IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04730/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2015	**On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

HJ
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER - BEIJING

Respondent

Representation:
For the Appellant: Ms K. McCarthy of Counsel, instructed by Gilman-Smith Lee Solicitors
For the Respondent: Ms S. Sreeraman, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Robinson promulgated on 24 April 2015 in which he refused the Appellant's appeal against the decision of the Respondent to refuse her application for entry clearance as the dependent of her mother under paragraph 297 of the immigration rules.

2. Given the sensitivity of these proceedings, I have made an anonymity direction.

3. Permission to appeal was granted as it was arguable that the Appellant's Chinese passport was a "valid national passport" which satisfactorily established her identity. The issue of the Appellant's nationality was superficially addressed. It was a case in which the Respondent appeared to accept the Appellant's claimed identity. It was arguable that even if paragraph 320(3) could not be met, this was a suitable case to consider outside the rules under Article 8, which was an obvious point that should have been raised by the judge, if it had not been raised by the Appellant's representatives.

4. Further, it was arguable that the judge had failed to give sufficient reasoning for rejecting the evidence from the Sponsor and her husband that she was solely responsible for the Appellant. It was an arguable error of law for the judge to have required sole responsibility to be corroborated by documentary evidence in such a case. The judge had arguably given insufficient reasoning for rejecting the credibility of the Sponsor's claims regarding sole responsibility.

5. It was also arguable that, in reaching findings in relation to paragraph 297(i)(f) and otherwise, the judge had failed to take into account a relevant consideration, which was the particular difficulties faced by the family in the context of their escape from North Korea and residence in China.

6. The Sponsor, her husband and a friend attended the hearing. I heard submissions from both representatives. I have taken into account the documents contained in the Respondent's bundle and the Appellant's bundle (118 pages). At the end of the hearing I reserved my decision which I set out below with my reasons.

Submissions

7. Ms McCarthy relied on the grounds of appeal. She had represented the Appellant at the hearing in the First-tier Tribunal and submitted that Article 8 had been raised at that hearing.

8. In relation to paragraph 320(3) she submitted that the requirement was that the document "satisfactorily establish" nationality which was less than a requirement to "prove" nationality. What was satisfactory depended on the circumstances of the case. The Appellant has a Chinese passport but this was obtained by the Sponsor giving false information to the Chinese authorities stating that the Appellant had been born in Jilin rather than in North Korea. She submitted that the Appellant had satisfactorily established that she was North Korean but that she held a Chinese passport which was accepted by the Chinese authorities as being a valid passport. The only people who could invalidate the passport were the Chinese authorities.

9. She submitted that the Appellant's nationality should be considered against the backdrop of the difficulties encountered by people leaving

North Korea. There was a real risk of refoulement from China to North Korea. The Appellant's aunt had been refouled to North Korea from China and has not been heard from since. She referred to the updated evidence from the UNHCR regarding refoulement, and the fears for nine North Korean citizens who were due to be refouled. There was a real risk of people with North Korean nationality being returned to China, and the question of what was satisfactory had to be established against that backdrop. The passport was not an invalid document. She submitted that it was an error of law to refuse the application under paragraph 320(3) and it was to misread the clear flexibility allowed for by this paragraph.

10. In relation to sole responsibility, numerous witness statements had been provided explaining with whom the Appellant had lived, in addition to the oral evidence. She submitted that the Sponsor was the sole carer for the Appellant. The Sponsor had explained in whose care she had left the Appellant and for what period of time. She had paid the carers. Schooling decisions were taken by the Sponsor. The Appellant continued to need the support of her mother rather than her temporary carers, none of whom were related to her. She had not been in the care of one person since her mother left China but had several temporary carers. The finding that the Sponsor did not have sole responsibility for the Appellant went against all of the evidence.

11. In relation to paragraph 297(i)(f), there had been no consideration given to the compassionate circumstances of the case. The Appellant's mother had no right to go to China. The Appellant had a strong desire to be reunited with her mother. She had no contact with her biological father and no biological relatives in China. There was no stability in her temporary care arrangements. Unless the Appellant came to the United Kingdom, there were insurmountable obstacles to family life continuing with her mother. She submitted that the judge had given short shrift to paragraph 297(i)(f) and had failed to consider the circumstances in North Korea. Even if paragraph 320(3) was applicable, the extent to which the Appellant met paragraph 297 was relevant to consideration of the Appellant's case under Article 8 outside of the immigration rules.

