Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03839/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 10th January 2018	**On 7th February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

[M A]
~~**(Anonymity direction not made)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Winter, Advocate, instructed by Katani & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision by Judge of the First-tier Tribunal Handley, dismissing an appeal on human rights grounds.

2. The appellant was aged 19 at the date of the hearing before the First-tier Tribunal. He is a national of Syria and has been recognised

as a refugee in Germany. He appealed against a decision dated 11th January 2016 refusing him entry clearance to join his father in the UK as the child of a refugee.

3. The appellant applied for entry clearance on 19th November 2015. Documentary evidence supplied by the appellant gave his date of birth as [ ] January 1998. However, at his screening interview on 27th November 2013 the appellant's father said his son was aged 16 at that time, which would have meant the appellant was at least three months older than he claimed. The Judge of the First-tier Tribunal was not satisfied that the appellant was aged under 18 when he applied for entry clearance.

4. Before the Judge of the First-tier Tribunal was evidence given by the appellant's father at his own screening interview in 2013 to the effect that he had not seen the appellant since 2005. It seems the appellant's parents divorced in 2005 and some time after this the appellant moved with his mother to Saudi Arabia. The appellant's parents had joint custody of him but his father, according to what he said at his screening interview, did not see him between 2005 and the screening interview in 2013. In his subsequent evidence, however, the appellant's father said he continued to have contact with the appellant after 2005. The appellant left Saudi Arabia in 2015 and travelled to Germany via Turkey. He said he left home because his mother had remarried and his stepfather abused him but the judge observed that there was no evidence from the appellant's mother.

5. The Judge of the First-tier Tribunal accepted there was family life between the appellant and his father even during the period after 2005 when the judge accepted there was no contact between them. There was evidence that the appellant and his father now talk by phone but the judge had limited evidence about the frequency and duration of phone calls. The interests and welfare of minor children were a primary consideration but the family life between the appellant and his father was of a very limited nature. The appellant was being adequately cared for in Germany and attending school or college. The appellant's father has visited him in Germany on several occasions. Contact by telephone and visits could continue.

6. The judge considered the effect of the refusal decision not only on the appellant but also on his father, who suffers from anxiety and depression. A doctor's letter stated that the depression was due in part to the loss of his family and separation from the appellant. Nevertheless the judge was not satisfied there was a breach of Article 8.

7. Two succinct grounds of appeal were raised. The first was that the Tribunal erred by stating that family life could be carried on by

electronic communications and occasional visits. This was contrary to *Mansoor* [2011] EWHC 832 (Admin). The second ground challenged the Tribunal's reasoning in relation to the appellant's father's mental health. There was no finding on whether it was proportionate to maintain separation when that was part of the cause of the appellant's father's difficulties.

8. The grant of permission to appeal was rather longer than the application itself. The stated grounds were considered arguable. In addition, the grant questioned the Judge of the First-tier Tribunal's approach to the issue of the appellant's age. It was arguable that the judge had gone against the preponderance of the evidence in finding that the appellant was 18 when he sought family reunion. There was only the statement of the appellant's father at his screening interview to indicate that the appellant was older than he claimed and, at the time of the screening interview, the appellant was on the cusp of becoming 16, which was the age stated by his father. It was further considered arguable that the judge erred by not taking into account the mental health of the appellant's father when making credibility findings.

Submissions

9. At the hearing Mr Winter addressed me on behalf of the appellant. He summarised the decision of the First-tier Tribunal and addressed the grounds upon which permission to appeal. In reliance upon *Agyarko* [2017] UKSC 11 he submitted that all factors were relevant to the issue of proportionality. Both the appellant and his father were refugees so there was no issue of public order. In relation to the appellant's father's mental health the grant of permission pointed out the judge had had little regard to the substantive content of the medical evidence. Relying on the case of *AM (Afghanistan)* [2017] EWCA Civ 1123, Mr Winter submitted that, where there was a vulnerable witness, care should be taken to consider whether there was a reasonable explanation for discrepancies. It could not be maintained that another judge would have reached the same decision.

