



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/04830/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 15th April 2015

Determination Promulgated
On: 20th April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

Deana Aboswed
(no anonymity direction made)

Appellant

and

Entry Clearance Office, Beirut

Respondent

Representation:

For the Appellant: Mr Moran, Alex Moran Immigration and Asylum

For the Respondent: Ms Holmes, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Syria date of birth 28th February 1998. She appeals with permission¹ the decision of the First-tier Tribunal (Judge R.G Walters) to dismiss her appeal against a decision to refuse to grant her entry clearance.

¹ Permission was granted on the 23rd January 2015 by First-tier Tribunal Judge De Haney

Background

2. The application for entry clearance was made on the 11th September 2013. The basis of the application was that the Appellant is the niece and adopted daughter of Mr Ibrahim Abdul Hamid Abou Swaid, a Syrian national with refugee status in the United Kingdom. She made her application at the same time as Mr Abou Swaid's wife and three sons. They were all granted entry clearance as the family members of a refugee. The Appellant was refused with reference to paragraph 352D(i) because she is not Mr Abou Swaid's biological daughter. Indeed she had never asserted that to the case, having plainly stated from the outset that she is his *de facto* adopted daughter, having lived under his care since she was five years old. It was perhaps for that reason that the ECO withdrew his original decision and invited the Appellant to submit evidence establishing that she met the requirements of paragraph 319X of the Immigration Rules, which provides for entry clearance as a "child of a relative with limited leave to remain as a refugee":

319X. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the child of a relative with limited leave to remain as a refugee or beneficiary of humanitarian protection in the United Kingdom are that:

(i) the applicant is seeking leave to enter or remain to join a relative with limited leave to enter or remain as a refugee or person with humanitarian protection; and:

(ii) the relative has limited leave in the United Kingdom as a refugee or beneficiary of humanitarian protection and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and

(iii) the relative is not the parent of the child who is seeking leave to enter or remain in the United Kingdom; and

(iv) the applicant is under the age of 18; and

(v) the applicant is not leading an independent life, is unmarried and is not a civil partner, and has not formed an independent family unit; and

(vi) the applicant can, and will, be accommodated adequately by the relative the child is seeking to join without recourse to public funds in accommodation which the relative in the United Kingdom owns or occupies exclusively; and

(vii) the applicant can, and will, be maintained adequately by the relative in the United Kingdom without recourse to public funds; and

(viii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity or, if seeking leave to remain, holds valid leave to remain in this or another capacity.

3. On the 11th February 2014 the Appellant's representative informed the Respondent that although satisfying all other requirements of 319X, she could not show that she could be maintained and accommodated without any additional recourse to public funds. She wished to pursue the application on Article 8 grounds alone. In a fresh refusal dated 12th March 2014 the Respondent indicated that he was not minded to grant entry clearance on that basis since there was insufficient evidence to demonstrate that the facts were as claimed. For instance the only court document provided in respect of the guardianship was dated July 2013.
4. The Appellant appealed on human rights grounds. At that hearing it was established that since the decision the Sponsor Mr Abou Swaid had come into funds such that he would be able to meet the maintenance and accommodation requirements the rules. The HOPO relied on this and submitted that the Appellant should make an application under 319X. At paragraph 25 of the determination the reasoning is summed up as follows:

“Having considered the evidence and the submissions, I did not find there are arguably good grounds for granting leave to enter outwith the Rules because I find an application under paragraph 319X may well succeed. Following the case of Gulshan, I therefore do not propose to engage on a ‘Razgar’ exercise”.

Error of Law

5. I need not set out the parties' submissions in detail since before me Mr Moran and Ms Holmes were in agreement that the determination must be set aside. A surprising number of errors might be identified in that short passage set out above, but it suffices to say that the First-tier Tribunal erred in dismissing an out of country entry clearance appeal against a decision dated the 12th March 2014 on the basis of a change in circumstance which post-dated that decision by some six months. The task of the Tribunal was to assess whether, on the 12th March 2014, the decision of the ECO was a disproportionate interference with, or lack of respect for, this young lady's private and family life. The determination manifestly fails to grapple with that question and it is therefore set aside.

