MS and others (family reunion: "in order to seek asylum") Somalia [2009] UKAIT 00041

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Procession House, London Date of Hearing: 19 May 2009

Before

Mr C M G Ockelton, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Grubb
Senior Immigration Judge Kekić

Between

MS
AA
FA

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Yeo instructed by Lawrence Lupin Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

The family reunion provisions of para 352A et seq do not extend to the family members of those whose own status derives only from those Rules. In those circumstances, a claimant cannot show that the sponsor left his country of former habitual residence "in order to seek asylum" as required by the Rules.

DETERMINATION AND REASONS

1. The first Appellant is a Somali national aged twenty-six. The second and third Appellants are her two dependent children aged respectively five and three years of age. On 1 February 2008 the Entry Clearance Officer in Addis Ababa refused the Appellants entry clearance to come to the UK as the spouse (in the case of the first Appellant) and the children (in the case of the second and third Appellants) of the Sponsor. On appeal, Immigration Judge J R Devittie in a determination signed on 23 October 2008, dismissed each of the Appellants' appeals under paras 281 and 352A

(in the case of the first Appellant) and paragraphs 297 and 352D (in the case of the second and third Appellants) of the Immigration Rules (Statement of Changes in Immigration Rules, HC 395). He also concluded that the Appellants had failed to show a breach of Article 8 and their respective right to respect for their family life. On 27 November 2008, Senior Immigration Judge Waumsley ordered reconsideration and thus the matter came before us.

2. The essential background facts to these appeals are as follows. The Sponsor fled Somalia, a country of which he is a national, in 1991 at the outbreak of the civil war. He claims to be of Ashraf ethnicity. He went to Addis Ababa in Ethiopia. On 30 January 2002 in Ethiopia he married his first wife, LD on 30 January 2002. Shortly after that LD came to the United Kingdom where she gave birth on 12 January 2003 to their son. She claimed asylum and was recognised as a refugee in 2004. On 24 December 2002, after LD had left Ethiopia, the Sponsor married the first Appellant. On 10 September 2003 their daughter (the second Appellant) was born. On 28 May 2005, the Sponsor came to the United Kingdom under the refugee family reunion provisions to join LD, his first wife who, as we have said, had been granted refugee status in the United Kingdom. On 19 November 2005 the second child of his marriage to the first Appellant was born in Ethiopia. That child is the third Appellant. On 4 December 2007, the Sponsor and his first wife, LD were divorced (see decree absolute issued by the Willesden County Court at pages 19-20 of the Appellants' trial bundle). Thereafter, the Appellants sought entry clearance to join the Sponsor as his spouse and daughters, the refusals of which are the subject of this appeal.

3. Mr Yeo accepted that the Appellants could not succeed under paragraphs 281 and 297 of HC 395 because they could not meet the maintenance and accommodation requirements. Instead, Mr Yeo relied exclusively upon the family reunion rules of HC 395, namely paras 352A and 352D.

4. The first point taken before us concerned para 14 of the Judge's determination where he concluded that the first Appellant and the Sponsor were not validly married. Thus, the Judge concluded that the first Appellant could not rely on para 281 to gain entry to the UK. That conclusion would equally debar the first Appellant relying on para 352A as the "spouse" of a refugee.

5. Mr Yeo submitted that the Immigration Judge had erred in law in concluding that the marriage was invalid. He submitted that the Judge's reasoning in para 13 of his determination was wrong. There, the Judge said this:

> "It is accepted that polygamous unions are not recognised in English law. I find in public law…a polygamous union is void ab initio….I find that for the reasons I have set out the fact that polygamous unions

> are voidable in Ethiopian law does not confer validity on them in UK immigration law which I take to be governed by principles of public law."

6. Mr Yeo accepted that the marriage to the first Appellant was a polygamous one but it was, he submitted, nevertheless valid under Ethiopian law unless subject to an order of dissolution under Ethiopian law. Consequently, he submitted that as a matter of private international law the first Appellant's marriage to the Sponsor, being a valid law under Ethiopian law, was one that was recognised by English law.

7. We need say little about this submission, other than to note that it is demonstrably correct, and it was accepted as such by Mr Deller on behalf of the Respondent. He accepted that the Judge had erred in law in concluding that the first Appellant's marriage to the Sponsor is not a valid marriage for the purposes of English law: it is valid. He further acknowledged that the polygamous nature of the marriage did not affect the application of the Immigration Rules to the first Appellant. We were referred to paragraph 278 of HC 395 which provides, so far as relevant, as follows:

> "278. Nothing in these Rules should be construed as allowing a person to be granted entry clearance, leave to enter, leave to remain or variation of leave as the spouse of a man or woman (the Sponsor) if:
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> (i) his or her marriage to the Sponsor is polygamous; and
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> (ii) there is another person living who is the husband or wife of the Sponsor and who:
>
> (a) is, or at any time since his or her marriage to the Sponsor has been, in the United Kingdom; or …"

8. It was accepted that since the Sponsor and his first wife were divorced under English law on 4 December 2007 it could not be said that, in the words of para 278(ii), "there is another person living who is the… wife of the Sponsor".

