



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/26107/2016
HU/26112/2016
HU/26116/2016
HU/26117/2016
HU/26121/2016
HU/26127/2016

THE IMMIGRATION ACTS

Heard at Field House
On 1st August 2018

Decision & Reasons Promulgated
On 20th August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

SJHA (FIRST APPELLANT)
HA (SECOND APPELLANT)
AA (THIRD APPELLANT)
AA (FOURTH APPELLANT)
FA (FIFTH APPELLANT)
HA (SIXTH APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - AMMAN

Respondent

Representation:

For the Appellants: Mr J Gajjar of Counsel instructed by A2 Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellants appealed against a decision of Judge Watson (the judge) of the First-tier Tribunal (the FTT) promulgated on 18th January 2018.
2. The Appellants claim to be stateless non-documented Bidoons from Kuwait currently living in Lebanon. The first Appellant born 1st June 1976 is the mother of the second to sixth Appellants born 5th November 2011, 1st October 2003, 6th June 2006, 1st October 2008, and 10th February 2002, respectively.
3. The Appellants applied for entry clearance to enable them to join the Sponsor in the UK. The Sponsor is the husband of the first Appellant and the father of the remaining Appellants. He has been recognised as a refugee in the UK, and therefore the Appellants were applying for family reunion.
4. An initial application made by the Appellants had been refused on 1st September 2014. The Appellants successfully appealed against that decision, their appeals being allowed by Judge Munonyedi of the FTT in a decision promulgated on 2nd December 2015.
5. However the Appellants were not granted entry clearance following their successful appeals, although there was no appeal by the Entry Clearance Officer against the decision of Judge Munonyedi. Further refusal decisions were issued dated 26th October 2016 alleging deception that had not been apparent when the Appellants were initially refused entry clearance, and therefore which had not been considered by Judge Munonyedi.
6. In relation to the first Appellant the reason for refusal relied upon paragraph 320(7A) of the Immigration Rules on the basis that the first Appellant had submitted false documents with her application, those documents being a certificate of entry of marriage to the Sponsor, and a Ministry of Health birth registration.
7. In relation to the remaining Appellants the reason given for refusing entry clearance also referred to paragraph 320(7A) in relation to Ministry of Health birth registration documents. The Respondent relied upon a document verification report (DVR) in relation to the marriage certificate, and a separate document verification report in relation to the birth registration documents.
8. The judge accepted that DNA evidence proved the relationship between the Appellants and Sponsor. The judge found that false documents had been submitted as contended by the Respondent and therefore the Appellants could not satisfy the Immigration Rules in order to be granted entry clearance, because of paragraph 320(7A).

9. The judge considered Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) and found that as false documents had been submitted, it was “in the clear public interest to refuse the application.” The judge found that the Appellants and Sponsor “are the authors of that deception and it is proportionate that they bear the consequences in accordance with the rules.” The appeals were dismissed.
10. The Appellants applied for permission to appeal to the Upper Tribunal and relying upon five grounds which are summarised below.
11. The first ground contends that the judge erred in concluding that the marriage certificate is false. No further details need be set out as this ground was not pursued.
12. The second ground contends the judge erred in finding the birth registration documents to be false. It was contended that the error was made by accepting the document verification report which was not supported by any documentary evidence. A sample of a supposed genuine birth document was not attached to the report to serve as a comparator. It was submitted that the judge had erred in relying upon an inconclusive report.
13. The third ground contends that the judge erred and failed to consider or address the Appellant’s Article 8 claims.
14. The fourth ground contends that the judge erred by failing to consider the Appellant’s claim with reference to section 55 of the Borders, Citizenship and Immigration Act 2009. The judge did not make a finding on the best interests of the children and failed to take into account that a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.
15. The fifth ground contends that the judge erred at paragraph 14 when concluding there was a significant inconsistency between the accounts of the first Appellant and Sponsor. This relates to the claimed marriage of the Sponsor and first Appellant.
16. Permission to appeal was granted by Judge Saffer in the following terms.

“It is arguable that in visiting the sins of the parents on the children the judge materially erred especially given the DNA evidence establishing the paternal link to their Sponsor, a refugee. The rest of the grounds appear to have less weight but can be argued.

Error of Law

17. On 11th June 2018 I heard submissions from both parties in relation to error of law. The first Appellant conceded that the first ground disclosed no error of law. Reliance was placed on the remaining grounds which had been contained within the application for permission to appeal. The Respondent argued that any error of law was not material,

as it was now accepted on behalf of the Appellants that a false marriage certificate had been submitted by the first Appellant.

