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Heard at: Field House

MS (Article 8 - Family Life -
Dependency -
Proportionality) Uganda
[2004] UKIAT 00064

On: 18 March 2004

IMMIGRATION APPEAL TRIBUNAL

notified: Date Determination

Given orally in court 06 April 2004

Before

:

Mr J Barnes (Chairman)
Mrs A J F Cross de Chavannes
Mr C P O'Brian

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
RESPONDENT

DETERMINATION AND REASONS

1. The appellant was represented before us today by Ms C Simpson of Counsel instructed by Tayo Arowojolu; and the Secretary of State was represented by Mr Underwood, a Home Office Presenting Officer.
2. This appeal first came before the Tribunal for hearing on 2 October 2003 when it was adjourned (not part heard) so that oral evidence might be adduced because the issue had arisen as to whether there was any evidence of a special dependency over and above normal family ties which existed between this appellant and his parents and siblings lawfully resident here for the purposes of his appeal under Article 8 of the European Convention, the only issue before the Tribunal. In the event the directions then issued were not complied with but there was a late submission of a witness statement by his father to

which no objection has been taken by Mr Underwood for the respondent save in relation to such parts as will seek to suggest that there is any basis under the Refugee Convention or Article 3 of the European Convention affecting the returnability of this appellant.

3. The appellant is a citizen of Uganda born on 1 July 1984. He left Uganda on 10 September 2002 and arrived in the United Kingdom on 11 September 2002 when he attempted to enter with a forged identity card. When that was discovered he then sought asylum. He was subsequently interviewed after submitting a statement of evidence form and his application for asylum was refused for the reasons set out in a letter of 25 October 2002. On 31 October 2002 the Secretary of State issued directions for his removal to Uganda following refusal of leave to enter after refusal of his asylum application. He appealed against that decision on both asylum and human rights grounds but it is to be noted that the decision was made within some six weeks of his illegal arrival here. It is accepted that since his arrival he has lived with his parents and siblings lawfully here. At the time of his arrival he had of course attained the age of eighteen.

4. The appeal was heard by Mr R G Walters, an Adjudicator, on 19 March 2003 and he dismissed his claims made under the Refugee Convention, Article 3 of the European Convention and Article 8 of the European Convention. There is no appeal before us in relation to either the asylum or Article 3 claims and we are, as we have already mentioned, concerned only with Article 8 issues. The Adjudicator dealt with this aspect as follows at paragraphs 30 to 32 of his determination:

"30. The appellant's father left Uganda in 1989 and came to the UK. He was granted refugee status. He was followed by the appellant's mother in 1990 and she also was granted refugee status. The appellant said that his parents left five children behind in Uganda to be brought up by other relatives. He himself was brought up by an uncle, but did not have contact with his other siblings. Nor did he have contact with his parents after they had left for the UK. The appellant said that at present he is living with his parents in the UK, pending this hearing.

31. On this evidence I do not find that the appellant has established family life with his parents in the UK. They apparently made no effort between 1990 and the appellant's arrival to bring him to the UK as a dependant. I did not accept the appellant's evidence that his parents could not get in touch with him whilst he was in Uganda. The appellant arrived in the UK carrying his parents' telephone number.

