Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/20012/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2013	**On 19 November 2013**

Before

LORD BOYD
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MORTIZA DELAVAR

Appellant

and

ENTRY CLEARANCE OFFICER-STOCKHOLM

Respondent

Representation:

For the Appellant: Mr A. Eaton, Counsel instructed by Irving & Co Solicitors
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran, presently living in Norway. He was born on 14 May 1983. His application for entry clearance as a child of a refugee was refused by the Entry Clearance Officer ("ECO") on 12 September 2012. His appeal against

that decision was dismissed by First-tier Tribunal Judge Clayton after a hearing on 13 June 2013.

2. The ECO refused the application with reference to paragraph 352D of HC 395 (as amended). Judge Clayton decided that the appellant could not meet the requirements of the Immigration Rules and did not come within the terms of what was described as "the policy", although it was not more specifically identified and its terms are not set out in the determination. She also rejected the Article 8 ground of appeal.

Submissions

3. Mr Eaton relied on the grounds of appeal to the Upper Tribunal. In so far as his submissions repeated what is contained in those grounds we do not repeat them. In relation to paragraph 317 of the Rules, that was never a basis on which the appeal was advanced and the judge was therefore wrong to consider the appeal with reference to it, this illustrating a lack of care in the determination.

4. Grounds 2 and 3 were suggested to be the stronger grounds. The judge had not given appropriate consideration to the documents which dealt with the appellant's asylum appeal in Norway. It was conceded by Mr Eaton however, that there was no documentary evidence before the First-tier judge which showed that the appellant had exhausted his appeal rights in Norway (where his claim for asylum had been refused). Nevertheless, that was the evidence of the witnesses who gave evidence before the First-tier Tribunal and their evidence was accepted as credible. The First-tier judge was wrong to conclude that the appellant's family in the UK could visit him in Norway where his status was at least highly precarious. The judge did conclude that there was no possibility of physical contact if the appellant was returned to Iran.

5. The assessment of family life did not take into account the circumstances in which the family were separated, they having had to flee Iran. We were referred to the decision in H (Somalia) [2004] UKIAT 00027. Judge Clayton had accepted that there was family life before the family left Iran but had failed to take into account the circumstances in which that family life was disrupted.

6. Mr Jarvis relied on various authorities, although we have not found it necessary to refer to them in this determination. He submitted that it was accepted before the First-tier Tribunal that the appellant was not able to meet the requirements of the Rules and therefore if there was an error on the part of the judge in considering paragraph 317, it was not material. The judge was in any event entitled to consider any Rule that might apply.

7. The evidence put before the judge so far as it related to the date of the refusal of entry clearance, which is the relevant date, did not establish that the appellant had no further right of appeal in Norway. The documentary evidence only established that he may be liable to be removed to Iran. In so far as the evidence post-dated the decision it could not be taken into account. H (Somalia) could be

distinguished because that was a decision about a family living illegally as refugees in Kenya.

8. In reply, Mr Eaton suggested that Judge Clayton having found that there was no family life because of the family fleeing Iran, it was wrong for her to refer to the family having had any choice in where their family life was conducted.

Our assessment

9. It is not suggested on behalf of the appellant that the ECO failed to consider the applicable refugee family reunion policy, albeit that the ECO's decision is brief. It is said in the decision that there are no "compelling, compassionate circumstances", which is what lies at the heart of the application of the policy in this case.

10. The first ground of appeal relates to the First-tier judge having apparently decided the appeal, under the Immigration Rules at least, with reference to paragraph 317 which is concerned with entry for dependent relatives, including children over the age of 18. It is said that the application was not made under that paragraph of the Rules and the ECO's decision was not made with reference to it.

11. We are satisfied that the First-tier judge did err in this respect. The application was plainly made on the basis of refugee family reunion. At [1] of the determination the judge incorrectly stated that the appeal was against the refusal to grant entry clearance under paragraph 317. At [24] and [25] she dismissed the appeal under the Rules with reference to paragraph 317. There is no mention in the determination of paragraph 352D. The notice of decision itself only makes reference to paragraph 352D and not 317. Paragraph 317 contains requirements, for example as to maintenance and accommodation that 352D does not.

12. In passing we note that when considering paragraph 317 the judge at [24] in referring to paragraph 317(1)(f) used the phrase "compelling and compassionate circumstances" when in fact that subparagraph of the Rules states that the applicant must be living alone "in the most exceptional compassionate circumstances."

13. Whilst a judge may sometimes be entitled to consider whether an applicant who does not meet the requirements of a particular Rule meets the requirements for entry clearance in respect of a different Rule, that was not the basis on which paragraph 317 was considered by the judge in this case.

