



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/10540/2012
OA/10541/2012

THE IMMIGRATION ACTS

**Heard at Newport
On 12 November 2013**

**Determination
Promulgated
On 06 January 2014**
.....

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**AJA
ASF**

(ANONYMITY ORDER MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER - NAIROBI

Respondent

Representation:

For the Appellants: Mr G Hodgetts instructed by South West Law
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. These appeals are subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind

the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellants are citizens of Somalia. The first appellant was born on 21 April 1926 and the second appellant was born on 21 October 1994. The second appellant is the adopted daughter of the first appellant and they have lived together in Nairobi, Kenya since March 2009. The first appellant is the father of the sponsor ("AJ"). He came to the UK and was recognised as a refugee in 2001. He became a British citizen in 2007. He lives in the UK with his wife, who joined him in July 2005, and son who was born in the UK in 2010.

The Appeals' History

3. These appeals have a protracted history. The appellants first applied for entry clearance to join the sponsor on 19 June 2009. Their applications were refused on 15 July 2009. They appealed to the First-tier Tribunal. The appeals were heard by Judge Knowles on 28 May 2010. It was accepted before Judge Knowles that the appellants could not meet the requirements of the Immigration Rules in paras 317 and 297 respectively of HC 395 as they could not establish that they would be adequately maintained and accommodated in the UK. Instead, the appellants relied upon the Secretary of State's Family Reunion Policy and Article 8 of the ECHR. Judge Knowles made a number of factual findings. He accepted the relationship between the first and second appellant was akin to that of father and daughter. Judge Knowles also accepted that, prior to the sponsor coming to the UK and claiming asylum, the appellants lived in his household and had formed a family unit. Judge Knowles allowed the appellants' appeals on the basis that the ECO had not considered the application of the Family Reunion Policy to the appellants and that therefore his decisions were not in accordance with the law.
4. Subsequently, the ECO considered the appellants' appeals under the Family Reunion Policy but concluded that the policy could not apply as the sponsor was not a refugee but was a British citizen. Consequently, on 18 January 2011, the ECO again refused the appellants' applications.
5. The appellants again appealed to the First-tier Tribunal. The appeals were heard by Judge L Murray on 4 October 2011. Judge Murray allowed each of the appellants' appeals on the basis that the ECO's decisions were not in accordance with the law because he had been wrong to conclude that the Family Reunion Policy did not apply because the sponsor had ceased to be a refugee on becoming a British citizen. Judge Murray concluded that the Supreme Court in ZN (Afghanistan) [2010] UKSC 21 had decided that the family reunion provisions in the Immigration Rules, namely paras 352A and 352D applied even where the sponsor, who had come to the UK and been granted refugee status, had subsequently become a British

citizen. Judge Murray concluded that that approach equally applied to the Secretary of State's Family Reunion Policy.

6. Having allowed the appellants' appeals on that basis Judge Murray nevertheless concluded that the respondent's decisions did not breach Article 8 of the ECHR. The Judge found (at para 35) that, although family existed between the appellants, it did not exist between the appellants and the sponsor as she was not satisfied that there was "an unusual degree of emotional dependency" between the appellants and sponsor. In addition, Judge Murray went on to find that, in any event, the respondent's decision was proportionate. In reaching that finding, Judge Murray concluded that the appellants could not establish that they fell within the Family Reunion Policy on the basis that their circumstances in Kenya could not be described as "compelling, compassionate circumstances". Given that finding, it might be thought somewhat surprising that the Judge allowed the appeal on the basis that the respondent had failed to consider the Secretary of State's Family Reunion Policy since, on Judge Murray's findings the appellants simply did not fall within the terms of the policy. Be that as it may, the appellants did not seek to appeal against Judge Murray's decision. That might well be because they had, in a sense, partially succeeded as their applications were remitted to the respondent to consider the application of the Family Reunion Policy.