12. Ms Sreeraman relied on the Rule 24 response. The judge had applied paragraph 320(3) correctly. Adequate reasons had been given from paragraphs [30] to [38]. The Appellant was not Chinese and false information had been used in order to obtain her passport. She submitted that having found that paragraph 320(3) applied, the judge could have stopped there, but he had continued to consider paragraph 297(i)(e) and (f) as a belt and braces approach. Adequate reasons had been given as to why the Sponsor did not have sole responsibility for the Appellant [40] to [45]. In relation to paragraph 297(i)(f), this was a high threshold and the judge had looked at the core components. There was no evidence to suggest that the Appellant's welfare and health have been negatively impacted. There were no material errors. Even had the judge proceeded to consider Article 8 outside the rules the outcome would have been the same.

Error of Law

13. In relation to paragraph 320(3), this provides that an application will be refused where there is a "failure by the person seeking entry to the United Kingdom to produce to the Immigration Officer a valid national passport or other document satisfactorily establishing his identity and nationality". In paragraph [33] of the decision the judge sets out the evidence of the Sponsor from her witness statement. The Appellant has a Chinese passport which the Sponsor obtained by giving incorrect information to the authorities when she said that the Appellant had been born in Jilin in China rather than in North Korea.

14. In paragraph [38] of the decision the judge states:

> "It follows from this finding that the application must be refused under paragraph 320(3), which is a mandatory ground for refusal. Not only could the Respondent not determine the nationality of the Appellant from her Chinese passport, he was unable to establish her place or country of birth. Consequently the appeal must be refused on this basis."

15. I find that the Appellant must produce "a valid national passport or other document satisfactorily establishing his identity and nationality". The Appellant has provided a valid national passport, albeit one obtained using incorrect information. The issue is whether it can be said to satisfactorily establish her nationality. The Sponsor has been open about the fact that the Appellant was born in North Korea and not in China. The Chinese national passport establishes her nationality as Chinese, but the Sponsor has admitted that she was born in North Korea, and it was only by saying that the Appellant was born in China that she was able to obtain a Chinese passport for her. Given this, it cannot be said that the passport provided satisfactorily establishes the Appellant's nationality as, on the Sponsor's own admission, the Appellant was born in North Korea, and therefore not entitled to Chinese citizenship. While the passport states that she is a national of China, the truth is that she is a national of North Korea. I find therefore that the judge correctly applied paragraph 320(3).

16. Having found that the Appellant could not meet the requirements of the immigration rules owing to this mandatory refusal, the judge went on to consider those requirements of paragraph 297 which the Respondent considered had not been met by the Appellant, namely 297(i)(e) and 297(i)(f). Having done this, he did not proceed to consider Article 8 outside the immigration rules. It was submitted that Article 8 had been raised by the Appellant's representative at the hearing in the First-tier Tribunal. Even if it had not been, given the circumstances of the Appellant and Sponsor, the failure of the judge to consider Article 8 outside the immigration rules amounts to an error of law. It is an obvious point which he should have addressed. The extent to which the Appellant met the requirements of paragraph 297 is relevant to any consideration of Article 8 outside the rules.

17. The judge's findings in relation to paragraph 297(i)(e) are set out in paragraphs [40] to [45]. In paragraph [42] the judge states "I am not satisfied that the Sponsor has shown that she has an active involvement in two key areas of her daughter's upbringing namely her education and healthcare. The Sponsor claims that she used to speak to her daughter's teacher by telephone but no written confirmation has been provided from the Appellant's schools giving details of her attendance, progress or academic achievements." Evidence was before him from the Sponsor, her husband, the Appellant and the three carers of the Appellant, but he has placed no weight on that evidence, and he has failed to give reasons for why he has placed no weight on this evidence. I find that inadequate reasons have been given for failing to give weight to the evidence before him, and instead he has placed weight on the fact that there was no corroborative documentary evidence.

18. Further, I find that the judge did not give adequate consideration to the Appellant's circumstances, in particular in relation to paragraph 297(i)(f). The judge has not considered the implications of the Appellant's and Sponsor's nationalities. While he might have been correct in his application of paragraph 320(3), there is no consideration of the effect of the Sponsor's North Korean nationality and the Appellant's Chinese passport. There is no consideration of the very real difficulties faced by the Appellant and Sponsor. His assessment of paragraph 297(i)(f) amounts to only one paragraph, [46], which cannot be said to be a satisfactory consideration of the very significant difficulties faced by the Appellant and Sponsor owing to their history of escape from North Korea. I find that inadequate reasons have been given for why the Appellant does not meet the requirements of paragraph 297(i)(f).

19. Given the failure of the judge to give adequate reasons for his findings under paragraph 297(i)(e) and (f), and his failure to proceed to consider the Appellant's appeal under Article 8 outside the immigration rules, I find that the decision involves the making of an error of law on a material matter, and I set aside the decision in relation to the findings under paragraph 297.

