



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07197/2015

THE IMMIGRATION ACTS

Heard at Field House
On 28 August 2018

Decision & Reasons Promulgated
On 11 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

HK (A MINOR)
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, AMMAN

Respondent

Representation:

For the Appellant: Ms G Kiai, Counsel instructed by Wilson Solicitors LLP

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who was born in Jordan on 21 October 2014, appeals to the Upper Tribunal from the decision of the First-tier Tribunal dismissing his appeal against the decision of an Entry Clearance Officer in Amman to refuse him entry clearance for the purposes of family reunion with a recognised refugee. The First-tier Tribunal made an anonymity direction, and I consider that it is appropriate that anonymity is maintained for these proceedings in the Upper Tribunal.

Relevant Background Facts

2. As has been established by DNA evidence, HK is the son of BK, who was granted refugee status in the UK as a stateless Bidoon from Kuwait on 11 September 2012, following an appeal. On 27 March 2014 the appellant's mother and his older brother applied from Jordan to join BK in the United Kingdom. While these applications were pending, the appellant's mother gave birth to the appellant in Amman on 21 October 2014. The appellant had been conceived following a family visit to Jordan by his father, who left Jordan to return to the UK at the end of March 2014.
3. On an unspecified date, the respondent refused the applications of the mother and the older brother. On 17 February 2015 the respondent gave his reasons for refusing a separate application for entry clearance made by the appellant.
4. The first ground of refusal was that there was not satisfactory evidence that his UK sponsor was his father. The second ground of refusal was that he did not in any event come within the scope of Rule 352D, as he was not part of the sponsor's family unit at the time of the sponsor's departure from his country of habitual residence. The Entry Clearance Officer said that consideration had been given as to whether the application raised exceptional circumstances which, consistent with the right to respect for family life contained in Article 8 ECHR, warranted consideration by the Secretary of State for the grant of entry clearance outside the requirements of the Rules. The answer was in the negative. He was currently residing with his mother and older brother in Amman, and their refused applications were currently going through the appeals process. There was no exceptional need for him to leave his mother and older brother in order to stay with the sponsor.
5. On 10 March 2015 the Home Office notified the appellant's mother that they intended to revoke the decision to refuse visas to her and the older sibling and to issue them with entry clearance visas, "*subject to further checks*", as fresh evidence had been produced. I infer that the fresh evidence referred to was DNA evidence establishing paternity.
6. On 18 August 2015 the pending appeals against the refusal of entry clearance to the mother and older brother were withdrawn, because the Home Office formally withdrew the decisions under appeal. The Home Office did not however proceed to issue visas to the mother and older brother.
7. On 20 April 2016 the sponsor was sentenced to a term of three years' imprisonment, following his conviction on 16 March 2016 at Southwark Crown Court of the criminal offence of possessing/controlling identity documents with intent. The sponsor was released on licence on 8 September 2017, and his licence expires on 9 March 2019, which is the date when his sentence expires.

The Hearing Before, and the Decision of, the First-tier Tribunal

8. The appellant's appeal eventually came before Judge Housego, sitting at Hatton Cross on 28 September 2017, having been previously adjourned on at least two occasions.

Both parties were legally represented. The appellant was represented by Mr Adebayo of A2 Solicitors, and the sponsor was represented by a Home Office Presenting Officer.

