The Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: OA/07314/2014
OA/07316/2014
OA/07318/2014
OA/07319/2014
OA/07322/2014
OA/07323/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decisions & Reasons**
On May 6, 2016	**On May 18, 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

[A AF]
[A F]
MASTER AWAD AL FAWZAN
MASTER FARAJ AL FAWZAN
MASTER FAWZAN AL FAWZAN
MISS WAFAA AL FAWZAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr Sadiq (Legal Representation)
For the Respondent: Mr Harrison (HOPO)
Interpreter: Mr Chmaissani

DECISION AND REASONS

1. The appellants, citizen of Kuwait, are all siblings and they are the children of the two Sponsors, Toama Al Fawzan and Mariha Yasin Awayid. They had applied for entry

clearance under paragraph 352D HC 395 but the respondent refused their applications on June 2, 2014 under paragraphs 320(3) & (10) and 352D HC 395. The appellants appealed those decisions on June 24, 2014 under section 82(1) of the Nationality, Immigration and Asylum Act 2002.

2. The appeal came before Judge of the First-tier Tribunal Mulvenna on July 2, 2015 and he allowed the appeals of the first two named appellants under the Immigration Rules but refused the remaining applications under both the Immigration Rules and ECHR legislation in a decision promulgated on July 2, 2015.

3. Both parties appealed that decision and when the matter came before me on January 29, 2016 I accepted there had been errors in law as argued by both parties and I directed that the matter be listed for a further hearing and I made the following findings for the purpose of today's hearing:

   a. All of the appellants are the children of both sponsors.

   b. The first two-named appellants are under the age of eighteen.

   c. The remaining appellants were found to be over the age of eighteen at the date of application. If the appellants maintain they were under the age of eighteen, then further evidence would be necessary to persuade me to depart from the First-tier Judge's finding on this issue.

   d. Did the translated birth documents mean the appellants were documented Bidoons?

   e. As the appellants are all siblings would it be disproportionate to refuse them all entry, even if some of them are over the age of eighteen?

4. The First-tier Tribunal did not make an anonymity direction and pursuant to Rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008 I make no order now.

PRELIMINARY ISSUES

5. Mr Harrison adduced in evidence a section of the appellants' father's screening interview in which dates of birth had been written. Mr Harrison stated, having checked with colleagues, that he could not verify the authenticity of the birth documents and he accepted these documents did not mean the appellants were documented. As the sponsors had been accepted as undocumented Mr Harrison accepted that these appellants must also be treated as undocumented in the absence of any evidence to the contrary,

6. Mr Sadiq produced correspondence from when the appellants' father claimed asylum that set out the ages of the appellants and he also handed over the original birth documents. Translations of these documents appeared in the respondent's bundle and Mr Harrison later confirmed that these documents had been given to the respondent when the application was submitted.

EVIDENCE

7. Mr Toama Al Fawzan gave evidence through the interpreter and adopted his two witness statements. In answer to questions posed by Mr Harrison he confirmed:

   a. In addition to these appellants he had three other daughters who were married and living with their husbands and children in Kuwait. They were all undocumented but one of his daughters was married to a documented Kuwaiti. He had occasional telephone contact with them but the last contact was three months ago.

   b. The appellants were taken to Jordan after he and his wife had been granted discretionary leave to remain. They had travelled from Kuwait to Jordan hidden in carts.

   c. The original birth documents had been given to him around ten days after each child had been born. He agreed each document looked the same as they were same colour. He explained that each document was placed in a suitcase and they had been folded which explained why they were in good condition and had folds in the same place. The documents were only there to prove that the appellants were their children.

   d. He spoke to the appellants on the internet and he and his wife had travelled to see them on four occasions between April 2014 and May 2015 with each of them travelling on two occasions. They were now unable to travel because of additional financial requirement placed on visitors by the Jordanian government.

   e. They received around £850 a month plus housing benefit and sent around £200 to Jordan for their children. Evidence of money transfers had been submitted. They had also borrowed money on two occasions to fund trips to see them.

8. Mr Toama Al Fawzan further stated that neither he nor his wife had travelled to Kuwait to see their other children and their other children had been unable to travel to Jordan to see the appellants because they were undocumented Bidoons.

SUBMISSIONS

9. Mr Harrison submitted that on the evidence available two of the children were under the age of eighteen but the other four were older. None of the additional evidence altered the finding made on this in the First-tier Tribunal. He accepted they all lived together as a family in Jordan albeit their living accommodation was limited to one room. On the evidence available, he accepted none of them had any status in Jordan and he also accepted they were "undocumented Kuwaiti Bidoons" with no right to return to Kuwait. However, he submitted they were an autonomous group of individuals who looked after themselves. If the Tribunal concluded that the youngest two appellant's appeals should be allowed then the issue for the Tribunal would be whether it would be disproportionate to split this part of the family up and that, Mr Harrison submitted, was a matter for the Tribunal to decide but in considering their claims regard should be had to Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31.

10. Before taking submissions from Mr Sadiq, I clarified with Mr Harrison what exactly his position was with regard to the first two-named appellants who he accepted were under the age of eighteen at the date of application.

11. Mr Harrison accepted that these two appellants would have succeeded under paragraph 352D HC 395 save they had no passports and that as minors there was a strong argument that they should be allowed to live with their parents under article 8 ECHR.

12. I indicated to Mr Sadiq that I was minded to allow the appeals of the first two-named appellants for reasons I would give later and that his submissions should address firstly whether I should accept the remaining appellants as also being under the age of eighteen and secondly, why it would be disproportionate to refuse them entry clearance if they were found to be over eighteen.

13. Mr Sadiq submitted that the First-tier Tribunal finding on age should be revisited because it had been made on a misunderstanding of how the birth documents should be treated. There was additional evidence now before the Tribunal that demonstrated the sponsor had told the immigration officer when interviewed for his asylum claim the exact dates of birth of each child. These ages were confirmed in the screening interview save for what was probably an incorrect recording of two dates of birth. He submitted two dates had clearly been incorrectly recorded as 1969 instead of 1996 and 1979 instead of 1997. Although the birth documents were in a good condition he submitted applying the principles of Tanveer Ahmed [2002] UKIAT 00439 these documents should be considered in the round with the other evidence. He referred me to the Home Office's own guidance on age assessment and submitted each of the appellants should be accepted as under eighteen.

14. However, if the Tribunal considered the remaining appellants to be over the age of eighteen then he submitted that separating the family would be disproportionate. They were young adults who had no legal status in Jordan having travelled there illegally intending to try and join their parents in the United Kingdom. They were stateless because they were undocumented and their situation was both unique, unusual and exceptional. There was also medical evidence about the fourth-named appellant which showed he suffered with neuromuscular dystrophy and was in need of both medical assistance and the love and care of his parents. They remained financially dependent on their parents and refusing their applications would be disproportionate.

DISCUSSION AND FINDINGS

15. The sponsors are the parents of nine children. Three of those children are accepted as being over the age of eighteen and living independent lives when the sponsors left Kuwait and came here and applied for asylum as undocumented Bidoons. They are married and apparently living safely with their husbands and children. Whilst they may also be undocumented Bidoons they have made their own lives and do not form part of the applications before me.

16. The history of this case makes sad reading because their applications were lodged in April 2014 but were rejected because firstly the respondent was not satisfied they were related as claimed; secondly as undocumented Bidoons they could not satisfy paragraph 352D and thirdly, there was an issue over their ages.

17. By the time their appeals came before the First-tier Tribunal, DNA tests had been carried out and they conclusively confirmed that the sponsors were the parents of all of the appellants. Judge of the First-tier Tribunal Mulvenna accepted the first two appellants were under the age of eighteen and that finding remains unchallenged today. He found that as undocumented Bidoons they were not able to produce passports as evidence of nationality and identity and he allowed their appeals under the Immigration Rules under the family reunion policy. Unfortunately, for reasons previously stated, that amounted to an error in law and that decision had to be set aside. He did not make any finding under article 8 ECHR and that is the first matter I intend to address.

18. The respondent previously agreed that these claims fell to be considered under article 8 and applying the tests set out in Razgar [2004] UKHL 00027 I accept that there is family life between the first-two named appellants and the sponsors. Refusing them entry would interfere with that right and as they did not satisfy the Immigration Rules it is in accordance with the law for one of the legitimate aims set out in article 8(2) ECHR.

