**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: OA/10448/2013

**THE IMMIGRATION ACTS**

| **Heard at Sheldon Court Birmingham** | **Determination Promulgated** |
|---|---|
| **On 14th October 2014** | **On 20th October 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE M A HALL**

**Between**

**ENTRY CLEARANCE OFFICER - TIRANA**

Appellant

**and**

**M D**
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr N Smart, Senior Home Office Presenting Officer
For the Respondent: Mr A Pipe of Counsel instructed by Premier Solicitors

**DETERMINATION AND REASONS**

**Introduction and Background**

1. The Entry Clearance Officer (ECO) appeals against a determination of Judge of the First-tier Tribunal Thomas promulgated on 31st March 2014.

2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal. I will refer to her as the Claimant.

3. The Claimant is a female national of Albania born 17th January 1997 who applied for entry clearance to enable her to settle in the United Kingdom with her father to whom I shall refer as the Sponsor.

4. The application was refused on 5th April 2013. The ECO doubted the claimed relationship between the Claimant and Sponsor but this was subsequently proved by DNA evidence. The application was refused in reliance upon paragraph 320(7A) of the Immigration Rules, that the ECO contended that the Sponsor had submitted, in connection with the entry clearance application, his British passport, which records that he was born in Mitrovica in Kosovo. However documentation had also been submitted with the application which indicated that the Sponsor was in fact born in Albania and not in Kosovo.

5. The ECO contended that the Sponsor had fraudulently claimed asylum by claiming to be Kosovan, and he had eventually been granted British citizenship based upon deception, that being his claim to be Kosovan rather than Albanian. The ECO contended that a false document had been submitted in connection with the application for entry clearance, that being the Sponsor's British passport which contained false information, and that this had been done dishonestly, hence the refusal under paragraph 320(7A).

6. The Claimant's appeal was heard by Judge Thomas (the judge) on 20th March 2014 who found that the ECO had not discharged the burden of proof to establish that dishonesty or deception had been used.

7. The ECO was given permission to appeal to the Upper Tribunal and at a hearing before me on 25th June 2014 I found that the judge erred in law in her consideration of paragraph 320(7A) and the decision of the First-tier Tribunal was set aside.

8. Full details of the application for permission to appeal, the grant of permission, and my reasons for finding an error of law are contained in my decision dated 4th July 2014, which was promulgated on 17th July 2014.

## Re-Making the Decision

## Submissions

9. Mr Pipe confirmed that it was accepted, in view of my findings at the error of law hearing, that the appeal could not succeed under the Immigration Rules, because of the application of paragraph 320(7A). Mr Pipe indicated that further evidence would not be called, but that he intended to make submissions on the basis that the appeal should be allowed under Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules.

10. Mr Pipe relied upon his skeleton argument dated 9th January 2014. Mr Pipe submitted that the finding by Judge Thomas that the witnesses before the

First-tier Tribunal were credible, had not been challenged and should stand.

11. Mr Pipe submitted that the application had been made under paragraph 297 of the Immigration Rules, and the requirements of that rule had been satisfied, as the refusal had been based upon paragraph 320(7A).

12. I was asked to accept that the Claimant should not be blamed for the submission of false documents, and that she is a child, and therefore her best interests must be a primary consideration. It was conceded that the finding that paragraph 320(7A) applied was a negative factor in the balancing exercise.

13. I was reminded that the Sponsor's three children had all been granted entry clearance in 2005 and had joined him in the United Kingdom. The Sponsor's sons were born in 1993 and 1995 and they have British passports and remain in the United Kingdom. The Claimant returned to Albania after living in the United Kingdom for eleven months. She had been looked after by her grandparents, and this application for entry clearance was made following the death of her grandfather in 2012.

14. Mr Pipe indicated that it was not known whether any action would be taken by the authorities in the United Kingdom to deprive the Sponsor of his British nationality which he had obtained by deception, but in any event, this would not affect the Claimant's two adult brothers who would be remaining in the United Kingdom as British citizens.

15. I was asked to accept that the Claimant's paternal uncle had taken over her care following the death of her grandfather, and that he does not wish to be responsible for her, and hoped that she would accept an offer of marriage in Albania.

16. In relation to factors to be taken into account pursuant to section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) I was asked to accept that the Claimant's school reports at pages 85-87 of the Claimant's bundle indicated that she had studied English when she was in the United Kingdom in 2005-2006, and that she could be adequately financially supported by the Sponsor if she was granted entry clearance. There were no issues with accommodation.

17. I was asked to find that the best interests of the Claimant would be to live with her father and brothers in the United Kingdom, and that this outweighed the public interest in the maintenance of effective immigration control.

18. Mr Smart submitted that the issue in this appeal related to proportionality. The Sponsor arrived in the United Kingdom in 1998 having left the Claimant in Albania at a very young age. He was granted refugee status in 2001, and became a naturalised British citizen in 2004.

19. It was not until 2005 that the Claimant joined the Sponsor in the United Kingdom and she subsequently indicated that she wished to return to live in Albania which she did in 2006.

20. I was asked to note that the Claimant's uncle had made a brief statement at page 102 of the Claimant's bundle, and made no reference to a wish to have the Claimant married. Mr Smart questioned what reliance should be placed upon any assertion made by the Sponsor, bearing in mind the deception that he had carried out in order to obtain British citizenship.

21. Mr Smart pointed out that the Claimant's father and brothers had visited her in Albania on a regular basis, and then submitted that there was no reason to go outside the Immigration Rules to consider Article 8, but if Article 8 was considered, then I should find that the decision to refuse entry clearance is proportionate.

22. By way of response Mr Pipe submitted that Article 8 must be looked at, as this is not a case covered by Appendix FM of the Immigration Rules. The Sponsor had not attempted to have the Claimant join him between 2001 and 2004, because at that time he had obtained refugee status as a Kosovan national. He did not become a British citizen until 2004. I was reminded that the Judge had found the Sponsor and his sons to be credible.

23. At the conclusion of oral submissions I reserved my decision.

## My Conclusions and Reasons

24. As this is an entry clearance appeal I consider the circumstances appertaining at the date of refusal that being 5th April 2013. I am satisfied that this applies to consideration of human rights in an entry clearance appeal, as was confirmed in AS (Somalia) v SSHD [2009] UKHL 32.

25. I have taken into account all the evidence that was before the First-tier Tribunal, and taken into account the submissions made by both representatives.

26. This appeal cannot succeed under the Immigration Rules because of the application of paragraph 320(7A).

27. I am asked to consider Article 8 outside the rules. In my view where the provisions in the Immigration Rules permit consideration of exceptional circumstances and other factors, then the Immigration Rules can be regarded as being a complete code and there will usually be no need to consider Article 8 directly. This is because the same outcome will derive from the application of the Immigration Rules as under Article 8. Where the Immigration Rules contain no such provisions, then they are not a complete code and Article 8 will need to be considered directly.

28. The Court of Appeal considered this issue in MM [2014] EWCA Civ 985 and I set out below paragraph 135 of that decision;

135. Where the relevant group of IRs (Immigration Rules), upon their proper construction, provide a "complete code" for dealing with a person's Convention Rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the **Huang** tests and UK and Strasbourg case law.

29. Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply because although the Claimant is a child, she is not in the United Kingdom, and section 55 relates to the need to safeguard and promote the welfare of children who are in the United Kingdom. However the Upper Tribunal in Mundeba [2013] UKUT 88 (IAC) decided that the exercise of the duty by an ECO to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable, inevitably involves an assessment of what the child's welfare and best interests require. Where an Immigration Decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. Therefore the best interests of the child should be a primary consideration.

30. The best interests of the Claimant should therefore, in my view be considered under Article 8 outside the Immigration Rules. I set out below Article 8 of the 1950 Convention;

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

31. In considering Article 8 I adopt the step-by-step approach advocated in Razgar [2004] UKHL 27 which involves answering the following questions;

(i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(iii) If so, is such interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being

of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

32. Although Razgar concerned a removal case, I find that the principles are relevant to an entry clearance case. I also accept that the decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the family life of all the family, and not only that of the Claimant.

33. This is a case that is concerned with family life as opposed to private life. I am satisfied that the Sponsor and Claimant have established family life because they are father and daughter. I am also satisfied that the family life includes the Claimant's two adult brothers. I take into account the decision in Tuquabo-Tekle v The Netherlands [2006] 1 FLR 798, which confirms that Article 8 contains a positive duty inherent in effective respect for family life and family life should be enabled to develop.

34. I am satisfied that refusal of entry clearance is an interference by a public authority with the Claimant's family life, which has consequences of such gravity as potentially to engage the operation of Article 8.

35. Dealing with the third question in Razgar, I find that the interference is in accordance with the law. This is because the Claimant cannot satisfy the requirements of the Immigration Rules, in order to be granted leave to enter the United Kingdom.

36. The ECO has to prove that the interference is necessary for one of the reasons set out in Article 8(2), and is proportionate to the legitimate public end sought to be achieved.

37. Section 117B of the 2002 Act confirms that the maintenance of effective immigration control is in the public interest.

38. In making a proportionality assessment under Article 8, the best interests of a child must be a primary consideration which means that they should be considered first, although those best interests can be outweighed by the cumulative effect of other considerations, as explained in ZH (Tanzania) [2011] UKSC 4. It was also explained in ZH, that the best interests of a child broadly means the well-being of a child, and although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.

