Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/09555/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1st July 2013	**On 10th October 2013**

Before

UPPER TRIBUNAL JUDGE A JORDAN
DEPUTY UPPER TRIBUNAL JUDGE A A WILSON

Between

MR GEORGY BEREZITSKIY

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Eastey of Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

Determination and Reasons

1. On 12th March 2013 a decision of the Upper Tribunal given by Deputy Upper Tribunal Judge Wilson was promulgated in respect of this appellant. Subsequent to that an application for permission to appeal to the Court of Appeal was lodged by Counsel who appeared in front of Judge Wilson. That related primarily to an

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argument of procedural unfairness as to the question of the family reunion policy. This had been raised both before the First-tier Tribunal and in the Upper Tribunal. The Respondent had failed to produce that document and a last opportunity was given to the Respondent to do so until 20th March 2013. The promulgation of the decision prior to that date therefore was asserted procedural unfairness.

2. That application was considered by Upper Tribunal Judge Dawson, who in a memorandum and directions dated 1st May 2013 noted that an email had been received on 19th March that contained three links. Judge Dawson considering Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and in particular sub-paragraph (2) considered that the direction requiring the Respondent to comply by 20th March may have been overlooked. The judge concluded;

> "… unless I receive a proposal to the contrary within seven working days of the date of the sending out of the memorandum and these directions, the decision of Judge Wilson will be set aside. In such events the hearing will be restored before him and an opportunity given to the parties to make such further representations as they are advised in response to the email from Ms Kenny and the information contained therein.
>
> A copy of the email is annexed to this memorandum and these directions."

Neither party replied opposing that proposed course. The Appellant requesting a copy of the attached letter from Lorna Kenny and also in due course filing a short further witness statement we have therefore considered initially, neither advocate addressing the issue before us, whether having regard to Rule 43 sub-Section (2) it is appropriate to set aside the decision. There is no dispute that the determination was promulgated prior to the date specified and we therefore set the determination of the Upper Tribunal of the 12th March 2013 aside under Rule 43.

3. The general background of the appeal of this Appellant is that his Sponsor and her husband had been accepted as refugees in the United Kingdom and by the time of the application subject to the appeal had both been granted indefinite leave to remain in the United Kingdom. The Immigration Rule that had been considered appropriate by the Respondent was therefore paragraph 317 of HC 395 as amended.

4. It is appropriate to set out the letter from Lorna Kenny, a Senior Presenting Officer dated 19th March 2013. This is by way of an email that was sent to the Field House correspondence section on that date.

> *"Subject: For the urgent attention of Judge Wilson*
>
> *Attachment: Accompanying Letter – Grant of Asylum and Leave to Remain.doc*
>
> *Re: OA/09555/2012 Mr Georgy Berezitskiy*
>
> *Please could you forward the information below to Judge Wilson? I am providing this in response to a direction set by him at appeal hearing OA/09555/2012 on 27/02/13, the deadline for which is 20/03/13. The direction was to disclose when the Family Reunion Policy was withdrawn and replaced.*

The following has been confirmed to me by the lead for refugee family reunion policy who introduced the relevant rules.

The Part 8 rules for relatives of refugees came into effect on 4 July 2011. In addition to the Statement of Changes (HC 1148) announcing this, which I referred to at the hearing, a written ministerial statement was also made to Parliament when the Rules were laid.

(email link set out)

The guidance on refugee family reunion policy was published in accordance with this on 05/07/2011.

(email link annexed to our determination)

There was no formal announcement withdrawing the discretion to grant leave outside the rules for Other Dependent Relatives of beneficiaries of international protection.

I have also been directed to the guidance published in July 2011, which was previously available on the UKBA website and can be now found at

(national archive link set out and annexed to our determination)

For clarity, I have attached a copy of the letter confirming the sponsor's grant of asylum and leave to remain.

Kind regards"

5. The attached grant of leave to the Sponsor in this matter, Mrs Irina Kishikova was dependent to her husband Victor issued on 15th March 2005.

6. At the hearing on 1st July 2013 neither advocate had produced a copy of those documents. Mr Bramble however did produce a copy of the Statement of Immigration Rules laid before Parliament on 13th June 2011 in confirmation that the Sponsor was granted indefinite leave on 11th May 2011. We were also given by Mr Bramble a copy of the policy family reunion for asylum seekers. It is appropriate in view of its shortness to set it out here.

"**Family reunion for asylum seekers, partners and families child dependent relatives**

This page explains how asylum seekers can apply to be reunited with the family members they left behind when they fled to the UK.

People who flee to the UK to seek asylum can include their dependants in their application for asylum, if those dependants have travelled with them to the UK. However, we recognise that families can become fragmented in cases of asylum, depending on the speed and manner in which the person has fled.

