the discretion exercised in making a decision against which the decision is brought or is treated as being brought should have been exercised differently.

23. This is not a case, in my view, in which it can be said that the Tribunal is empowered to give effect to a policy either directly or through the medium of Article 8. The question of whether there are compelling and compassionate circumstances is one for the Secretary of State in the exercise of her policy, and through the medium of the Entry Clearance Officer she has exercised that discretion, as the Immigration Judge correctly noted, and come to a conclusion on it. It was not for the Immigration Judge to do any more than note that fact which she rightly did. Again, there is no error of law in this regard.

24. As regards the third ground, I agree with Ms Love that there is an error in the conclusion that there is not family life since the sponsor left the children and came to the United Kingdom. As was said at paragraph 14 in H (Somalia):

> "It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up."

25. That having been said, the question is whether that error was material. The Immigration Judge went on at paragraph 18 of her determination to say the following:

> "Even if it could be argued that there is still a subsisting family life as the sponsor is a refugee and that refusal amounts to an interference I do not find, following the dicta in Huang, that the circumstances are truly exceptional as the appellants are not the sponsor's own children, they are accommodated by extended family, the sponsor is able to fund them from the UK and whilst arguably the sponsor may not be able to live legally in Ethiopia she can indeed visit and in turn the appellants can visit the sponsor."

26. It is clear therefore that the Immigration Judge considered the matter in the alternative. Even though she employed the test of exceptional circumstances as set out by the Court of Appeal in Huang, I do not consider there is a material error since she clearly set out relevant circumstances which, on a proper assessment of proportionality, justified the conclusion that there would be no breach of the appellants' Article 8 rights by refusing entry clearance. Clearly the policy is relevant to this but, as the Tribunal has made clear in KL [2007] UKAIT 44, a near miss has to be regarded as such and, though of relevance to the Article 8 balancing exercise, it does not of itself mean that an expulsion decision (as it was in that case) constitutes a disproportionate interference with an appellant's Article 8 rights. Proper consideration was given to the relevant circumstances in this case in my view, and I consider that the Immigration Judge did not commit any material errors of law and her decision dismissing these appeals stands.

Signed Date
Senior Immigration Judge Allen