39. The Upper Tribunal decided in MK (India) [2011] UKUT 00475 that the best interests of a child must be addressed first as a distinct inquiry, and factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child considerations.

40. The Upper Tribunal decided in Azimi-Moayed [2013] UKUT 00197 that as a starting point it is in the best interests of children to be with both their parents. It is generally in the interests of children to have both stability and continuity of social and educational provision, and the benefit of growing up in the cultural norms of the society to which they belong.

41. When considering the best interests of the Claimant, I note the lack of any independent evidence. There is no witness statement from the Claimant, nor from her grandmother. There is a very brief statement from her uncle who confirms that he is unemployed.

42. The Sponsor and both his sons have made witness statements indicating that they are British citizens and that the Claimant lived in the United Kingdom in 2005-2006 for a period of eleven months, and made a mistake in returning to Albania. They are of the view that the best interests of the Claimant would be to live with them in the United Kingdom.

43. The Claimant made a choice when she was very young to return to Albania. There appear to have been no particular problems until the death of her grandfather. The Claimant has had the benefit of growing up in the cultural norms of the society to which she belongs. However on balance, I conclude that the Claimant's best interests would be served by being with her father, the Sponsor, and her two elder brothers.

44. I accept on balance, that her best interests would probably be served by being in the United Kingdom rather than in Albania but I do not find that this is overwhelmingly in her best interests. As was stated in paragraph 36 of EV – (Philippines) [2014] EWCA Civ 874;

> "If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interest to remain, but only on balance (with some factors pointing either way), the result may be the opposite."

45. This is a case where I do find that the Claimant's best interests, on balance would be to be reunited with her father and brothers in the United Kingdom but not overwhelmingly so. This is a case where there are no relevant medical issues, and the Claimant has been brought up in Albania, and she is an Albanian citizen. It is not the case that she is living in poverty, and if financial support is needed, this can be supplied, and has been, by the Sponsor.

46. Having decided the best interests of the Claimant would be served by being with her father and brothers, I have to consider whether there are any countervailing factors. The maintenance of effective immigration control is in the public interest, and it is in the public interest that an individual seeking to enter the United Kingdom can speak English, and be financially independent.

47. I do not accept that the Claimant has proved that she is able to speak English. The school reports referred to by Mr Pipe go back to 2005-2006. There is no recent evidence of the Claimant's ability in English, and there is no evidence that she has undertaken any English courses. The Claimant would be financially supported by the Sponsor if she came to the United Kingdom and I accept that he has employment and accommodation.

48. This is not a case where the child seeking entry to the United Kingdom is a British citizen. It is the case that the child's father is a British citizen, but here we have a situation where it is accepted that British citizenship has been obtained through deception. As indicated by Mr Pipe, it is not clear whether the immigration authorities in the United Kingdom intend to take action against the Sponsor to deprive him of British citizenship. There would certainly appear to be grounds for such action to be taken. I accept that such action is not likely to be taken against the Claimant's elder brothers, who entered the United Kingdom when they were minors.

49. Therefore the future status of the Sponsor is uncertain. If proceedings are successfully taken against him, then he may have to leave the United Kingdom and return to Albania.

50. I find that considerable weight has to be given to the fact that the Immigration Rules cannot be satisfied, because of the application of paragraph 320(7A) which involved serious deception.

51. It is accepted that the Sponsor and the Claimant's two brothers regularly visit her in Albania and the family maintain contact with each other by modern methods of communication. The Claimant has adequate accommodation in Albania, and close family members there, including her grandmother, and it would seem from the evidence that it was primarily her wish to be with her grandparents, that caused her to return to Albania.

52. I conclude that very significant weight must be attached to the public interest in maintaining effective immigration control. In my view this outweighs the weight to be attached to the best interests of the Claimant, and I also take into account that it may be that proceedings are brought against the Sponsor to deprive him of British nationality. I therefore conclude that in all the circumstances of this case, the decision of the ECO to refuse entry clearance is proportionate and does not breach Article 8 of the 1950 Convention.

## Decision

The determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is dismissed under the Immigration Rules.

The appeal is dismissed on human rights grounds.

## Anonymity

Because this appeal involved the consideration of the best interests of a minor, I have made an anonymity order under rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008. This order is to remain place unless or until this Tribunal, or any other appropriate Court, directs otherwise. No report of these proceedings shall directly or indirectly identify the Claimant or any member of her family. Failure to comply with this direction could amount to a contempt of court.

Signed Date: 16th October 2014

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT**
**FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed Date: 16th October 2014

Deputy Upper Tribunal Judge M A Hall