10. Mr Matthews began by maintaining that the appellant's case was limited to the grounds on which permission was given. In response I observed that the overriding issue was one of fairness – the respondent had had adequate notice of all the grounds in the grant of permission to appeal and the appellant could rely on all of these.

11. Mr Matthews referred to the relevant provision of the Immigration Rules, paragraph 352D, which required that the appellant was under 18 when the application was made and was part of his father's family unit in his father's country of habitual

residence. The appellant and his father had been apart for 10 years and had no face-to-face contact during this period. It had been the father's choice not to see his son. The medical evidence did not refer to the effect on the father's mental health of this period of separation.

12. Mr Matthews continued that the case of *Mansoor* was concerned with a family who had lived together in the UK for six years. This was a different case from the present appeal, in which the appellant and his father had been separated for over ten years. It was said that the father's mental health problems were caused in part by separation from the appellant. The evidence was referred to by the judge at paragraph 20 of the decision and taken into account in the proportionality assessment.

13. Mr Matthews continued that points were raised in the grant of permission to appeal which had not been argued before the First-tier Tribunal. The question of age was an issue of fact for the First-tier Tribunal. There was evidence to support the finding made and there was no issue of law arising from this.

14. Mr Matthews referred to the issue raised in the grant of permission as to whether the appellant's father's mental health problems had been taken into account in relation to credibility. Mr Matthews questioned the relevance of this. The screening interview, at which the father had stated the appellant's age, took place some years before the period addressed by the medical evidence. The question of whether the father's screening interview should be relied upon was a question of fact, with which there should be no interference.

15. In response Mr Winter submitted that in terms of *Agyarko* the question was one of whether a fair balance had been struck. At paragraph 20 of the decision the judge asked the wrong question by considering whether the father could receive treatment in the UK instead of asking whether his condition would be ameliorated by his son's entry to the UK. Mr Winter accepted that *Mansoor* was based on different facts but after having been apart the appellant and his father had resumed contact and the principle of *Mansoor* applied.

16. Mr Winter raised the case of *Gurung* (reported as *Pun & others* [2011] UKUT 00377) as showing the existence of family life was fact sensitive. It could be established by post-decision events. The Judge of the First -tier Tribunal had referred to these events, which showed that family life was now stronger than formerly.

Discussion

17. I will address first the issues relating to the appellant's age. The Judge of the First-tier Tribunal found the appellant was over 18 when the application for entry clearance and the refusal decision were made. I have no hesitation in accepting Mr Winter's submission that another judge might have made a different finding. On the other hand, Mr Matthews pointed out the question was whether the judge erred in law in making the finding.

18. I think there is a further point to be considered. The respondent's refusal decision under the Immigration Rules was made on the basis both that the appellant was over 18 and that he had not been in the same family unit as his father before leaving his country of origin. This second ground of refusal was not disputed. The appellant had been living with his mother and step-father in Saudi Arabia and had not lived in the same household as his father for many years. Thus even if it was accepted that the appellant was under 18, his application for entry clearance would not have succeeded under the Immigration Rules.

19. When looking at family life under Article 8, there is a less clear cut-off point on attaining the age of eighteen. Mr Winters referred me to the case of *Gurung*, which illustrates this point albeit in the rather different area of family reunion for former Gurkha soldiers. Family life between a parent and child does not necessarily come to an end just because a child attains the age of 18. Dependency in different forms may extend into adulthood. This is particularly so where the child has been living in the same family unit as the parent concerned. In the circumstances of this appeal, however, the appellant was not part of his father's family unit. He left his mother's family unit in Saudi Arabia and travelled first to Turkey and then to Germany. In Germany, where he was recognised as a refugee, he has been studying and seemingly beginning to establish an independent life.

