The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: OA/19181/2013
OA/19185/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On February 9, 2015	**On February 16, 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR ARNAULD ELAT ETIMBIC
MISS ERIKA ETEINGUE ELAT
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms Patel (Legal Representative)
For the Respondent: Ms Johnstone (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant are citizens of Cameroon and are aged 28 and 8 respectively. On February 26, 2013 the appellants applied for entry clearance under the family reunion provisions. They applied to join the sponsor, Frank Eric Elat Ekwala, the same sex partner of the first-named appellant. The second named appellant is the sponsor's daughter. The respondent refused both applications under paragraph 320(3) HC 395

because neither provided a valid national passport or other document satisfactorily establishing his identity and nationality. The respondent also refused the second named appellant's application because:

a. The respondent was not satisfied the appellant was part of the sponsor's family in Cameroon in 2012 when the sponsor left the country.

b. The respondent was not satisfied her mother would relinquish sole responsibility to the sponsor and consequently the appellant could not satisfy paragraph 352D(iv) HC 395.

2. The appellants appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on October 14, 2013.

3. The entry clearance manager reviewed the decisions on February 24, 2014 but upheld both decisions. The respondent accepted that a passport was not always required but as both appellants were nationals of Cameroon and lived in the country the respondent concluded their failure to present such passports was a reason to refuse under paragraph 320(3) HC 395. In respect of the second-named appellant the entry clearance manager upheld the original decision that the appellant was not part of the sponsor's family.

4. The appeal was listed for hearing on June 13, 2014 before Judge of the First Tier Tribunal Hague (hereinafter referred to as the "FtTJ"). In a determination promulgated on June 25, 2014 the FtTJ refused both appeals under both the Immigration Rules and human rights.

5. The appellants lodged grounds of appeal on July 3, 2014 and on July 21, 2014 Judge of the First-tier Tribunal Page found there was no error in law. An application for leave to appeal was renewed to the Upper Tribunal on August 4, 2014 and on October 10, 2014 Upper Tribunal Gleeson gave leave to appeal finding it was arguable the FtTJ did not apply his mind to the relevant provisions of the Rules.

6. The matter came before me on the above date. The representatives made submissions and I reserved my decision.

SUBMISSIONS ON ERROR OF LAW

7. Ms Patel argued that the FtTJ had refused the first-named appellant's application under paragraph 320(3) HC 395 but no issue had been raised in the refusal letter about the sponsor and first-named appellant being in a relationship. The FtTJ considered the decision of Fetle (Partners:Two year requirement) [2014] UKUT 00267 (IAC) but failed to apply the principles correctly and failed to have regard to the sponsor's interview. With regard to the second named appellant the FtTJ failed to have regard to the decision of BM and AL (352D(iv); meaning of 'family unit') Columbia [2007] UKIAT 00055 and the reason the appellant and her father were separated. The FtTJ wrongly applied the case in paragraph [8] of his determination. As regards the refusal under paragraph 320(3) HC 395 the FtTJ by not accepting the

documents as evidence of their identity, nationality and date of birth because he failed to have regard to the decision of AM (Section 88(2): "Immigration Document") Somalia [2009] UKIAT 00008.

8. Ms Johnstone reminded me that the grounds of appeal had not challenged the findings in paragraph [7] of the determination namely the inconsistencies in the evidence. The FtTJ was not satisfied the sponsor was living with anyone else prior to leaving Cameroon and his findings in paragraphs [8] and [9] were therefore open to him. The second-named appellant cannot succeed under these provisions because the FtTJ rejected they were part of the same household. As regards the finding under paragraph 320(3) HC 395 the FtTJ was not satisfied with the explanation about the passport. The FtTJ considered the evidence and explanations and rejected them. The grounds amount to nothing more than a mere disagreement.

