Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03702/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral judgment given at hearing On 12 August 2014	**On 29 August 2014**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

MR AHMADULLAH

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: No Legal Representative

DETERMINATION AND REASONS

1. The appellant in these proceedings is the entry clearance officer ("eco"), but I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Afghanistan. He was born on 1 January 1985. He made an application for entry clearance as a spouse. That application was refused in a decision dated 17 December 2012. The application was

made and refused with reference to paragraphs 281 and 320 of the immigration rules, HC 395 (as amended).

3. It is important to say at this stage that it was accepted on behalf of the eco before me, that notwithstanding what is in the grounds of challenge to the First-tier Tribunal's decision, the 'new' Article 8 Rules do not and did not apply to this appeal.

4. The refusal of the appellant's application for entry clearance raised a number of issues. In support of the application the appellant had provided a passport giving a particular name and a date of birth of 1 January 1985. The name on the passport is the name in which his appeal was advanced. However, records said to be available from a biometric finger scan show that on 5 January 2008, when he applied for indefinite leave to remain in the UK, he gave different personal details in terms of his name as well as a different date of birth, that date of birth being 1 January 1990. Further records appeared to show that on 7 January 2008 when he came to the attention of the police he gave a different name from the one in the passport and again a different date of birth, that is a third date of birth.

5. Various aliases are referred to in the notice of decision. The visa application form, so the decision says, has not satisfactorily explained his change of identity on the visa application. In the light of the multiple use of identities by the appellant, the eco was not satisfied that the appellant had satisfactorily established his identity. The application was therefore refused under paragraph 320(3) of the immigration rules.

6. The decision also referred to paragraph 320(11). That related to a contention that the appellant had previously contrived in a significant way to frustrate the intentions of the immigration rules. He had stated that he came to the UK in 2005 and had been granted a visa but there was no trace of such a visa. There was no evidence to substantiate that claim.

7. The appellant came to the attention of the UK immigration authorities in January 2008, and although vaguely expressed within the notice of decision, it states that he was "issued" a custodial sentence at that time, although what for is not stated. He then made his application for indefinite leave to remain and gave the identities to which I have referred. He left the UK in April 2008 having been detained by the immigration authorities. It was those circumstances which led to the refusal under paragraph 320(11).

8. A further ground for refusal was under the 'substantive' immigration rules in relation to spouses; that is paragraph 281(ii), which relates to the English language requirement.

9. First-tier Tribunal Judge C. M. Phillips heard the appeal against the refusal of entry clearance, on 26 March 2014. She concluded that the appeal under the immigration rules should be dismissed but she allowed the

appeal on human rights grounds, with reference to Article 8 of the ECHR. She heard evidence from the sponsor and from two other witnesses.

10. At [7] of the determination the judge said that it was accepted that the appellant had used false names in the past and he does not have the required English language qualification.

11. At [11] she referred to the decision in Devaseelan [2002] UKIAT 000702 in terms of a previous appeal in relation to an application made by the appellant for entry clearance. That appeal was heard by Immigration Judge O'Connor, as he then was, on 18 April 2011. Judge O'Connor dismissed the appeal, making a number of adverse credibility findings against the appellant and the sponsor.

12. The First-tier Judge in this case, Judge Phillips, made findings starting at [27] of the determination. She concluded that it was a matter in the appellant's favour that the sponsor attended the hearing "thus demonstrating clearly her knowledge of the application and her support for the application and for the appeal." She stated that she found the sponsor and the witnesses to be credible.

13. At [28] she acknowledged that the starting point in her assessment should be the determination of Immigration Judge O'Connor, in accordance with the decision in Devaseelan. She referred to Judge O'Connor's conclusion that the sponsor's relationship with the appellant was not genuine and that the appellant had not fathered her children. That was also a refusal under paragraph 320(11).

14. However, Judge Phillips had before her DNA evidence that was not before Judge O'Connor. She referred to that evidence at [29], it being evidence that the judge concluded showed that the appellant was the father of the sponsor's children. She noted that it postdated the respondent's decision but found it admissible because it related to circumstances obtaining at the time of the decision.

15. At [30] Judge Phillips noted that no issue was taken in the refusal with the genuine and subsisting nature of the relationship or with the paternity of the sponsor's children. For completeness however, she concluded that the DNA evidence established the relationship between the appellant and the children, and that it further established that the relationship between the appellant and the sponsor was genuine and subsisting and that they intended to live together permanently as spouses.

16. Judge Phillips acknowledged at [31] that the appellant had used different identities although noted that there was a difference of view as to why he had used different identities. Nevertheless at [31] she found that the sponsor had consistently used the name that the appellant used on his passport and for the entry clearance applications. The judge considered the question of the passport at [32], and the extent to which it satisfactorily established the appellant's identity and nationality.

17. She went on to consider paragraphs 320(11), and 281 in terms of the language requirement. She considered Article 8 of the ECHR, and ultimately concluded, taking into account the best interests of the appellant's children, that the decision to refuse entry clearance would amount to a disproportionate "interference", as she described it, with the appellant's Article 8 right to family life.

18. Now the grounds on behalf of the eco, at [1], assert that the judge was wrong to conclude that merely because the sponsor attended the hearing, that was a matter that the judge was entitled to take into account in assessing credibility. However, it seems to me that that contention does not adequately represent what the judge said in this respect at [27]. The judge said that:

> "I find that it is in the appellant's favour that the sponsor attended the oral hearing thus demonstrating clearly her knowledge of the application and her support for the application and for the appeal. I find the sponsor and the witnesses to be credible."

