Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/10732/2013
OA/10739/2013
OA/10743/2013

THE IMMIGRATION ACTS

Heard at Field House
On 3rd May 2016

Decision & Reason Promulgated
On 9th May 2016

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MRS SAVI ATIA (1)
MR DORI ATIA (2)
MR KOLI ATIA (3)
(ANONYMITY ORDER NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr G Davison, Counsel, instructed by Regal Law Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellants are citizens of Albania, and are a mother and two children. They are the wife and children of Mr Ferdi Atia who asserts he is a British citizen. The second appellant was born on 4th August 1991 and the third appellant was born on 23rd July 1995. The appellants applied for entry clearance to join Mr Atia on 8th March 2007. The respondent refused the application on 28th February 2013, and the appellants appealed. Their appeal against the decision to refuse entry clearance was allowed by First-tier Tribunal Judge Joshi to the extent that the decisions were found to be not in accordance with the law in a determination promulgated on the 5th August 2015.

2. Permission to appeal was granted by Judge of the First-tier Tribunal PJM Hollingworth in a decision dated 2nd December 2015 on the basis that it was arguable that the First-tier judge had erred in law in the construction of the Immigration Rules and on the basis that the judge had misunderstood a material fact: namely the judge had not understood that the respondent had not come to a conclusion on the issue of whether Mr Atia was entitled to British citizenship.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Respondent's Submissions – Error of Law

4. The respondent relies upon the grounds of appeal. In these she submits that the First-tier Tribunal had erred in law as it accepted that sponsor was a British citizen when it was clear he had obtained his British passport by fraudulent means by adopting the false identity of Mondi Bega born in Jumik, Kosovo. The grant of citizenship was either a nullity in law or capable of being treated as such by the Secretary of State, see Kaziu & Ors v SSHD [2014] EWHC 832 Admin. This fact had been irrationally ignored by the First-tier Tribunal. This was the ground primarily relied upon by Mr Clarke at the hearing. My attention was drawn to the fact that Kaziu had been appealed to the Court of Appeal, and that the decision of Ouseley J had been upheld in Hysaj & Ors v SSHD [2015] EWCA Civ 1195.

5. The respondent also argues that the First-tier Tribunal found the sponsor credible where in fact he claimed asylum in a false identity and used this identity in numerous other application to the respondent including for citizenship, in his marriage to his ex-wife (a British citizen) and in this application for the appellants to join him. The finding that the appellant was a credible witness was therefore an irrational conclusion.

6. The respondent also argues that the First-tier Tribunal wrongly found that it was not possible to apply paragraph 320(7a) of the Immigration Rules in refusing the application which was made under paragraph 281 of the Immigration Rules. Appendix FM should not have been applied to

this application as it was made in 2007, and thus prior to Appendix FM being incorporated into the Immigration Rules.

Conclusions – Error of Law

7. Singh v Secretary of State for the Home Department [2015] EWCA Civ 74 holds that whatever the date of application the new Immigration Rules under Appendix FM apply for all decisions on family applications made from 6th September 2012. The decision in this case was made on 28th February 2013, and thus undoubtedly after the 6th September 2012, and as such the First-tier Tribunal was correct to identify that paragraph 320 (7A) does not apply to application for entry clearance to enter the UK as a family member, and as such to find the respondent erred in law in applying it to refuse the appellants and also in not considering the application generally under Appendix FM.

8. The First-tier Tribunal reached the conclusion that the sponsor was a credible witness taking into account his admissions of having adopted a false identity. This is done on a rational basis at paragraph 21 of the decision, and it was open to the First-tier Tribunal to find that the appellant had a reason to do this as is set out at paragraph 25 of the decision. The First-tier Tribunal judge gives reasons for the conclusion that the appellant is the person who naturalised as a British citizen on the basis of a marriage to a British citizen at paragraph 28: these are perfectly rational. She also rationally finds that the sponsor remarried the first appellant in March 2007 and that the second and third appellants are his sons from their first period of marriage, at paragraph 32 of the decision

9. The First-tier Tribunal clearly understood that the respondent contended that she had not reached a conclusion as to whether to deprive the sponsor of his citizenship despite this matter being muted since 2008: this is evident from what is said at paragraphs 11 and 12 of the decision. However the First-tier Tribunal concluded that the material before them showed that the sponsor was told in 2011 that no further action would be taken in a potential deportation case as he is a British Citizen and found, as there was no further action since then regarding depriving the sponsor of his British citizenship, that they was entitled to find that he was still a British citizen, see paragraph 30 of the decision.

