



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

Appeal Number: VA/21639/2012
VA/21635/2012

THE IMMIGRATION ACTS

**Heard at Field House
On 25 September 2013**

**Determination
Promulgated
On 25th October 2013**

Before

DESIGNATED TRIBUNAL JUDGE MURRAY

Between

ENTRY CLEARANCE OFFICER - MOSCOW

and

**YA, 1st
and
AA, 2nd**

Appellant

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms Ong, Home Office Presenting Officer
For the Respondent: Mr Fransman, for Gherson Solicitors, London

DETERMINATION AND REASONS

1. The appellant in these proceedings is the Entry Clearance Officer, however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The appellants are citizens of Russia born on 1 February 1980 on 27 December 2007 respectively. The first appellant is the mother of the

second appellant. They appealed against the decision of the respondent dated 24 May 2012 refusing to grant them entry clearance to the United Kingdom as visitors. Their appeals were heard by Judge of the First-tier Tribunal Suchak and allowed under the Immigration Rules and under Article 8 of ECHR in a determination promulgated on 17 May 2013.

3. An application for permission to appeal was lodged by the respondent and permission was granted by Judge of the First-tier Tribunal Garratt on 19 July 2013. The grounds of application argue that the judge exceeded his jurisdiction because there is only a limited right of appeal for the appellants, on human rights grounds, as they are general and not family visitors and the judge's findings relating to Article 8 of ECHR are wrong in law because the judge failed to have regard to the new Immigration Rules when making the Article 8 proportionality assessment. The permission refers to paragraphs 55 to 70 of the determination in which the judge considers the refusal of the first appellant's appeal under the provisions of paragraph 320(7B) of the Immigration Rules when he had no jurisdiction to consider an appeal under the Rules. The grounds go on to state that this is an error which affected the judge's consideration of the human rights issues. The judge dealt with Article 8 of ECHR on the basis that the protection of a person's reputation should be considered when Article 8 is dealt with. The permission then refers to the ground relating to the new Immigration Rules but states that this is unarguable as the refusal decisions which form the basis of the appeals were made on 24 May 2012 before the new Rules came into operation on 9 July 2012.

Determination

4. I have to decide if there is a material error of law in the judge's determination. The Presenting Officer referred to the appellants' skeleton argument and submitted that she is relying on the grounds of application. She submitted that the judge materially misdirected himself in law and took into account matters which he should not have considered as there is no appeal under the Rules and the judge's approach was therefore flawed. She submitted that paragraph 320(7B) should only have been considered under the prism of Article 8 and that the judge's Article 8 findings are tainted by his consideration of the Immigration Rules before dealing with Article 8, as the judge had no jurisdiction relating to the Rules.
5. Counsel for the appellant submitted that the only ground for consideration is section 84 (1) (c) of the 2002 Act. Both parties accepted this.
6. I was referred to paragraph 85 of the determination which states that the appeal of the first appellant is allowed under the Immigration Rules and under Article 8 of ECHR. Counsel submitted that this is an error on the part of the judge but the judge did not approach the determination in an incorrect way. Counsel submitted that the words "under the Immigration Rules and" should not have been put into paragraph 85 and submitted that if these words are struck out the determination can stand. He

submitted that these words are surplusage and aberrational and there is no material error of law although there is this technical error.

