Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12375/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 27 June 2013	**On : 2 July 2013**
	.....

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

L M R

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr N Aghayere of UK Immigration Consultants
For the Respondent: Ms H Horsley, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant claims to be a citizen of Burundi born in September 1994. He has been given permission to appeal against the determination of First-tier Tribunal Judge Charlton-Brown dismissing his appeal against the respondent's decision to refuse him entry clearance.

2. The appellant applied for entry clearance to settle in the United Kingdom with his mother, H M H. His application was refused on 29 May 2012 under paragraph 320(3) of HC 395 on the grounds that he had failed to provide a valid national passport or other document satisfactorily establishing his identity and nationality. It was noted that he claimed to have lived in Burundi his entire life until a month prior to his application when he travelled to Uganda, but there was no evidence of either his residence in Burundi or his journey from Burundi to Uganda. The respondent was furthermore not satisfied that the appellant met the requirements of paragraph 297. He had failed to submit evidence to confirm his relationship to the sponsor. He claimed to have lived with his father when his parents separated and prior to his mother's departure for the United Kingdom and to have lived with his aunt in Burundi from 2003 when his father died and had provided no evidence of contact between himself and his mother, the sponsor. There was no evidence to support his claim that his father was deceased, that his aunt had abandoned him in Uganda and that his mother had only recently located him when someone contacted her. The respondent was not, therefore, satisfied that there were any serious and compelling family or other considerations which merited the issue of United Kingdom entry clearance and was not satisfied that the appellant had ever been part of the sponsor's family unit. The respondent was also not satisfied that there was adequate accommodation available to the appellant in the United Kingdom or that the decision to refuse entry clearance was in breach of Article 8 of the ECHR.

3. The appellant's appeal against that decision was heard in the First-tier Tribunal on 29 January 2013. On behalf of the respondent, the present officer indicated that he was not pursuing concerns about maintenance or accommodation in the United Kingdom. Furthermore, in the light of DNA evidence, the relationship between the appellant and the sponsor was accepted. The only issues, therefore, were paragraphs 320(3) and 297(i)(f), the latter being the existence of serious and compelling family or other considerations making the appellant's exclusion from the United Kingdom undesirable.

4. Judge Charlton-Brown noted that the sponsor claimed to have left Burundi as a refugee and had arrived in the United Kingdom on 12 May 2001 and claimed asylum. Her claim had been refused and she had made two unsuccessful appeals, both raising credibility issues and involving concerns about her nationality, although the second judge had accepted her nationality. She remained in the United Kingdom and was eventually granted indefinite leave to remain on 8 September 2010, under the legacy provisions. She claimed to have left the appellant with his father and sister in Burundi until she departed and that both his father and sister had been killed in 2003, at which time the appellant was left with an aunt, her sister. The aunt had abandoned him outside a mosque in Uganda on 4 April 2012, after which he was taken in by a good Samaritan, Mr Aly, who had managed to contact her and put her in touch with him. The judge heard from the sponsor and noted that she had made no attempt to approach any of the appropriate authorities for travel

documentation for her son. She concluded that the respondent had made out their case under paragraph 320(3).

5. With regard to paragraph 297, the judge noted that the sponsor had been disbelieved in her own previous applications and appeals and did not find her a credible witness. She noted the sponsor's claim to have provided money to Mr Aly to assist the appellant but had concerns about the evidence in that regard. She found it significant that the sponsor had made no attempts to locate or contact her son in the eleven years since she had last seen him. She noted the sponsor's claim to have re-established contact with her son in March when Mr Aly contacted her, having been given her telephone number by the appellant who in turn had been given it by his aunt, but found there to be no explanation as to why her sister had her mobile number if, as she claimed, they had lost contact. She did not find it credible that the appellant's aunt would have simply abandoned him in Uganda and shared the ECO's concerns as to how he had managed to travel from Burundi to Uganda without any appropriate documentation. The judge concluded that there were no serious and compelling family or other considerations and that the sponsor had always known where her son was, had always been satisfied as to his circumstances and had no concerns about his health and wellbeing. She went on to consider Article 8 but concluded that any family life that existed between the appellant and the sponsor had already been interfered with by the sponsor's own actions and that, in any event, the decision to refuse entry clearance was not disproportionate and was not in breach of the appellant's human rights.

6. Permission to appeal against the decision was sought on behalf of the appellant on the following grounds: that the judge had erred in finding that the refusal was justified under paragraph 320(3) and ought to have found that the appellant's nationality and identity was evidenced by the respondent's acceptance of the sponsor's nationality together with the DNA report; that the judge had failed to have regard to the decision in AM (Section 88(2): Immigration Document) Somalia [2009] UKAIT 00008; and that the judge had erred in her findings in regard to paragraph 297(i)(f) since there were compelling family considerations owing to the prolonged separation between mother and son as a result of the sponsor having had to flee her country of nationality.

7. Permission was granted on 7 May 2013 with respect in particular to the judge's findings in regard to paragraph 320(3).

Appeal hearing

8. At the hearing I heard submissions on the error of law.

9. Mr Aghayere expanded upon the grounds of appeal, submitting that the respondent's confirmation of the sponsor's nationality in her immigration status document together with the DNA report was sufficient as evidence of the appellant's own nationality, so as to satisfy paragraph 320(3). He relied upon the decision in AM. With regard to paragraph 297(i)(f), he submitted that the

judge was wrong to find that there were no serious and compelling circumstances and that she had failed to consider that the appellant's father had died, that his aunt had taken him to another country and abandoned him and that there had been a prolonged and enforced separation between the appellant and the sponsor. Mr Aghayere also raised a new ground of appeal, submitting that, following the recent decision in Mundeba (s.55 and para 297(i)(f)) Democratic Republic of Congo [2013] UKUT 88, the judge ought to have considered the best interests of the child.

