IAC-AH-CO-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/16590/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 December 2014	**On 21 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

ENTRY CLEARANCE OFFICER - DHAKA

Appellant

and

LAW
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Avery of the Specialist Appeals Team
For the Respondent: Mr M Hassan Solicitor of KC Solicitors

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2000 and 8I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to content of court proceedings.

The Respondent

1. The Respondent to whom I shall refer as "the Applicant" is a citizen of Bangladesh born in March 2004. On or shortly before 13 May 2013 she applied through her then solicitors to the Appellant (the SSHD) for a Certificate of Entitlement to a Right of Abode. This application followed two previous applications for limited leave with a view to settlement.

2. On 29 July 2013 the ECO refused the application under reference 635666 on the basis that at the time the Applicant's parents married, her father was still married to his previous wife whom he did not divorce until 16 August 2010. He went on to refuse the Certificate because he was not satisfied the Applicant was of legitimate descent.

3. On 15 August 2013 the Applicant through her present solicitors lodged notice of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002 as amended (the 2002 Act). The grounds assert that the ECO had failed to have regard to Section 1 of the Legitimacy Act 1976 and assert without reasons or explanation that the decision of the ECO was unfair and unreasonable.

The First-tier Tribunal's Determination

4. By a determination promulgated on 29 September 2014 Judge of First-tier Tribunal Canavan found the ECO's decision under the Immigration Rules was not in accordance with the law and went on to find in the alternative that it was unlawful under Section 6 of the Human Rights Act and allowed the appeal on human rights grounds.

5. By a decision 3 November 2014 Upper Tribunal Judge Martin granted the ECO permission to appeal because it was arguable that having found the ECO's decision unlawful the Judge ought to have remitted it to the ECO to make a lawful decision. If there was no lawful decision there was nothing that could be said to engage Article 8.

6. The grounds for appeal had referred to the judgment in *Mirza & Others v SSHD [2011] EWCA Civ 159* and in particular paragraph 46 where Sedley LJ had said:-

> As to Article 8, it may follow that an unjustified deferral of a decision on removal, being contrary to law, makes it impossible to justify the disruption of family or private life caused by what Mr Malik submits is the presumptive removal that follows refusal of leave to remain. But there is no need to travel into Article 8 once unlawfulness is established and there are obvious difficulties about presuming a removal which, if the law is observed, may never happen...

The Upper Tribunal Hearing

7. The Applicant's parents were present. For the ECO Mr Avery submitted the Judge's determination that the ECO's decision under the Immigration Rules was not in accordance with the law was not challenged. The decision should therefore be remitted to the ECO to re-make. There had

been no cross-appeal by the Applicant against the decision under the Immigration Rules. The ECO relied on what had been said in *Mirza* and the Judge had erred in law that having concluded the decision was not in accordance with the law should not have gone on to consider Article 8 of the European Convention outside the Immigration Rules.

8. For the Applicant Mr Hassan submitted that *Mirza* was of little assistance because it had involved a removal case and the present appeal was an entry clearance case. Sedley LJ had said there was no "need" to consider Article 8 if the decision was unlawful. This did not mean that a Judge could not or must not consider a claim under Article 8 in such circumstances. The Judge was entitled to conduct a consideration of the Article 8 claim and to allow it.

9. In response Mr Avery submitted that if the decision was unlawful then there was no decision and consequently it was not possible for the Judge to consider a claim under Article 8: she had lacked jurisdiction.

10. He pointed out that the decision under appeal was in relation to a status application and not an application for leave to enter, for example for family reunion under the Immigration Rules as a dependent child. He re-iterated that having found the original decision not to be in accordance with the law the Judge should have remitted it to the ECO.

Consideration and Disposal

11. I noted that there was no challenge by either party to the part of the determination that the original decision under the Immigration Rules was not in accordance with the law and should be remitted to the ECO.

12. I turn to the Judge's consideration of the claim under Article 8. I note *Mirza* was a removal case and find the comments of Sedley LJ at paragraph 46 have limited application to this case. If a decision to remove is found to be unlawful and remitted to the decision maker, the appellant will remain in the United Kingdom and a fresh decision will have to be made before he can be removed. In those circumstances there is no reason to consider a claim under Article 8 of the European Convention. The position is different in entry clearance cases. The rights to respect for private and family life protected by Article 8 of the European Convention and also the duty to consider the welfare of a child enacted by Section 55 of the Borders, Immigration and Citizenship Act 2009 extended to out of country cases as explained in *Mundeba (s.55 and para 297(i)(f)) DRC [2013] UKUT 00088(IAC)* do not depend on the existence of an immigration decision. They are rights in themselves and the existence and enforceability of those rights do not depend on the refusal of leave to enter in a valid immigration decision.

13. An immigration decision may be invalid in relation to an application under the Immigration Rules but valid in relation to a claim under the European Convention outside the Rules. Such a decision will be a "dual decision" and the concept of part of a dual decision being valid and part invalid is familiar from those decisions refusing leave to remain under the Immigration Rules and containing directions are removal under section 47

of the Immigration, Asylum and Nationality 2006 before the coming into force of section 51 of the Courts and Crime Act 2013.

14. Crucially in this appeal, the immigration decision is not one to refuse leave to enter or remain. It is one which relates to status, namely whether the Applicant has shown she satisfies the requirements for the grant of a Certificate of Entitlement to a Right of Abode. An application for such a Certificate is not about rights to respect for private and family life or family reunion. It is not an application for entry clearance. In this context it is difficult to see how the Applicant can assert the decision is one which can be said to relate in law to her right to a family life. I understand that the issue of a Certificate to the Applicant would enable her to join her parents in the United Kingdom and so put her private and family life on a completely different level. However, the Certificate is about her status and not about a permission to enter the United Kingdom.

15. In the case of private life, the European Convention has a more restrictive application to out of country appeals. Any decision would not amount to an interference with the Applicant's private life because it simply makes no change to it so it would be an extremely rare or unusual set of circumstances does not amount to an interference. In this light the Applicant has failed to show that any obligations which the United Kingdom may have under Article 8 are even engaged. The consequences are that the appeal so far as it is based on Article 8 of the European Convention must fail.

16. The Applicant is a minor. It is understood that both her parents are in the United Kingdom. In such circumstances the ECO is requested to deal promptly with any re-making of the decision under the Immigration Rules and should the Applicant be advised to make another application on different grounds the effect of which is to seek entry clearance to join her parents in the United Kingdom then again the ECO is requested to deal with it expeditiously.

Anonymity

The Applicant is a minor. The Judge of the First-tier Tribunal made an anonymity direction and I find it appropriate that it should continue.

NOTICE OF DECISION

The determination of the First-tier Tribunal contained an error of law in relation only to its treatment of the applicant's claim under Article 8 of European Convention and that part is set aside. The effect is:-

The decision of the ECO in relation to the Certificate of Entitlement to a Right of Abode is not in accordance with the law and so remains to be decided.

The claim of the Applicant on human rights grounds is dismissed.

Signed/Official Crest Date 31. xi. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE ECO: FEE AWARD

I have considered whether it would be appropriate to make a fee award. For the reasons given in the determination of the First-tier Tribunal, I do not consider it appropriate to make a fee award.

Signed/Official Crest Date 31. xii. 2014

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal