IAC-AH-DP-V2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21908/2013

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 16th December 2014	**On 10th March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MRS IBTISAM AGEEL ALDHUFAIRI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Siddique
For the Respondent: Mr A McVeety

DECISION AND REASONS

1. The Appellant claims to be an undocumented Bidoon from Kuwait born on 1st January 1985. The Appellant applied for entry clearance as a spouse in the family reunion category and her application was considered by the Entry Clearance Officer under paragraphs 320 and 352A of the Immigration Rules. By notice of refusal dated 24th November 2013 the Appellant's appeal was dismissed. The Appellant was found to have not provided satisfactory evidence to satisfy the Entry Clearance Officer of her identity and that she had submitted her application in Amman but had

provided no verifiable details or credible explanation as to how she travelled to Jordan or why she had not submitted her application in Kuwait. The Entry Clearance Officer was not satisfied on the balance of probability that the Appellant was a Kuwaiti Bidoon and in the light of any evidence was not satisfied as to her claimed identity.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Malik sitting at Manchester on 4th August 2014. In a determination promulgated on 8th August 2014 the Appellant's appeal was allowed. On 15th August 2014 the Secretary of State lodged Grounds of Appeal to the Upper Tribunal. On 6th October 2014 First-tier Tribunal Judge Parkes granted permission to appeal. Judge Parkes noted that the Appellant applied to enter the UK under family reunion and that it was not accepted that the Appellant was married to the Sponsor or that the documents submitted could be relied on or that she was a Kuwaiti Bidoon and she had not produced a valid passport. Judge Parkes noted that the appeal was allowed with the judge finding that the parties were married as claimed, but they had met since the Sponsor came to the UK and remained in contact. In granting permission to appeal Judge Parkes noted that the grounds argued that the judge at first instance had erred in not addressing the mandatory Grounds of Refusal under paragraph 320(3) and the failure to produce a valid national passport which was not defeated by other positive credibility findings.

3. There is no Rule 24 response served on behalf of the Appellant. It is on that basis that the appeal comes before me to determine initially whether there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by her instructed solicitor Mr Siddique. Mr Siddique is familiar with this matter having appeared before the First-tier Tribunal. The Appellant appears by her Home Office Presenting Officer Mr McVeety. I note that this is an appeal by the Secretary of State. For the purpose of continuity throughout the appeal process the Secretary of State is referred to herein as the Respondent and Mrs Aldhufairi as the Appellant.

Factual Development

4. Both Mr McVeety and Mr Siddique draw my attention to two factual issues which they asked me to bear in mind and which postdate the date of decision of the First-tier Tribunal Judge. Firstly they advise me that on 11th December 2014 the Appellant entered the United Kingdom and made application for asylum. Secondly they point out that the Appellant's application is based on family reunion and that as the Appellant is now within the United Kingdom it is not possible for entry clearance to be granted for family reunion as her application was and has to be made from outside the UK and the Appellant is now of course currently within the UK. Mr Siddique acknowledges that theoretically the Appellant could return to Jordan in order to obtain the appropriate entry clearance stamp although Mr McVeety is of the view that it would not be possible for her to be able to obtain a visa in such circumstances.

5. I deliberated as to whether or not these developments affected my ability to hear the appeal and concluded that they did not bearing in mind that the relevant date in an out of country appeal is the date of decision which is when the Appellant was out of country and consequently it was possible to go on to consider this matter on appeal within the Upper Tribunal.

Submissions/Discussions

6. Mr McVeety indicates that the Appellant quite simply could not meet the Immigration Rules and I am considerably assisted in this matter by Mr Siddique who acknowledges that position. Consequently there is agreement between the Secretary of State and the Appellant's representative that there is a material error of law in the decision of the First-tier Tribunal and that it should be set aside.

Findings on Error of Law under the Immigration Rules

7. I acknowledge that the judge made a series of findings in respect of the history and substance of the Appellant's marriage and I accept that those were findings that were open to her as was the conclusion that the Appellant is an undocumented Bidoon. However amongst the Grounds of Refusal of entry clearance was a ground referring to paragraph 320(3) of the Immigration Rules. Paragraph 320(3) states:

   Grounds on which entry clearance or leave to enter the United Kingdom is to be refused

   (3) Failure by the person seeking entry to the United Kingdom to produce to the Immigration Officer a valid national passport or other document satisfactorily establishing his identity and nationality.

8. I accept the submission that that is a mandatory Ground of Refusal and not one which can be defeated by a favourable credibility finding or (as the First-tier Tribunal Judge sets out at paragraph 28 of her determination) by an observation that, as an undocumented Bidoon, the Appellant would be unable to produce such a document. The judge has failed to deal with the mandatory nature of such a decision. *AM (Somalia) [2009] UKAIT 00008* whilst concerned principally with the appealability of paragraph 320(3) refusal accepts without challenge that such a decision (if supported by the facts) is indeed mandatory. In such circumstances I endorse the view expressed by both legal representatives that the Appellant cannot succeed under the Immigration Rules and consequently there is a material error of law and the decision of the First-tier Tribunal must be set aside.

