Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/07262/2015
OA/07270/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 April 2017	**On 5 June 2017**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

[A L] (FIRST APPELLANT)
[M L] (SECOND APPELLANT)
~~(NO ANONYMITY DIRECTION MADE)~~

Appellants

and

ENTRY CLEARANCE OFFICER – NEW DELHI

Respondent

Representation:

For the Appellants: Mr Roberts
For the Respondent: Mr Avery

DECISION AND REASONS

1. The Appellants are citizens of Bhutan born on [ ] 1998 and [ ] 2001 respectively. They made applications on 31 December 2014 for entry clearance to join their mother, a recognised refugee from Bhutan.

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2. In summary, their claim was that they were refugees in Nepal. Their mother with whom they had lived in a refugee camp in Nepal had arrived in the UK in October 2009 subsequently being granted refugee status.

3. They themselves have been living for the last three years and eight months at a boarding school in Nepal. They have a legal guardian there.

4. They were issued in November 2014 with a Bhutanese travel document and exit permit by the government of Nepal.

5. The applications were refused on 13 March 2015 under paragraph 319X(vi) and (vii) of the Immigration Rules. The ECO was not satisfied that their mother could maintain and accommodate them. They were also refused under paragraph 320(3). Checks conducted by the ECO confirmed that the documents purporting to be the refugee travel document and exit permit were not genuine.

6. They appealed.

First tier hearing

7. Following a hearing at Taylor House on 30 August 2016 Judge of the First-tier Monson dismissed the appeals under the Rules and under Article 8.

8. He heard evidence from the Appellants' mother.

9. In his 'Discussion and Findings' the judge found that the applications should not have been considered under paragraph 319X as one of the requirements is that the relative the applicant is seeking to join is not the parent. Also, they do not meet the maintenance and accommodation requirements. Further, they could not meet the requirements of paragraph 297 under maintenance and accommodation.

10. The judge considered the applications under paragraph 352D. Maintenance and accommodation are not requirements under that paragraph. However, the judge concluded that the applications failed under paragraph 352D (iv).

11. The judge went on to consider the refusal under paragraph 320(3). Having expressed some concerns about the documents he, nonetheless, concluded '… *the Respondent has not produced the necessary evidence to show that the travel documents are not genuine*' [24]. However as the claims failed under paragraph 352D (iv) he dismissed them under the Rules.

12. The judge finished by examining their claims under Article 8 outside the Rules. He considered as part of the proportionality exercise that the children's best interests were finely balanced, on the one hand that it was in their best interests to enjoy family reunion with their mother in the UK, but on the other hand that it would not be in their best interests to break

off their education in Nepal. He concluded that the balance favoured the Respondent.

13. The Appellants sought permission to appeal which was granted on 27 February 2017.

Error of law hearing

14. At the error of law hearing before me Mr Roberts did not seek to argue grounds alleging lack of a fair hearing due to some documents not being in the possession of the Appellants at the First-tier hearing.

15. Both Mr Roberts and Mr Avery agreed that the relevant paragraph was 352D. In Mr Roberts' submission the analysis under paragraph 352D (iv) was inadequate. It was clear that the Appellants were part of the family unit prior to the mother claiming asylum. The only issue which prevented the family living together prior to the Sponsor seeking asylum was the fact that she was arrested by the Bhutanese authorities and imprisoned in Bhutan between 2005 and 2009. While she was in prison in Bhutan her children had lived with their aunt in India. Further, it was perverse to find that the Appellants do not qualify under paragraph 352D by claiming that the reason the Sponsor left her country of habitual residence was not to seek asylum when she was in fact detained by the Bhutanese authorities. She was released from prison in 2009 after which she went to India to see her children before travelling to the UK to seek asylum.

16. Mr Roberts also submitted that the assessment of Article 8 was flawed. In a family reunion case the best interests of the children must be to be with their mother who was separated from them when she fled to claim asylum.

17. Mr Avery's brief reply was that the judge's interpretation of paragraph 352D was one that was open to him. As for Article 8 the submission amounted to nothing more than a disagreement.

