Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number:
AA/04365/2015

AA/04368/2015
AA/04356/2015

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 25 February 2016	**On 16 March 2016**
Prepared on 26 February 2016	

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

C. A.
A. A.
K. A.
(ANONYMITY DIRECTION)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Selway, Brar & Co Solicitors
For the Respondent: Mr Mangion, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants entered the UK illegally, and claimed asylum on 25 September 2014, asserting that they were citizens of the DRC who were under 18 years of age.
2. Those applications were refused on 26 February 2015, and in consequence removal decisions were made in relation to the Appellants. Whilst the Respondent accepted that the Appellants were citizens of the DRC, she was not satisfied the Appellants had told the truth about their ages, the date upon which they had entered the UK, or, their experiences in the DRC. Although their true names were not specifically disputed, the documents that they had produced to the Respondent as their birth certificates were specifically disputed, and the Respondent also noted that A3 maintained a Facebook account in a different name to that under which he had claimed asylum.
3. The Appellants appealed to the Tribunal against the removal decisions and their appeals were heard on 15 April 2015. They were dismissed on all grounds by decision of Judge Cope promulgated on 6 July 2015.
4. The Appellants duly lodged applications with the First Tier Tribunal for permission to appeal, in which they sought to challenge only the dismissal of their Article 8 appeals. Permission was granted by Judge Lambert on 3 August 2015.
5. The Respondent filed a Rule 24 Notice of 19 August 2015 in which she accepted that the Judge had not made reference to the decision of Singh [2015] EWCA Civ 630. This decision had not been promulgated by the date of hearing, but it was promulgated two months later on 24 June 2015, and thus before the Judge had written his decision. Nevertheless the Respondent argued that this did not give rise to any material error of law because on the facts of these appeals no material error of law arose because the Article 8 appeals were bound to be dismissed.
6. Thus the matter comes before me. It follows that the decision to dismiss the asylum, Article 3, and humanitarian protection grounds of appeal is unchallenged, and is confirmed.

The evidence of Ms M & the Appellants

7. Ms M claimed asylum in March 2004 as a citizen of the DRC. Her application was refused, and her subsequent appeal was dismissed by decision of Judge Zucker on the basis that her account of events in the DRC was a complete fabrication. Her account had centred upon the claim that her husband was involved in political activity in the DRC, and that he had

been killed by the authorities as a result, and that she would also face a risk of harm from them in the event of return.

8. In the course of her asylum application, and her appeal, Ms M gave details of four children of her marriage, who she had left behind in the DRC. These were the Appellants and an elder brother I shall refer to as Mr X. She gave specific dates of birth for each of them.

9. In the course of his decision Judge Cope accepted that Ms M was in truth the mother of each of the Appellants, although he made no specific finding upon whether they had given their true names when claiming asylum. (The question over their true identities arose because A3 used a different name for his Facebook account, and because all of the Appellants were found to have used a false date of birth.)

10. The Respondent did not remove Ms M to the DRC despite her lack of any immigration status, and the exhaustion of her appeal rights, and there was no evidence before Judge Cope to suggest that she had returned voluntarily to DRC at any stage. I am told that in due course Ms M was granted ILR by the Respondent under the "legacy programme" and she has since naturalised as a British citizen, although no documents relating to that process have been placed before the Tribunal, and one might have expected the pursuit of a false asylum claim based upon her falsehoods to count against her as regards the character test.

11. There is no evidence before the Tribunal to suggest that Ms M has ever renounced her citizenship of the DRC, or that the authorities in the DRC have ever been made aware of her naturalisation as a British citizen.

12. Mr Selway accepts before me, that Ms M has never been acknowledged as a refugee from the DRC. He was right to do so. As Judge Cope identified [117] the claims that were made by the Appellants, and Ms M, to him to the contrary in the course of these appeals were quite simply untrue.

13. Ms M gave written and oral evidence to Judge Cope, as she had done to Judge Zucker. Judge Cope comprehensively rejected her evidence, and declined to revisit or to remake in her favour any of the adverse findings of fact about her evidence that had been made by Judge Zucker in 2005.

14. Judge Cope make a series of adverse findings of fact about specific issues raised by the evidence offered to him by both Ms M, and the Appellants. He plainly found all four witnesses to be dishonest, and he rejected as untrue their accounts of the experiences in the DRC of the different members of their family [112-3]. In my judgement the following findings of fact were relevant not only to the protection claim, but were also relevant to the Article 8 claims that were made by the Appellants.