7. He referred me to his skeleton argument which states that the focus of this case is the Article 8 approach made by the judge. He submitted that all the evidence before the judge was admissible and the judge considered the 5 step process in Razgar (2004) UKHL 27. I was referred to the case of Huang [2007] UKHL11 which states that it is the duty of the judge to find on the facts and in this case the judge looked at everything including the issue of false representation. The judge was well aware that he was dealing with a human rights appeal only and Section 84 (1) (c). This is made clear at paragraph 6 of the determination when he refers to the Entry Clearance Manager's review letter.
8. Counsel submitted that when the judge dealt with proportionality he had to decide whether there had been deception on the part of the appellants. The judge states that if the appellant used deception then the decision is proportionate.
9. Counsel submitted that the judge had to decide whether there are false answers in the visa application form. The judge noted that the presenting officer has conceded that question 10 of this form was answered honestly. In paragraph 61 of the determination the judge states that the appellant correctly answered that she was not refused entry on arrival. In paragraph 65 he deals with Q79 of the form and finds that the appellant has not given incorrect answers. Counsel submitted that this goes to the crux of the respondent's case. At paragraph 69 of the determination the judge refers to the case of AA (Nigeria) (2010) EWCA Civ 773 and finds that the appellant made a full disclosure of her previous immigration history and did not set out to deceive the respondent and/or use deception. Because of these findings he goes on to state that the respondent has failed to discharge the burden upon him and has made a decision which is not in accordance with the law and the Immigration Rules. The judge had to make findings relating to paragraph 320 (7B) to enable him to deal properly with proportionality.
10. Counsel submitted that the determination is impeccable. The judge has gone through the step by step approach required in the case of Razgar. At paragraph 77 he refers to reputation, the appellant's private life in the UK and the ties she has developed here over the years. The judge quotes the relevant law and at paragraphs 82 and 83 finds that Article 8 is engaged. He then deals with proportionality, finding that Rule 320 (7B) does not apply in this case as there was no deception.
11. It was submitted that the only error is the surplusage previously referred to. The respondent states that paragraph 86 has tainted the whole decision but he has not explained how it has done so and it was submitted that it has not done so.

12. Counsel submitted that there is no error of law in the determination. All there is is a technical error. The determination does not require to be set aside. The findings of fact are not challenged.
13. The Presenting Officer submitted that it is not clear from the determination whether the judge knew that he was only dealing with the human rights aspect of this claim. She submitted that paragraphs 54-70 inclusive tell a different story. She submitted that the burden of proof has not been discharged by the appellant and the judge has made a material error of law.

Determination

14. I have to decide whether the judge was aware that the only claim being considered is under ECHR and whether the decision made by the judge is only flawed because of a technicality.
15. The determination makes it clear that the judge knew that there was no valid appeal under the Immigration Rules and that he was only considering the human rights aspect of the appeal. At paragraph 6 he refers to the appellants being general visitors and only being entitled to a limited right of appeal on human rights grounds. When he deals with pre hearing matters he states that the appellants are not family visitors. I am satisfied that the judge knew that he was only dealing with the human rights aspect of the claim.
16. Before the judge could make a finding under Article 8 of ECHR he had to deal with the appellant's supposed deception. He found at paragraph 69 of the determination that there was no deception. He explained this at paragraphs 54 to 69. The judge went on to deal with proportionality. Had there been deception the Article 8 claim could not have succeeded.
17. The judge referred to the relevant case law and found that the appellant has private life in the United Kingdom. He had to decide whether, if the appeal is not allowed the interference with her private life will or will not be in accordance with the law. At paragraph 82 the judge states "I cannot see that such interference is necessary. There is no question of national security, public safety etc, referred to in proposition (iv) of Razgar. The appellant has had an impeccable immigration history. The question as in all cases is whether such interference is proportionate to the legitimate public end sought to be achieved." At paragraph 83 he finds that the decision to refuse the visit visa cannot be proportionate. The appellant was refused entry on 26 August 2011 through no fault of her own, having been admitted to the UK on 24 previous occasions during the last 15 months, on her Panamanian passport. There is nothing to suggest she is not a genuine visitor. After finding this, the judge goes on to deal with the totality of the evidence before him. He finds that the respondent has failed to discharge the burden upon him on a balance of probabilities.

18. There is a technical error of law in the judge's determination but this is not a material error.

DECISION

19. The determination of First-tier Tribunal Judge Suchak should not be set aside. Paragraph 85 of the decision should be deleted and replaced by the words "The appeal of the first appellant is allowed under Article 8 of ECHR."
20. Paragraph 320 (7B) of the Immigration Rules does not apply in this case.
21. The appeals of the first and second appellants are allowed under Article 8 of ECHR.

Signed

Date 25th October 2013

Designated Judge Murray
Judge of the Upper Tribunal