9. Mr Deller submitted, however, that the error of law was not material since the first Appellant could not succeed under para 352A and by parity of reasoning neither could the other Appellants under para 352D. The only possible outcome of the appeal was to dismiss the Appellants' claims under the Rules.

10. The applicable provision of the Immigration Rules in respect of the first Appellant is para 352A which, so far as relevant, provides as follows:-

> "352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse or 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 or civil partner and the marriage or civil partnership is subsisting;…"

11. The applicable provision of the Immigration Rules in respect of the second and third Appellants is para 352D which, so far as relevant, provides as follows:

> "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:
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> (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 had not formed an independent family unit; and
>
> (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum; and
>
> (v) 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;..."

12. In relation to paragraph 352A, Mr Deller submitted that the first Appellant could not show that she was the spouse of "a refugee", that she is married to "a person granted asylum" in the UK (para 352A(i)) and that the marriage did not take place after the Sponsor left Ethiopia "in order to seek asylum" (para 352A(ii)). By parity of reasoning, in relation to the second and third Appellants Mr Deller submitted that they were not the children of a person (the Sponsor) "granted asylum" (para 352D(i) and (iv)) and further that they had not been part of the family unit of a person granted asylum who left Ethiopia "in order to seek asylum" (para 352D(iv)).

13. Mr Yeo submitted that the Sponsor was indeed a refugee and a person who had been granted asylum in the UK. He submitted that the Sponsor when he came to the United Kingdom in May 2005 had been recognised as a refugee. He drew our attention to the Convention travel document which had been issued to the Sponsor, a copy of which is at pages 14-17 of the Appellants' trial bundle. Further, he referred us to page 18 of the same bundle where it is clear that the Sponsor had been granted indefinite leave to remain. Mr Yeo submitted that it was irrelevant that the Sponsor's status derived not from his own fear of persecution in Somalia but from his marriage to a refugee and the recognition of his status in line with that of his first wife's when he joined her in the UK.

14. Mr Yeo referred us to a number of documents set out in his original skeleton argument before the Judge at pages 8-10 (which for reasons which will shortly become apparent we need not set out here) and to the recent Court of Appeal decision in DL (DRC) v ECO, Pretoria; ZN Afghanistan v ECO, Karachi [2008] EWCA Civ 1420. He submitted that the documents showed that it was normal to grant refugee status to those family members who were joining a person who was a refugee by virtue of his fear of persecution in the country of refuge and that it was the Secretary of State's policy to do so. He relied upon para [19] of DL (DRC) where the Court of Appeal saw no difference in the expression "refugee" used in the preamble words to para 352A and the phrase "person granted asylum" in para 352A(i) and (ii).

15. 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 and the relevant IDI (set out at paras 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 the light of DR (DRC) that the phrases in paras 352A and 352D of "refugee" and "a person granted asylum" were synonymous.

16. Consequently, that aspect of Mr Deller's argument fell away in favour of the Appellants. Mr Deller maintained his other submission, namely that the Sponsor was not someone who, within the wording of para 352A(ii) and 352D(iv), had left his country of former habitual residence (namely Ethiopia) "in order to seek asylum". Mr Deller submitted that the basis of the Sponsor's application for entry clearance to come to the United Kingdom and for the subsequent grant of refugee status was his spousal relationship with his first wife who was, herself, a refugee in the UK. Thus it could not be said that the sponsor had left Ethiopia "in order to seek asylum" rather he had left Ethiopia in order to seek reunion with his first wife in the UK.

17. In response, Mr Yeo acknowledged that the Sponsor had never said he was in fear of persecution when seeking entry to the UK. Mr Yeo did, however, suggest – without saying any more - that he would have had a good case on his own merits if he had made it.

18. Mr Yeo submitted that a person in the position of the Sponsor should be seen in precisely the same light as someone who did leave his country of habitual residence because of such a fear. He submitted that the family members of a refugee, himself recognised on the basis of his family relationship with a refugee in the UK, should be granted the same benefits of family unity as the family members of the refugee whose status was recognised because of their fear. Mr Yeo submitted that family members were, in practice, granted refugee status to recognise the fact that they were themselves often in danger. He referred us in particular to recital (27) of the EU Qualification Directive dealing with refugees and others in need of international protection (Council Directive 2004/83/EC of 29 April 2004) which is in the following terms:-

> "Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status."