18. I found there was a material error of law in the FTT decision and set aside the decision but preserved the finding which had not been successfully challenged, that a false marriage certificate had been submitted on behalf of the first Appellant.

19. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 11th June 2018, promulgated on 19th June 2018. I set out below paragraphs 33-40 of that decision, which contain my conclusions and reasons for setting aside the FTT decision;

“33. It is common ground between the parties that the judge did not err in finding that a false marriage certificate was submitted on behalf of the first Appellant. That is acknowledged on behalf of the Appellants by the fact that Ground 1 was not relied upon at the hearing before me and not proceeded with.

34. The marriage certificate was only a feature of the refusal in relation to the first Appellant, not the remaining Appellants, her children. Mr Bramble did not seek to contend that the judge did not err in consideration of the birth documents, taking the view that any error was not material. I am persuaded, that the judge did err in considering the birth registration documents, for the reasons given in Ground 2. I find that error to be material, as that was the only reason given for refusal of entry clearance in relation to the second-sixth Appellants.

35. I deal with Grounds 3 and 4 together. It is accepted that the best interests of children must be considered as a primary consideration, when proportionality is considered, and the best interests of children must be assessed in isolation from other factors such as parental misconduct. I find that such an assessment did not take place in this case. The judge at paragraph 21 makes reference to considering the interests of the children, but does not make a specific finding as to what the best interests would be. I find that the judge erred in concluding that all the Appellants and Sponsor ‘are the authors of that deception and it is proportionate that they bear the consequences in accordance with the rules.’ Even if a deception had been carried out by the Sponsor and first Appellant in relation to the birth certificates, as well as the marriage certificate, it is difficult to see how children should be held responsible for that deception.

36. There was limited information before the judge in relation to Article 8, but there was evidence that the Appellants and Sponsor are related as claimed, as the DNA evidence was not disputed, and there was evidence that the Appellant and Sponsor have a genuine relationship. This was a finding made by Judge Munonyedi, and the judge specifically stated that this finding was not disturbed.

37. There was evidence that the Appellants are living in Lebanon, and the Sponsor had been refused visas to enter Lebanon.

38. I find that the judge did err in considering the best interests of the children, which has led to a flawed Article 8 proportionality assessment.
39. With reference to Ground 5, I find that this is linked to the first ground, and does not disclose any material error of law.
40. Because I find a material error of law disclosed in Grounds 2, 3 and 4, I set aside the decision of the FTT. I find that it is not appropriate, having considered the Senior President's Practice Statements at paragraph 7, to remit these appeals back to the FTT. I find it is appropriate to have a further hearing before the Upper Tribunal. The issue to be decided is whether the Respondent has proved that the birth registration documents submitted on behalf of the Appellants are false, and there needs to be an assessment of the best interests of the children and Article 8 of the 1950 European Convention on Human Rights. As there was no successful challenge to the finding that a false marriage certificate had been submitted, that finding is preserved."

Re-making the Decision

20. The Sponsor attended the hearing. I established that there was no difficulty in communication between the Sponsor and interpreter in Arabic. I had on file all documentation that had been before the FTT. This included two bundles submitted on behalf of the Appellants, the first comprising 52 pages, and a second comprising 15 pages. The solicitors acting on behalf of the Appellants had submitted a third bundle with specific reference to the Upper Tribunal hearing, which comprised sixteen pages. Mr Kotas confirmed that he had received the Appellants' bundles. Mr Gajjar advised that no skeleton argument had been prepared.
21. The Representatives were ready to proceed and there was no application for an adjournment.

Oral Evidence

22. The Sponsor gave oral evidence relying upon his three witness statements. In answering a question put by Mr Gajjar he confirmed that the documentation at pages 49A and B of the first Appellant's bundle relates to visa applications that he had made to visit his family in Lebanon, which had been refused.
23. The Sponsor was cross-examined. He explained that he had been refused entry to Lebanon because he does not hold a British passport. He said that he is not eligible for a British passport. He confirmed keeping in touch with his family in Lebanon using WhatsApp and telephone. He sometimes sends his family money if he is able to borrow that money from friends.

24. He confirmed that his wife and five children lived together in a small rented room in Lebanon. They cannot afford larger accommodation. His children do not attend school because that is too expensive. They are therefore receiving no education.
25. His family have been in Lebanon since 2014. At present the Sponsor is not in employment as he is unwell. He lives in a flat which has one bedroom. He confirmed that his family do not speak English.
26. There was no re-examination following the cross-examination.