19. It was not the mere attendance of the sponsor that helped to persuade the judge of the sponsor's credibility. It was her demonstration of her knowledge of the application, her support for the application, and in general terms the finding that the sponsor was credible.

20. It is said in ground 2 that the judge did not give adequate reasons for finding that the appellant had established his nationality, particularly with reference to the passport. At [32], on that issue, the judge said that she did not find that the respondent had set out in the refusal any basis for refusing to accept the appellant's Afghan passport as a document that satisfactorily established his identity and nationality.

21. It seems to me that what the judge was referring to there was that there was no specific or direct challenge to the passport itself, in its own terms, as opposed to in terms of the general proposition that it could not be relied on because of the appellant's use of false identities in the past. What is said in the determination at [32] is as follows:

> "I find that the respondent had not set out in the refusal any basis for refusing to accept the appellant's Afghan passport as a document that satisfactorily establishes his identity and nationality. In the absence of any substantive challenge to this document and in light of the other evidence I find that there is sufficient evidence in the consistent evidence of the sponsor and witnesses and in the documentary evidence to justify a finding that the appellant has satisfactorily established his identity and nationality."

22. What the judge was saying there was that it was not just the passport that led her to conclude that the appellant has established his identity but the consistent evidence of the sponsor and the witnesses also led to that conclusion. It is also right to say that the DNA evidence had a part to play in the judge's assessment of the appellant's identity and nationality.

23. The grounds also attack the judge's conclusion in relation to paragraph 322(11) of the immigration rules, and it is said that the judge should not have concluded that the discretion under paragraph 320(11) should have been exercised differently. There is reference to the evidence given on behalf of the appellant in terms of his reasons for using deception, namely to protect his family from removal, a decision that was based on false premise in any event in terms of whether the family would have been removed.

24. But it is important to see the judge's decision in context. At [33] it was concluded that the discretion under paragraph 320(11) should have been exercised differently because the appellant's family life with the sponsor and his two young children in the United Kingdom had not been considered or taken into account by the respondent.

25. Although another judge may perhaps have come to a different view, Judge Phillips was entitled to conclude that it was credible that the appellant had not put forward a case to remain in the UK on the basis of family life in the UK in January 2008 because he feared that his family may be deported with him. She then concluded that it was a credible explanation for the use of different names and failure to be named on the birth certificates, an omission that had now been corrected.

26. In the same paragraph it was stated as follows:

> "I find that when the family circumstances are taken into account along with the length of time since his deportation and the efforts made by this family to reunite that the refusal under paragraph 320(11) is undermined."

She then concluded that the discretion should have been exercised differently.

27. I am satisfied that those conclusions were conclusions that were open to the judge. Paragraph 320(11) is a discretionary ground for refusal and the judge was entitled in her assessment of the evidence to come to the view that the exercise of the discretion under that paragraph should have been made differently. In any event, she nevertheless found that the appellant was not able to meet the requirements of the immigration rules because of the language requirement.

28. It does not seem to me that the issue in relation to the language requirement in terms of the proportionality assessment was raised in the grounds to the Upper Tribunal, although it was raised in submissions by Mr Avery on behalf of the respondent. It is in fact not correct to say that the judge did not give this any consideration in the proportionality assessment.

29. At [40] the judge stated that she took full account of the circumstances weighing in favour of the refusal "including the weight to be attached to the English language requirements in the Immigration Rules".

30. It is also important to note that she expressly took into account the appellant's "poor immigration history". It is not the case therefore, that in the proportionality assessment the judge was blind to the appellant's background and his use of false identities, and his consequent poor immigration history. The contention therefore that the judge failed properly to consider factors such as the appellant's previous criminality and his use of multiple and false identities, is not a contention that is made out having regard to the passages of the determination to which I have referred. In any event, when one makes a global assessment of the determination it is apparent that the judge had those matters well in mind when considering the proportionality assessment.

31. The further contention on behalf of the respondent is that there was inadequate consideration given to the public interest in immigration control. As I have already indicated however, at [40] there is reference to the requirements of the immigration rules and the English language requirement, as well as the appellant's poor immigration history. That seems to me to demonstrate an awareness of the need to take into account the public interest in immigration control.

32. Furthermore, there is express reference to that public interest at [45] whereby the judge expressly stated that she took into account "the legitimate interest of immigration control in the economic interests of the United Kingdom". There is further reference to the appellant's poor immigration history.

33. One of the features of the determination which is apparent is the judge's consideration of the best interests of the appellant's children. There are two children who were born on 23 February 2007 and 28 September 2008. They were therefore at the time of the hearing before the First-tier Tribunal aged 7 and 5. Their ages in fact are only relevant with reference to the date of the decision by the eco on 17 December 2012. But in any case, they were two years, or a year and a half, younger at that time.

34. The judge referred to their best interests in the determination and she referred to evidence that satisfied her that the appellant was living as a family with his wife and elder child prior to his removal. She concluded that if the appellant had not been removed he would have remained living with the sponsor and their children.

35. At [41] she accepted the evidence of contact between the appellant and his children by phone, and accepted evidence that the children were coming to an age where the appellant's absence is causing distress.

36. In conclusion therefore, notwithstanding the submissions made on behalf of the respondent by Mr Avery, I am not satisfied that it is established that there is any error of law on the part of the First-tier Tribunal. The judge took into account the factors that needed to be taken into account and did not leave out of account factors that needed to be taken into account.

37. There is no error of law in the proportionality assessment and the decision to allow the appeal on human rights grounds with reference to Article 8 of the ECHR therefore stands.

Upper Tribunal Judge Kopieczek 27/08/14