15. The dates of birth that Ms M had originally given in 2004 and 2005 for the Appellants were completely different to those which she now said were accurate, and which the Appellants had each given as their own when they had claimed asylum. Thus she originally said A1 was born on 13 July 1994, although it was now said he was born on 16 November 1997. She originally said A2 was born on 10 April 1995, although three other dates of birth had been given in the course of his asylum claim, 24 December 1999, 19 December 1999, and 19 December 1998. She originally said A3 was born on 26 November 1996, although it was now said he was born on 28 October 2000.
16. Judge Cope rejected as untrue Ms M's account of how she had "found" the birth certificates she asserted were the Appellants' genuine identity documents [57]. He noted that the document said to be A2's birth certificate was inconsistent with any date of birth previously given by either herself for A2, or by A2 for himself. He concluded that all of these documents were unreliable, and he rejected the accuracy of the dates of birth recorded upon them [58]. Although he did not spell this out in terms it is a necessary consequence of his findings, when they are read as a whole, that he concluded that these were false documents advanced dishonestly by Ms M and the Appellants to support a false claim that A1 and A2 were children, and that A3 was younger than seventeen, and thus that all of them were entitled to a grant of DLR.
17. The Judge concluded that each of the Appellants was an adult by the date of the hearing [65]. There is no challenge to that finding. Nor to his finding that A1 and A2, supported by Ms M, had each falsely claimed to be under the age of 18 upon arrival in the UK and when claiming asylum. He went on to find that it was most likely that the dates of birth given in 2004/2005 were accurate. As to A3 he concluded that there had again been a false date of birth given. The date of birth given in 2004/2005 would, if accurate, mean that he was just short of eighteen on the date he had claimed asylum.
18. It follows that Judge Cope accepted on the balance of probabilities that when Ms M left DRC in 2004, she had left behind A1 when he was ten years old, A2 when he was nine years old, and A3 when he was eight years old. It also follows that Judge Cope accepted that A1 and A2 were over eighteen when they claimed asylum on 25 September 2014, although A3 was then two months short of his eighteenth birthday.
19. Judge Cope also rejected the account of when the Appellants had arrived in the UK, as inconsistent with entries and

photographs on the Facebook account of A3 that showed that A3 was in her company in the UK three months earlier than the date for entry that she and they had given. He was unable to make a positive finding however as to when they did arrive in the UK. Even if the Appellants had entered the UK in March 2014 rather than June 2014, it would still have meant that A1 and A2 were over eighteen when they entered the UK, although A3 was not.

20. Judge Cope also rejected the claim that the Appellants' elder brother, Mr X, had disappeared. He accepted that entries on the Facebook account of A3 showed that A3 was in contact with Mr X [91-5]. It followed that both Ms M and each of the Appellants were always in contact with Mr X.

21. Judge Cope also rejected as fabrication the following claims;
    i) that any member of the family with whom the Appellants had lived since 2004 had been politically active,
    ii) that any member of the family with whom the Appellants had lived in DRC since 2004 had come to the adverse attention of the authorities,
    iii) that the Appellants had been required to live in hiding from the authorities at any stage, and,
    iv) that the authorities in the DRC had any adverse interest in either the Appellants, any member of their own family, or, any member of the family with whom they had lived since 2004.

22. Thus Judge Zucker's finding that the husband of Ms M, and the father of the Appellants, had not been killed as claimed, was confirmed. No finding was ever made by either Judge to the effect that this individual had died later, or in some other circumstances. Although Judge Cope did not spell this out in terms, it followed that the only sensible inferences that could be drawn were that the father of the Appellants was still alive, and living in the DRC, and that the Appellants had always been in contact with him.

23. Moreover the claim that the Appellants' elder brother Mr X had disappeared was rejected by Judge Cope as untrue. It was, as he noted, plainly inconsistent with the entries on the Facebook account of A3. Again, although Judge Cope did not spell this out in terms, it followed that the only sensible inferences that could be drawn were that he too was alive and living in the DRC, and that the Appellants had always been in contact with him.

<u>The Article 8 decision</u>

24. This then was the context in which Judge Cope had to approach the Article 8 appeals of the Appellants. The Appellants were all by the date of the hearing adults. They

had entered the UK illegally, and they had then relied upon false dates of birth, and false identity documents (the so-called birth certificates) when making claims to asylum that were based upon a series of falsehoods about their family's circumstances, and their own lives in DRC. They had in fact lived in the DRC in safety all of their life, despite being abandoned by their mother as children in 2004. They had both a father, and an elder brother to return to in the DRC, and they could return to that country in safety. By the date of the hearing they would all do so as adults. It was a very short step to infer (and as set out above I am satisfied when the decision is read as a whole that the Judge did infer) that whilst living in the DRC the Appellants had always been in contact with both their father and their elder brother, and that they had always retained a family relationship with them both.

25. At the date of the hearing, although ironically they had denied it, the result of Judge Cope's findings was that the Appellants had been in the UK for a little over a year. They had lived with their mother Ms M throughout, and in the course of that year A3 had also become an adult.