9. As is recorded in the Judge's contemporaneously typed record of the proceedings, which is on the file, at the outset of the hearing the Presenting Officer, Ms Islam, announced that additional checks with regard to the mother and the older brother were "*still ongoing*" and referred to the fact that there was an alert on the computer to say that their documents were not genuine. Mr Adebayo said that he was hearing this for the first time. The Presenting Officer acknowledged that no issue about the validity of the birth and marriage documents had been raised at the CMRH on 12 April 2017. The Judge's typed record continues: "*I am not going to take judicial notice of that [the alleged invalidity of the birth and marriage documents] as it is a surprise and not mentioned before.*"
10. In his subsequent decision, the Judge set out the history of the applications in considerable details at paragraphs [2]-[15]. On the topic of the current status of the applications for entry clearance by the appellant's mother and older brother, the Judge stated as follows at paragraph [11]: "*In the meantime, the Home Office have questioned the validity of documents provided by the mother and older brother of the appellant, but have made no decision on that issue.*"
11. At paragraph [49], the Judge set out what he described as the known facts. These included the following:
 - 49.7 The father is able to travel to Jordan, if his licence supervisor agrees.
 - 49.8 The appellant does not meet the Immigration Rules for family reunion.
 - 49.9 The appellant's mother and older brother have outstanding visa applications to come to the UK, which the Home Office will in principle grant, but have not done so until they are satisfied about documents tendered with those applications.
12. At paragraphs [51]-[63], the Judge gave his reasons for concluding that the appeal on human rights grounds should be dismissed. The appellant's father had been convicted of being a people-smuggler. He had a false, purportedly Swedish, passport in his possession in the name of a fellow passenger. While 15 months was a long time not to have finished checking the documents of the mother and older brother, the sponsor's conviction for the use of false documentation, and his caution for another matter of dishonesty, made the possibility of false documents for the mother and brother of the appellant the more likely. If so, this might lead to a different view being taken of the applications of the mother and older brother. The suspicions of the Home Office were not to be discounted, even if the time for investigation was overly lengthy. Given the facts of the case (the appellant's father arriving on false papers, and his subsequent conviction relating to false papers of another person) were reasons to be cautious about accepting that the mother and brother of the appellant had genuine papers. Although, the Home Office said in principle that they would grant visas for the mother and older brother, they had not done so by reason of concern over

documents. If they became satisfied about the documents and did issue visas, then the position of the appellant would be different, as he had a family life with his mother and brother *“and could not be left alone.”*

13. The father’s licence did not prohibit him from leaving the UK. He required the consent of his supervisor to travel outside the UK, and he had not sought the consent of his supervisor. There was no documentary evidence before him as to the status of the mother and children in Jordan. There was only oral evidence. Given the father’s conviction and caution for shoplifting, he did not find the honesty of the father was such that the burden of proof was met only by oral evidence. The family had a flat in Amman, and had medical treatment there. It had not been shown that the appellant would be wanting in schooling. The father had been able to travel to Jordan on his refugee travel document. The Judge continued in paragraph [59]: *“I find that the appellant has not shown that family life cannot be continued elsewhere. There is no evidence that Jordanian law precludes family reunion there, or that any application has been made there. There is no evidence that the licence supervisor will not agree to the father of the appellant leaving the UK. There is no evidence that the appellant and his mother and brother in Jordan have no status, other than the oral evidence of the father of the appellant (and the witness statements in similar terms offered for the mother and paternal grandfather of the appellant), and I find that evidence unreliable.”*
14. At paragraph [60], the Judge noted that the father presently had refugee status, but that the offence for which he had been convicted might lead to the revocation of that status. The Judge concluded at paragraph [63]: *“Looking at all the circumstances of this case holistically, and looking at the rights of all 4 people affected and those of the state, overall, is the Article 8 right to family life interfered with disproportionately by the decision under appeal? I conclude not. 3 of the 4 live together. The 4th is a criminal who would normally expect to be deported. He has not shown that he cannot live with his wife and sons elsewhere. For all the reasons set out in this determination I decide the proportionality assessment in favour of the refusal.”*

The Initial Grounds of Appeal to the Upper Tribunal

15. The initial grounds of appeal to the Upper Tribunal were settled by the appellant’s previous representatives.
16. Ground 1 was that the Judge had materially erred in law accepting the Presenting Officer’s oral account of concerns about the documents of the appellant’s mother and older brother, while at the same time discounting oral evidence about their lack of immigration status in Jordan.
17. Ground 2 was that the Judge had misdirected himself at paragraph [59] of the decision in concluding that the appellant had not shown that family life could not be continued elsewhere.
18. Ground 3 was that the Judge’s Article 8 proportionality assessment was flawed and was not sufficiently robust. The Judge placed too much emphasis on the conviction of the appellant’s father, and this had blighted the proportionality assessment.