Remaking

20. I have found above that paragraph 320(3) was correctly applied but that there was a failure by the judge fully to consider the Appellant's and Sponsor's rights under Article 8 outside the immigration rules. As I have set out above, the extent to which the Appellant meets the requirements of the immigration rules, especially given the reason why her application falls to be refused under paragraph 320(3), is relevant to any consideration under Article 8.

21. The circumstances in which the Appellant's Chinese passport were obtained have been explained by the Sponsor. She has been open and honest about the fact that she gave incorrect information to the Chinese authorities in order to obtain the passport. Given the circumstances, the

reasons why the Sponsor gave incorrect information are entirely plausible and understandable, and I find that her actions do not damage her credibility in any way.

Paragraph 297(i)(e)

22. In her witness statement the Sponsor states that the Appellant has been in the care of three different people since the Sponsor left China. She states that she has been sending money for her daughter's care and living expenses [12]. She states that she has sole responsibility including making all major decisions for example "choice of schools, which clinic to go to if she is sick, what subjects to choose in school, how much pocket money she should have, to buy or change her mobile phone etc" [12]. She states that when the teachers wanted to speak to a parent about concerns about her daughter, they informed the carers who called the Sponsor, who then called the school. The Sponsor states that she financially and emotionally supports the Appellant [16e]. She states she is "consulted and involved in her upbringing, education, medical needs and what school she attends". She states that they communicate at least twice a week via Skype.

23. At page 95 of the bundle is a letter from the Appellant. She states that her mother takes care of her financially. Whenever she has difficulties or worries she talks to her mother who comforts her and provides help. She has been moving from one family to another and has no biological connection with any of the people who have taken care of her. On page 97 of the bundle is a letter from SJ with whom the Appellant lived from 2002 to 2005. SJ states that the Appellant's living costs, hospital fees and pocket money was sent by the Sponsor. SJ states that the Appellant and Sponsor spoke to each other on the phone very often. She states that the Sponsor always made the decisions for the Appellant "such as HJ's health, anything that was related to her school, from the smallest day to day decisions to the biggest concerns for HJ's future".

24. On page 101 of the bundle is a letter from CJ. She states that when she looked after the Appellant "all these years everything related to HJ had to be agreed by her mother and her mother made decision on it". On page 105 is a letter from YN with whom the Appellant lives now. She states "HJ has no father so everything related to her has to get consent from her mother".

25. The Sponsor provided evidence from the three different people with whom the Appellant has lived, all of whom the state that it was the Sponsor who took responsibility for the main decisions in the Appellant's life. They also refer to the provision of financial assistance by the Sponsor for the Appellant. The Appellant herself refers to how frequently she speaks to her mother, and how she talks to her mother when she has difficulties or worries.

26. In relation to the lack of documents the judge found that no medical documents had been provided as the Sponsor had claimed that the Appellant had not required medical treatment in the last 10 years. This is perfectly plausible. In relation to the lack of documents from school, from the date of the application to the date of the decision was a period of some 16 months, as the Respondent withdrew the first decision and remade it. The period from the date of application to the date of the hearing was some two and a half years. Therefore, as set out at paragraph [29] of the grounds of appeal to the Upper Tribunal, by the time of the hearing the Appellant was no longer at school. The Sponsor provided evidence from the three people who had cared for the Appellant all of them stating that the Sponsor had dealt with the Appellant's education. Given that the Appellant was no longer attending school at the time of the appeal hearing, I do not find it casts doubt on the evidence that the Sponsor did not provide corroborative evidence from the Appellant's school, especially given the other evidence before him.

27. I find that the Appellant's biological father has had no involvement in her life since she left North Korea with her mother when she was a young child. Evidence of remittances from the Sponsor was provided and I find on the balance of probabilities that the financial assistance provided by the Sponsor was and is for the Appellant's care. All of the evidence before me is that the Sponsor has had sole responsibility for the major decisions in the Appellant's life, and continues to have sole responsibility. I find on the balance of probabilities that the Appellant meets the requirements of paragraph 297(i)(e).

Paragraph 297(i)(f)

28. In any event, even if I am wrong in this, I find that the Appellant meets the requirements of paragraph 297(i)(f), an alternative to paragraph 297(i)(e). This paragraph applies where there are "serious and compelling family or other considerations which make exclusion of the child undesirable", and I find that there are such considerations in the Appellant's case.