The Present Appeals

7. The ECO now considered the appellant's applications for entry clearance for a third time. On 8 December 2011, the ECO again refused each of the appellants' applications for entry clearance. Relying on the findings of Judge Murray, the ECO concluded that the appellants did not satisfy the requirements of the Family Reunion Policy on the basis that their circumstances were not "compelling, compassionate circumstances". Further, in relation to Article 8 the ECO concluded that there was no reason to go behind Judge Murray's findings and decision that Article 8 was not breached.
8. The appellants again appealed to the First-tier Tribunal. The appeal came before Judge A E Walker on 1 July 2013. The appellants again relied upon the Family Reunion Policy and Article 8 of the ECHR. In paragraph 29 of her determination, Judge Walker recorded:

"29. It was accepted by both parties that only if I find that there was any change in the appellants' circumstances between 18.01.2011 and 18.12.2011 ("the relevant period") will the appellants have any chance of a successful appeal. This is because 18.01.2011 was the date of the decision appealed against to IJ Murray and therefore sets the date of her findings and 18.12.2011 is the date of the decision which is before me. This approach follows the case of Devaseelan (Second Appeals - ECHR Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702 which is authority for the proposition that the first Immigration Judge's determination should always be the starting point but that facts happening since the first

determination can always be taken into account at a subsequent hearing.”

9. Judge Walker then went on to consider the additional evidence relied upon by the appellants. She rejected the appellants’ argument that the situation in Kenya was worsening and did not accept that the situation had worsened in reality in the “relevant period”. She found that the first appellant was able to access suitable care and that the situation had not changed during the “relevant period”. At para 34 she concluded:

“34. It follows from these findings that I conclude that there has not been any change of circumstances or additional evidence in the relevant period which would cause me to alter or contradict the comprehensive findings made by IJ Murray in her determination of 08.10.2011. ”

10. At para 35, Judge Walker confirmed the findings of IJ Murray that the second appellant’s emotional tie was with the first appellant rather than the sponsor.

11. At para 36, Judge Walker concluded:

“36. It follows from my findings above that the respondent’s refusal of the applications was justified. There has been no change in circumstances in the relevant period and the findings of IJ Murray must stand.”

12. The appellants sought permission to appeal to the Upper Tribunal. On 14 August 2013, the First-tier Tribunal (DJ Appleyard) granted the appellants permission to appeal. Thus, the appeals came before me.

The Submissions

13. At the hearing, Mr Hodgetts (who now represented the appellants) relied upon the grounds of appeal dated 4 August 2013 drafted by him which he developed in his oral submissions.
14. Mr Hodgetts’ central argument was that the Judge had been wrong in law to take as her “starting point” Judge Murray’s adverse findings applying Devaseelan ([2003] Imm AR 1). He submitted that Judge Murray’s findings were legally unsustainable. In that latter regard he developed six points which can be summarised as follows.
15. First, Judge Murray misdirected herself in concluding that the Family Reunion Policy was only relevant in assessing proportionality. There was no option to the decision maker other than to apply the policy in the appellants’ favour. Mr Hodgetts submitted that that was a misreading of the AIT’s decision in AG and Others (Policies: Executive Directions; Tribunals’ Powers) Kosovo [2007] UKAIT 00082 and inconsistent with the Court of Appeal’s decisions in R (Tozhlukaya) v SSHD [200?] EWCA Civ 379 and Miao v SSHD [2006] EWCA Civ 75. Secondly, Judge Murray misdirected herself as to the meaning of “compelling, compassionate circumstances” under the Family Reunion Policy in having regard to the

fact that the appellants' circumstances were "no different to other Somalis living in Kenya" (at para 46 of the determination). Thirdly, given the appellants' circumstances it was irrational for Judge Murray to find that an 85 year old man sharing a single room of about 4 metres by 4 metres with a teenage girl who was his carer amounted to "adequate living conditions" (see para 42 of the determination) and it was irrational to find that overall their situation did not amount to "compelling, compassionate circumstances". Fourthly, Judge Murray failed to take into account the "best interests" of the second appellant who was a 14 year old girl sharing a single room with her 85 year old adopted father and who was unable to go to school. Finally, Judge Murray misdirected herself in finding that there was no "family life" between the appellants and sponsor in the UK upon whom they were wholly economically dependent applying the requirement that there be an "unusual degree of emotional dependency" (see para 35 of the determination). Mr Hodgetts submitted that this was consistent with the Court of Appeal's decision in Kugathas v SSHD [2003] EWCA Civ 31 and the factually nuanced approach set out in the Upper Tribunal's decision in Ghising (Family Life - Adults - Gurkha Policy) [2012] UKUT 00160 (IAC).

