Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: VA/07369/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 4 February 2014	**On 17 March 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

ENTRY CLEARANCE OFFICER - AMMAN

Appellant

and

ABDULKADER ALBADRA

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms D Albadra, Sponsor

DETERMINATION AND REASONS

1. The Entry Clearance Officer appeals against the decision of the First-tier Tribunal (Judge Afako) which, in a determination promulgated on 18 October 2013, allowed the appellant's appeal against the Entry Clearance Officer's decision on 28 March

2013 refusing to grant him entry clearance under para 41 of the Immigration Rules (HC 395 as amended), in order to visit his daughter, Ms Dima Albadra.

2. Although this is an appeal by the Entry Clearance Officer for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Syria as is his daughter, the sponsor. The sponsor is a Tier 4 (Student) in the UK. She came to the UK on October 2010 when she was 23 years of age and undertook a Masters degree in Architecture at the University of Bath. She is currently studying for a PhD in Architecture.

4. On 27 February 2013, the appellant applied for entry clearance in order to visit the sponsor in the UK for 20 days. In refusing the appellant's application on 28 March 2013, the ECO did not accept that the appellant was a genuine visitor who intended to leave at the end of his visit or that he would be adequately maintained and accommodated in the UK and could pay for the cost of his return journey. Consequently, the ECO refused the application under para 41(i), (ii), (vi) and (vii). That decision was maintained by the Entry Clearance Manager on 2 June 2013.

5. The appellant appealed to the First-tier Tribunal. The appellant only had limited appeal rights because the appeal was governed by s.88A of the Nationality, Immigration and Asylum Act 2002. The appellant's situation did not fall within the Immigration Appeals (Family Visitor) Regulations 2012 (SI 2012/1532). This was because, although he had the requisite relationship as the father of the sponsor (see reg 2(1) and (2)(a)), the circumstances of the sponsor did not fall within regulation 3 (as required by reg 2(1)(b)) as she did not have settled status in the UK being here only with temporary leave as a Tier 4 student. As a result, the appellant could only appeal on human rights and race relations grounds. He could not rely directly on the Immigration Rules, in particular para 41 (see s.88A(1) and (3)).

6. Consequently before Judge Afako the appellant relied upon Article 8 of the ECHR. A claim based upon race relations grounds was not pursued although Judge Afako did remark that any such claim was made out (see para 21 of the determination).

7. The appeal turned, therefore, on whether the refusal of entry clearance was a breach of Art 8.

The First-tier Tribunal's Decision

8. Having set out some of the evidence and the appellant's claim, at para 11 Judge Afako found that the appellant and his daughter enjoyed family life and the ECO's refusal of entry clearance interfered with that family life so as to engage Article 8.1. Judge Afako said this at [11]:

> "11. With regard to article 8, having regard to the step-by-step Razgar approach, the first composite question here is whether the decision entails an interference with a protected right of sufficient gravity to engage article 8.

> The refusal of the application of course means that the appellant cannot come to the United Kingdom to see his daughter. It seems to me that there is a family life between the appellant and his daughter, who is a young student in the United Kingdom, although I expect she is over the age of 18. The family life endures in this case because the appellant and his wife are supporting their daughter through her education and she remains very much a part of the family and is their dependant. The need for the support of her parents also arises, as the appellant explains, because their country is at war and this has (unsurprisingly) had a psychological impact on the appellant's daughter, hence the need for frequent visits. Whether viewed as family or private life, I consider that article 8 is engaged on these facts, and one must also take into account the adverse impact that the decision has on the appellant's daughter, who consequently suffers greater isolation at a difficult time, although she is lawfully here in the United Kingdom."

9. Judge Afako then turned to Article 8.2 and, in particular, the requirement that the ECO's decision should be "in accordance with the law". As regards that, at para 12 of his determination Judge Afako reasoned that the decision could not be "in accordance with the law" if in fact the appellant satisfied the requirements of the Immigration Rules, namely para 41. He said this:

> "12. The next key question is whether the decision is in accordance with the law. This question is not answered simply by pointing to a legitimate framework for making the decision or to the formalities: it involves, too, an assessment of whether the law applicable was correctly applied. In an immigration case, a decision which is not sustainable by reference to the immigration rules cannot be in accordance with the law. When faced with an article 8 challenge to an immigration decision, the lawfulness of that decision cannot be assumed."