26. Judge Cope was not satisfied that "family life" for the purposes of Article 8 existed at the date of the hearing between the Appellants on the one hand, and their mother, Ms M, on the other [142]. He accepted that they must have a family relationship together as adult brothers living in the same house as their mother [143], but he sought to draw a qualitative difference between that, and the test for "family life" for the purposes of Article 8. He did so because he was not satisfied that either of the Appellants had demonstrated the existence at the date of the hearing of additional ties of dependency or support over and above the normal relationship between an adult children and their parent [147].

27. Judge Cope reached a similar conclusion in relation to the relationships between the Appellants as adult siblings [149] although as he noted, since they each faced removal to DRC, their removal together could not affect their ability to pursue their relationships as siblings together [150].

28. Thus Judge Cope's conclusion was that the Article 8 rights of the Appellants and Ms M were not engaged by the removal decisions. He did not go on to consider the proportionality of those removals in the alternative event that their Article 8 rights were engaged.

Error of Law?

29. Although the grounds of appeal suggested a broad attack was to be advanced upon "*all of the material findings with*

regard to the Article 8 appeal" that approach was clearly never open to the Appellants. The argument that was actually advanced by Mr Selway was much more narrow.

30. The grounds of appeal raise no suggestion that either of the Appellants had established by the date of the hearing a "private life" that was sufficient either to engage Article 8, or to render either of the removal decisions disproportionate, and it was not argued before me that the evidence that was before Judge Cope meant he made any material error of law in failing to reach such a conclusion. I note that none of the witness statements had offered any detail of how the Appellants spent their time since their arrival in the UK.

31. It was not argued before me that there was any error in the conclusion that even if the Appellants as adult siblings had at the date of the hearing established that their inter-sibling relationships constituted "family life", their removal together would not engage their Article 8 rights, because their removal would not interfere with their ability to pursue those relationships as adult siblings with one another in the DRC.

32. Indeed, as Mr Selway acknowledged before me, the Article 8 appeals were only ever argued on the basis that the removal of the Appellants to the DRC would constitute a disproportionate interference in the ability of the Appellants to pursue their relationships as adult children with Ms M their mother, which parent/child relationships amounted to "family life".

33. Thus it was accepted before me that the only challenge pursued was to the approach that had been taken to the evidence relied upon in support of the claim that the Appellants had established by the date of the hearing a "family life" with their mother that was sufficient to engage Article 8, and/or, to render the removal decisions disproportionate. As argued, this amounted to the deceptively simple complaint that, despite an extremely lengthy decision, Judge Cope had failed to apply the approach of the Court of Appeal in Singh to the evidence before him.

34. Broken down I understand the limbs of this argument to be;

    i) that the decision did not demonstrate any reference to the decision in Singh, or, to the principles set out therein, and,

    ii) that as a matter of law it was enough to found a "family life" of sufficient quality both to engage Article 8, and to render their removal disproportionate, for the Appellants to establish merely that they were living in the home of their mother as young adults at the date of the hearing.

35. The second limb is based upon the following passage in Singh;

24. ……In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the ECHR cited approvingly in Kugathas did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8. [emphasis added]

36. Mr Selway's argument focused simply upon the sentence emphasised. He went so far as to assert that as a result the Court of Appeal in Singh had disapproved of the Kugathas approach, and had established a new test, because in the case of a young adult living with his parents there was now a presumption that "family life" existed. I regret to say that I consider this assertion ill founded, since it conveniently ignores the context in which this sentence appears and the clear statement to the contrary with which the paragraph he has focused upon commences. Kugathas remains in my judgement good law.

Conclusions

37. It is common ground that in the course of his decision Judge Cope made no reference to the Court of Appeal decision in Singh. The decision in Singh had not been available at the date of the hearing, although it had been promulgated by the date of his decision. The mere lack of a direct reference to Singh is not however of itself an error of law. The real issue is whether the substance of Judge Cope's decision is consistent with the statement of principles to be found therein.

38. I accept that Judge Cope did treat each of the Appellants as being in the same position concerning their relationship with Ms M. He was, in my judgement, arguably wrong to take such a course, given his own findings of fact as to their ages. The law required a more nuanced approach, even if the analysis of the evidence overall would lead ultimately to the same conclusion.

39. A de facto "family life" for Article 8 purposes between a mother and child is traditionally accepted as being created

upon the birth of that child, even if it is perfectly possible for that "family life" to cease, or to be diminished to extinction, subsequently.