14. However, it is not suggested that he was in any event able to succeed under any provision of the Immigration Rules. In respect of paragraph 352D he needed to have been under the age of 18 at the date of application, which he was not.

15. Whilst therefore, we have concluded that the First-tier judge did err in law in relation to her consideration of paragraph 317, it by no means inevitably follows that her decision should be set aside.

16. Mr Eaton accepted that the importance of the complaint in ground 1 in relation to paragraph 317 should not be overemphasised, submitting that this issue really relates more to the level of care that is evident in the determination. The real focus for the appeal before us was said to be grounds 2 and 3. These grounds overlap.

17. At [19] Judge Clayton accepted that the appellant's asylum application in Norway had been refused, going on to state that "there was no evidence as to whether he had further rights of appeal or whether all his rights had been exhausted and he was facing removal from Norway." In so finding it is said that the judge failed to have regard to the oral evidence that this was the appellant's only level of appeal. Judge Clayton accepted at [18] that the witnesses were credible.

18. The summary of the oral evidence in the determination does not reveal that evidence was given as to the extent of the appellant's further appeal rights in Norway. The appellant's brother and father adopted their witness statements but were not cross-examined, and the cross-examination of the appellant's mother does not indicate that she was asked about that issue, at least not in direct terms. She did state that the appellant's money (from the State) had been halved, and Mr Eaton asked us to infer that that was because he had no further right of appeal.

19. We do not have the benefit of the judge's record of proceedings which is not on the Tribunal file. Having said that, no record of proceedings was provided to us on behalf of the appellant in terms of any notes of evidence that were taken by his representatives at the hearing before the First-tier Tribunal. The witness statements that were adopted by the witnesses at that hearing do not say anything about the appellant's appeal rights in Norway, and as we have indicated only the appellant's mother was cross-examined. The record of that cross-examination in the determination similarly does not state that his appeal rights have been exhausted.

20. On the Tribunal file is a translation of the determination of the appellant's asylum claim, (or appeal) in Norway. That does not indicate one way or another what appeal rights he had or has. Mr Eaton referred us to another document that was served separately from the appellant's main bundle. That is a letter to the appellant from the Immigration Appeals Board in Norway. It appears to be dated 19 February 2013 and is headed "Information regarding departure deadline". It states in effect that the appellant must leave Norway on 19 March 2013. It further states that questions regarding postponing the departure date are to be addressed to the Police Immigration Unit. It does also state that complaint regarding the date "cannot be made according to the immigration act."

21. It is apparent that notwithstanding the departure date of March 2013 the appellant has not been removed from Norway, that having been confirmed to us at the hearing. The evidence given before the First-tier Tribunal indicates that he was still there then. Having said that, we are concerned, as was the First-tier judge, with the position as at the date of decision in September 2012.

22. At [22] the judge stated that if the appellant remains in Norway there will be nothing to prevent the family here from visiting him. That, it seems to us, is entirely correct. If he remains there they can visit, and it was not suggested that there was any reason why they could not, albeit that that would involve some expense.

23. Whether under the Immigration Rules, the policy or Article 8, the position of the appellant must be looked at as at the date of decision. The decision was made on 12 September 2012. The decision on his asylum claim in Norway was made on 11 February 2013, according to the translation of the judgement. On that basis therefore, Judge Clayton would have been entitled to find that the family could visit him in Norway. In any event, albeit that Judge Clayton did not refer to the Norwegian documents, they do not establish that he is about to be removed from Norway. As we have already said however, at the date of decision his asylum claim had not been determined.

24. The grounds state that it is only a matter of the administrative convenience of the Norwegian authorities that the appellant is not removed to Iran, but that can only be speculation.

25. The refugee reunion policy is not set out in the determination. Both parties agreed that the policy as it applied at the date of decision is as set out in SS (Jurisdiction – Rule 62(7); Refugee's family; Policy) Somalia [2005] UKAIT 00167, at [35]. It is entitled "Family Reunion". The only part of it relevant to the appeal before us is the following:

> **"ELIGIBILITY OF APPLICANTS FOR FAMILY REUNION**
>
> Only pre-existing families are eligible for family reunion i.e. the spouse and minor children who formed part of the family unit prior to the time the sponsor fled to seek asylum.
>
> We may exceptionally allow other members of the family (eg elderly parents) to come to the UK if there are compelling, compassionate circumstances.
>
> The parents and siblings of a minor who has been recognised as a refugee are not entitled to family reunion. Such applications are considered under the criteria above, ie there must be compelling, compassionate circumstances in order for the family to be granted entry to the UK.
>
> Family reunion may be refused if family members fall within the terms of one of the exclusion clauses in the 1951 UN Convention."