10. Consequently, at paras 13-19, Judge Afako considered the requirements of para 41 for entry clearance as a visitor and concluded that the appellant met those requirements. He accepted that the appellant was a genuine visitor who would leave at the end of his visit and that he had sufficient means to be adequately maintained and accommodated in the UK and to pay for his return fare. The Judge's reasons were as follows:

> "13. In this case, therefore, consideration of the second Razgar question requires an appraisal of whether the facts of the case as at the time of the decision held against the provisions of the rules required that entry clearance be issued to the appellant.
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> 14. In this case, this requires an examination of the reasons for the decision. The respondent placed particular reliance on the fact although it was stated that he is the Managing Director of a Water Treatment Plant in Aleppo, Syria, that the appellant seemed to be outside of his country Syria, which is acknowledged to be in a stage of turmoil, and the appellant appears to be residing in Jordan. In fact the appellant counters that he is not residing in Jordan, although his son and wife are based there. He also points to his passport, which indicates that he has been travelling back and forth from Jordan. There has been no response to these assertions although the entry clearance manager was aware of them. For my part I accept that he continues to have business interests in Syria and in the region. One of the issues that might not have been fully comprehended was that the appellant

> is in fact a businessman, and not merely an employee as the ECM's decision appeared to apprehend.
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> 15. The question of where the applicant resides is not determinative of the key issue under paragraph 41(i) and (ii) which focus on the applicant's bona fides in asserting that they intend a visit for a limited period only.
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> 16. I note that the respondent has not taken into account the fact (which is highly relevant to his bona fides) that he has previously visited and left the United Kingdom, without any suggestion of a breach of the terms of his leave. He had also travelled in Europe as the documents he submits indicates.
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> 17. As for the question of maintenance and accommodation, once is accepted (as I have done) that the appellant's intends only visits for a limited period to see his daughter, then the question becomes whether he can afford to come to the United Kingdom.
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> 18. Here too, the evidence is clear that the appellant is a person of sufficient means to afford a visit to this country. Not only is he able to maintain his wife and son in Jordan but his is putting his daughter through university in this country as a foreign student. He has produced his bank accounts. There is no question that he and his wife can afford to visit the United Kingdom.
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> 19. The evidence for all of the above is very clear and there ought properly only to have been one outcome to this application on the facts. Accordingly, I must conclude that the decision is not in accordance with the law, national security, public safety or the economic well-being of the country. No allegation has been made in this case relating to public safety or protection concerns."

11. On that basis, Judge Afako allowed the appeal under Article 8 as the decision was not "in accordance with the law".

12. In addition, at para 20 Judge Afako expressed a tentative view that, in any event, the ECO's refusal to grant entry clearance was not proportionate. He said this:

> "20. This is a genuine family visit to the appellant's daughter who is living away from her family in circumstances where the conflict in her home country is doubtless causing her a certain amount of anxiety, as asserted in the grounds of appeal. The effect of the decision on her is also a matter to be taken into account, and I accept that the refusal to allow her father to see her has a deleterious effect on her stay and studies in the United Kingdom, and would be a further reason for setting aside the decision, had the matter to be determined by reference to a proportionality assessment."

The Appeal to the Upper Tribunal

13. The ECO sought permission to appeal to the Upper Tribunal on essentially two grounds. First, the Judge had been wrong to allow the appeal under Article 8. He had failed to give adequate reasons for doing so, in particular, he had failed to take into account that the appellant could not succeed under the Immigration Rules. Secondly, the Judge had failed to give adequate reasons for finding that the refusal of entry clearance was disproportionate.

14. On 20 November 2013, the First-tier Tribunal (Judge Cheales) granted the ECO permission to appeal. Thus, the appeal came before me.

15. The appellant was not legally represented but his daughter, the sponsor, attended and made submissions on the appellant's behalf.