DISCUSSIONS AND FINDINGS

9. When the matter came before the FtTJ the sponsor was called to give oral evidence. During the course of the evidence the FtTJ indicated to Ms Patel that in addition to the refusal under paragraph 320(3) the FtTJ also believed that there was an issue under 352AA (ii) HC 395 which required the first-named appellant to demonstrate that he and the sponsor had been living in a relationship akin to a marriage or civil partnership for two years or more.

10. Ms Johnstone submitted that the lengthy grounds of appeal had not challenged the FtTJ's finding in paragraph [7] that the sponsor's evidence was to be treated with caution because during cross-examination he altered his evidence to try and accommodate the inconsistencies. The issues surrounding the first-named appellant must be considered in the light of this finding.

11. Both appellants had been refused under paragraph 320(3) HC 395 but these findings were challenged in the grounds of appeal. Paragraph [8] of the grounds of appeal outlined the challenge and in particular they alleged the FtTJ had erred in his approach to the lack of passports for either appellant.

12. The decision of AM had been handed to him and the FtTJ did not make any reference to this decision in paragraphs [9] and [10] of his determination which was where he considered paragraph 320(3) HC 395. The FtTJ considered the evidence about both appellant's "passport" in paragraphs [9] and [10] and found they did not establish their identity and nationality because of the way they were obtained. The FtTJ erroneously noted there was no other identity document before him for the first-named appellant because as the grounds of appeal correctly pointed out there were birth certificates in the appellants' bundle for both appellants. In paragraph [10] he found the evidence in relation to the second-named appellant to be unreliable.

13. Ms Patel submitted that the respondent had not raised any issue of authenticity over the birth certificates and having considered the evidence I am satisfied that Ms Patel has a valid point. Mr Ogbewe's concerns related to the passport and his closing submissions centred on the fact the appellants could re-apply with a valid passport.

There is strength in the argument that if the respondent does not challenge a document that is capable of satisfying Section 88(2) of the 2002 Act then is it appropriate for the FtTJ to make such a finding. If the FtTJ wished to reject the reliability of the document he was obliged to give his reasons. I am satisfied he did this in paragraph [9] because he expressed concern about the manner in which the passport was obtained and this led him to conclude the birth certificate's authenticity was questionable.

14. The case of AM considered the requirement to produce either a valid national passport or other document satisfactorily establishing a person's identity and nationality. However, in AM the judge found the sponsor's evidence credible and found there was nothing in the evidence she heard that threw any doubt upon the claim made. The judge concluded in that case the documents produced satisfactorily established the person's identity.

15. The failure in this case by the FtTJ to mention the case of AM is not a material error. The FtTJ was aware of the evidence that was submitted but was unconvinced by it. The sponsor had already admitted in paragraph [8] of his witness statement that a passport had been obtained by payment of a bribe and the FtTJ was therefore entitled to consider documentary evidence with that factor in mind. He did not reject the other forms of identity because they were not passports but simply because he did not find them reliable. The argument in these circumstances advanced by Ms Patel has no merit and I therefore find the FtTJ was entitled to reject both applications under paragraph 320(3) HC 395 and regardless of any other findings I make these appeals must fail.

16. Turning to the First-named appellant the FtTJ rejected his appeal for not satisfying paragraph 352AA HC 395. The FtTJ accepted the sponsor and appellant had been in a relationship but found that as they had not been cohabitees their relationship was not akin to a civil partnership and this was a requirement of paragraph 352AA HC 395. The FtTJ considered the decision of Fetle but still found they were not in a relationship akin to a civil partnership.

17. In Fetle (Partners: two year requirement) [2014] UKUT 00267 (IAC) the Tribunal held that in contrast to the requirement of Para GEN 1.2(iv) of Appendix FM, a requirement (such as in paragraph 352AA of the Immigration Rules) that "parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more" does not require two years cohabitation, but two years subsistence of the relationship. Whether the relationship still subsists, as required by the tense of that requirement and as may be separately required, is a different issue.