16. Mr Hodgetts submitted that the errors in Judge Murray's determination were Robinson obvious even if they were not raised before Judge Walker by the appellants' representative and, in effect, he submitted that Judge Walker should have taken the points for herself. In addition, he indicated that he would formally withdraw the concession made by the (then) appellants' representatives and he referred me to the decision of the Court of Appeal in NR (Jamaica) v SSHD [2009] EWCA Civ 856 in support of that.
17. Neither in his grounds nor oral submissions did Mr Hodgetts directly challenge any aspect of Judge Walker's reasoning in dismissing the appeal other than her reliance upon Judge Murray's findings and her application of Devaseelan.
18. On behalf of the respondent, Mr Richards submitted that Judge Murray's decision was not under appeal. He pointed out that her decision had never been appealed. He submitted that there was nothing in Devaseelan which allowed Judge Walker to go behind Judge Murray's factual finding on the basis that Judge Murray's findings were flawed in law. In any event, Mr Richards submitted that this had not been argued before Judge Walker. The appellants had been represented by an experienced advocate before Judge Walker and he had accepted that Judge Walker could only find in the appellants' favour if there had been a "material change" in circumstances since Judge Murray's decision. Mr Richards submitted that that was a significant concession by the appellants' representative and it could not be an error of law for Judge Walker to do precisely what the appellants' representative had asked her to do. Mr Richards submitted that the errors were not Robinson obvious points.

Discussion and Analysis

19. The first issue which I must address concerns the application of Devaseelan and whether Judge Walker was required, despite any legal errors in Judge Murray's determination, to take her finding as a "starting point". The second issue is what is the relevance, if any, of the concession by the appellants' representative that Judge Murray's findings should only be departed from if there was a "material change of circumstances" since her decision?
20. Devaseelan was a case in which the Immigration Appeal Tribunal was asked to consider the relevance and effect of findings made by an adjudicator in an appellant's asylum appeal when subsequently a second appeal, after the coming into force of the Human Rights Act 1998, came before an adjudicator where the same appellant relied upon his human rights arising from essentially the same factual matrix. The IAT laid down a number of guidelines at [37]-[42]. It is not necessary of set out those guidelines in full; suffice it to say that the underlying approach is that the first adjudicator's determination is the "starting point" and is an authoritative assessment of the appellant's status at the time it was made. However, the second decision maker must reach a decision on the appellant's situation and claim at the date of the second hearing. Any facts arising since the first determination must always be taken into account. Facts in relation to circumstances before the first decision but having no relevance to it may also be taken into account by the second decision maker to the extent that they are relevant to the issues in the second appeal. These matters are set out in Guidelines (1)-(3) in [39] of the IAT's determination. The IAT then went on to give guidance on the assessment of evidence at the second appeal hearing which was not considered by the first decision maker.
21. To what extent if any, can the second decision maker look behind the findings in the first determination not on the basis that there is new evidence about subsequent factual matters which may justify a (now) favourable decision for an appellant, but rather so as to undermine the findings of the Judge in the first appeal? There are a number of passages in the determination of the IAT which touch upon, and are relevant to, this issue.
22. At [37] the IAT said this:
 - "37. ...the first adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the appellant was then making, at the time of that determination. It is not binding on the second adjudicator; but, on the other hand, the second adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second adjudicator's role to consider arguments intended to undermine the first adjudicator's determination."