26. The significant part of that extract from the policy is the second paragraph which requires there to be "compelling, compassionate circumstances". Judge Clayton was referred to two authorities on the possible meaning of that phrase, although unhelpfully no citation is given for either case in the determination. Ex parte Joseph [1988] Imm AR 329 and Mohamed [2012] EWCA Civ 331 both involved

consideration of the phrase "most exceptional compassionate circumstances" but it is not suggested that Judge Clayton decided the case with reference to that higher test.

27. The judge correctly identified that the phrase in the policy is "compelling, compassionate circumstances", and she gave consideration to the evidence on that issue. We have already dealt with the complaint about her consideration of whether the appellant was to be removed from Norway. As part of her assessment of the appellant's circumstances and whether they could be said to compelling and/or compassionate, contrary to what is asserted in the grounds she was entitled to take into account that, as she stated at [21], he was living in a country where there is a high standard of living with good medical facilities. She noted that he was living in a refugee camp and it is apparent from [20] and [24] that she appreciated that this is not an ideal living circumstance for any individual, including the appellant.

28. In our judgment the consideration of the appeal with reference to the family reunion policy was free from any error of law. In any event, we are inclined to agree with Mr Jarvis's submission that given that the ECO had considered the relevant policy, the judge had no jurisdiction to interfere with the ECO's decision on it. It would be different, for example, if the judge had found that the factual basis on which the decision on the policy was made was flawed. Mr Jarvis's submission is what prompted us to observe at [9] above that it was not contended that the ECO had not considered the applicable policy, albeit that the reference to the policy is indirect and brief.

29. In ground 3 it is suggested that the First-tier judge accepted that the appellant had enjoyed family life with his family in Iran which was curtailed when the family had to flee. Paragraph [14] of H (Somalia) is relied on, wherein it states as follows:

> "It cannot be right to approach the disruption to family life which is caused by someone having to flee persecution as a refugee as if it were of the same nature as someone who voluntarily leaves, or leaves in the normal course of the changes to family life which naturally occur as children grow up."

30. Although not the subject of submissions to us, it is apparent that there is some ambiguity in the judge's assessment of family life between the appellant and his family in the UK. She concluded initially when dealing with the policy that the evidence did not indicate that the appellant had family life with his relatives in the UK, noting at [23] that he was age 29 at the date of application and concluding that there was no evidence that their relationship extended beyond ordinary emotional ties between close adult relatives [19]. Again at [23] she found that although the family may well be close and have lived together as a single unit in Iran, there was nothing to suggest that their relationship "*was* anything over and above that to be expected between close adult blood relatives" (our emphasis). Given the reference to his age at the date of application and the use of the past tense "was", it is apparent that she did not in fact find that there was family life (in the legal sense) in Iran.

31. In the assessment of Article 8, she stated at [26] as follows:

> "as already stated I am not persuaded that the relationship between the Appellant, his parents and brother was over and above that to be expected between adult close blood relatives. "

32. In the next sentence however, she said that "They did enjoy family life together [in] Iran, which was unfortunately curtailed when they fled from the country." Although these two sentences together are, on the face of it, inconsistent the repetition of the earlier finding that there were no additional elements of dependency indicates that her conclusion was that there was no family life in Iran when the application was made, and that consequently there was none at the date of decision.

33. We note that at [18] the judge did conclude that but for the family fleeing Iran they would still be together. At that point at least she did not conclude that there had been a deliberate choice for the family to separate or that that was in the natural order of things, an approach in refugee reunion cases which had been found in H (Somalia) to be a flawed. On the other hand, the observation at [26] in terms of Article 8 not giving an "unfettered choice" as to where family life may be enjoyed would, we accept, otherwise indicate a wrong approach in circumstances where separation was caused by having to flee persecution, as per [14] of H (Somalia). However, that aspect of the judge's determination does not detract from the primary finding that there was no pre-existing family life between them.

34. It is not contended that the judge left out of account any other material factual matter in her consideration of Article 8. For completeness we note that she took into account the Article 8 rights of the other family members. In relation to his mother's health, at [27] she did not accept that the appellant's mother's health was deteriorating because the appellant had been denied entry clearance.

35. In conclusion, whilst we are satisfied that the judge did err in law in relation to paragraph 317, that is not an error of law that requires the decision to be set aside. We are not satisfied that the grounds of appeal establish any other error of law.

Decision

36. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, the decision is not set aside and the decision to dismiss the appeal under the Immigration Rules and under Article 8 of the ECHR stands.

Upper Tribunal Judge Kopieczek

7/11/13