Submission/Discussion on Error of Law re Article 8

9. The appeal under the Immigration Rules is however not the end of this matter. The appeal to the First-tier Tribunal also involved an appeal pursuant to Article 8 of the European Convention of Human Rights. The judge has not gone on to make such a consideration (quite possibly because she considered it was appropriate to allow the appeal under the

Immigration Rules). Mr McVeety acknowledges that it is "**Robinson** obvious" that the First-tier Tribunal Judge has not made a consideration under Article 8 and that it is appropriate if the Appellant cannot meet the Rules give due consideration to it. He further concedes the Secretary of State does not challenge any of the findings of fact made by the judge. Mr Siddique endorses this view.

The Law

10. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial consideration, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

11. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings under Article 8

12. It is clear that the judge has failed to go on to consider Article 8 (perhaps quite possibly because she did not consider it necessary bearing in mind her finding under the Immigration Rules) but in the light of the correct analysis of the Immigration Rules it is a material error of law not to go on to consider it. In such circumstance I am satisfied that there is a material error of law in the failure of the First-tier Tribunal Judge not to go on to address the issue pursuant to Article 8 of the European Convention of Human Rights.

13. In considering the position with regard to other documents Mr Siddique points out that there were other documents produced which he contends go to the identity of the Appellant namely her marriage certificate and birth certificate were produced so he submits that it was not correct to say that the Appellant did not do anything but that she did do as much as she could. However he accepts that this does not take him a great deal

further as he accepts that it is necessary that the documents produced must establish, in order for him to succeed under the Rules, the Appellant's nationality and as she has been found to be stateless as an undocumented Kuwaiti Bidoon it is not possible that she can succeed under the Immigration Rules.

Findings under Article 8

14. It is appropriate for me to go on to reconsider this matter and to remake the decision bearing in mind that the findings of fact of the First-tier Tribunal Judge are not challenged and secondly because of the concessions made and submissions by Mr McVeety on the Home Office behalf. It is possible and indeed I consider appropriate in this matter to remake the decision allowing the appeal outside the Rules under Article 8 of the European Convention of Human Rights. There is very little reference made to me by either legal representative other than an acknowledged agreement that that is the correct way forward. Whilst that may be a substantial push in the right direction as far as the Tribunal is concerned that does not mean automatically that the Tribunal is merely going to endorse that course of action. The Appellant has to be in a position to succeed outside the Immigration Rules as a matter of law.

15. The general starting point is *Razgar [2004] UKHL 27* in which the House of Lords set out the five steps to follow when determining Article 8 outside the Rules namely:

    (i) *Does family life, private life, home or correspondence exist within the meaning of Article 8?*

    (ii) *If so, has or will the right to respect for this have been interfered with?*

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

    (iv) *If so, is the interference in pursuit of one of the legitimate aims set out in Article 8(2)?*

    (v) *If so, is the interference proportionate to the pursuit of the legitimate aim?*

16. There have been a considerable number of authorities since then including a line of cases which started to suggest that where the Immigration Rules were not met it would not always be necessary to go on and consider the appeal under Article 8 outside the Rules. However applications pursuant to Article 8 depend upon all the circumstances of the case and provisions dealing with the application of Article 8 including the period of leave normally to be granted are contained in relevant statements of policy and are not required to be set out within the Immigration Rules. It is necessary to formulate a view on whether overall there is a good arguable case of disproportionality if leave was not granted and I am satisfied giving due consideration to the facts of this case which are not challenged by the

Secretary of State there are arguable grounds. There is a requirement that there needs to be compelling or exceptional circumstances not sufficiently recognised under the new Rules that outweigh the public interest in deportation and this was confirmed in *Haleemudeen [2014] EWCA Civ 558*. This is now necessary to find compelling circumstances which go outside the Rules. In two recent authorities *MM (Lebanon) and Others [2014] EWCA Civ 985* it was suggested that where a particular set of the Immigration Rules are not a complete code then the issue of proportionality under Article 8 would be more at large and further in *R (on the application of Ganesabalan [2014] EWHC 2712 (Admin)* it was held unlike other Rules which have a built in discretion based on exceptional circumstances Appendix FM and Rule 276ADE are not a "complete code" so far as Article 8 compatibility is concerned because Appendix FM and Rule 276ADE have no equivalent "exceptional circumstances" provision.

17. Consequently there is now a strong argument for reapplying when making an assessment under Article 8 outside the Immigration Rules the old approach that was adopted and the accepted premise under *Razgar*. To a certain extent the law has gone full circle. That is not to say that allowing an appeal outside the Rules should be made without very careful and due consideration of the facts. The factual situation in this matter is that the Appellant and the Sponsor have been found having married before the Sponsor sought asylum in the UK and that they married in Kuwait back in 2010 and that they have the intention to live together as spouses and that they are both resident within the UK and are both undocumented Bidoons. It seems to me that this is a case which meets the criteria for the Appellant to succeed under Article 8 of the European Convention of Human Rights and this indeed does little more than endorse the view expressed by both Mr McVeety and by Mr Siddique. It is important however that I had set out my reasons as to why I was satisfied both factually and as a matter of law that they met the requirements of Article 8 and in doing so I am satisfied that this is an appeal that therefore should succeed but not for the grounds originally allowed by the First-tier Tribunal Judge.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law and is set aside. The decision is remade allowing the appeal pursuant to Article 8 of the European Convention of Human Rights.

No anonymity direction is made.

Signed Date **16th December 2014**

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award and none is made.

Signed Date **16th December 2014**

Deputy Upper Tribunal Judge D N Harris