Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/07303/2017
HU/06149/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 May 2019	**On 14 May 2019**

Before

THE HONOURABLE MR JUSTICE SOOLE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE McWILLIAM

Between

IM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms C Litchfield, Counsel instructed by Kenton Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

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.

1. This is the appeal against the decision of the First-tier Tribunal, Judge Hussain, promulgated on 9 January 2019, which dismissed his appeal against two separate decisions of the respondent. The first was dated 9 August 2017 and refused him a residence card as the extended family member of an EEA national. The second was dated 19 February 2018 and refused his human rights claim. Permission to appeal was granted by Judge Saffer on 1 February 2019.

2. We have granted the appellant anonymity in order to protect the identity of his children.

3. The appellant is a national of Albania born 6 February 1983. He arrived clandestinely in this country on 28 October 1998, then aged 15, with his father. His father having returned to Albania, the appellant claimed asylum as an unaccompanied minor on 26 March 1999. Eventually on 24 September 2004 he was granted indefinite leave to remain. Between May 2004 and February2005 he was convicted of a number of driving offences receiving various forms of community punishment. On 18 July 2005 he was convicted of assault occasioning actual bodily harm and sentenced to four months' imprisonment suspended for fifteen months. On 10 March 2006 at Reading Crown Court he was convicted of wounding/inflicting grievous bodily harm and sentenced to fifteen months' imprisonment, together with a consecutive term of three months by way of activation of a suspended sentence. This produced a total of eighteen months' imprisonment. On 18 June 2007 a notice of deportation order was served on him. Following exhaustion of his appeal rights he was deported to Albania on 27 September 2007. On 27 July 2010 he unlawfully entered the United Kingdom and was deported the following day. He again returned unlawfully on, according to his account, 10 September 2010.

4. He began living in the UK with IK, a national of Latvia. They have three children, J, born on 24 September 2013, aged 5, M born on 21 October 2014, aged 4, and H born on 8 September 2015, aged 3. The appellant and his partner remain unmarried.

5. On 16 September 2016 he submitted an application to the respondent for the issue to him of a residence card pursuant to the Immigration (European Economic Area) Regulations 2016. Regulation 18(4) provides that the Secretary of State may issue a residence card to an extended family member who is not an EEA national, if certain conditions are satisfied. These include that the relevant EEA national is a qualified person and that in all the circumstances it appears to the Secretary of State

appropriate to issue the residence card. For these purposes an extended family member includes a person who is the partner of and in a durable relationship with an EEA national and is able to prove this to the decision maker (Regulation 8(5)) and a qualified person includes an EEA national who is a worker exercising treaty rights (see Regulations 4(1)(a) and 6). By Regulation 17(1) the Secretary of State must issue a registration certificate to an applicant subject to proof of matters including that the applicant is a qualified person.

6. The appellant's application for a residence card was refused on 9 August 2017 on the basis that the respondent was not satisfied that IK was a qualified person. The appellant appealed to the First-tier Tribunal and the appeal was listed to be heard on 20 June 2018. In the meantime, on 15 September 2017 a one stop notice was served on the appellant. This led to a human rights claim which was refused on 19 February 2018. The decision in particular took account of Immigration Rule 399D to which we shall return. He appealed against that decision. In due course the two appeals were listed to be heard together on 29 October 2018, the hearing on 20 June having been vacated. Shortly before that vacated hearing, on 1 June 2018, the respondent issued IK with a registration certificate pursuant to Regulation 17.

7. At the hearing of the appeals on 29 October 2018 the central issue on the refusal of the residence card was whether IK was a qualified person, namely exercising treaty rights in work. The judge received written and oral evidence from the appellant and IK. The judgment records her evidence of the issue of the registration certificate for which she had applied at the end of May 2018. It continues:-

> "The document was given to her on the basis of her employment with Caversham Ltd for whom she still works. With her application she submitted statements up to June 2018. She started working for Caversham from July last year. Initially she worked part-time until 1 November last year. When it was put to her that her statement does not say that, she was silent."

