Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/05691/2015
OA/05689/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 6 July 2016	**On 14 July 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

KUSAI ALWADI (FIRST APPELLANT)
ATHAR ALWADI (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER - ISTANBUL

Respondent

Representation:

For the Appellants: Mr Moran, Alex Moran Immigration & Asylum
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The first appellant is Kusai Alwadi who was aged 17 years at the date of his application for entry clearance but is now aged over 18 years. He is he son of the

sponsor, Muhammed Alwadi (hereafter the sponsor). The second appellant, Athar Alwadi, is the adult daughter of the sponsor. She was over the age of 18 at the date of her application for entry clearance. In respect of the second appellant, it was conceded that she was unable to reach requirements required by paragraph 352D(ii) of HC 395 (as amended) so her application was made outside the Rules under Article 8 ECHR. The mother of both appellants and their two younger siblings had, together with the appellants, appealed against refusals of entry clearance to the First-tier Tribunal (Judge Heynes) which, in a decision dated 28 September 2015 dismissed the appeals of Athar Alwadi and Kusai Alwadi but allowed the appeals of the other appellants. Athar Alwadi and Kusai Alwadi now appeal, with permission, to the Upper Tribunal.

The First Appellant: Kusai Alwadi

2. The first appellant (Kusai Alwadi) was initially refused on the basis that insufficient evidence had been provided to show that he was related to the sponsor as claimed. That issue has now been decided conclusively by way of DNA evidence. The respondent now agrees that the only reason for refusing the first appellant under the Immigration Rules lay with the refusal under paragraph 320(7A) of HC 395 which provides that entry clearance must be refused,

> 'Where false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge), or material facts had not been disclosed, in relation to the application.'

3. The appellant was refused under 320(7A) on the basis that an extension sticker in his (valid) passport was false and had been obtained through dishonesty. The First-tier Tribunal decision [17] reports that "the forgery report, which was subject to a Section 108 application, notes differences between the extension sticker and documents normally used by the Syrian authorities." For reasons which will become apparent later, I do not intend to deal further with the Section 108 application and examination of the forgery report save that I proceeded on the understanding that the stamp was not genuine. For the reasons I give below, an issue in this appeal is whether the appellant was aware or unaware that the sticker in the passport was a forged document although it is, of course, the case that 320(7A) remains a mandatory grant for refusal of entry clearance whether or not an applicant was aware that he or she had used a forged document.

4. The sponsor has submitted a witness statement signed and dated 25 February 2015. At [13] this records that the first appellant's passport had expired on 19 September 2014 whilst he was resident in Libya. The United Kingdom and Syrian Embassies had closed which "meant that he was stuck in Libya with no means of leaving the country." Enquiries amongst the Syrian community by the sponsor had led him to a Syrian Embassy official still living in Libya who "could extend expired Syrian passports." The sponsor paid a fee and obtained the extension. This looked "official" to the sponsor who assumed that it was "fine and perfectly legal." It then

came as a "huge surprise" to the sponsor and the rest of the family to find out that the sticker was not legal.

5. Judge Heynes found that dishonesty had been used by the first appellant (and, presumably, the sponsor) in the use of the document bearing the false stamp. However, the only reason that he gives at [19] was "the delay in coming forward with the explanation". This delay led the judge to believe that he had not been "told the whole truth about the acquisition of this counterfeit extension or about precisely who amongst the family members was involved." The problem with his finding is that, as is apparent from the papers which were before the First-tier Tribunal, the explanation was put forward by the family to the ECO immediately following the refusal of entry clearance. Indeed, the explanation is considered (and rejected) in an email from Mrs A Fotheringham, Entry Clearance Manager at Istanbul who stated,

> "I have noted the witness statement and assertions made by the sponsor regarding various issues surrounding his adult daughter and his son's counterfeit extension, however these are not supported by sufficient evidence to satisfy me the decisions were incorrect."

Judge Heynes was, therefore, factually incorrect to find that there was delay in providing an explanation. In consequence, I find that he erred in law. He has given no other reason for rejecting the explanation and the reason he has given is inaccurate. I have therefore proceeded to remake the decision in respect of the first appellant.

6. As noted above, the first appellant relies on Article 8 ECHR. He was a minor at the date of his application for entry clearance although he has now achieved his majority. The remainder of his family are living in the United Kingdom. Mr Moran, for the appellants, sought to rely on the decision of the Upper Tribunal in *Mumu (paragraph 320); Article 8; scope)* [2012] UKUT 00143 (IAC) in particular [18]:

> "Nothing in what we have just said should be taken to amount to a finding that it will *never* be disproportionate in Article 8 terms to uphold a decision under paragraph 320(7A). Each case ultimately turns on its own facts. There may well be cases where, despite the public policy issues inherent in paragraph 320(7A), it would nevertheless be disproportionate to refuse entry clearance. The point we wish to make, however, is that the effect of 320(7B) and 7(C) is not such as to cause paragraph 320(7A) to be "read down" in a general way."

