Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/12687/2012
OA/12700/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13th February 2014	**On 25th February 2014**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUSSAIN MAZLOOM
HASSAN MAZLOOM

Respondents

Representation:

For the Appellant: Mr N Bramble, Senior Presenting Officer
For the Respondents: Ms V Eastey, Counsel instructed on behalf of Duncan Lewis & Co Solicitors

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Malins) who in a decision promulgated on 29th November 2013

allowed the Respondent's appeals against the decision to refuse entry clearance as family members of a person settled in the United Kingdom.

2. The history of the appeal can be shortly stated. The Sponsor, Mr Sheralam Mazloom, married Waranga Mazloom on 2nd March 2002 in Afghanistan. During the course of their marriage, four children were born including twin sons born on 6th January 2010 who are the Respondents to this appeal. The Sponsor left his home country of Afghanistan on 30th November 2005 and claimed asylum. He was granted refugee status thereafter and indefinite leave to remain was granted in or about August 2011. It is plain from the history given by the parties that the Sponsor and his wife lived together after he had left Afghanistan for periods of time in Pakistan in 2007, 2008, 2009 and 2011 until 9th February 2012. It was during one of those visits in 2009 that the two youngest children and the Respondents to this appeal were born. Thus they were born after he was granted refugee status.

3. Applications were thus made for family reunion by the Sponsor's wife and four children. Those applications were made on 23rd February 2012. In a series of immigration decisions made on 14th May 2012 those applications were refused. The Sponsor's wife's application was firstly refused under paragraph 320(7A) on the basis that a document had been provided that was said not to be a genuine document and also under paragraph 352A on the basis that the Sponsor's wife had failed to prove that they had contracted a valid marriage and also that the Entry Clearance Officer was not satisfied that they intended to live together or had a subsisting relationship (352A(i) and (iv)). In respect of the two eldest children, their applications were considered under paragraph 352D of the Immigration Rules. Similarly they were refused under paragraph 320(7A) but also under paragraph 352D(i) and (iv) on the basis that the Entry Clearance Officer was not satisfied that they were children of a person granted refugee status in the UK or that they were part of the family unit at the time the Sponsor left. Those applications were also considered under Article 8. In respect of the two youngest children, they had applied for entry clearance as a child of a parent settled in the United Kingdom. Thus those applications were considered under paragraph 297. As with the earlier applications they were also refused under paragraph 320(7A) on the basis of documentation that had been produced but also they were not satisfied that the Appellant was a child of a person settled and present in the UK (paragraph 297(i)). The Entry Clearance Officer also considered in very brief terms Article 8 in respect of those two applications.

4. The appeals came before the First-tier Tribunal (Judge Malins) on 8th October 2013. It is plain from the determination that in respect of the issue raised by the Entry Clearance Officer under paragraph 320(7A) that after considering the documentation the judge did not uphold the refusal under paragraph 320(7A). She found the Sponsor to have legal status as a refugee in the UK and based on the DNA evidence from Cellmark was satisfied that the Sponsor's wife was the biological mother of all four children and that the Sponsor was their biological father. She also found that as the marriage had preceded the Sponsor's refugee status, the Sponsor was entitled to

family reunion with the five appellants (his wife and four children). Therefore she allowed all five appeals.

5. The Secretary of State sought permission to appeal that decision but only in respect of the two youngest children. There was no appeal against the decision relating to the Sponsor's wife or elder two children. Nor was there any appeal against the judge's refusal to uphold the decision under paragraph 320(7A). The grounds submitted relate to the judge's assessment under paragraph 352D of the Immigration Rules. It was set out in the grounds that the judge erred in allowing the appeals of the two younger children as they could not satisfy the requirements of paragraph 352D as they did not form part of the Sponsor's family in 2005 when he left Afghanistan to seek asylum in the UK. Secondly, the judge had failed to assess the appeals under the relevant Rule, that being 297 (or in the alternative 319R). The judge had failed to consider or make findings on these requirements.

6. At the hearing before the Upper Tribunal, Ms Eastey on behalf of the Respondents conceded that the grounds submitted on behalf of the Secretary of State had been made out and that the judge had made an error of law in that the applications of the two younger children should have been considered under the provisions of paragraph 297 as set out in the decision letters. Furthermore the judge was also required to consider in the alternative matters relevant to Article 8. Ms Eastey and Mr Bramble, Senior Presenting Officer, prior to the case proceeding had the opportunity to discuss the appeals and they informed the Tribunal that the course that they invited the court to adopt was to set aside the decisions made in respect of the two youngest children and to remit the appeals to the original judge (Judge Malins) so that the judge could consider the issue in respect of paragraph 297 including maintenance and accommodation and Article 8.

7. In light of the concession made before me on the Respondent's behalf, there is no basis on which I could possibly do otherwise than accept that concession and find that the judge made an error of law as set out in the preceding paragraph. The younger two children's applications were considered on a different basis to the other children by reason of their dates of birth being after the Sponsor left Afghanistan. Thus in those circumstances, both representatives have invited this Tribunal to remit the appeal to Judge Malins to consider paragraph 297, which was the basis of the refusal and in the alternative, Article 8 of the ECHR. In those circumstances, I am satisfied that the appropriate course is for the decision of the First-tier Tribunal in respect of the Respondent to be set aside. Both advocates have invited the Tribunal to adopt the course outlined in the preceding paragraphs with a fresh oral hearing by way of remittal to the First-tier Tribunal (Judge Malins) based on the nature of the error of law in this case, namely that the consideration of the relevant paragraph of the Immigration Rules is still outstanding. Due to the nature of the error of law, First-tier Tribunal will be required to hear the oral evidence of the Sponsor and consider the documentation provided relevant to the issues outlined above. Both advocates are in agreement to this course being adopted for the reasons that they have furnished the Tribunal with. Whilst it is not the ordinary practice of the Tribunal to remit cases to the First-tier Tribunal, there are reasons advanced by both

parties why this is the case and having given particular regard to the overriding objective of the efficient disposal of the appeal have reached the conclusion that that is the appropriate course.

8. Therefore the decision of the First-tier Tribunal is set aside and the case is to be remitted to the First-tier Tribunal (Judge Malins) at Hatton Cross for a hearing which should be listed before Judge Malins in accordance with Section 12(2) of the Tribunals, Courts and Enforcement Act and paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

Decision

9. The First-tier Tribunal made an error of law. The decision is set aside. The appeal is to be remitted to the First-tier Tribunal at Hatton Cross for a hearing before First-tier Tribunal Judge Malins on a date to be fixed.

Signed Date: 14/2/2014

Upper Tribunal Judge Reeds