16. Mr Richards essentially made three submissions. First, he submitted that the Judge had been wrong to find that the ECO's decision was not in accordance with the law simply because the Judge had taken the view that on the facts the appellant succeeded under the Immigration Rules, namely para 41. Secondly, he submitted that the Judge had provided inadequate reasoning for his findings that the appellant and his daughter had family life and that the decision to refuse a visit was an interference which engaged Article 8.1. Thirdly, he submitted that if the Judge had erred in law then I should remake the decision and dismiss the appeal under Article 8.

Discussion

17. It is common ground in this appeal that the appellant's appeal to the First-tier Tribunal was limited to human rights and race relations grounds by virtue of the combined effect of s.88A of the 2002 Act and the Family Visitor Regulations 2012. It is not necessary, therefore, for me to set those out here.

18. The first issue is whether Judge Afako erred in law in paragraph 12 of his determination in concluding that, for the purposes of Article 8.2, an interference with an individual's family life will not be "in accordance with the law" if the Entry Clearance Officer was wrong to find that the individual did not meet the requirements of the Rules and, in fact, the individual does satisfy the requirements of the relevant rules.

19. The meaning of the phrase "in accordance with the law" is found in the Strasbourg jurisprudence. The European Convention on Human Rights is an international treaty. As such, the phrase "in accordance with the law" must be given an autonomous meaning equally applicable in each of the countries of the Council of Europe in which the Convention applies (see R v SSHD ex p Adan and Aitseguer [2001] 2 AC 477).

20. The Strasbourg Court has addressed on a number of occasions the question of the meaning of the Convention phrase "in accordance with the law" or an alternative phrase of "prescribed by law" which is understood to bare the same meaning (see, *Human Rights Law and Practice* (3rd edn 2009) (eds Lester, Pannick and Herberg) at paras 3.14 and 4.8.88). The Strasbourg case law makes plain that the phrase encompasses a "principle of legality". The case law was summarised by Lord Hope in R (Purdy) v DPP [2010] 1 AC 345; [2009] UKHL 45 at [40] as follows:

> "40. The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and

> sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in way that is not proportionate. I derive these principles, which have been mentioned many times in subsequent cases, from *Sunday Times v United Kingdom* (1972) 2 EHRR 245, para 49 and also from *Winterwerp v The Netherlands* (1979) 2 EHRR 387, pp 402-403, para 39, *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647, p 669, paras 58-59 which were concerned with the principle of legality in the context of article 5(1), *Silver v United Kingdom* (1983) 5 EHRR 347, paras 85-90; *Liberty v United Kingdom* (2008) 48 EHRR 1, para 59 and *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112."

21. At [41] Lord Hope provided some colour to the three requirements of 'legality' (a legal basis; accessibility; arbitrary application) as follows:

> "41. The word "law" in this context is to be understood in its substantive sense, not its formal one: *Kafkaris v Cyprus* (2008) 25 BHRC 591, para 139. This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute. As the Grand Chamber said in that case, in paras 139-140, it has been held to include both enactments of lower rank than statutes and unwritten law. Furthermore, it implies qualitative requirements, including those of accessibility and foreseeability. Accessibility means that an individual must now from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it what acts and omissions will make him criminally liable: see also *Gülmez v Turkey*, Application No 26330/02, 20 May 2008, para 49. The requirement of forseeability will be satisfied where the person concerned is able to foresee, if need be with appropriate legal advice, the consequences which a given action may entail. A law which confers a discretion is not in itself inconsistent with this requirement, provided the scope of the discretion and the manner of its exercise are indicated with sufficient clarity to give the individual protection against interference which is arbitrary: *Goodwin v United Kingdom* (1996) EHRR 123, para 31: *Sorvisto v Finland*, Application No 19348/04, 13 January 2009, para 112."

22. Lord Hope's approach is settled law both at the level of the Strasbourg Court (see Lester, Pannick and Herberg, *op cit*) and also in our domestic courts. The same approach was adopted by the House of Lords in the earlier case of R (Gillan) v Commissioner for the Police for the Metropolis [2006] 2 AC 307; [2006] UKHL 12, see especially Lord Bingham of Cornhill at [31]-[35]. At [34], Lord Bingham in Gillan again emphasised that the two Convention phrases of "in accordance with the law" and "prescribed by law" address the legality of the underlying administrative or public law act:

> "34. The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis

> of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided."