Consideration

18. In considering this matter the issue, both parties agreed, was whether the Appellants satisfied paragraph 352D (iv) which reads '*The requirements to be met by a person seeking leave to enter or remain in the United Kingdom in order to join or remain with the parent who is currently a refugee granted status as such under the immigration rules are that the applicant… (iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum…'*

19. The judge's analysis of this is contained in one paragraph [17] where he writes:

> '*However, one of the conditions which has to be met is that contained in subparagraph (iv) of paragraph 352D which is that the applicant was part of the family unit of the person granted asylum "at the time*

that the person granted asylum left the country of his habitual residence in order to seek asylum". From the history provided by the Sponsor in her oral evidence, she did not leave the country of her habitual residence in order to seek asylum.' [The judge emphasised the last five words.]

20. The oral evidence (none of which is challenged) is contained at [13] and [14]. In summary, the Sponsor left Bhutan at the age of 13 with her parents and had gone to live in a refugee camp in Nepal. She left the camp in 2005 to make a protest at the Bhutan/Nepal border. She was arrested by the Bhutanese police and imprisoned for four years. Her children were taken from the camp by a relative to an aunt in India. She was reunited there with her children. She only remained in India a brief time before making her way to Europe arriving in the UK in October 2009.

21. As indicated the judge's conclusion was that '*from the history provided by the Sponsor in her oral evidence, she did not leave the country of her habitual residence in order to seek asylum*.' He does not state what her country of habitual residence was. It may be that he considered it to be her country of nationality, Bhutan, which she left when young apparently to seek safety in Nepal, and as such she did not leave Bhutan in order to seek asylum in the UK.

22. It may be that he considered it to be Nepal and that because she was arrested and imprisoned in Bhutan following a protest at the border, he decided that she did not leave Nepal in order to seek asylum.

23. It may be that because, following release by the Bhutanese authorities on the Nepal/India border, she spent some time in India before advancing to Europe and the UK, such was the basis for his conclusion.

24. Whatever was in his mind the judge failed to give reasons for his decision. Such was a material error of law.

25. As also indicated Mr Roberts suggested that the judge had found that the children were not part of the family unit prior to the mother leaving and that such was wrong as it was clear that they were part of the family unit of their mother since their births in Nepal and that the only matter which prevented the family living together prior to her coming to the UK and claiming asylum was the fact that she was imprisoned for four years.

26. In fact, the judge appears to have found, albeit again without giving reasons, that the children were part of the family unit at the relevant time. Such would suggest that he, indeed, considered the country of habitual residence to have been Nepal.

27. In any event, for the reasons stated the decision is set aside to be remade.

28. I consider what the mother's country of habitual residence was. Whilst the paragraph will encompass many who have left their country of nationality I

see no reason not to give the words '*country of habitual residence*' their ordinary meaning.

29. The unchallenged evidence, as indicated, is this. The mother left Bhutan at the age of thirteen in 1994 for Nepal where she lived with her parents in a refugee camp and then with her children, the Appellants, who were born there in 1998 and 2001. She continued living in Nepal with her children until 2005. Having lived continuously in Nepal for some eleven years until 2005 I find Nepal to have been her country of habitual residence.

30. It is not disputed that in 2005 she went to make a protest at the border between Nepal and Bhutan.

31. I agree with Mr Roberts that it would be absurd to find that the children do not qualify under paragraph 352D (iv) by claiming that the reason the mother left the country of habitual residence (Nepal) was not to seek asylum when she was in fact arrested and imprisoned for four years at the border by the Bhutanese authorities.

32. It is clear that on her release on the border between Nepal and India, she went to India where she remained briefly before she arrived in the UK and sought asylum in October 2009. The fact that she was granted refugee status clearly indicates that, having been freed from imprisonment, she came to the UK to seek asylum. The history indicates that she left Nepal her country of habitual residence in order to seek asylum.

33. As part of the family unit at the time their mother left Nepal to seek asylum, her children should be allowed to join her in family reunion. Their appeals succeed.

34. I set aside the decision and remake it by allowing the appeals under the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal shows material error of law. It is set aside and remade as follows:

The appeals are allowed under the Immigration Rules.

No anonymity direction made.

Signed Date 1 June 2017

Upper Tribunal Judge Conway