The Reasons for the Initial Refusal of Permission to Appeal

19. On 16 April 2018, First-tier Tribunal Judge Saffer refused permission to appeal as he considered that the grounds amounted to nothing more than a disagreement with findings on the evidence, for which the Judge gave cogent reasons: *“The conviction of the appellant’s father for (essentially) being a people smuggler and using false documents was bound to raise concerns regarding any documents produced by family members. The length of time it has taken to deal with that is a matter that could fall within the proportionality balancing exercise and was considered by the Judge.”*

The Renewed Application for Permission to Appeal

20. The renewed application for permission to appeal was settled by Catherine Robinson of Counsel on 2 April 2018. She raised an additional ground of appeal as follows: having regard to the procedural history of the appeals of the appellant’s mother and brother (including an email dated 1 July 2017 from an Entry Clearance Manager at the British Embassy in Amman) fairness required the Tribunal to adjourn the appellant’s appeal and to issue directions so that the respondent could set out in writing his concerns regarding the validity of the documents tendered by the appellant’s mother and older brother.

The Reasons for the Eventual Grant of Permission to Appeal

21. On 11 July 2018 Upper Tribunal Judge Allen granted permission to appeal on all grounds raised as they disclosed an arguable error of law.

The Hearing in the Upper Tribunal

22. At the hearing before me to determine whether an error of law was made out, Ms Kiai developed the arguments raised in both the initial grounds of appeal and in the additional ground of appeal. With regard to the latter, she relied on **Nwaigwe (Adjournment: fairness) [2014] UKUT 00418 (IAC)** and on **Secretary of State for the Home Department -v- IAT [2001] EWHC 1067 (Admin)**.
23. Ms Kiai also informed me of subsequent developments since the hearing in the First-tier Tribunal, as these were pertinent to the relief which the appellant was now seeking, if an error of law was made out.
24. As Mr Melvin was able to confirm, the sponsor had had his refugee status revoked on 20 October 2017.
25. In January 2018 a decision was made to deport the sponsor to Kuwait as a foreign criminal. However, it had subsequently been accepted by the Secretary of State that the sponsor could not be removed to Kuwait, and on 21 June 2018 the sponsor had been granted limited leave to remain in the UK for a period of six months. The sponsor currently had an appeal pending in the First-tier Tribunal against the decision to revoke his protection status, pursuant to section 84(3) of the 2002 Act.

26. Mr Melvin submitted that the Judge had not erred in law in any of the respects advanced by Ms Kiai. But even if he was wrong about that, the appellant's appeal could not now succeed in any event, as his father no longer had the requisite immigration status to support an application by the appellant for entry clearance.
27. Ms Kiai disputed this. However, if an error of law was made out, she submitted that the appeal should be remitted to the First-tier Tribunal for substantive consideration after the sponsor's appeal against the revocation of his protection status had been heard and determined.

Discussion

28. It is convenient to deal with the additional ground of appeal first. This is that the Judge should not have proceeded to hear the appeal, but should have adjourned it of his own motion and directed the respondent to put in writing his concerns over the validity of the documents tendered by the appellant's mother and older brother.
29. As I explored with Ms Kiai in oral argument, the difficulty with this proposition is that the appellant was legally represented, and his solicitor did not make an application for an adjournment. Accordingly, this case falls outside the scope of the discussion in Nwaigwe, which is concerned with cases where the refusal of an adjournment has arguably led to material unfairness.
30. I accept that the Judge had the power to adjourn the hearing, even though neither representative requested an adjournment. However, I am wholly unpersuaded that he ought to have taken this unusual step. The Judge was hearing the appellant's appeal, not the appeal of his mother and older brother, in respect of whom an immigration decision was still outstanding, the respondent not having substituted a fresh immigration decision following the withdrawal of the earlier decision to refuse.
31. Ms Kiai's alternative argument is that, in order to ensure a fair hearing of the appellant's appeal, the Judge ought to have proceeded on the basis that the appellant's mother and older brother were likely to be issued with visas. For the British Embassy in Jordan had represented that this was going to be the likely outcome on more than one occasion.
32. However, the representation that visas were going to be issued to the mother and older brother was, to the knowledge of all concerned, always conditional upon further checks having been carried out to the Entry Clearance Officer's satisfaction; and the situation which confronted the Judge and the parties at the date of the hearing was that visas had *still* not been issued to the mother and older brother. So, it was neither unreasonable nor unfair for the Judge to conduct his assessment on the basis of the circumstances which appertained at the date of the hearing, rather than on the basis of the circumstances which had appertained earlier. Moreover, as it was a human rights appeal, it was mandatory for the Judge to engage with the facts as they stood at the date of the hearing.