> *If you are a recognised refugee or have been given humanitarian protection in the UK, our family reunion programme allows you to be reunited with your family members (that is, those who were part of your family unit before you fled).*
>
> *Under the Immigration Rules, only your pre-existing family (husband, wife, civil partner or unmarried/same-sex partner, plus any children under 18 who formed part of the family unit when you fled to seek asylum) can apply to enter the UK under the family reunion programme. However, we may allow family reunion for other family members if there are compassionate reasons why their case should be considered outside the Immigration Rules.* Our emphasis.

7. Mr Bramble in his submissions argued that this argument was fundamentally misconceived. Firstly, the amendment to the Immigration Rules corrected the difficulty of persons only having limited leave to enter the United Kingdom making appropriate applications for family and other relatives. The revised Rule 319(v) –

> *"The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection"*

mirrored exactly the terms of the requirements for a father aged 65 or over as under paragraph 317. There was also echoed in 319W requirements for indefinite leave to remain in the United Kingdom. In both Immigration Rules there is a requirement that the applicant can and is financially wholly or mainly dependent on the relative with limited leave to enter or remain as a refugee or beneficiary of humanitarian protection in the United Kingdom and can and will be accommodated adequately together with any dependants without recourse to public funds in accommodation which the Sponsor owns or occupies exclusively.

8. The suggestion that the application for entry clearance would be dealt with differently under Rule 319 was argued therefore had no substance. In relation to the policy Mr Bramble was equally clear the matter was not really advanced at all by the matters set out in Miss Kenny's email. For example the policy at 4.7 simply recorded a previous decision responses for granting humanitarian protection before 30th August 2005. This Sponsor of course, was granted leave after that date. In any event that simply records the decision of making an application and not the terms of that.

9. What was not disputed is that on occasions there may be provisions of family reunion for other family members for the compassionate reasons why the case should be considered outside the Immigration Rules. Within the Respondent's bundle is set out a letter in support of his application dated 23rd December 2011 from his solicitors. That concludes after setting out the circumstances for the application requests -

> *"We also asked you to consider the compassionate circumstances in this case. Mr Berezitskiy is an elderly widow with a number of health conditions. He needs the*

support of his only close relative, his daughter Irina Kishikova who is in the UK. He also has grandchildren in the UK.

It is submitted that to refuse entry clearance in this case would represent a disproportionate interference with the applicant's right to a family life and would therefore constitute a breach of Article 8 of the European Convention on Human Rights."

10. It was an agreed position between the parties that the decision of the Entry Clearance Officer of 27th April 2012 did not consider such matters.

11. Ms Eastey's position was firstly that the policy was in existence. It had not been considered by the Respondent and that we should firstly consider the existence of the policy in the consideration of the public interest when assessing proportionality with the decision in relation to Article 8, as set out in **AJ v Kosovo [2008]UKAIT 00082** and if the Appellant were unsuccessful on that aspect in any event the matter should be returned to the Entry Clearance Officer for consideration of that policy.

12. We directed Ms Eastey to Macdonald's Immigration Law & Practice 8th Edition Section 12.197 on family reunion and in particular footnote 5 which related to an assertion the requirements to be satisfied mirror those of the refugee family reunion describes in preceding paragraph the family reunion for those with discretionary leave must normally await the settlement of the Sponsor which in this case is six years. The first supplement to the 8th Edition of Macdonald's amended to 12.197 to –

"Other family members of persons with limited leave as refugees with humanitarian protection that his parents, grandchildren, children, siblings, uncles and aunts over the age of 18 may be granted entry clearance or leave to enter or remain on similar terms as such family members of settled and non-refugee Sponsors."

13. Another matter that was then contended by Ms Eastey, although not in the application and not within the terms of an application under Rule 43 was that the decision of 12th March 2013 contained an error in its assessment of paragraph 317. Reliance was made in support of the argument by reference to the case of **Mohamed v Secretary of State for the Home Department [2012] EWCA Civ 331**.

14. In Mohamed the court was considering the provisions of paragraph 317 sub-Section (e) -

"a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances and mainly dependent financially on relatives settled in the United Kingdom."

15. It was argued by Ms Eastey that the 12th March decision, notwithstanding the Court of Appeal decision failed to allow for the fact that "but for" the support from the Sponsor in the United Kingdom that the Appellant's circumstances would be such

severe that there would only require to be one result, namely the grant of entry clearance as it was alleged the circumstances were clearly most compassionate.

16. At the end of the hearing we formerly reserved our decision which we now give with our reasons.

17. As we recorded above the decision of the Upper Tribunal of 12th March 2013 was promulgated prior to the receipt of the email from Lorna Kenny of 19th March 2013 and was earlier than the direction given in court. That decision is set aside and we have carried out a full review of the appeal.