23. Although I was not referred to it, I see nothing in what was said in the Upper Tribunal's decision in SC (Article 8 – in accordance with the law) Zimbabwe [2012] UKUT 00056 (IAC) at [10] as being inconsistent with the Strasbourg case law or its adoption by the House of Lords. There, the Upper Tribunal said:

> "We recognise that there are cases where a decision to refuse an extension of stay or remove a person maybe so contrary to a requirement contained in established policy or practice as to be not in accordance with the law. In such a case the analysis does not move on to justification for Article 8 purposes and the decision must be remade in accordance with the law, either by the Secretary of State or the Judge."

24. No doubt, the Tribunal had in mind a situation where the decision was "so contrary" to an established policy of practice that it was unlawful on public law grounds. Likewise, no direct assistance can be gleaned from the terms of s.86(3) of the 2002 Act which sets out, inter alia, where the Tribunal must allow an appeal when the decision is "not in accordance with the law (including the Immigration Rules)". That Parliament had chosen to include within the statutory phrase "not in accordance with the law" a decision by a Tribunal on the merits that the decision was not in accordance with the immigration rule does not assist to illuminate the autonomous meaning in the European Convention which is an international treaty.

25. The Strasbourg jurisprudence and its adoption by the House of Lords is, in my view, conclusive of the first issue raised by Mr Richards. In this appeal, Judge Afako did not determine that the ECO's decision offended the "principle of legality" summarised by Lord Hope in [40] of Purdy. Instead, Judge Afako concluded that the ECO's decision was, on the evidence, not correct. On that basis, the Judge was wrong to conclude that decision was not in accordance with the law: it was simply a decision with which Judge Afako disagreed on the evidence. The decision was lawful even if it was wrong. The decision had a legal basis in domestic law, namely the Immigration Rules; those rules were sufficiently accessible; and the law was not being applied in an arbitrary way. It cannot be said that a decision is "unlawful" or "illegal" or contrary to the law as used in the Convention simply on the basis that a Judge on the evidence (which may include evidence which was not before the original decision maker) reaches a different conclusion on the factual application of the rule. That is precisely what Judge Afako did in this appeal and, in my judgment, he erred in law in finding that the ECO's decision was "not in accordance with the law".

26. It is not necessary for me to go further in this appeal to explore precisely the scope of the "principle of legality" enshrined in the Convention phrase "in accordance with the law". The appellant was not legally represented and I did not have the benefit of contested legal argument on the issue. As a consequence, I say no more about the scope of the Convention phrase than is necessary to determine this appeal.

27. That does not mean, however, that in an appeal such as this one where the appellant cannot directly rely on the ground that the decision under the Immigration Rules

was not correctly made, that issue is irrelevant. It is relevant in the assessment of proportionality of any interference with the individual's right to respect for his/her private or family life.

28. The Immigration Rules represent the Secretary of State's policy reflecting the public interest and the legitimate aim of "the economic well-being of the country" in Article 8.2 (see, eg SSHD v Huang [2007] UKHL 11; Odelola v SSHD [2009] UKHL 25; R(on the application of Alvi) v SSHD [2012] UKSC 33). Any interference with an individual's private or family life must be "necessary in a democratic society" furthering one or more of the legitimate aims set out in Art 8.2. That is the proportionality assessment which entails balancing the public interest against the rights and interests of the individual (see R (on the application of Razgar) v SSHD [2004] UKHL 27 at [20] *per* Lord Bingham of Cornhill). Whether an individual meets or does not meet the requirements of the relevant immigration rule is relevant to that assessment. Indeed, the grounds in this appeal argue, on behalf of the ECO, that the Judge failed to have regard to the fact that the appellant could not meet the requirement of the immigration rules as a "detailed expression of Government policy on controlling immigration and protecting the public". In effect, that concedes that a Judge is entitled (perhaps even required) to determine whether on the evidence the individual in fact does or does not meet the requirements of the rules even in an appeal where an appellant is relying on Article 8 of the ECHR. The fact that an individual does meet the requirements of the Rules, and therefore falls positively within the "policy" of the Secretary of State as set out in the Immigration Rules, must be a significant factor in balancing an individual's rights and interests against the need for effective immigration control. The need for effective immigration control must necessarily be significantly diluted (if not washed away) in such a situation.