32. If I were to be held in error on this, I have gone on to consider whether it would amount to an interference with the appellant's family life to return him. I do not find that it would be. If it were to be held to be an interference, I would have found that such interference was in accordance with immigration law and had the legitimate aim of immigration control and was proportionate."
5. It is common ground before us that there are certain factual errors in what the Adjudicator records at paragraphs 30 and 31 which are demonstrated by the uncontested statement given by the appellant's father. First it would appear that the parents, although they had claimed political asylum and in the case of the father as early as 4 December 1989, were not successful in those applications but eventually were granted indefinite leave to remain on 20 October 1999 by which time the father had been in the United Kingdom for over ten years and his wife since 30 April 1990 with two of their children. Two further daughters arrived in 1995 and 1997 respectively as minors and were treated as forming part of the family who had been given periodic exceptional leave to remain until the final grant of indefinite leave to remain in 1999. Mr Underwood suggested that this would have been on the basis of their long residence here and it seems to us that this is probably correct. There is nothing in the history to suggest that they have ever formally been accepted as refugees.
6. The second way in which the Adjudicator's factual findings are inaccurate is that it is now accepted on the basis of the father's statement that he had instructed solicitors in or about 1999 - and we suspect shortly after his stay had been finally regularised - to make an application for settlement of the appellant by issue of entry clearance by the British Embassy in Nairobi. That application, which would have been under the relevant Immigration Rules, was refused and the father says that there was an appeal against that decision which was subsequently dismissed. No further information about those proceedings is available because the solicitors who then acted are no longer in practice but it is at all events quite clear that legitimate attempts to secure the appellant's entry were made in 1999 and were unsuccessful. It is against that background that the appellant arrived here illegally in October 2002.
7. It was Ms Simpson's submission to us that the appellant had not earlier been able to enjoy his family life with his parents and his siblings by reason of their long separation and that his uncle who had brought him up was, as is again common ground, now dead so that he was not available to continue to look after him in Uganda. On that basis it was her submission that there was family life created here by reason of what had taken place since his arrival although she had to accept that

there was no satisfactory evidence of any direct contact prior to his arrival in the period since his parents had left Uganda. It is against that factual background that we are asked to consider issues of family life and proportionality under Article 8 of the European Convention which provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."
8. In our judgment the factual errors which we have recited above do not in this case undermine the conclusions which the Adjudicator drew that there was not any family life established with the parents and siblings in the United Kingdom by reason of the very short period of reunion following illegal entry. It is accepted law that in circumstances where family life is put forward as existing between an adult child and his parents or an adult sibling and his other siblings there needs to be further elements of dependency involving more than normal emotional ties. This was reaffirmed by the Tribunal recently in the decision in Salad [2002] UKIAT 06698 relying on the earlier case of Advic v United Kingdom, a Strasbourg case decided in September 1995. The relevant quotation from Advic is contained at paragraph 13 of the decision in Salad. Each case is fact dependent. In Salad adult brothers had been living apart for a long period of time and were not dependent on each other. Equally where relationships between parents and an adult child are concerned the protection of Article 8 would not necessarily be engaged without evidence of further elements of dependency. In the present appeal no evidence of such further dependency has been adduced although the appellant was offered the opportunity to bring oral evidence before us had he wished to do so.
9. We are therefore satisfied that on the facts as they exist the Adjudicator's decision in relation to the lack of existence of family life within the meaning of Article 8 of the European Convention is a sustainable decision. That of itself is sufficient to dispose of this appeal but, like the Adjudicator, in case we are wrong in saying this we go on to consider the question of proportionality of removal under Article 8(2).
10. It seems to us highly relevant in those circumstances that the appellant is an illegal entrant who came here only after

legitimate attempts to enter the United Kingdom had failed. We note that in the case of Kaya [2002] UKIAT 08312 the Tribunal said that the Adjudicator correctly stated the principle that the European Convention on Human Rights must not be used to circumvent the immigration rules "but we feel that is exactly what her ruling on proportionality would accomplish". That is the guiding principle in our view and it must be taken seriously into account in relation to issues of proportionality.

11. The Secretary of State had not himself dealt with whether removal under Article 8 would be proportionate but the Tribunal in its starred decision in [2004] UKIAT 00024 M (Croatia) has clearly stated the approach which should be adopted by the Tribunal and Adjudicators in approaching proportionality issues. It sets this out at paragraph 28 as follows:

"The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and Adjudicators should regard Shala, Edore and Djali as providing clear exemplification of the limits of what is lawful and proportionate. They should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. ... It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality. We cannot think of one at present; it is simply that we cannot rule it out."

11. That approach is of course binding on this Tribunal and there is nothing in the submissions made by Ms Simpson on behalf of the appellant which would persuade us that no reasonable Secretary of State could properly have reached the decision on the facts in this appeal that removal in the public interest in the regular enforcement of immigration control was not a proportionate response.
12. We are therefore satisfied that the Adjudicator was right in his secondary alternative conclusion that removal would not be disproportionate and that part of his decision also is sustainable.
13. For the above reasons we agree with Mr Underwood's submissions and this appeal is dismissed.

J Barnes
Vice President