23. The IAT would appear to preclude the very challenge that the appellants seek to bring in this appeal to Judge Murray's earlier decision. In effect, the appellants' submissions amount to an appeal against Judge Murray's decision (which was never brought) and, contrary to what is said in the final sentence of the above passage, would have required Judge Walker "to consider arguments intended to undermine" Judge Murray's determination.
24. Read alone, these comments would be a complete answer to Mr Hodgetts' submissions seeking to demonstrate that Judge Walker's decision was flawed in law.
25. Likewise in stating that the first Judge's determination is always the "starting point", in guideline (1) the IAT states that:

"In principle, issues such as whether the appellant was properly represented,...are irrelevant to this".
26. That, of course, as a submission in a second appeal would amount to a legal challenge to the findings of the first Judge on the basis of unfairness arising from inadequate representation.
27. Having stated that, however, the IAT returned to the situation where in a second appeal it is argued that the appellant was poorly represented in guideline (7) at [41]. Having set out in its earlier guidelines (4) and (6) at [40] and [41] that a second Judge should be circumspect in relying on evidence that was available but not relied on in the earlier appeal, the IAT noted that that reasoning was:

"Greatly reduced if there is some *very good reason* why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him."
28. The IAT cautioned that "such reasons will be rare". Specifically, the IAT considered the argument that there was error or incompetence on the part of the appellant's representatives at the earlier hearing. Although the IAT noted that: "an adjudicator should be very slow to conclude that an appeal before an adjudicator had been materially affected by a representative's error or incompetence" the IAT did not exclude such a possibility as permitting the second Judge to rely upon the evidence and reach findings, potentially, different from those of the first Judge.
29. Although the IAT was concerned specifically with an appellant's reliance in a second appeal on evidence that could have been submitted at the earlier appeal hearing, the underlying point is that that findings of the first Judge may have to be revisited in the light of error or unfairness that are beyond the appellant's control.
30. That, in my judgement, is reinforced by the passage in [42] of the IAT's determination which immediately follows:

“42. Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second adjudicator would, in such a case, be able to build very meaningfully on the first adjudicator’s determination, but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)”

31. It seems to me that in that passage, the IAT (entirely understandably) left open the possibility that in the interests of justice the circumstances of the first appeal might be such that the second appeal should not take the findings in the first appeal as the starting point and should reach findings as if the first appeal had never happened. That passage, in my judgement, provides a cautionary note to the IAT’s view expressed at [37] (which I have set out above) that the Judge in the second appeal should not consider argument intended to undermine the first Judge’s determination. The circumstances will no doubt be rare and exceptional, for example where there was obvious procedural irregularity or unfairness at the first hearing or where the findings are flawed because of patent errors of law.

32. The Court of Appeal approved Devaseelan in Djebbar v SSHD [2004] EWCA Civ 804; [2004] Imm AR 497. The Court of Appeal rejected a number of challenges made to the substance of the IAT’s guidelines set out in Devaseelan. Dealing with guideline (7) concerned with allegations of error or incompetence by legal representatives at the earlier appeal hearing and that such incompetence could result in reporting to the Immigration Services Commissioner, Judge LJ (as he then was) at [39] said this:

“39. In our judgement no-one benefits if [the representatives] are not so reported, and the requirement that they should be does not impinge on the second adjudicator’s obligation to act on findings of legal incompetence in the course of the first adjudication if such findings are justified.”

33. That, in my view makes clear that the Court of Appeal contemplated a Judge in a second appeal reaching findings (inconsistent with those of the first Judge) in circumstances where there has been incompetence by the appellant’s previous legal representatives. That gives support to the IAT’s expression at [42] of “occasional cases” where the Judge would be entitled to disregard findings in a previous appeal hearing for very good reasons.

34. In approving the approach in Devaseelan and the guidance, the Court of Appeal emphasised that the guidance was flexible. Judge LJ said at [40]:

“40. We have no reason to believe that adjudicators approach this guidance as if they were construing statutory regulation, or apply it as if it were, without regard to the true merit (or otherwise) of the fresh application. The great value of the guidance is that it invests the decision making process and each individual fresh application

with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator's ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."