29. Consequently, although Judge Afako erred in law in finding that the ECO's decision was not in accordance with the law because, on the evidence, he concluded that the appellant met the requirements of para 41, that finding was (and would be) relevant to the proportionality assessment. Of course, this can only arise in cases where the individual is able to establish that Article 8.1 is engaged because his private and family life has been sufficiently interfered with. Only then is it necessary to consider whether that interference is justified under Article 8.2.

30. Whilst each case must dependent upon its own circumstances, in non-family visits, it is not likely that Art 8.1 will be engaged on the basis of 'private life' alone. Even in 'family visits' it will be necessary to establish that family life exists and the decision sufficiently interferes with that family life to engage Art 8.1.

31. In this appeal, Judge Afako found that Article 8.1 was engaged. I have already set out above his reasoning in paragraph 11 of his determination (see para 8 above). Mr Richards' second submission was that the Judge had inadequately reasoned that first, he had family life with his daughter over the age of 18 and that the decision by preventing him visiting his daughter was sufficiently serious to engage Article 8.1.

32. It is clear that family life does not necessarily conclude simply because a child reaches majority (see Ghising [2012] UKUT 00161 (IAC) approved by the Court of Appeal in Gurung and others v SSHD [2013] EWCA Civ 8 at [46]). The Judge noted that the sponsor was over the age of 18 (in fact she before me that she was 23 when she came to the UK); he noted that she was supported by the appellant and his wife and was their dependent. He also noted the evidence that the conflict in Syria had had a psychological impact upon the appellant's daughter and that she needed the support through frequent visits from the family. It is clear from the evidence that the appellant has visited her in the UK in 2010, 2011 and again in 2012 before leaving to return to his home country. I see no basis upon which the Judge's finding that family life existed between the appellant and sponsor can be successfully challenged. The Judge gave adequate reasons and on the evidence his conclusion was not irrational or otherwise unsustainable.

33. Likewise, given that the ECO's decision effectively excluded the appellant from visiting his daughter, that decision did interfere sufficiently with that family and private life so as to engage Article 8. The sponsor is based in the UK having successfully studied for a Masters degree and is currently studying for a PhD. As the sponsor told me, she was not subject to the same term structure as a PhD student. Although she is not settled in the UK, her leave is only temporary, her studies are ongoing and it would not be reasonable to expect her to engage in family life simply by leaving the UK to visit her family. The point of the evidence was that she needed the support of her family, from time to time, whilst she was studying in the UK. In my judgment, it was properly open to the Judge to conclude that Article 8 was engaged.

34. That then leaves the issue of proportionality. I have already set out the Judge's view in paragraph 20 of his determination above. He accepted that the refusal had a deleterious effect upon the sponsor's stay and studies in the UK and that she gained support by visits by her family. The Judge's findings that the appellant met, in fact, the requirements in paragraph 41 are not challenged. There is, therefore, little if any weight to be placed upon the legitimate aim or public interest in effective immigration control. The appellant had met the requirements that define when a visitor should be allowed entry into the UK. He is a genuine visitor who will leave at the end of his visit which he intends to make in order to support his daughter who is lawfully undertaking higher education studies in the UK. Given the circumstances of the sponsor and appellant, there is nothing unreasonable in the appellant wishing to visit his daughter in the UK rather than the reverse.

35. Balancing the public interest (such that it is) against the interference with the appellant's (and his daughter's) family life by the refusal of entry clearance, I am entirely satisfied that the decision is not proportionate. The ECO has failed to make out the justification in Article 8.2.

36. Thus, albeit for somewhat different reasons from those of Judge Afako, I am satisfied that the appellant has established that the ECO's decision breaches Article 8.

Decision

37. The First-tier Tribunal erred in law in allowing the appellant's appeal under Article 8 of the ECHR. That decision is set aside and I remake the decision allowing the appeal under Article 8 for the reasons I have given.

Signed

A Grubb
Judge of the Upper Tribunal