18. I accept Ms Patel's submission that the FtTJ erred in finding that, as they had not been cohabitees the relationship was not akin to a civil partnership. The Tribunal made clear in Fetle that this was not required. In assessing whether this error is material I have to consider the FtTJ's assessment of the evidence on the relationship. This can be found in paragraph [7] of the determination. The FtTJ did not reject the

sponsor's claim they were in a relationship but merely the claim that they lived together. Following the decision of Fetle it appears that cohabitation of any form is not a requirement and the parties merely have to demonstrate their relationship has been subsisting for two years or more. In the circumstances I find that the relationship had been subsisting for at least two years and the requirement of paragraph 352AA is met. The error in this appeal is not material because of my earlier finding on paragraph 320(3) HC 395.

19. Finally I have considered the FtTJ's finding that the requirements of paragraph 352D(iv) are not met. The FtTJ considered the decision of BM and AL but concluded that did not appear to apply in this appeal. In paragraph [25] of BM and AL the Tribunal found that whether a person is part of a person's family unit will depend on the particular facts of the case. At paragraph [27] the Tribunal stated-

> "We regard the issue as to what is a "family unit" for the purposes of para 352D(iv) as a question of fact. In many cases it will be clear that a child was part of a family unit with an asylum seeker in his country of habitual residence. The child will have lived with the asylum seeker and perhaps another partner. Alternatively if there has been separation the reason for that separation may well be associated with the claim of persecution and a child might still remain part of the family unit from which the potential refugee had been temporarily separated."

20. The FtTJ found in paragraph [12] that the second-named appellant had been living with the sponsor's brother for the two years preceding the time when the Sponsor left the country and so was not part of his household at the time he departed. The grounds of appeal at paragraphs [6] and [7] challenge the FtTJ's whole approach to this issue. It is argued that the FtTJ failed to have regard to the sponsor's asylum interview contained in the bundle.

21. I have considered the interview and in particular the section when the sponsor was asked questions about whom he lived with and why his daughter did not live with him. In Q12 he stated he last saw his daughter in 2012 and at Q13 and 14 he stated she lived with his brother because he had separated from her mother in 2008 and she left the second-named appellant with him. At Q15 he confirmed that he lived on his own and at Q16 he explained that his daughter did not live with him because he moved around a lot and he felt it was better that she stayed with his brother.

22. As stated above the Tribunal made it clear that each case had to be considered on its own merits. The FtTJ did not make findings on why the child could not be said to form part of the sponsor's family if she was living with his brother and there was no examination of that situation or the sponsor's own situation when he lived in Cameroon save the FtTJ found he was living alone and away for periods of time.

23. If this was the only issue to be considered I would have been minded to hear further evidence on this so a finding could be made, as I am not satisfied on the information before me that this was properly considered. Even if I found the child came within

paragraph 352AA the appeal would still fail because of my earlier finding on paragraph 320(3) HC 395.

24. In summary, I find there is no material error in respect of both appellants.

25. I accept the FtTJ erred in respect of his assessment of the relationship between the first-named appellant and sponsor. All the first-named appellant should need to do is to produce a document that satisfied the respondent as to his nationality and identity. As a Cameroonian national it is of course open to him to obtain a passport.

26. With regard to whether the second-named appellant comes within paragraph 352AA I accept the FtTJ erred by failing to examine and make findings on the family matrix but before the second-named appellant can satisfy paragraph 352AA he would have to satisfy the respondent (or a judge on appeal) that he was part of the sponsor's family unit and that of course could, in certain circumstances, include being with the sponsor's brother. That is a matter for a different day.

DECISION

27. The decision of the First-tier Tribunal did not disclose an error in law and I uphold the original decision.

28. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) an appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. An order was not made in the First-tier and I see no reason to amend that order.

Signed: Dated: **February 16, 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

No fee was payable.

Signed: Dated: **February 16, 2015**

Deputy Upper Tribunal Judge Alis