10. Ms Horsley submitted that the judge had given adequate reasons for finding that the appellant had failed to satisfy the provisions of paragraph 320(3) and that her findings in that regard were sustainable. The decision in AM did not assist the appellant as the circumstances were entirely different. The respondent had had to accept that the sponsor was a Burundian national because of the findings of the judge, which were based upon the low standard of proof, but that did not mean that she was Burundian. With regard to paragraph 297(i)(f), there had been no challenge to the judge's credibility findings, which were sustainable, and on the basis of which she had found there to have been no prolonged and enforced separation. There was no error of law. The credibility findings disposed of any argument in relation to Mundeba.

11. In response, Mr Aghayere submitted that the appellant's nationality would have had to follow that of his mother and the judge ought to have considered the link between the DNA report and her nationality as establishing the appellant's nationality. The judge failed to consider the appellant's circumstances. The decision was in breach of Article 8, following the principles in Mundeba.

12. I advised the parties that I found no error of law in the decision of the First-tier Tribunal. My reasons for so concluding are as follows.

Consideration and findings.

13. It is asserted in the grounds that the acceptance by the respondent of the sponsor's nationality, in her immigration status document, taken together with the DNA report confirming the relationship between the sponsor and appellant as mother and son, was sufficient to establish the appellant's nationality. What the grounds assert, in effect, is that the judge was wrong to find otherwise.

14. However, the judge gave careful consideration, at paragraphs 15 and 16 of her determination, to the question of the appellant's status. At paragraph 15, she took account of the fact that the respondent had accepted the sponsor's nationality as a result of the findings of the Tribunal in that regard in the sponsor's own appeal. At paragraph 14 she noted the respondent's concession as a result of the DNA test results. She then went on, however, at paragraph 16, to give consideration to other matters. She found the sponsor's evidence, in regard to the lack of documentation establishing her son's nationality, to be unsatisfactory, noting that the sponsor was unable to give any credible

explanation as to how she expected her son to travel to the United Kingdom without documentation and why no attempt had been made to prove his nationality. Those were matters that she was entitled to take into consideration and it was plainly her view, in the light of those considerations, that there was simply no credible explanation for the absence of appropriate documentation.

15. It is, at this point, relevant to note that the grounds of appeal do not take account of the fact that the relationship between the appellant and sponsor had not been established by documentary evidence before the ECO and that the DNA report was submitted only after the decision to refuse entry clearance. Neither do the grounds state why the sponsor's nationality was conclusive of the appellant's nationality, given the absence of evidence of the appellant's father's nationality, evidence that a child's nationality followed that of his or her mother under Burundian law or evidence that the sponsor's Burundian nationality was acquired prior to the appellant's birth. Those were matters that the judge did not specifically address and her determination could perhaps have benefitted from such additional considerations. Nevertheless, she properly noted that the relevant concern was that of the appellant's status and not simply that of his mother.

16. It is also asserted, in the grounds, that the judge failed to have regard to the decision in the case of AM. However, aside from the fact that that was not a matter raised before her, the grounds fail to explain how that case was of relevance to the appellant's appeal. That case concerned the jurisdiction of the Tribunal in cases of refusal under 320(3) and the exemptions under section 88 of the Nationality, Asylum and Immigration Act 2002 from the section 82 rights of appeal. It has never been suggested in the appellant's case that there was no right of appeal. Furthermore, the favourable decision in AM arose out of an acceptance by the judge of the oral evidence and the documentation produced by the appellant as evidence of his identity, whereas there was no such documentation in this appellant's case and Judge Charlton-Brown rejected the oral evidence and statements made in respect to identity and nationality.

17. Accordingly, I find that it was open to the judge to conclude, for the reasons that she gave and on the basis of the evidence before her, that the appellant had failed to establish his nationality and identity for the purposes of paragraph 320(3).

18. The judge's findings in regard to paragraph 320(3) were in any event not ultimately material to the outcome of the appeal, given her conclusion that the appellant was unable to meet the requirements of paragraph 297. The grounds challenge her findings with regard to paragraph 297 but do not state the basis for such a challenge. Mr Aghayere's submission was that the prolonged and enforced separation between the appellant and the sponsor, the death of his father and his aunt's actions in abandoning him amounted to serious and compelling circumstances. However he was unable to respond to the suggestion that the judge had not accepted any of those facts, other than by submitting that she was wrong to have made such findings. There was clearly no failure on the part of the judge to consider all of those circumstances and

she did so in some detail, at paragraphs 17 to 24, making fully and cogently reasoned findings at paragraphs 20 to 25. She did not find the sponsor to be a reliable witness and she did not accept any of the evidence about the appellant's circumstances and the circumstances of the re-establishment of contact between them. She was fully entitled to reach the conclusions that she did and the grounds do not in any event challenge her findings other than by way of disagreement. There are no errors of law in her decision.

19. With regard to the additional ground raised by Mr Aghayere at the hearing, with respect to the decision in Mundeba, it is clear that that does not assist the appellant, given the adverse credibility findings made by the judge. She undertook a detailed and careful assessment of the appellant's and sponsor's circumstances in the context of Article 8 and found that family life existed between them only to the extent of their biological relationship and that any interference with that family life had been caused by the sponsor and not as a result of the respondent's decision. Whilst, in going on to consider proportionality, she made no specific reference to the best interests of the child, there is nothing in her detailed and cogent findings, in particular those at paragraphs 25 and 27, to suggest that such a consideration could have led to any other conclusion than the one she reached. I therefore find no merit in this ground of appeal.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve the making of an error of law. I do not set aside the decision. The decision to dismiss the appeal therefore stands.

Signed

Date

Upper Tribunal Judge Kebede