Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00961/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 7 March 2018	**On 8 March 2018**

Before

Deputy Upper Tribunal Judge Pickup

Between

The Entry Clearance Officer Istanbul

Appellant

and

Sarab Al Hasan
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr A Moran
For the appellant: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Entry Clearance Officer's appeal against the decision of First-tier Tribunal Judge Davidson promulgated 30.5.17, allowing the claimant's appeal against the decision of the Entry Clearance Officer, dated 4.12.15, to refuse her application made pursuant to paragraph 352D of the Immigration Rules for entry clearance (EC) as a child then under the age of 18 to join her Syrian mother granted refugee status in the UK. It is relevant to note that the claimant's father is a British citizen resident in the UK with her mother and other members of the family.

2. The application was refused in the decision dated 4.12.15, pursuant to the mandatory grounds under paragraphs 320(3) and 320(7A), on the basis that the claimant submitted a non-genuine passport. It followed that the Entry Clearance Officer could not be satisfied that the claimant was related as claimed.

3. Paragraph 320(7A) is a mandatory ground of refusal "where false documents have been submitted "whether or not material to the application and whether or not to the applicant's knowledge."

4. Judge Davidson found at [22] on the balance of probabilities that the passport was false and thus that refusal under 320(7A) was correct. However, the judge went on to consider the appeal outside the Rules pursuant to article 8 ECHR family life, noting that apart from "the technicality of the suspect document" all the other elements required to satisfy 352D were met. The judge then stated, "I therefore consider that the (claimant) falls within the scope of what the Immigration Rules determine to be within her right to a family. Life," and allowed the appeal.

5. The grounds first submit that having found 320(7A) met, the judge should have dismissed the appeal. Second, the grounds submit that the judge failed to consider the public interest in the deception used by the claimant. Third, it is submitted that the judge materially erred in law by failing at [24], or elsewhere within the decision, to give adequate reasons why the appeal was to be allowed outside the Rules pursuant to family life rights under article 8 ECHR. It is pointed out that there was no proportionality assessment.

6. On 21.12.17, Upper Tribunal Judge Martin granted permission to appeal on all grounds, noting in particular that "the decision to allow the appeal on Article 8 grounds is wholly unreasoned and no account taken of the submission of a false passport with the application."

7. Thus, the matter came before me on 7.3.18 as an appeal in the Upper Tribunal.

Error of Law

8. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision to be set aside.

9. In the light of the DNA evidence proving the relationship between the claimant and her parents in the UK, at the First-tier Tribunal the Secretary of State did not rely further on paragraph 320(3) as a ground of refusal.

10. It is clear that the application fell to be rejected on the application of paragraph 320(7A), a mandatory ground of refusal. The First-tier Tribunal Judge agreed, and so found. However, as the only viable appeal was on human rights grounds, the judge was obliged to go on consider article 8

family life rights outside the Rules. To that extent, there is no merit in the first ground of appeal, as Mr McVeety accepted.

11. The first part of the second ground of appeal is also flawed in the sense that 320(7A) does not require deception to have been used by the claimant, or that it was used in the application with her knowledge and consent. However, it was incumbent on the judge to consider and make a finding on the claim that the family members were entirely unaware of the deception, as that would be relevant to any article 8 assessment. I reject Mr Moran's argument that by referring to the passport issue as a "technicality" the judge implicitly accepted that no blame fell on the family. Whilst that might have been the judge's view, it was not made clear within the decision.

12. At [24] the judge purported to go on to consider the appeal under article 8 family life rights. Surprisingly, the entire basis for the decision to allow the appeal under article 8 appears to be enclosed within a single sentence at [24], "I therefore consider that the appellant falls within the scope of what the Immigration Rules determine to be within her rights to a family life."

13. I find that Judge Davidson failed to conduct an adequate article 8 Razgar assessment, and in particular failed entirely to conduct the crucial proportionality balancing exercise. In such an assessment, that the application fell to be refused under the mandatory Rules for refusal is a weighty consideration in the assessment of the proportionality of the decision. Neither did the judge make any assessment of the public interest in immigration control (s117B of the 2002 Act), or in refusing entry where fraudulent documents have been used to circumvent the Rules. In that regard the judge should have considered and made a finding as to whether deception was employed by the claimant or the extent, if any of her culpability in the submission of a false document. Even the Entry Clearance Officer went on to consider article 8 and to make a proportionality assessment; the First-tier Tribunal did not.

14. I reject Mr Moran's argument that the admittedly inadequate article 8 assessment was immaterial to the outcome on the basis that on the findings of the Tribunal the decision to refuse EC cannot have been proportional to the accepted genuine and subsisting family life. He relied in support on the indications from the Rules as to how such matters are treated with and without deception on the part of the applicant, such as in 320(7B). It was pointed out that even where deception had been used, where a person was under the age of 18, that was not a bar to future applications. However, such an argument, whilst badged as one of 'materiality,' are in essence an attempt to reargue the appeal, rather than directly addressing the issue of an error of law. I do not accept that on its own facts and the findings of the First-tier Tribunal the appeal was bound to be allowed under article 8 family life considerations. Whether a judge reached such a conclusion remains to be seen and depends on an assessment of proportionality that was not undertaken in this case. The

decision has to be fair to the Entry Clearance Officer and needs to provide clear and cogent reasons for the conclusions reached. That was not done.

15. In the circumstances, for the reasons stated, the decision was in material error of law and cannot stand and must be set aside.

Remittal

16. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings and conclusions on a crucial issue at the heart of an appeal are unclear, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
17. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.
18. I declined to preserve any findings of fact, as that would unfairly tie the hands of the judge considering the remitted appeal.

Conclusion & Decision

19. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal at Hatton Cross.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

I make no fee award.

Reasons: The outcome of the appeal remains to be seen.

Signed

Deputy Upper Tribunal Judge Pickup

Dated