IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21624/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 9 December 2014	**On 12 December 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVID TAYLOR

Between

MAMURSHOKH TULKUNOV
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Harris, Counsel, instructed by Quality Solicitors (Orion)
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. Although, in this appeal, the Secretary of State is strictly the appellant, for the sake of conformity I have described her as the respondent (as she was in the First-tier Tribunal). Mr Tulkunov similarly continues to be described as the appellant.

2. The appellant, a 19 year old citizen of Uzbekistan, applied for entry clearance to the United Kingdom under the Family Reunion

provisions of paragraph 352D of the Immigration Rules. The basis of his application was that his mother (and sponsor) Mrs Malika Mahmudova has been granted refugee status in the UK. The appellant's application was made just three days before his 18th birthday. It was refused on 30 October 2013 by the Entry Clearance Officer who found that the appellant did not meet the requirements of paragraph 352D(iv) which requires the applicant to show that he

> "was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of his habitual residence in order to seek asylum."

3. The appellant's appeal came before First-tier Tribunal Judge A M Black who allowed the appeal under the Immigration Rules in a determination promulgated on 22 September 2014. The judge (at paragraph 14) noted that the sponsor left Uzbekistan and entered the UK on 23 March 2007 as a student with leave which, by extension, continued until 16 October 2011. Her subsequent applicant for an extension was refused. Only then did the sponsor apply for indefinite leave to remain outside the Immigration Rules on human rights grounds. Her appeal against that refusal was allowed under Article 3 ECHR and, although the sponsor has never applied for refugee status in the UK, the respondent nevertheless granted her refugee status on 2 May 2013. The appellant's application to join his mother in the UK was made some three months later.

4. Judge Black noted that when the sponsor made her application for indefinite leave to remain, and during her appeal hearing itself, she made it clear that she did not seek refugee status because she wanted to be able to visit her children in Uzbekistan and did not consider herself to be at risk of harm during such visits. It was noted that between June 2008 and March 2011 the sponsor had visited her children, of whom the appellant is one, on three occasions. The judge allowed the appellant's appeal under the Immigration Rules based on her interpretation of paragraph 352D(iv).

5. The Secretary of State was granted permission to appeal on the basis of the grounds which, in essence, argue that 352D(iv) applies only where an applicant was part of the family unit of the person granted asylum at the time that person left the country of her habitual residence in order to seek asylum. But the sponsor left Uzbekistan in 2007 not to claim asylum, but after she had obtained leave to enter as a student. She never claimed asylum although she was subsequently granted asylum status by the respondent in May 2013.

6. At the hearing before me Mr Avery invited me to find that the judge erred in her holding that the appellant fulfilled the criteria in paragraph 352D(iv). The judge, he submitted, was vague in her arguments and although the judge accepted that the sponsor had a fear when she left her country, she did not in fact leave Uzbekistan in order to seek asylum. She came as a student. The Rules do not cover the situation of this appellant. The sponsor is, in effect, a refugee *sur place* and the Rules do not cover such a situation in connection with family reunion.

7. In reply Mr Harris acknowledged that the issue before me is a narrow point. It appears from the basic reading of the Rules that a *sur place* refugee cannot take advantage of the family provisions in the Rules. He submitted, however, that that was not in accordance with the spirit of the Refugee Convention nor of Article 23 of the Qualification Directive 2004/83/EC which provides that Member States must ensure that family unity can be maintained. He argued that the Rules appeared to discriminate against applicants who relied on *sur place* refugees. In those circumstances, the appellant ought to be able to succeed on the basis of his family life under Article 8.

8. My judgment, however, is that the appellant cannot succeed. I find that the judge erred in her interpretation of paragraph 352D(iv). It is clear from the ordinary reading of that Rule that the sponsor in this case never "left the country of her habitual residence in order to seek asylum". Had that been the case she would have applied for asylum on arrival and not have remained here for some years as a student. She deliberately chose not to claim asylum. She has returned several times to Uzbekistan in order to see her children and clearly has no fear of being there for relatively short periods of time.

9. The First-tier Tribunal decision must therefore be set aside in its entirety.

10. I find therefore that the appellant cannot succeed under 352D(iv). Mr Harris submitted that the family reunion Rules discriminated against *sur place* refugees and that, at the very least, the appellant should succeed under Article 8. I do not find that argument convincing because there are other avenues for entry open to the appellant under the Immigration Rules. If an applicant, such as the appellant, is unable to obtain entry clearance under the Family Reunion provisions there is nothing to prevent him making an application as a family member under Appendix FM. As to Article 8, his family life is and has always been in Afghanistan where he lives with his father and his siblings. He would like to come to live with his mother in the UK and if he is able to meet the requirements of Appendix FM there may be nothing to prevent

that happening in the future. But the present refusal is neither discriminatory nor an interference with his established family life.

11. Nor, with respect, is there any merit in Mr Harris's submission in relation to Article 23 of the Qualification Directive which refers to family unity. It need only be said that if the appellant were to join his mother in the UK, his family unity with his father and siblings would be weakened. Family unity cannot mean that members of one family, some of whom are living in one country and others in another, have a right to choose where they wish to live.

Decision

12. The First-tier Tribunal determination contains an error of law as set out above and is hereby set aside in its entirety. I remake the decision by dismissing the appeal of Mr Tulkunov.

13. As the appellant is now over the age of 18 and as no application for anonymity has been made, I revoke the anonymity direction made in the First-tier Tribunal.

14. The appeal having been dismissed I make no fee award.

Deputy Upper Tribunal Judge David Taylor
11 December 2014