20. The proper question is not whether the appellant was under or over 18 when he made his application. Under Article 8 there is no bright-line distinction at the eighteenth birthday. In assessing the proportionality of an interference with family life the focus is not so much on the precise age of the child as on the strength of the ties between the parent and child, assessing which includes looking at the history of their relationship. In this context the findings made by the judge on the issue of age are of much less significance that the findings made on the nature of the relationship between the appellant and his father, and the extent to which the appellant has formed a life for himself independently from his father. On this basis I do not think any error made by the judge in assessing the appellant's age, even if there was such an error, would be material to the outcome of the appeal.

21. It is implied in the grant of permission, and addressed by Mr Winter in his submission, that a slightly different approach to the evidence on age might have led to a significantly different finding. As Mr Matthews pointed out, however, the judge's finding on age was based on the submissions made at the hearing. It is difficult to find fault with the judge for not following reasoning which seemingly was not advanced at the hearing before him.

22. In considering whether the appeal should be allowed under Article 8 when the appellant cannot succeed under the Rules, the proper approach is set out in *Agyarko*, to which Mr Winter referred. The appellant must show that there is something exceptional in his circumstances which allows him to succeed where the Rules are not met. In the balancing exercise the appellant's circumstances are weighed against the public interest.

23. Mr Winter submitted that as both the appellant and his father have been recognised as refugees there was no public order aspect to the application. I took Mr Winters to mean by this that there was no breach of immigration control and that the status of the appellant and of his father was resolved in their favour. The rights of a refugee, however, do not include an unqualified right to family reunion. Furthermore, the balancing exercise under Article 8 should be approached with regard to the Rules as expressing the weight accorded to the public interest by the Secretary of State and by Parliament.

24. In this appeal the judge found on the evidence that the ties of family life between the appellant and his father are weak. Mr Winter argued that although they may have been weak in the past they were strengthening. The Judge of the First-tier Tribunal was, however, clearly aware of this and referred to it in his decision. The two are in contact by phone and the father has visited his son.

25. With regard to contact Mr Winter sought to rely on *Mansoor* as to the inadequacy of electronic communication and occasional visits as a means of maintaining family life. I accept Mr Matthews' submission, however, that *Mansoor* was concerned with a completely different set of circumstances. In the present appeal the appellant and his father were not forced to separate by the requirements of immigration control. Before the appellant arrived in Germany they had had no contact for around ten years. The appellant now appears to be in the process of establishing an independent life for himself as a refugee in Germany, even if he was under 18 when the application was made. The appellant is not a child who has been forced apart from a father whose care and company he was accustomed to on a daily basis.

26. There is the question of whether the judge dealt properly with the medical evidence of the father's mental health problems. It does read a little oddly that at paragraph 20 the judge seems to emphasise the availability of treatment for the father in the UK, whereas of greater importance might have been the question the extent to which the father's symptoms were the result of separation from his son. The judge was, however, clearly aware of the doctor's view of the contribution made to the father's problems by this separation. This was a relevant factor in the balancing exercise. There is nothing to show that the judge did not have regard to it. The question of what weight the judge should have attached to this factor may be a matter for debate but does not demonstrate an error of law.

27. There is much that might be said about the judge's style and presentation. These are matters which may have led to permission to appeal having been granted in the way it was. Criticisms arising from style and presentation are, however, different from showing an error of law. A full reading of the decision shows that the judge had regard to all the relevant factors arising from the evidence, took account of the submissions he heard, and reached sustainable conclusions supported by reasons which adequately addressed the material issues in this appeal.

Conclusions

28. The making of the decision of the Judge of the First-tier Tribunal did not involve the making of an error on a point of law.

29. The decision is not set aside.

30. I uphold the decision dismissing the appeal.

Anonymity

No anonymity direction was made by the First-tier Tribunal. I have not been asked to make an anonymity direction and see no reason of substance for doing so.

Deputy Upper Tribunal Judge Deans 4th February 2018