18. In relation to that we have considered closely the materiality of the material that is now placed before us and to what to extent that impacts, if at all, on the decision. In respect of the arguments as to the appropriateness of using Rule 319(v) we are satisfied that indeed nothing turns on that issue at all. It is essentially a mirror Rule for someone who's Sponsor, unlike the Sponsor in this appeal does not have indefinite leave to remain.

19. In relation to the policies that have been asserted we are satisfied that in the policies adduced to us that there is nothing in them that clarifies or limits the meaning of the word compassionate circumstances. The compassionate circumstances were clearly stated in the letter from the solicitors that we have highlighted above. There was no reference to a policy to guide the ECO in considering exceptional circumstances but it is clear there is provision to grant an application where there are-as contended here- *we may allow family reunion for other family members if there are compassionate reasons why their case should be considered outside the Immigration Rules.*

20. It is therefore appropriate to decide whether that is an exercise of discretion outside the Rules for the terms of that generally to be considered both by the First-tier Tribunal Judge and by the Upper Tribunal on appeal.

21. What is clear is the immigration decision appealed is silent on this issue properly before them for a decision. To that extent we are satisfied the decision is not in accordance with the accepted principles of administrative law. Subsequently to the immigration decision there was a review by the Entry Clearance Manager. After consideration we are have decided the review is not clear as to whether he was satisfied there was no relevant guidance or whether indeed he was following the departmental guidance.

22. In accordance with the decision of the AIT in AG Kosovo we have proceed to determine whether the appeal falls to be allowed either under the Rules or Human Rights before considering this point further.

23. The Appellant's position is set out in paragraph 15 of Upper Tribunal Judge Wilson's decision of 12th March. The judge was satisfied that the question of dependency in paragraph 317(iii) had not been met. Nothing has been put before us that can lead us to revisit that conclusion.

24. In relation to the argument that there was an incorrect analysis of the "but for" test we observe of course that this was not raised to in the original application. As this is a matter that has been raised before us and relates primarily to an issue of law we have however considered it appropriate to determine it.

25. We are satisfied that this again has no relevance to the outcome of the determination. This is because the decision of **Mohamed** is in relation to a materially different sub-paragraph of the Rule- relatives under the age of 65.

26. For the avoidance of doubt we adopt all the factual findings of the 12th March.

27. We are satisfied the relevant immigration rule is Paragraph 317. We are satisfied that the Appellant is not wholly maintained by the sponsor who contributes approximately 1/3rd of his expenses and will continue to do so.

28. Following AG Kosovo dealing with the question of the asserted breach of Article 8 we are satisfied that the refusal of entry clearance in these circumstances does constitute a substantial interference with family life requiring justification. Having regard to the steps in Razgar we are satisfied that the interference is lawful. It is made in pursuance of immigration control a legitimate aim. It is a necessary step the appellant fails the relevant immigration Rule.

29. As to the question of proportionality we have considered whether there any compassionate circumstances which we take as the finding in Paragraph 15 of the Upper Tribunal decision of the 12th March. In assessing that we are satisfied that in the absence of a lawful decision on the exercise by the respondent when compassionate circumstances exist we can not adequately evaluate the weight to be given to the justification of the immigration decision in our consideration of Article 8 (2).

30. We accept that there are good reasons why the Appellant and his family (sponsor) would wish him to come to the UK but equally there are arguable reasons why the Respondent can point to public policy matters essentially the Sponsors daughter inability to provide support without any additional burden on public funds to justify the decision. Albeit in circumstances where as Judge Wilson found and which finding we adopt; the Appellant would in due course be able to move funds from Russia.

31. We are satisfied that while the letter from the solicitors requesting admission for compassionate circumstance was considered post decision by the entry Clearance Manager there is nothing in that decision that elucidates whether there was any guidance or not. If there was internal guidance that should be set out.

32. The application therefore returns to the Respondent to await a lawful decision and in these circumstances we satisfied that we can not accept the justification in relation to Article 8 (2). We are however satisfied it is appropriate to direct no relief, save for the making of a lawful decision in this respect as an adverse decision could be reviewed.

33. Summary of Decision

Application for review of Deputy Upper Tribunal Judge Wilson's determination of 12th March 2013 and the provisions of Rule 43 allowed.

Immigration Appeal dismissed.

The exercise of discretion by the Respondent was not lawful and the applicant awaits a lawful decision from the respondent. To that limited extent the Appellants Human Rights (Article 8) have been infringed but the Upper Tribunal directs no relief in this respect save for the making of a lawful decision.

Signed: *Andrew Wilson* Date *10th October 2013*

Judge A A Wilson

Deputy Upper Tribunal Judge Wilson