The Oral Submissions

27. Mr Kotas submitted that the DVR in relation to the birth certificates provided sufficient evidence to prove on a balance of probability that they are false documents. I was asked to note that it was not disputed that a false document, that being a marriage certificate had been submitted on behalf of the first Appellant. Mr Kotas submitted that it was not necessary for the Respondent to provide an original document as a comparator, when contending that a document was false. It was submitted that the Appellants had not provided evidence to dispute the conclusion in the document verification report that the birth registration documents for the second-sixth Appellants were false.
28. With reference to Article 8 Mr Kotas pointed out that it was accepted that the first Appellant did not satisfy the relevant Immigration Rules. With reference to the best interests of the children, it was accepted that their best interests would be served by living with both parents, and their best interests would be served by living with both parents in the UK, given the circumstances in which they were living in Lebanon. The issue was therefore proportionality. I was asked to find that it was proportionate to refuse entry clearance in this case because false documents had been submitted. I was also reminded that I must consider section 117B of the Nationality, Immigration and Asylum Act 2002 which confirms that the maintenance of effective immigration control is in the public interest. The Appellants could not speak English and are not financially independent. The Appellants would therefore need to be accommodated in larger accommodation than the Sponsor currently has, and would need to be financially maintained. In view of that it was submitted that the public interest dictated that refusal of entry clearance in these circumstances was proportionate.
29. Mr Gajjar disagreed.
30. I was asked to find that insufficient evidence had been submitted to prove that the birth certificates are false documents. The burden of proof is on the Respondent.
31. Mr Gajjar's main submission was that even if false documents had been submitted, the best interests of the children meant that it would be disproportionate to refuse entry clearance and it would be disproportionate to dismiss these appeals.

32. I was asked to take into account that the Appellants had been living illegally in Lebanon since 2014. They cannot return to Kuwait because they are undocumented Bidoons and would be at risk. The Sponsor has been accepted as a refugee. There is no doubt as to the relationship between the Sponsor and Appellants as DNA evidence confirms this. The Sponsor has been refused entry to Lebanon and therefore the family cannot live together in Lebanon. I was asked to find the decision to refuse entry clearance in these circumstances disproportionate.
33. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

34. The Respondent's decision to refuse entry clearance is deemed to be a refusal of a human rights claim. The Appellants rely upon Article 8. I find that Article 8 is engaged in that it is accepted that the Appellants are related as claimed. The Sponsor is the partner of the first Appellant and they are the parents of the second-sixth Appellants.
35. In considering this appeal I adopt the balance sheet approach recommended at paragraph 83 of Hesham Ali [2016] UKSC 60.
36. It is accepted that the first Appellant cannot satisfy the Immigration Rules in order to be granted entry clearance by reason of paragraph 320(7A) because a false document was submitted on her behalf, that being a marriage certificate. That was a finding made by the FTT which was not successfully challenged and is preserved. Judge Munonyedi made a finding that the relationship between the Appellants is genuine and subsisting and that finding was preserved by the judge and remains preserved. An issue in dispute relates to whether or not false birth documentation was submitted on behalf of the second to sixth Appellants. This was the only reason given for refusing their application for entry clearance under the Immigration Rules.
37. The burden of proof is on the Respondent, and the standard is the balance of probability. I have considered the document verification reports in relation to the second to sixth Appellants dated 9th August 2016. I do not find that the burden of proof has been discharged for the following reasons.
38. The birth documents are described as certificates of live birth issued by a hospital. They are therefore technically not birth certificates. It is the Respondent's contention that the certificates of live birth documentation are false.
39. The DVR records that the live birth documents presented are in the same format as other live birth certificates submitted as part of family reunion visa applications by claimed Bidoon, who have subsequently been found to be Iraqi nationals. That without more does not mean that the documents submitted by the Appellants are false. DNA evidence proves that the Sponsor is their father, and the Respondent does not

contend that the Sponsor is an Iraqi national, but has granted him refugee status as an undocumented Bidoon from Kuwait.