29. The Appellant and her mother fled North Korea in 2001 when the Appellant was four years old. They fled because of the domestic violence that the Sponsor was suffering from her husband, and also because she and the Appellant were "dying of hunger". They fled with the Sponsor's sister. In June 2005 the Sponsor's sister was caught by the Chinese authorities and sent back to North Korea from China. She has not been heard from since. The Sponsor left China in June 2005. She now has British citizenship. She is not allowed to visit China because she was previously a North Korean national. She tried to apply for a Chinese visa in October 2014 to visit the Appellant but her application was refused (paragraph [17] of her witness statement). The Sponsor cannot even visit China, let alone live there.

30. The Appellant has no biological relatives in China. The Sponsor explained why the Appellant described her carers as she did (paragraph [15a] of her witness statement), and I find her explanation plausible. The Appellant

has lived with three different people since her mother left China in 2005. I find that none of these people are related to her. She has not had a permanent or stable home since her mother left China in 2005, and she did not have a permanent or stable home prior to that.

31. This is not a situation where the Sponsor can simply return to her country of origin to be with the Appellant. There can be no suggestion that it is possible for the Appellant and Sponsor to return to North Korea to continue their family life. The Sponsor's sister was refouled to North Korea by China and has not been heard from since. There are ongoing concerns for North Koreans being refouled to China. At page 31 is a press briefing note from the UNHCR relating to the fate of nine North Korean nationals who were forcibly repatriated to North Korea. On page 33 is an article from the Guardian entitled "Fears for North Korean refugees who may "face death" if returned by China".

32. The Sponsor cannot return to China, the country of which her daughter has nationality, and where her daughter is now living. She cannot even obtain a visit visa to China owing to the fact that she used to be a North Korean national.

33. I find that if the Appellant is excluded from the United Kingdom, she will be prevented from having any family life with her mother. The Appellant and her mother have already endured escape from North Korea and separation from each other for a period of 10 years. The Respondent's own delay in making a decision has contributed to the length of this separation. Given the extremely unusual circumstances of the Appellant's case, which are inextricably bound up with her escape from her country of origin and her nationality, I find that exclusion of the Appellant from the United Kingdom would effectively put an end to the Sponsor and the Appellant being able to enjoy any meaningful form of family life together anywhere. I find that that her circumstances amount to "serious and compelling family or other considerations" which make her exclusion from the United Kingdom undesirable.

34. However, given my find that paragraph 320(3) applies, although I find that the Appellant meets the substantive requirements of paragraph 297, the Appellant cannot meet the requirements of the immigration rules.

Article 8

35. I have considered the Appellant's appeal under Article 8 outside of the immigration rules in accordance with the steps set out in Razgar [2004] UKHL 27. I find that the Appellant and Sponsor have a family life sufficient to engage the operation of Article 8. I find that the decision constitutes an interference in that family life.

36. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration

rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

37. In carrying out the proportionality assessment, I have taken into account the factors set out in section 117B of the 2002 Act insofar as they are relevant to the Appellant. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. There is no English-language requirement for a child applying under paragraph 297 (section 117B(2)). The Respondent did not refuse the application because the Sponsor was unable to provide financially for the Appellant (117B(3)). Sections 117B(4) to (6) are not relevant.

38. In coming to my decision I have taken into account my findings in relation to paragraph 297(i)(e) and (f) above, in particular those findings relating to the serious and compelling circumstances in the Appellant's case [28]-[33], and I do not intend to repeat them here.

39. I have found above that the Appellant meets the requirements of paragraph 297. The only reason that the application falls to be refused under the immigration rules is owing to the highly unusual circumstances surrounding the Appellant's passport. The Respondent's representative before the First-tier Tribunal acknowledged that "the Sponsor's motives in providing false information/false documents may not have been bad" [21]. Far from not being bad, I find that they were entirely understandable given the family circumstances as set out above, [29]-[32].

40. Given the difficulties and complexities of the Appellant's circumstances, the fact that the Sponsor cannot return to China to enjoy family life with the Appellant, the fact that they cannot return to North Korea, their country of origin, to enjoy family life together, the fact that the Appellant meets the substantive requirements of the immigration rules, and the fact that the Sponsor is now a British citizen who is able to provide financially for the Appellant, on the balance of probabilities, in carrying out the balancing exercise, I find that the balance weighs in favour of the Appellant and Sponsor being able to enjoy family life together in the United Kingdom. I find that the interference in their right to family life would be disproportionate. I find on the balance of probabilities that the decision is a breach of the Appellant's and Sponsor's rights to a family life under Article 8 ECHR.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law, and is set aside.

I remake the decision allowing the appeal on human rights grounds.

Direction Regarding Anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 20 December 2015

Deputy Upper Tribunal Judge Chamberlain