19. That, then, is the issue between the parties. Our task is to interpret the phrase "in order to seek asylum" in paras 352A(ii) and 352D(iv) of HC 395. Mr Yeo prays in aid the underlying purpose of these paragraphs namely that of family reunion between a refugee and his family members, at least, for these purposes, his wife and children.

20. The proper interpretive approach to the Immigration Rules was recently set out by Laws LJ in MB (Somalia) [2008] EWCA Civ 102 at para [59] in the following terms:

> "I disagree with Collins J's insistence [in *Arman Ali* [200] INLR 89] on a purposive construction of the Immigration Rule, if it is thought that such an approach would produce a result in any way different from the application of the Rule's ordinary language. As Dyson LJ indicates, the purpose of the Rules generally is to state the Secretary of State's policy with regard to immigration. The Secretary of State is thus concerned to articulate the balance to be struck, as a matter of policy, between the requirements of immigration control on the one hand and on the other the claims of aliens, or classes of aliens, to enter the United Kingdom on this or that particular basis. Subject to the public law imperatives of reason and fair procedure, and the statutory imperatives of the Human Rights Act 1998, there can be no *a priori* bias which tilts the policy in a liberal, or a restrictive direction. The policy's direction is entirely for the Secretary of State, subject to Parliament's approval by the negative procedure provided for by the legislation. It follows that the purpose of the Rule (barring a verbal mistake or an eccentric use of language) is necessarily satisfied by the ordinary meaning of its words. Any other conclusion must constitute a

> qualification by the court, on merits grounds, of the Secretary of State's policy; and that would be unprincipled."

21. That approach was subsequently adopted by the Court of Appeal in DL (DRC) at para [24] and AM (Ethiopia) v SSHD [2008] EWCA Civ 1082 where Laws LJ at [38] stated:

> "The whole of [the Immigration Rules'] meaning is, so to speak, worn on their sleeve."

22. We must therefore search for the "ordinary meaning" of the words "in order to seek asylum". Having said that, it would be wrong not to acknowledge at least in general terms that the underlying purpose of paras 352A and 352D is to facilitate family union between refugees and their pre-existing spouses and children. That is consistent with the UK Government's obligation (now) under Article 23 of the Qualification Directive that "Member States shall ensure that family unity can be maintained". That obligation, as the material we have been referred to, well demonstrates, has been a long-standing one. The obligation applies to "family members" including the refugee's spouse and minor children (see Article 2(h) of the Directive). Article 23.1 of the Qualification Directive also imposes an obligation on member States to ensure that family members "who do not individually qualify" for refugee status are entitled to the benefits accorded to refugees set out in Articles 24-34 of the Qualification Directive which, inter alia include documentation, travel documents and access to employment, education, social welfare and healthcare. As we have already noted the administrative practice in the UK is to confer upon the relevant family members of a refugee, refugee status and the grant of leave in line with that of the refugee.

23. Our interpretive task is not greatly illuminated by recourse to a claim that paras 352A and 325D seek to further family unity between a refugee and certain of his family members. The issue for us is not the principle of reunion but rather, accepting that to be the case, the precise circumstances when it is contemplated in the relevant paragraphs of the Immigration Rules.

24. More telling, in our judgment, are two provisions in the Rules themselves. First, we turn to Part 11 of the Rules headed "Asylum". Here in paras 326A-352G are found the provisions setting out the procedures for dealing with asylum and humanitarian protection, including the process for applying for and the basis for granting, refusing or revoking such protection. For these purposes we can confine ourselves to the provisions dealing with applications for asylum. Paras 326A-328 provide as follows:

> "**Procedure**
>
> **326A.**The procedures set out in these Rules shall apply to the consideration of asylum and humanitarian protection.

Definition of asylum applicant

327. Under the Rules an asylum applicant is a person who either;

> (a) makes a request to be recognised as a refugee under the Geneva Convention on the basis that it would be contrary to the United Kingdom's obligations under the Geneva Convention for him to be removed from or required to leave the United Kingdom, or
>
> (b) otherwise makes a request for international protection. "Application for asylum" shall be construed accordingly.

327A. Every person has the right to make an application for asylum on his own behalf.

Applications for asylum

328. All asylum applications will be determined by the Secretary of State in accordance with the Geneva Convention. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these Rules."

