IAC-MD-BFD-V1

First-tier Tribunal
(Immigration and Asylum Chamber) Appeal Numbers:
OA/17649/2013

OA/17650/2013
OA/17648/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 5th December 2014	**On 22nd December 2014**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS ELFY MIDIMO
MR KULAMBA ZUBI
MR WASWEZIA ZUBI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr M Diwnycz, Home Office Presenting Officer
For the Respondent: Mrs Z Preston, of Counsel

DECISION AND REASONS

1. This is the appeal of the ECO Nairobi against the decision of the First-tier Tribunal (Judge Hillis) which in a determination promulgated on 10th July 2014 allowed the appeals of the

Respondents against the refusal of their applications to enter the United Kingdom as the dependent relatives of their UK Sponsor Gishangu Zubi.

2. Whilst this is an appeal by the Entry Clearance Officer, for convenience I shall refer to the Respondents as "the Appellants" and the Entry Clearance Officer as "the Respondent" in line with their respective positions when they appeared before the First-tier Tribunal.

History of the Appeal

3. The Appellants are citizens of DRC born 28th November 1988, 20th January 1991 and 3rd April 1994. They seek entry clearance as the adult dependant relatives of their Sponsor Gishangu Zubi, a man who is in the United Kingdom with recognised refugee status.

4. The eldest Appellant Elfy Midimo is the biological child of the Sponsor; the other two Appellants are his de facto adopted children. The Sponsor entered the UK in 2007 claiming asylum. He was recognised as a refugee in 2007 and subsequently his wife and six other children were granted entry clearance to join him under the Respondent's Family Reunion policy. It is correct to say that one of the Sponsor's children Gisele Kapata (who is also an adopted child and a minor) was initially refused entry clearance, but following an appeal before FtT Mensah, her application was granted and she also travelled to the United Kingdom to join the Sponsor and his wife.

5. So far as the three Appellants before me are concerned, they made application for entry clearance on 30th July 2013. The Respondent's refusal decision is dated 9th August 2013.

Decision of First-tier Tribunal

6. In a determination promulgated on 10th July 2014 Judge Hillis allowed the Appellants' appeals under Article 8 ECHR. The three Appellants were all adults at the date of application for entry (and therefore at the date of decision) and lived in Kinshasa, where they had lived since 2009 when their mother left them to join the Sponsor in the United Kingdom with the younger children.

7. In his determination Judge Hillis concluded concerning all Appellants' that Article 8 was met and therefore he allowed their appeals. This was on the basis that they had demonstrated emotional ties well beyond those experienced in the normal family situation, even in the environment of the DRC. At [28] of his determination he said;

> "I find that as this family has been involuntarily separated the essential aspects of their family life together have continued

> notwithstanding their physical separation. The remaining family members have simply been waiting for the opportunity to join the rest of their family in the UK and have constantly stayed in contact with each other. I do not find that these Appellants have set up, either voluntarily or involuntarily, a new independent household during the period of separation".

8. He continued at [29];

> "I accept the Sponsor's evidence that he has paid the rent on the Appellants' house and that they have been financially dependent on him during their enforced separation. I do not find, in the exceptional circumstances of these Appellants, that the fact they are now over eighteen years-of-age they have no more than the normal emotional familial ties. In my judgment, the separation of these Appellants from their father for the period 2007 to 2014 and from their mother and siblings from 2009 to date will have created emotional ties well beyond those experienced in the normal family situation, even in the environment of the DRC".

Submissions

9. Mrs Preston before me relied on the findings of Judge Hillis (and Judge Mensah before him) that the Sponsor was found to be a credible witness. It was found credible that application for the passports of the Appellants had been made at the same time as the application for the passports of their siblings. Therefore I should accept as did Judge Hillis, that the three Appellants applied for their passports at the same time as other family members and had their passport been issued at that time then they would have been granted entry clearance at the same time as the other family members. This made their cases exceptional and compelling and their Article 8 claims should be allowed.

10. Mr Diwnycz maintained the stance set out in the grounds seeking permission. He said that the Appellants could not qualify under the Immigration Rules and that no good or compelling reasons had been put forward, within the meaning of Article 8 ECHR, for granting leave outside the Rules. All three Appellants are adults and were so at the date of decision. They have been living apart from their parents since 2009 without any recorded mishap. There is no evidence that the relationship between the Appellants and their parents and siblings go beyond normal emotional ties as outlined in Kugathas.

Has the Judge Erred?