35. In my judgement, in an appropriate case a Judge hearing a second appeal may have good reason to decide afresh the relevant facts in an appeal without regard to a Judge's earlier findings where those findings are clearly and obviously undermined by procedural or other legal error. But, given the importance of finality and certainty in judicial decision-making, those situations are likely to be rare and exceptional. Where the previous Judge's decision has already been subject to an unsuccessful appeal, I find it difficult to contemplate circumstances in which a second Judge could entertain any challenge to the first Judge's findings. The appellant will have had his opportunity to challenge those findings by way of further appeal and has not succeeded. Likewise, where there was no appeal there would have to be a very good reason why the party affected did not appeal and challenge at the findings at the appropriate time and in the appropriate way before a second judge could contemplate entertaining a challenge to the earlier findings.
36. Here, the appellant's appeal was allowed in part, namely on the basis that the respondent had not considered the Family Reunion Policy. It may be that the appellant's representative (wrongly) did not appreciate that the appellant could, nevertheless, appeal to the Upper Tribunal against the adverse decision and findings made under Article 8. I am not persuaded that this would have been a sufficient justification, had she been asked, for Judge Walker to have entertained the challenge which Mr Hodgetts now makes to Judge Murray's findings and, if made good, to have disregarded them as a "starting point" and to have reached her own view untrammelled findings based upon the evidence before her.
37. I, therefore, reject Mr Hodgetts' first submission.
38. The arguments were not, however, made to Judge Walker who was asked to determine the appeal on the basis that both Judge Murray's findings and decision to dismiss the appeals under Art 8 stood and the appellants could only succeed if there had been a material change of circumstances since Judge Murray's decision. That leads me to turn to the second issue in these appeals which, in my view, presents an insuperable obstacle to the appellants succeeding.
39. I see no basis upon which Judge Walker can be said to have erred in law in determining the appeal on the basis of the concession by the appellants' legal representative that (1) Devaseelan applied in the sense that the facts found by Judge Murray were the starting point; and (2) that her decision in respect of Art 8 (and the Family Reunion policy) were correct on those facts since only a material change of circumstances would allow the appellants to now succeed. There is no challenge to Judge Walker's finding that no change of circumstances was established.

40. Mr Hodgetts did not draw my attention to any authority which suggested that a Judge could not proceed to determine an appeal on the basis of the concession of the sort made in this case by the appellant's legal representative. Instead, Mr Hodgetts relied on the case of NR(Jamaica) v SSHD [2009] EWCA Civ 856 and, as I understood his submission, that the appellants could now withdraw that concession. There is no doubt that in NR (Jamaica) the Court of Appeal recognised that a tribunal had a discretion to allow a party to withdraw a concession "if in its view there is good reason in all the circumstances for that course to be taken" (*per* Goldring LJ at [12] adopting SSHD v Davoodipannah [2004] EWCA Civ 106 at [22] *per* Kennedy LJ). However, I do not consider the NR (Jamaica) can assist the appellants in these appeals.
41. NR (Jamaica) was concerned with the issue of whether a concession could be withdrawn at an evidential hearing either of the initial appeal (where the concession had been made in the refusal letter) or, on further appeal, where an error of law had been identified and the appellate tribunal was itself remaking the decision. That, of course, is not the position in these appeals. No doubt, if Judge Walker's determination were set aside, the appellants' representative could seek to withdraw the concession made to Judge Walker. That would be a matter for the discretion of the Tribunal remaking the decision. A concession cannot, however, be withdrawn before an appeal tribunal so as to affect the legality of the Judge's decision based upon that concession. Judge Walker's decision was based upon that concession and, in my judgement, she was fully entitled to do so. It was made by an experienced representative in this field of law. I do not accept Mr Hodgetts' submission that Judge Walker's failure to detect and consider any legal errors in Judge Murray's determination gave rise to a Robinson obvious point of Convention law which Mr Hodgetts is now entitled to rely on so as to override the concession made by the appellants' legal representative before Judge Walker. Judge Walker did not 'miss' a point of Convention law which she was required to take despite it not being raised by the appellants' representative. The appellants' representative dealt with the application of Devaseelan and all that is now said is that the Judge should have applied Devaseelan differently. Judge Walker did what she was asked to do and found against the appellants on the evidence before her. Mr Hodgetts' submission, in my judgement, is not sustainable. As I have said, her assessment of the evidence and her adverse findings are not challenged in the Grounds and, therefore, in my judgment, they stand.

Decision

42. The decision of the First-tier Tribunal to dismiss the appellants' appeals did not involve the making of an error of law. Those decisions stand.
43. The appellants' appeals to the Upper Tribunal are, therefore, dismissed.

Signed

A Grubb
Judge of the Upper Tribunal

Date: