Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: VA/01609/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2017	**On 13 October 2017**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IBRAHIM KYARI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Armstrong, Senior Home Office Presenting Officer
For the Respondent: Mr J Walsh, Counsel instructed by Luqmani Thompson & Partners, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing an appeal by the respondent (hereinafter "the claimant") against a decision of the Secretary of State, by an Entry Clearance Officer, to refuse his application for leave as a student visitor.
2. The First-tier Tribunal allowed the appeal "under the Immigration Rules and on human rights grounds".
3. Although I have found it necessary to consider the decision and the grounds in some detail, Mr Walsh was quick to accept that the appeal should not have been allowed under the Immigration Rules. There was no power to allow the appeal under the Immigration Rules. The appeal could only be brought on

human rights grounds and any contrary decision by the First-tier Tribunal was plainly wrong. The First-tier Tribunal clearly erred in law in allowing the appeal under the Immigration Rules and I set aside that part of the decision.

4. The challenge to the decision to allow the appeal on human rights grounds requires rather more analysis and thought.

5. I begin by considering the decision made by the Secretary of State. It is dated 10 February 2015 and relies on paragraph 320(7A) of HC 395. This obliges the decision maker to refuse entry clearance if:

> "false representations or documents are used (whether or not material to the application and whether or not to the applicant's knowledge), or material facts are not disclosed in relation to the application".

6. The Secretary of State noted that the claimant had said on his Visa Application Form in answer to question 28 that he had not made an application to the Home Office to remain in the United Kingdom in the previous ten years, whereas he had in fact applied to the Home Office for asylum on 13 October 2015. The sole reason for refusing the decision was paragraph 320(7A) even though the case notes show that the asylum application was withdrawn due to the claimant leaving the United Kingdom.

7. The claimant's bundle includes (page 97) a Home Office record created on 19 November 2014 referring to a "withdrawal request received" in the Document Return and Investigations Team e-mail box and the details of that request are summarised in the following way:

> "October application recorded in error; applicant has medical condition (evidence supplied). Applicant needs to withdraw erroneous appln, leave country and consider entry clearance application in home country asap."

8. There is then a letter from the claimant's solicitors dated 8 December 2014 referring to their letters of 18 November and 27 November 2014 stating:

> "We clarified that, when an asylum claim appears to have been recorded when our client visited the public inquiry office on 22/24 October (prior to expiry of his leave on 12 November), that was not his intention and any such claim was to be cancelled."

9. It also referred to medical evidence that had been submitted to explain why an application had been made or apparently made and then withdrawn so quickly.

10. At paragraph 70 of its decision the First-tier Tribunal said that it found that the claimant:

> "was not dishonest because he withdrew his asylum claim and he already had nearly fifteen years of history with an excellent immigration record".

11. It then criticised the Secretary of State for not analysing the application in more detail rather than refusing solely because, in the Secretary of State's view, paragraph 320(7A) disposed of the application.

12. The First-tier Tribunal acknowledged that the Entry Clearance Manager had done rather better but "fell under the spell of the initial decision without considering the effect of that decision on all the evidence that had been presented within the Grounds of Appeal".

13. The First-tier Tribunal was satisfied that, paragraph 320(7A) aside, the claimant would have satisfied the Immigration Rules.

14. The judge then reminded herself of the decision in **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)** and allowed the appeal on human rights grounds.

15. It is necessary to see precisely how this claim is challenged in the Secretary of State's grounds.

16. The decision to allow the appeal with reference to paragraph 320(7A) is challenged at point 11 of the grounds where the judge is criticised for finding that the claimant:

> "Had no proper capacity – and certainly not sufficient capacity to form the kind of 'criminal' mens rea – in terms of intention to make an operative fraud claim in respect of his answer to Question 25 [...] on the application form' is simply not supported by the medical evidence".

17. I agree with the Secretary of State. I can find no medical evidence that supports the finding. Further, the finding is contrary to the claimant's case as set out in his statement. He said at paragraph 23:

> "As I have said, I did not think my interview at the Home Office in October counted because it had been a misunderstanding which had been quickly cancelled before anything happened to it. There was a full explanation on the Home Office file. I honestly thought what I put was the correct answer. I had no intention to deceive. The reason I returned to Nigeria and did not use my existing 5-year visit visa was because I wanted to do exactly the right thing."

18. There is no suggestion there that the claimant was unaware of his having made an asylum claim. He said that he did not think it was deceitful to say he had not made a claim when he had made it in the circumstances that he did and withdrew it and left the United Kingdom soon afterwards. Mr Walsh has reminded me of the decision of the Court of Appeal in **A v SSHD [2010] EWCA Civ 773**. The Rules, although in clear terms, are aspects of policy that are themselves qualified by policy and an extra regulatory policy statement has to be read with the Rules so that it is clear that a person's conduct is not within the scope of paragraph 320(7A) unless it is dishonest.

19. Although I disagree with the First-tier Tribunal's decision that the claimant was not dishonest because he was too poorly to form the intent, and I set aside that decision, when I remake the decision I too conclude that dishonesty has not been established. As a matter of strict fact an asylum claim that is made and then withdrawn is an asylum claim that has been made. If that were not the case then there would be nothing to withdraw. However, the asylum claim was never determined and the claimant left the United Kingdom. An allegation of dishonesty must be proved by the Secretary of State and I am not satisfied that it is probable that the claimant was acting dishonestly when he indicated that he had not made a claim when in truth he had made a claim that had been withdrawn after a few days and before it had been decided and shortly before the claimant left the United Kingdom. I find that the claimant was objectively entitled to think that a claim that was withdrawn in these circumstances was not of interest to the Secretary of State and so was not within the ambit of the question.