25. Although these provisions did not come into force until after the Sponsor came to the UK, in our judgment, they shed an illuminating light upon who is a person "seeking asylum" in the UK. Such a person will, as contemplated by the Rules, make "an application for asylum" (para 328). That person is, in the words of para 327, "an asylum applicant". Who is that? Ignoring a person claiming humanitarian protection, para 327(a) tells us that it is someone who requests to be recognised as a refugee under the Geneva Convention "because it would be contrary to the United Kingdom's obligations under the Geneva Convention" to remove him or require him to leave the UK. In other words, an asylum applicant is someone who falls within the Convention definition of a "refugee" (customarily within Art 1A(2) because he has a well-founded fear of persecution) and his removal (refoulment) would be contrary to Art 33 of the Convention. A person who claims to be entitled to live in the UK solely because he is the spouse or child of a refugee and seeks family reunion with that person is not "an asylum applicant" even if it is the UK's practice to recognise him as such in line with the refugee in the UK. It seems to us that this is a strong indication that when looking at paras 352A and 352D, which are also within Part 11 of HC 395, the phrase "in order to seek asylum" contemplates a person who, when he arrives in the UK, would, within the terms of para 327 (read with para 328), make "an application for asylum". It does not, therefore, include the Sponsor in these appeals.

26. Secondly, in our judgment, it is clear from their own terms that paras 352A and 352D are drafted on the basis that an individual seeking family

reunion is not "seeking asylum". Para 352A(iii) sets out a requirement for the grant of leave by a spouse of a refugee in the following terms:

> "The applicant would not be excluded from the 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"(emphasis added).

27. Paragraph 352D(v) is in precisely the same terms. These provisions make plain, in our judgment, that an applicant for family reunion made in accordance with them is not someone who is "seeking asylum", but in para 352A(ii) is treated hypothetically as if he were, in order to determine whether, if he had been seeking asylum, he would have been excluded from being a refugee under the Convention by virtue of Article 1F and if so will be refused leave as a family member.

28. In our judgment, these provisions are powerful pointers that lead us to conclude that the meaning of the phrase "in order to seek asylum" does not encompass a person who has left his own country (or that of his habitual residence), not because he fears persecution and is seeking international protection under the Refugee Convention but, in order to be reunited with a spouse or parent who has. Family reunion is, therefore, restricted under paras 352A and 352D to the spouse and children of a refugee as defined in the Refugee Convention. The family members of an individual who has been granted refugee status, himself on the basis of family reunion, in line with the refugee who is his spouse or parent, may only gain entry if able to establish a personal fear of persecution (as reflected in recital (27) of the Qualification Directive) or because he satisfies the applicable Immigration Rule for entry (e.g paras 281 or 297) or he can show that to exclude him from the United Kingdom would breach his right to respect for family life under Article 8.

29. Whilst not for the reasons given by the Judge, in our judgment the three Appellants were (and are) not entitled to succeed under para 352A and para 352D. The Judge's error of law was not material to his decision to dismiss each of the Appellants' appeals in respect of the Immigration Rules. His decision to dismiss those appeals therefore stands.

30. Finally, we turn to consider the Judge's decision to dismiss each of the Appellants' appeals in respect of their Article 8 claim. Although the grounds for reconsideration drafted by Mr Yeo challenge the Judge's conclusions in paragraph 23 and 24 of his determination that the Respondent's decision not to grant entry clearance to the Appellants was proportionate, Mr Yeo did not refer to these grounds in his submissions before us. He was right to take that course. In 2005 when the Sponsor came to the United Kingdom he made a conscious choice to leave his second wife and child (a second child was born shortly thereafter) and to

live with his first wife and child in the UK. The effect of that is described by the Judge in paragraph 25 of his determination as follows:-

> "25. The Sponsor left them to set up a separate family unit in the United Kingdom. There is merit in the view that although they are the offspring of a polygamous union, they are to a degree an independent family unit by virtue of the sponsor's decision to move to the United Kingdom to live with his first wife."

31. That conclusion is not challenged in the grounds for reconsideration or elsewhere. At paragraph 24 of his determination, the Judge refers to the contact between the Sponsor and the Appellants since 2005. In our judgment, taking all these factors into account the Judge was entitled in law to find that it would not be disproportionate to refuse the Appellants entry to the UK. Despite what is said in the grounds for reconsideration, these facts speak for themselves. We see no basis upon which it can be said that the Judge materially erred in law in dismissing the appeals under Article 8.

32. For these reasons, the Judge's decision to dismiss each of the Appellants' appeals stands.

C M G OCKELTON
DEPUTY PRESIDENT