10. The facts of this case differ materially from those before the Administrative Court and Court of Appeal in Kaziu and Hysaj.

11. In those cases the Courts found that the applicants fell to be found not to be British citizens as the applicants had fraudulently mislead the Secretary of State as to their true identities and thus their naturalisations as British citizens were nullities on grounds of fraud in relation to the applications. As such the Secretary of State did not need to make an order depriving them of citizenship under s. 40(3) of the British Nationality Act 1981. It was clear in these cases that there were

false identities given in terms of name, age, minority/adulthood and nationality which were vital characteristics as to whether the applicants were refugees and fell to be granted leave to remain, and which must therefore have been material to the grant of citizenship.

12. Whilst the sponsor in this case came to the UK as an asylum seeker, and started the process as had the applicants in Hysaj by adopting a false Kosovan identity and claiming asylum, he did not pursue this claim which was refused in 1999 by the respondent and gained nothing by it. He then married a British citizen and as a result of this marriage was granted leave to remain, and then indefinite leave to remain, and then applied to be naturalised as a British Citizen. The First-tier Tribunal considered allegations by the respondent that the marriage of the sponsor to a British citizen was bigamous (see paragraph 30 of the decision) but makes clear finding that this was not the case: it is clearly found at paragraphs 26 and 27 of the decision that the sponsor divorced the first appellant in July 1999 prior to his marriage to the British citizen in August 2000, and that he divorced the British citizen in 2005 prior to remarrying the first appellant in 2007 (see paragraph 29 of the decision). No other allegations have been made that the sponsor's marriage to the British citizen was fraudulent in any other way.

13. Given the fact that the sponsor's name, nationality and place of birth were not central to his grant of leave to remain and indefinite leave to remain as a spouse, the fact that he continued to use his assumed Kosovan name, nationality and place of birth in this application, rather then his actual Albanian name, citizenship and place of birth, cannot be said to be so central to the proper operation of the Secretary of State's powers to grant citizenship that the grant is rendered a nullity in accordance with the decisions in Kaziu and Hysaj.

14. It would seem that the respondent also takes this approach in her most recently letter of 29th April 2016. In this letter the Secretary of State says she is considering depriving the sponsor of his British citizen status under s. 40(3) of the British Nationality Act 1981 on the basis of alleged bigamy. If an order is potentially going to be made under s.40(3) as indicated by this letter then clearly the Secretary of State is of the view that the grant of citizenship is not automatically a nullity in the sponsor's case.

15. It would appear from the letter of 29th April 2016 that the respondent has further documents from Albania which show the sponsor was not divorced from the first appellant prior to his marriage to the British citizen. No such evidence was provided to the First-tier Tribunal in March 2015 or is attached to the letter. Given the very great delays in this matter if such documentation exists it must, as a matter of fairness, be produced to the sponsor's solicitors forthwith to enable them to respond to the letter as requested.

16. I also implore the respondent to produce a decision on the entry clearance applications by the appellants within a reasonable time frame: these applications now having been outstanding for over nine years which reflects extremely poorly on British administrative practice. I would venture that the appellants should have one month from the promulgation of this decision to provide the full relevant evidence in accordance with Appendix FM and Appendix FM-SE to the entry clearance post, and that a decision should be made by that post forthwith thereafter.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I do not set aside the decision
3. The decision of the First-tier Tribunal finding that the decisions of the entry clearance officer were not in accordance with the law is upheld.

Signed: Fiona Lindsley Date: 3rd May 2016
Upper Tribunal Judge Lindsley