40. Another reason for not accepting the genuineness of the documents is said to be that the documents are in landscape format rather than portrait format, but again without more I do not find that this proves that they are false.
41. It is also recorded in the DVR that key areas of the documents are missing when compared to an original, but no information is given as to which key areas are said to be missing. It is recorded that not all details of the birth have been filled in, but there is no explanation as to which details have been omitted, and the comment is made by the author of the DVR "this is not something I would expect to see in a genuine certificate issued by the Kuwaiti authorities", but again in my view this does not indicate that the document is false or forged.
42. It is also recorded that the documents appear to be the incorrect size, although the author of the report fairly concedes "as I have only seen a copy I am unable to conclusively comment on the size."
43. My primary conclusion is that insufficient evidence is contained within the DVR to prove the documents false. Therefore in the case of the second-sixth Appellants, I find that entry clearance should not have been refused as there is no public interest in the refusal of entry clearance. That is based on the premise of my finding that false documents were not submitted.
44. However, in the alternative, I will proceed to consider this appeal on the basis that the certificate of live birth documents are false, as is the marriage certificate, about which there is no dispute. If the Immigration Rules cannot be satisfied, that does not automatically mean that the appeals must be dismissed. I follow the guidance in paragraph 48 of Agyarko [2017] UKSC 11 in which, in summary, it was stated that if the relevant test within the Immigration Rules is not met, but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave may be granted outside the Immigration Rules on the basis of exceptional circumstances.
45. The factual matrix in this case is that the Sponsor has been granted refugee status as an undocumented Bidoon from Kuwait. The Respondent therefore accepts that he would be at risk of persecution if he returned to Kuwait.
46. It is accepted that there is a genuine relationship between the Sponsor and the Appellants. DNA evidence confirms they are related as claimed.
47. The Appellants are currently living in Lebanon on an illegal basis. They have done so since 2014. They left Kuwait and then travelled to Syria and from Syria to Lebanon.

48. The Sponsor has applied to visit the Appellants in Lebanon. His requests have been refused. There is evidence of two visa applications and I accept that these have been refused.
49. The Sponsor is currently not in employment and lives in accommodation with one bedroom. That accommodation would not be suitable if the Appellants were granted entry clearance.
50. I accept the Sponsor's evidence that the Appellants live together in one room in Lebanon. The children are not receiving an education because of the lack of funds. There are no significant medical issues so far as the Appellants are concerned.
51. The Sponsor and Appellants therefore cannot enjoy family life in Kuwait or in Lebanon.
52. Were it not for false documentation entry clearance would have been granted. I have regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. This confirms that the maintenance of effective immigration control is in the public interest. Producing false documents undermines effective immigration control.
53. It is accepted that the best interests of the children would be to live with both parents, and it was conceded at the hearing that their best interests will be served by living with both parents in the UK. In my view that concession was rightly made.
54. Therefore, the position is that a family are separated, and cannot live together, unless the Appellants are granted entry clearance to the UK. The one issue that prevents family reunification is the accepted false documentation in relation to the first Appellant, and although I find that false documents were not submitted in relation to the second-sixth Appellants, I am now considering a scenario whereby those documents are false. As I have previously stated, if those documents were not false, there is no reason why they should not be granted entry clearance and no public interest in their refusal.
55. I take into account the lack of financial independence and the inability of the Appellants to speak English. However, it is also relevant that I take into account that the Immigration Rules in relation to family reunion, those being paragraph 352A in relation to the first Appellant and 352D in relation to the remaining Appellants, do not require the ability to speak English or financial independence.
56. Having completed a balancing exercise in relation to proportionality, my primary finding is that no false documents were submitted in relation to the second-sixth Appellants, and they should be granted entry clearance and their appeals allowed. I would still make the same decision, even if false documents have been submitted (and it is accepted in the case of the first Appellant that a false document has been submitted) as I find that although the best interests of children can be outweighed by

other considerations, in this case those considerations do not outweigh the best interests of the children. The consequences of refusing entry clearance would be that this family remains separated, when it is accepted that the Sponsor is a recognised refugee. I do not find that the production of false documents means in the circumstances of this case, that refusal of entry clearance is proportionate. I therefore conclude that the Respondent's decision is disproportionate, and breaches Article 8 in relation to the family life of the Appellants and Sponsor. Therefore the appeals should be allowed.

Notice of Decision

The decision of the FtT involved a material error of law and was set aside.

I remake the decision and allow the appeals pursuant to Article 8 of the 1950 Convention.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Appellants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 6th August 2018

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

Although the appeals have been allowed I make no fee award. The appeals were allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed

Date: 6th August 2018

Deputy Upper Tribunal Judge M A Hall