The Re-Made Decision

The Oral Evidence

6. I heard oral evidence from four witnesses: the Sponsor Mr Ibrahim Abdul Hamid Abou Swaid, his wife Mrs Manar Abou Swaid, her brother Mr Ziyad Abdul Hamid Abo Sweed and his wife Rasha Adnan Al Lakud.

7. Mr Abou Swaid confirmed his statement dated 29th September 2015 was true. He explains therein that he and his wife came to care for the Appellant after her mother remarried. The Appellant's own father had disappeared whilst working in Iraq when she was a toddler, and when she was five her mother had married again. Mr Abou Swaid is the elder brother of the Appellant's mother. In Syria it is often the case that new husbands will refuse to take children from another man into their family. So it was with the Appellant. Her mother's new husband did not want to take her, and so she came to Mr Abou Swaid. In his evidence he said that from that day on, when she was five years old, she has lived with him and his wife. He explained that he continued to seek guidance from her paternal grandfather as a formality/custom, but he was an old man and in fact it was the Abou Swaid's who took the decisions about the Appellant's life as well as the day-to-day care. Ms Holmes asked about the whereabouts of the Appellant's mother. The Appellant had seen her from time to time as she grew up when the trouble started in 2011 she and her husband moved far away to another part of Syria, about 350km away from Damascus. At present no-one has had any contact with them and their whereabouts are unknown. Even if they could be found the Appellant cannot turn to them for support for the reasons already outlined: "if he would not take her when she was a little girl, why will he take her now?".
8. When the Appellant came to live with the Abou Swaids they had just married. Mrs Abou Swaid was pregnant with their first child. They didn't get any formal paperwork - they never needed to. It was an arrangement within the family. Mr Abou Swaid explained that he and his wife have three sons. The Appellant is therefore very special as she is their only daughter. He became emotional as he described how difficult it has been for the family to be separated. He said that whenever he speaks to the Appellant he promises her that he is trying to resolve her situation and bring her here. He describes her as being a "beautiful, quiet girl". He said that she is "very sweet - everybody likes her". She is a good student - her favourite subjects are Arabic and maths, and she also speaks English. He manages to talk to her now about twice a week - his wife more often. They use 'apps' such as 'whatsapp' and 'viber' so communication depends on the internet working. Because of the fighting it can go down sometimes and then they cannot speak.
9. The background to the family being separated was explained as follows. In November 2012 they were all living together in their family home. The neighbourhood was attacked suddenly one night. Everyone was stuck in their homes. When the firing stopped they took the chance to flee - they grabbed their passports and essential items and left very suddenly. They went to Dara'a. Mr Abou Swaid explained that they had not really thought at that time that they would not be able to return to their home. They had hoped to do so, but it didn't work out like that. When it became apparent that they needed to get out of Syria they decided that Mr Abou Swaid should go first. He didn't want to

take the family because the journey was dangerous. Once he got to the UK and obtained refugee status, the family made their application.

10. Mr Abou Swaid appeared to find it difficult to talk about the Entry Clearance Officer's decision. In his oral evidence he looked strained and upset when he spoke about the decision to leave the Appellant behind after his wife and sons were granted entry clearance: "I was faced with the terrible choice of leaving all my family in danger in Syria so that they could stay with Deana, or leaving Deana behind alone with relatives. In the end, I decided that I couldn't risk losing everyone I loved and so my wife and sons travelled here".
11. When they left the Appellant was left with his wife's sister and her husband. Although obviously she knew them beforehand she was not close to them and so this was not ideal, but it was the only choice. They are living in a suburb of Damascus called al-Tadhamon. It is immediately adjacent called Yarmouk, a neighbourhood which has very recently been taken over by ISIL. At the date of the decision the security situation there was poor but it is even worse now. There was shelling and fighting between the government and the rebels, but now the situation is even more precarious. The Appellant is effectively stuck in the house. She cannot go out because it is too dangerous. She has not been to school for two years. She feels uncomfortable because she is not with her own family. The adults have to travel to a different district to get food for the family - the shops are all shut where they are. Every time they go out they do not know what to expect - they could be attacked at any time. As well as the fighting people are being arrested - on both sides of the line.
12. Mr Abou Swaid was asked why, now that he is able to maintain and accommodate the Appellant, he could not simply make another application for her, as was suggested before the First-tier Tribunal. He explained that the journey from Damascus to either Beirut (previously the relevant post) or Amman (as it is now) are difficult and dangerous. She does not have papers to cross the border and it is hard for her to do this. The process is expensive. It was put to him that he failed to provide much documentary evidence about their life with the Appellant. He said that everything that they had had, such as school reports, or more photographs, were all left in the family home when they fled that night in November 2012. It is not possible for anyone to retrieve them now. They are pursuing this appeal because they want the quickest possible route for the Appellant. His wife's sister and her family want to move to Jordan but they cannot take the Appellant with them because she has no papers. The only thing that is keeping them there is waiting for the Appellant to be granted entry clearance.
13. Mrs Manar Abou Swaid adopted her witness statement dated 29th September 2015. She said that she was married in August 2001 and that the Appellant came to live with them at the beginning of 2003, when she was pregnant with their eldest son. It had been a joint decision to take her in. Mrs Abou Swaid described the Appellant as being a "beautiful, calm" girl whom she thought of

