Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/02471/2015

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 6 February 2017	**On 2 June 2017**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ENTRY CLEARANCE OFFICER - ISLAMABAD

Appellant

and

A S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr Ahmed, instructed by Jusmount & Co Solicitors

DECISION AND REASONS

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, AS, was born in 2011 and is a male citizen of Afghanistan. The appellant's father is present and settled in the United Kingdom as a refugee. The other members of the appellant's family (including his mother and siblings) came to the United Kingdom on a family reunion visit

visa. The sponsor had visited the family before they departed for the United Kingdom and the appellant had been conceived during that visit. Having been born "post-flight" the appellant was not eligible to join the rest of his family under the family reunion provisions. He was left living abroad with his grandmother.

2. The application by the appellant to enter the United Kingdom for settlement was rejected by the ECO on maintenance grounds and also in respect of accommodation. By the time the appeal reached the First-tier Tribunal in Birmingham on 18 December 2015, the judge recorded [9] that "the only live issues are the adequacy of accommodation; and any Article 8 issues". The Entry Clearance Manager (ECM) produced a report dated 20 April 2014 in which he/she only refers to the accommodation issue. It appears that the First-tier Tribunal proceeded on the basis that only accommodation was at issue under the Immigration Rules; Mrs Aboni before the Upper Tribunal did not suggest otherwise.

3. The judge found [16] that if the appellant joined the family in Birmingham then the property in which they were living would be overcrowded. He therefore dismissed the appeal under the Immigration Rules but went on to consider Article 8 ECHR. At [28], the judge considered the accommodation issue in the context of Article 8. He noted that the two elder siblings had planned to move out of the house which would make room for the appellant. He also considered that,

> the legitimate aim of lawful immigration control is narrowed in this case because the remainder of the family has been brought over on a family reunion visa. If this child had been born pre-flight would have qualified without the stringent Rules being applied under Appendix FM

The judge allowed the appeal on Article 8 ECHR grounds.

4. The respondent submits that, if the accommodation was not adequate for the purposes of the Immigration Rules, it cannot have been adequate for the appellant under Article 8; it would not be in the best interests of the child (section 55 of the Borders, Citizenship and Immigration Act 2009) not be met by his being expected to live in overcrowded accommodation. The family should find a larger property and then apply again for entry clearance.

5. Mrs Aboni accepted the submission of Mr Ahmed, for the appellant, that the grounds of appeal are incorrect stating that the relevant date for assessing the evidence in the appeal was the date of the application. Section 85(4) of the Nationality, Immigration and Asylum Act 2002 (as amended) provides for all human rights appeals (including those in respect of appellants living abroad) be considered at the date of the appeal (see Section 85(4) of the 2002 Act (as amended)).

6. Given that that is the case, it is arguable that the judge erred by not taking into account circumstances at the date of the hearing which would

be favourable to the appellant's case. The judge had before him at the date of hearing an assured short hold tenancy agreement which had been entered into by the family in the United Kingdom which would commence on 1 March 2016. I understand that the family have duly entered that property and, notwithstanding the expiry of the fixed term of five months, continued to live in the property presumably on a periodic tenancy. There appears to be no argument that the property in which the family is now living is large enough for all of them, including the appellant. There was no need, therefore, for the judge to consider prospective events in his Article 8 analysis; he was able to consider events appertaining at the date of the hearing, namely that the family had already signed the new tenancy agreement. Indeed, if the Upper Tribunal were now to remake the decision on the basis of the evidence today, it would be compelled to find that the accommodation available for the appellant is adequate. The grounds also do raise the question of maintenance by reference to Section 117B of the 2002 Act (as amended) but, as I recorded above, there is no challenge before the First-tier Tribunal but the only issue before it is that of accommodation; maintenance was not a live issue before the judge.

7. In the light of what I have said above, I find that, even if the judge had erred in law, I should exercise my discretion in not setting aside this decision. I am, in any event not persuaded that the judge has erred either for the reasons given in the grounds of appeal or at all.

Notice of Decision

This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 20 May 2017

Upper Tribunal Judge Clive Lane