19. The issue was one of proportionality and in considering this I have to have regard to Section 117B of the 2002 Act as introduced by the Immigration Act 2014. Whilst I accept neither the sponsors nor the appellants speak English and the sponsors receive public funds I must have regard to the fact the appellants are minors of parents who have been accepted as refugees who would have qualified under paragraph 352D HC 395 but for the fact they have no documents. There is no evidence to suggest that the sponsors could relocate to live in Jordan. There is a strong presumption for children to live with their parents and I am satisfied that in light of the respondent's recognition of the sponsors' status in this country and their current living arrangements and status in Jordan that refusing the first two-named appellants entry clearance would be disproportionate. I therefore allow first two-named appellants' appeals under article 8 ECHR.

20. Turning to the remaining appellants I have to consider whether they are eighteen or under when their applications were lodged.

21. Judge of the First-tier Tribunal Mulvenna had limited evidence before him about their ages. He had translated birth documents and the entry clearance officer's own assessment. It was argued before him that he should be careful to accept a subjective view of the entry clearance officer and at paragraph [19] of the decision he reminded himself that the Tribunal should decide the case on the evidence presented. As he only had a translated form entitled "A Live Born Statement" for each appellant he concluded the appellants had not satisfied the burden of proof placed on them following the decision of Rawolfi (age assessment-standard of proof) [2012] UKUT 00197.

22. I made it clear at the earlier hearing that for me to re-visit this issue further evidence would have to be adduced. I have been provided with further evidence and that evidence relates to information provided by the appellants' father when he was interviewed for his asylum claim and details entered on the screening interview. I was also shown the originals of the translated forms and Mr Harrison confirmed that these had actually been handed to the respondent when the applications were submitted.

23. It follows therefore that I had more information than Judge of the First-tier Tribunal Mulvenna. I also heard oral evidence from the appellants' father who explained his family circumstances. The position prior to him coming to the United Kingdom was that he, his wife and the appellants all lived together in Kuwait but his older children were married and lived with their husbands.

24. Whilst I have some reservations about the original birth documents (produced at the hearing) due to their pristine condition I must consider them in the round. The

respondent does not suggest they are forgeries and Mr Harrison accepted they matched the documents shown to them in 2014. His own enquiry about these documents revealed it would be impossible to give a definitive answer as to their origin.

25. Having reconsidered all of the available evidence I am satisfied, on balance of probabilities, that all of the appellants were under the age of eighteen and are therefore entitled to be treated in the same way as their other two appellants whose appeals I addressed earlier.

26. I should add that even if I had concluded they were over the age of eighteen I do believe that it would have been disproportionate to separate this family bearing in mind they had no legal status in either Jordan or Kuwait, they had no income and were being supported emotionally and financially by their parents. There was evidence that their mother had spent seven months with them between June 2014 and May 2015 and their father had spent almost eight weeks with them between April and August 2014.

27. Applying the tests laid out in Kugathas, Ghising and others (Ghurkhas/BOCs: historic wrong; weight) [2013] UKUT 00567 (IAC) and Gurung & Others v SSHD [2013] EWCA Civ 8 I find there is a requisite degree of emotional dependence over and above the usual emotional bonds. The Court's approach in Gurung, to the issue of family life, is set out in paragraphs [45] to [46]. The court stated-

> "45. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case… in some instances an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents. It all depends on the facts.
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> 46. … Paras 50 to 62 of the determination of the UT in *Ghising* contains a useful review of some of the jurisprudence and the correct approach to be adopted. It concludes at para 62 that the different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive."

28. Accordingly, even if they had been over the age of eighteen I would have concluded, after considering section 117B factors, that in this case it would be disproportionate to refuse them entry.

29. I therefore allow all of their appeals under article 8 ECHR.

30. Ideally the respondent should grant them such leave to coincide with that issued to their parents so any future renewal can deal with all cases together but ultimately that is a matter for the respondent.

DECISION

31. There was a material error and I set aside the earlier decision and I have remade the decision.

32. I dismiss all appeals under the Immigration Rules.

33. I allow all appeals under article 8 ECHR.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

FEE AWARD

I do not make a fee award as the decisions taken by the entry clearance officer were open to him at the time.

Signed: Dated:

Deputy Upper Tribunal Judge Alis