7. Mr Moran submitted that this was an unusual case in which the appellant should succeed under Article 8. But for the operation of paragraph 320(7A), the appellant would have been granted entry clearance along with his younger sibling.

8. I have first to make a finding in respect of the alleged deceit in this instance. Mr McVeety, for the respondent, did not choose to cross-examine the sponsor who, in any event, could only throw limited light upon the circumstances surrounding the issuing of the false stamp. I am aware that the burden of proof rests on the appellant and that the standard of proof is the balance of probabilities. There is background

material relating to Libya and the administrative chaos existing there at the time of the application for entry clearance (and which still exists). I have no reason to disbelieve the sponsor's evidence that the United Kingdom and Syrian Embassies in Libya had closed down. On balance, I find that I accept the sponsor's evidence that the family, desperate to extend or renew the first appellant's passport, allowed themselves to be tricked by a Syrian Embassy official (or an individual posing as such). I accept the explanation given by the sponsor and make a finding that the first appellant (and the other members of the family) were unaware that the stamp endorsed in the first appellant's passport was a forgery. I accept the force of Mr Moran's submission that, had been possible to obtain a genuine extension to the passport, there is no reason to suppose that a family would not obtain such an extension. I accept that individuals who find themselves in foreign countries which are in a state of administrative chaos make well take imprudent steps to obtain travel documents. However, such imprudence does not indicate complicity in the act of forgery or an intention to deceive the United Kingdom immigration authorities.

9. The finding at [8] above is important in the Article 8 assessment as both representatives acknowledge. This is not a human rights appeal in which an ability of an appellant to satisfy the requirements of the Immigration Rules may or may not be of relevance in the Article 8 assessment (see *Mustafa [2015] UKUT 000112 (IAC); Adjei* [2015] UKUT 261 (IAC)). Here, the question of proportionality is directly connected to the reason for refusal of the application for entry clearance under the Immigration Rules; but for his reliance upon the false stamp, the appellant should have succeeded in his application. I agree with Mr McVeety's submission that, where deliberate deceit is used, the public interest favouring the applicant's exclusion from the United Kingdom is very considerable and will generally outweigh the appellant's interests in any proportionality assessment. I also acknowledge that there still remains a public interest in discouraging those potential entrants who might place themselves unwittingly or out of necessity in the hands of rogues from whom they might obtain unreliable travel documents. However, set against that public interest is the fact that the appellant otherwise satisfied the Immigration Rules and, at the time of the application for entry clearance and the refusal, found himself, at that time a child, separated from all his close family members other than the second appellant, his sister. Having considered all the circumstances carefully, I find that the decision to refuse the appellant entry clearance is disproportionate and breached his right to enjoy family life with those members of his family now living in the United Kingdom. His appeal is allowed on human rights grounds.

The Second Appellant: Athar Alwadi

10. Dismissing the second appellant's appeal, Judge Heynes said no more than this [28]:

> "The consequence of this decision to [to dismiss the Article 8 appeal of the first appellant] is that the Article 8 appeal of [Athar Alwadi] is accordingly weakened. Even if the remainder of the family chose to leave, she would remain in Turkey with [Kusai Alwadi] who is now over 18."

11. Mr McVeety acknowledged that he found it very difficult to support the judge's decision in respect of the second appellant. He also acknowledged that, in the event that the first appellant succeeded in his appeal, this would leave the second appellant (a 19 year old young woman) living alone in Turkey and separated from her family who would be entirely living in the United Kingdom. Mr Moran, for the appellants, acknowledged that the second appellant is an adult but both he and Mr McVeety accepted that the strength of her emotional ties and dependency upon her family would not cease upon her achieving majority. Having considered all the circumstances, including the finding which I have made as to the use of the false document by the first appellant, I find that this was a rare case where the decision to refuse the second appellant entry clearance to the United Kingdom separates her from her family (displaced from Syria in very difficult circumstances but now resettled in the United Kingdom) and is disproportionate. I find that the second appellant's appeal should be allowed under Article 8 ECHR.

Notice of Decision

The decision of the First-tier Tribunal dated 28 September 2015 is set aside insofar as it concerns the appeals of Athar Alwadi and Kusai Alwadi. I have remade the decisions in respect of Athar Alwadi and Kusai Alwadi. Both appeals are allowed on human rights grounds (Article 8 ECHR).

No anonymity direction is made.

Signed Date 11 July 2016

Upper Tribunal Judge Clive Lane