33. The Judge recognised the potential unfairness of giving weight to the Presenting Officer's disclosure that there was a note on the computer database to the effect that the documents tendered by the appellant's mother and older brother were not genuine. He made it clear to the representatives that he was going to ignore this piece of hearsay evidence; and he adhered to this promise by putting the matter neutrally at paragraph [11] of his decision. The Judge did not say that the respondent had decided that the documents were not genuine (as the file note arguably indicated), but only that the Home Office had questioned the validity of the documents, but had not yet made a decision on this issue.
34. It is argued that the Judge should have proceeded on the basis that there was not even a question as to the validity of the documents, and that therefore there was no outstanding obstacle to the visas being issued as previously promised.
35. But this argument is wholly unrealistic. It overlooks the fact that it was part of the appellant's case - as set out in paragraph [48] of the decision - that on 17 August 2015 there was to be an appeal hearing, but the Home Office withdrew their decisions on the basis that visas would be issued "*subject to further checks.*"
36. Accordingly, the appellant's representatives always knew that the validity of the documents provided by the mother and older brother were in question, as otherwise there would not have been a need for further checks to be undertaken.
37. The argument is wholly unrealistic for another reason, which is that the appellant's solicitor did not invite the Judge to disbelieve what was being said by the Presenting Officer. His line was that 15 months was more than ample time for concerns about the papers to have been addressed, and that in effect the respondent should not be given any more time.
38. The Judge engaged with this argument in his discussion of proportionality. He agreed that 15 months was a long time not have to finished checking the documents of the mother and older brother. But he found that the delay was justified in the circumstances, which were that the appellant's father had relied on false papers to gain entry to the UK himself, and he had been convicted of using false papers to assist another person to gain entry to the UK. So it was reasonable for the respondent to be cautious about accepting that the mother and brother had tendered genuine papers.
39. The Judge did not thereby misdirect himself as alleged in Ground 1 of the initial grounds of appeal. The Judge did not rely on evidence which he had ruled inadmissible at the outset of the hearing. The Judge did not rely on the proposition that the documents of the mother and brother had been found to be forgeries. The Judge also did not misdirect himself in relying on the oral statement from the Presenting Officer that the respondent had ongoing concerns about the documents. The appellant's solicitor did not invite the Judge to reject the Presenting Officer's evidence on this point. His line was that 15 months was more than ample time for such concerns to have been resolved, one way or another, and hence the maintenance of the refusal decision was disproportionate. It was to this line of argument that the

Judge was responding in paragraphs [53]-[55] of his decision, and there is no discernible error of law in his disposal of this line of argument.

40. It is argued that it was not open to the Judge to find that family life could be carried on in Jordan. I consider that this is no more than an expression of disagreement with a finding that was clearly open to the Judge for the reasons which he gave. There is no inconsistency in the Judge discounting the oral evidence of family members on this issue while at the same time accepting the oral evidence of the Presenting Officer that further checks still needed to be done - the obvious difference being that the Presenting Officer had not been convicted of an offence of dishonesty.
41. There is also no merit in the argument that the Judge gave undue weight to the father's criminality in the assessment of proportionality.
42. Accordingly, for the above reasons, none of the grounds of appeal is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

Signed

Date 2 September 2018

Judge Monson
Deputy Upper Tribunal Judge