40. The evidence relied upon by the Appellants was that they had enjoyed no contact with Ms M between her departure in 2004 and their unexpected appearance upon her doorstep in Newcastle in 2014. The explanation offered by Ms M for her departure from the DRC, and their own explanations for their departure from the DRC were all rejected by the Tribunal as untrue. There was therefore no credible explanation available for why Ms M had abandoned her children in the DRC in 2004. In these circumstances I am not satisfied that there was any viable alternative to the conclusion that long before 2014 any "family life" created between Ms M and each of the Appellants upon their birth had either ceased altogether, or, had diminished in quality to the point that it was no longer sufficient to engage Article 8.
41. That being so, there was no evidence that would have allowed Judge Cope to distinguish between the positions of A1, and A2, as adults who had arrived in the UK without an existing "family life" with Ms M, at the point at which they had taken up residence in her home in Newcastle.
42. What then was the result of their doing so? No evidence was offered by any witness to suggest that one enjoyed a different relationship to Ms M to the other. Moreover, having reviewed the evidence relied upon it is noteworthy that no evidence was offered to explain the relationships the Appellants had then formed with Ms M, or she with them.
43. In those circumstances there was no evidence that would have permitted the conclusion that the relationships formed when A1 and A2 did move into the home of Ms M in the UK as adults in 2014 had the necessary qualities by the date of the hearing in April 2015 to constitute "family life". The finding made by Judge Cope that their relationship did not have the requisite additional ties of dependency or support to do so was the only one open to him on the evidence, and in my judgement it must stand. There was in my judgement no viable alternative finding.
44. The only basis upon which a distinction could have been made between the positions of A1 and A2 arriving into the home of Ms M in 2014 as her adult children on the one hand, and that of A3 on the other hand, was that Judge Cope had concluded that A3 was seventeen and a half years old at that point. That distinction was not made. However the available reliable evidence fell well short of demonstrating that the consequence of making that distinction, was that by the date of the hearing A3 enjoyed a "family life" with Ms M. The finding made by Judge Cope that their relationship did

not have the requisite additional ties of dependency or support at the date of the hearing was therefore well open to him on the evidence and in my judgement it too must stand.

45. Those conclusions are in my judgement fatal to the appeal. I would however observe that even if Judge Cope were wrong, and on these facts "family life" between the Appellants as adult children and Ms M did exist at the date of the hearing, the evidence fell well short of demonstrating that the decisions to remove the Appellants from the UK was disproportionate.

46. Even if "family life" had been created, or had resumed, between A3 and Ms M upon his becoming a member of her household in 2014, when he was seventeen and a half, the evidence placed before the Tribunal failed to establish that it had any particular quality or strength. There was no evidence of any particular emotional ties, or reliance by A3 upon Ms M. His witness statement was not only silent upon the question of how he spent his time, but silent upon the nature of the relationship he had with her. Thus the mere fact that he remained a member of her household after his eighteenth birthday on 18 November 2014 was of little consequence. This was not the situation that the Court of Appeal had discussed in Singh of a child who had lived all of their life with their parents, and had then remained a member of their household as a young adult. Whilst none of the jurisprudence suggests that the mere fact that his mother had lived in the UK for the preceding ten years, whilst A3 remained in the DRC, was sufficient to prevent the re-creation of "family life", the evidence fell short of establishing that the relationship that had been created in the UK had the necessary strength and quality to render the removal decision disproportionate.

47. Moreover it would be relevant to the assessment of the proportionality of the removal to recognise that the Appellants had entered illegally, had failed to seek to regularise their position upon arrival, and had then actively pursued as adults an attempt to deceive both the Respondent and in due course the Tribunal, as to their true ages, and their circumstances in the DRC. None of them was ever a "qualifying child" for the purposes of s117A-D of the 2002 Act. They were neither fluent in English, nor financially self sufficient. They could all return in safety to the DRC, where they would be re-united with their father and elder brother, resuming the lifestyles they had abandoned in 2014. Indeed the rational inference was that they would return to whatever shelter and support they had previously enjoyed. It was also clearly perfectly possible for Ms M to visit them there in safety, even if she had somehow lost her

DRC nationality since 2004. She had never been recognised as a refugee. If she had in fact retained her DRC citizenship she could visit as often as she wished, or settle there, without any visa requirements.

48. Thus, looking at the matter in the round, I am not persuaded that the Tribunal if properly directed, could properly have reached the conclusion that the removal of either of the Appellants was disproportionate to the legitimate public interest in maintaining effective immigration controls; AM (s117B) Malawi [2015] UKUT 260. Accordingly, for the reasons set out above I am not satisfied that the approach taken by the Judge to the evidence in the course of his decision discloses an error of law that requires that decision to be set aside and remade. If I were to remake the Article 8 decisions upon the evidence that was before Judge Cope I am satisfied that I would be bound to dismiss them.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 6 July 2015 contains no error of law in the decision to dismiss the Appellants' Article 8 appeals which requires that decision to be set aside and remade. It is accordingly confirmed.

Signed
Deputy Upper Tribunal Judge JM Holmes
Dated 26 February 2016

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellants are granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 26 February 2016