11. The findings of the FtT in my judgment fail to demonstrate any evidential basis for the conclusions it reached. What the Judge has done is simply entered in to speculation and this is seen by the phrase *"in my judgment the separation of these Appellants from their father for the period of 2007 to 2014 and from their mother*

and siblings from 2009 to date will have created emotional ties well beyond those experienced in the normal family situation". To base a conclusion upon speculation is unjustifiable and for this reason I am satisfied that the Judge has misdirected himself on the relevant test for establishing that the Respondent's decision breached Article 8 ECHR. In addition because of the sparse findings on the evidence in the determination, this has led the Judge to give insufficient reasons for his findings and this renders the determination legally unsustainable.

12. Having announced to the parties my decision that the determination of Judge Hillis must be set aside for legal error, I asked the representatives if there was any reason why I should not proceed to remake the decision. Both representatives agreed that I had before me all the available evidence. Mrs Preston on behalf of the Appellants confirmed that there was no further evidence she wished to call. I therefore proceeded to hear submissions from both representatives. Essentially these submissions repeated those put forward earlier at the error of law stage.

Consideration and Findings

13. My starting point in this appeal is the date of decision which is 9th August 2013. It is accepted that when dealing with out-of-country appeals, one is constrained by taking into account facts only which were in existence at the date of decision. However I remind myself that, whilst evidence of post decision facts are precluded, the admission of further evidence adduced in order to establish what the true picture was at the time the decision was made, is not.

14. At the date of decision all three Appellants were adults aged 24, 22 and 19 years of age respectively. They were all living at an address for which their father pays the rent. They remain at that address to date. It is an address which according to the Sponsor's evidence at the FtT hearing, his wife found for the Appellants prior to her departure from the DRC in 2009. All three Appellants were and still are maintained by their father. All three Appellants have received higher education. They maintained contact with their parents. There is simply no evidence before me to demonstrate that Article 8 ECHR is even engaged. According to the Sponsor's statement the Appellants miss their siblings – that is not unnatural. The Appellants mother reports distress at being separated from them, but equally that is unsurprising.

15. Judge Hillis did correctly identify in [8] of his determination, that these appeals are out-of-county appeals and even in Article 8 ECHR cases, only facts which were in existence at the Entry Clearance Officer's date of decision can be taken into account. This is of course subject to my observations in paragraph 13 above.

16. What facts can be taken into account:

    (i) First the Appellants at the date of decision were all adults.

    (ii) They have family members and friends in the DRC.

    (iii) They live in rented accommodation which is paid for by the Sponsor and which was arranged for them by the Sponsor's wife before she left the DRC to join her husband in the UK. All three Appellants are maintained by funds which are sent from the UK.

    (iv) The Sponsor in the UK is wholly reliant on public funds.

    (v) There is no suggestion that the three appellants are suffering any kind of serious medical complaint or are in any sort of danger. They have remained in the DRC since 2009.

17. On these facts I find it hard to see that Article 8 ECHR is even engaged in these appeals. I am told, and I accept, that the three Appellants keep in contact with the Sponsor and their younger siblings. That is to be expected, but nothing has been put forward to show that this contact cannot continue. Nothing has been put forward to show that the arrangements made for the three Appellants cannot continue.

18. It is unfortunate perhaps that the three Appellants' passports did not arrive in 2009 along with those of the other family members, but at that time the first and second Appellants would have been adults, or approaching adulthood, in any event.

19. Even if I am wrong about Article 8 ECHR not being engaged and the five stage test in *Razgar* is applied then in my judgment that does not assist the Appellants' cause either. What has to be looked at is whether the Respondent's decision is proportionate to the legitimate aim of immigration control. What was before the Respondent were applications by three adult siblings to join their parents in the UK, their parents being reliant upon public funds. There was no evidence at the date of decision of anything other than the normal emotional ties between parents and their adult children. It has been said that the Appellants' case is somehow exceptional in that had their passports been issued in 2009, they would have been granted entry clearance under the Respondent's family reunion policy. That is a question that cannot be resolved. The reality is that they made their applications when adults and so far as the evidence laid before me shows, their needs are being met in the DRC. It is noteworthy that all three Appellants have received higher education. Because the Sponsor is reliant upon public funds to fund himself his wife and their minor children here

in the UK, any entry by the three Appellants would necessarily add to further public funds being expended.

20. Looking at the totality of the evidence therefore, the Respondent's decision to refuse these applications is proportionate and these appeals are dismissed.

Notice of Decision

The FtT Judge erred in law. His decision is hereby set aside. I remake the decision dismissing the Appellants' appeals against the Entry Clearance Officer – Nairobi's decision to refuse entry.

No anonymity direction is made.

Signed Date **5th December 2014**

Judge ROBERTS
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeals and therefore there can be no fee award.

Signed Date **5th December 2014**

Judge ROBERTS
Judge of the Upper Tribunal