as her daughter. Because she is the only girl they share a “special bond”. She said that all they wish for is the Appellant to be with them: “leaving Deana in Damascus was the toughest thing I have ever done and I have been wracked with guilt since the moment we left Syria”. She says that every time she speaks to her sister she tells her that they want to leave and that she needs to sort out the Appellant’s situation. They have two sons of their own and they are all living in one bedroom and one living area. It is very stressful for all of them.

14. Ziyad Abo Sweed and his wife Rasha Al Lakud adopted their witness statements, both dated 29th April 2015. These served to confirm that to their personal knowledge the Appellant has lived with her adoptive parents since she was a little girl. Ms Holmes had no questions for either of these witnesses.

The Documentary Evidence

15. The Respondent’s bundle contains the evidence submitted by the family after the Appellant was first refused. After the ECO had requested further evidence they managed to obtain a court order from the Deputy Sharia Judge of Nawa Abdulmajid Badawah, made under the Law of Personal Status. Having heard from Mr Abou Swaid’s lawyer, having had regard to the fact that the Appellant’s paternal grandfather had no objection and that her father is missing for over ten years, Judge Badawah ordered that Mr Abou Swaid has full legal guardianship. The order is dated 10th July 2013. There is further written confirmation from the Appellant’s birth mother stating that she has no objection to the Appellant travelling with Mr Abou Swaid who she describes as having been the legal guardian since the date of her marriage.
16. Both Respondent’s and Appellant’s bundles contained a number of photographs of the Appellant at various ages with the Abou Swaid’s and their children. The Appellant’s bundle also contained numerous “screenshots” of her ‘whatsapp’ correspondence with family members in the UK.
17. Payslips and tax credit correspondence was also provided to demonstrate the family’s current income.

My Findings

18. I have no hesitation in finding the evidence given in this appeal to be entirely credible. Mr and Mrs Abou Swaid spoke at length with consistency and detail about their relationship with the Appellant and the strain of separation from her was very evident in both of them. I find as fact that the Appellant has been the *de facto* adopted daughter of the Abou Swaids since she was five and that more recently Judge Badawah of the Sharia Court in Nawa has ordered that Mr Abou Swaid be considered her legal guardian as a matter of Syrian law. I accept and find as fact that there is a family life between the Appellant, her

adoptive parents and brothers in the UK. I do so having recognised that Article 8 requires the decision-maker to focus on the substance of the claimed relationship rather than the formality: Singh v ECO [2004] EWCA Civ 1075.