20. It follows that I conclude that the claimant is not dishonest and the application should not have been refused under paragraph 320(7A) of HC 395.

21. It is, I find, rather concerning that the Secretary of State was willing to regard the claimant as dishonest in these circumstances when her own records state "application recorded (note, "*recorded*", not "*made*") in error". I do not say that she should, as a matter of law, have made further enquiries because I do not have to decide that point but common decency suggests that a little more thought before besmirching the claimant's character would not have been amiss.

22. I now turn to the challenge to the finding that the decision was contrary to the claimant's rights under article 8 of the European Convention on Human Rights.

23. Here I find the Secretary of State's grounds completely miss the point. Ground 10 asserts that there are "No reasons are given for finding private life."

24. The judge said at paragraph 94:

> "The [claimant] has resided in the UK from 1999 until 2010 and again from 2014 until he returned to Nigeria to apply for a further Visa from there. That is a significant period of time."

25. The judge concluded from this that the claimant does have a private life in the United Kingdom. Much is made in the Decision and Reasons of the case of **Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC)**. It is quite a short decision and it might have been helpful if the parties, and particularly the Secretary of State, had considered what we said at paragraphs 23 and 24. I set them out below:

> "23. We have considered carefully the effect that this decision could have in other cases. Plainly this will mean that the underlying merits of an application and the ability to satisfy the Immigration Rules, although not the question before the Tribunal, may be capable of being a weighty factor in an appeal based on human rights but they will not be determinative. They will only become relevant if the interference is such as to engage Article 8(1) ECHR and a finding by the Tribunal that an appellant does satisfy the requirements of the rules will not necessarily lead to a finding that the decision to refuse entry clearance is disproportionate to the proper purpose of enforcing immigration control. However it may be capable of being a strong reason for allowing the appeal that must be weighed with the others facts in the case.
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> 24. It is the very essence of Article 8 that it lays down fundamental values that have to be considered in all relevant cases. It would therefore be extremely foolish to attempt to be prescriptive, given the intensely factual and contextual sensitivity of every case. Thus we refrain from suggesting that, in this type of case, any particular kind of relationship would always attract the protection of Article 8(1) or that other kinds of relationship would never come within its scope. We are, however, prepared to say that it will only be in very unusual circumstances that a person other than a close relative will be able to show that the refusal of entry clearance comes within the scope of Article 8(1). In practical terms this is likely to be limited to cases where the relationship is that of husband and wife or other close life partners or a parent and minor child and even then it will not necessarily be extended to cases where, for example, the proposed visit is based on a whim or will not add significantly to the time that the people involved spend together. In the limited class of cases where Article 8 (1) ECHR is engaged the refusal of entry clearance must be in accordance with the law and proportionate. If a person's circumstances do satisfy the Immigration Rules and they have not acted in a way that undermines the system of immigration control, a refusal of entry clearance is liable to infringe Article 8."

26. Given this it might have been expected that the Secretary of State would have challenged the finding that this case came within the protection of Article 8. Mr Walsh in his preparation had anticipated that challenge and had prepared a skeleton argument justifying his position. He said at paragraph 11:

> "That the [claimants'] claim comes within Article 8(1) is hardly in doubt in view of his long association with the UK, his long residence there, his attendance at education institutions. He resided in the UK from 1999 to 2010 and again from 2014 when he returned to Nigeria to apply for a further visa from there."

27. I find that Mr Walsh's use of the phrase "hardly in doubt" owes more to optimism than strict legal analysis. Nevertheless, it was supported with reference to **Razgar [2004] 2 AC 368**, and **Niemietz v Germany (Application No. 1370/88)** where the European Court of Human Rights emphasised the width of the protection coming from Article 8. In short there was reason for the judge's decision that the claimant's private life was protected. This was clearly in the judge's mind because he has relied on phrases that appear to be drawn, perfectly properly, from Mr Walsh's skeleton argument.

28. The contention that there was no reason for "finding private life" is demonstrably wrong. The rest of the grounds that criticise the implied finding that there was family life are irrelevant. This case was not put on the basis that it was a "family life" case and the judge did not decide it on that basis.

29. I may have taken a very different view about this appeal if the finding that the private life recognised by the judge was something which the Secretary of State was obliged to promote and within the protection of Article 8(1) had been challenged but that challenge was not brought in the grounds.

30. However I wish to make it clear to anyone interested in this decision that I have *not* decided that the private life recognised by the First-tier Tribunal came within the scope of the Convention. I have decided that there was some private life and the finding to that effect was supported by the evidence. The grounds relied upon have not been made out.

31. It follows therefore that although I find fault I have remade the decision and uphold the decision of the First-tier Tribunal.

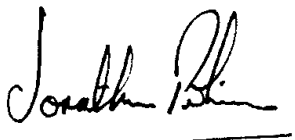
32. The claim is now very stale. I give no directions consequent on this decision. I doubt very much if the claimant has the slightest interest in returning to the United Kingdom on a student visit visa in the reasonably near future. Certainly the reasons that he advanced for wanting to do so has long since passed. It may be that it would be quite inappropriate to grant him entry clearance as a result of this decision. That is something that will have to be considered if it arises.

Notice of Decision

33. I allow the Secretary of State's appeal to the extent that I rule that the appeal should not have been allowed under the Immigration Rules and that the reason for finding that the claimant had not been untruthful is perverse.

34. I remake the decision and I find that the claimant did not make a false statement within the meaning of paragraph 320(7A) of HC 395.

I dismiss the appeal against the decision to allow the appeal on human rights grounds.

Signed 

Jonathan Perkins, Upper Tribunal Judge Dated: 12 October 2017