19. I find as fact that the refusal to grant her entry clearance amounts to an interference with, or 'lack of respect' for her family life. All of her family members are refugees in the UK and cannot return to Syria.
20. There is no dispute that the decision was one that the Respondent was in law entitled to make, or that the denial of entry to persons who do not meet the requirements of the Rules is rationally connected to the legitimate Article 8(2) aim of protecting the economy.
21. The Immigration Act 2014 amended the Nationality, Immigration and Asylum Act 2002 to insert into the statute mandatory considerations when weighing proportionality. I have had regard to these factors, set out in section 117B. The maintenance of immigration control is clearly in the public interest: I have attached great weight to the fact that at the date of decision the Appellant failed to qualify under the Rules. I agree that it is in the public interest that the Appellant is able to speak English because if she does she will be better placed to integrate. I have heard credible oral evidence from her parents that she does, and I further find that as a teenager she is likely to quickly improve her language skills after arrival. I accept that it is in the public interest that the Appellant is financially self-sufficient. I bear in mind that at the date of the decision her family did not have sufficient funds to support her to the level required by the Rules (although I acknowledge that that situation has changed now that Mr Abou Swaid is in employment). The remainder of the provisions in the Act are not relevant since the Appellant seeks to protect a family life that was established and has been maintained when she was outside the UK.
22. I have balanced the Appellant's failure under the Rules against the factors in her favour. I remind myself that the number of cases likely to succeed on Article 8 grounds where they have failed under the Rules is expected to be very small, indeed exceptional. I am quite satisfied that this is such a case.
23. The nature and quality of the Appellant's family life with her parents and siblings is immense. She is a child of this family, and she has been separated from them by a perfect storm of brutal civil war, bureaucracy and circumstance. Having been entirely dependent upon them for her entire conscious life I accept that she will be depressed and bewildered by their separation. For their parts I accept that her parents are devastated by having made the choice that they have, albeit in desperate circumstances. I attach some weight to the sense of loss that they and their sons are also suffering : Beoku-Betts v SSHD [2008] UKHL 39, R (Ahmadi and Ahmadi) v SSHD [2005] EWCA Civ 1721.
24. The Appellant's situation at the date of decision was difficult and dangerous. She is living in a suburb of Damascus that has been affected by the ongoing

conflict. I accept the oral evidence of her parents that she is confined indoors, sharing a space of two rooms with two adults and two other children. She has not attended school for two years, even though she is a good student who enjoys her education. Without friends or stimulation she is presently living a very limited existence. She is deprived of her family life with those closest to her; but is further denied an effective private life. The extent of the interference is therefore substantial.

25. Mr Moran has very helpfully set out a schedule of income for the UK based family, and a KA (Pakistan) [2006] UKAIT 00065 comparator table showing that the present weekly income of £449.10 is in excess of the £396.47 that a family of two adults and four children would receive on benefits. It was no doubt this evidence which led Judge Morgan to make the findings that he did about paragraph 319X. Whilst I accept that Mr Abou Swaid does now have that income from his work and tax credits it is not something that I am going to attach weight to in the context of the decision on Article 8. That is because it is very difficult to say that this financial security was something reasonably foreseeable to the ECO when he took his decision in March 2014. Although I have no reason to doubt that Mr and Mrs Abou Swaid wish to work hard and provide for their family, this income is not something that the ECO could have predicted then.
26. Having considered all of the evidence I consider that it would be wholly disproportionate to refuse to issue this young lady with entry clearance today. To expect her to make an arduous and dangerous journey to make another application, and then to wait yet more months away from her family until it is dealt with, is contrary to her best interests and disproportionate. In the circumstances it cannot be shown to be necessary in a democratic society in pursuit of any of the aims set out in Article 8(2).

Decisions

27. The determination of the First-tier Tribunal contains an error of law and it is set aside.
28. The decision in the appeal is remade as follows:

“The appeal is dismissed under the Immigration Rules.
The appeal is allowed on human rights grounds.”

Directions

29. There was no request for an anonymity direction and I see no reason to make one.

30. This appeal concerns a minor who is the last member of her immediate family left in Syria. The decision was contrary to Article 8 when it was taken. The Appellant currently meets the requirements of the Rules. There is therefore no justification for any further delay, which would be contrary to the Appellant's best interests. Although the Respondent is not in this situation bound by the terms of s55 of the Borders, Citizenship and Immigration Act 2009 policy dictates that he must have regard to the Appellant's welfare. I find that any further delay in the reunion of this family would be wholly contrary to her best interests. **I therefore direct that entry clearance be granted upon receipt of this determination.**

Deputy Upper Tribunal Judge Bruce
15th April 2015