The judge concluded that he was not satisfied that she was exercising treaty rights. He stated:-

> "31. … In making that decision, I do have regard to the fact that the sponsor has been issued with a Registration Certificate on 1 June 2018. In oral evidence, the appellant's sponsor said that this was on the basis of her employment with a company called Caversham Construction Ltd. I have no way of knowing why the Secretary of State granted the sponsor a registration certificate. Its mere issuance does not in my mind amount to a formal concession behind which this Tribunal should not go. In my view the Tribunal has the task in reaching its own decision as to whether the sponsor is employed.

32. In this regard, I have taken into account the four separate statements deposed by the appellant and his sponsor. I have to confess that the statements were thoroughly unimpressive. There was very little there that was of assistance to the Tribunal in making the finding I am required to make. In fact, it positively hindered the appellant in that the appellant's statement attached to his bundle dated 19 October 2018 said that his sponsor started working for Caversham from 17 August 2017, whereas, his statement attached to his 14 June 2018 bundle asserted that she started working there from 1 July 2017.

33. Other than a P60 for the year ending 5 April 2018, there was very little supporting evidence of the sponsor's exercise of treaty rights. It was claimed that she continues to work for the business, yet the payslips, which are sporadic, appear to go no further than 30 April 2018 and the bank statements show only one deposit of what appears to be a salary on 23 February 2018 and nothing beyond. In fact, the Tribunal has been presented only with bank statements that cover the whole month of February 2018 only. If the sponsor is paid into her account and she has been working since 2017 then there is no reason why all of the payslips pertaining to her employment as well as bank statements could not have been produced.

34. In view of my findings above, the conclusion to which I have come is that I am not satisfied that the sponsor was exercising treaty rights at the date of application, nor is she exercising treaty rights as of the date of hearing."

8. The essential ground of appeal from that decision is that the registration certificate of 1 June 2018 established in favour of IK that she was exercising treaty rights at that date and that the judge wrongly went behind that certificate. In support of that proposition the appellant cites the case of **The Queen v Immigration Appeal Tribunal ex parte Hubbard [1985] IAR 110** in which it was conceded by Counsel for the respondent that an appellate body should not go behind a finding of fact of the Secretary of State which is favourable to an appellant. It is submitted that the decision was illogical and irrational because the evidence was prepared for a hearing listed for 20 June 2018 and that in consequence of the certificate of 1 June the question of whether she was exercising treaty rights was no longer in issue at the date of the appeal hearing. Furthermore, the finding was at odds with the judge's subsequent statement when considering the appeal in respect of the human rights claim that "she is not herself a British citizen but is only in the United Kingdom because she is exercising treaty rights" (paragraph 38).

9. The appellant also seeks, pursuant to Rule 15(2) to put in further evidence which includes a witness statement of IK dated 18 April 2019. This evidence was not before the Judge and there was no reason advanced before us why it should be admitted in order to decide whether the judge

erred. Even if we were to admit this further evidence, it provides no support for the argument that the Judge erred. On the contrary, it states that she began working with Caversham Construction Ltd on 17 August 2017, left that job on 1 September 2018 "and started another job with my current employer Tilehurst Valeting Garages Ltd in February 2019". Thus it confirms that IK was not at work at the relevant date of the appeal hearing on 18 October 2018.

10. In any event, in our judgment the judge made no error of law. He stated that he did have regard to the fact that the sponsor had been issued with a registration certificate. He did not exclude that as evidence of the position as at 1 June 2018. What he rejected was the argument that the grant of the certificate by the Secretary of State was the end of the matter, hence his observations in the final two sentences of paragraph 31.

11. As Counsel for the appellant, Ms Litchfield, rightly acknowledged, the judge had to decide what the position was at the date of the hearing. In reaching his conclusion the judge in effect noted that no relevant evidence postdating the certificate had been produced. In evidence he was evidently unimpressed by IK's oral evidence. The appellant and IK had no good reason simply to rely on the certificate for the purpose of the hearing on 29 October; and it was the appellant's burden to produce evidence to establish the case. As now appears from the further witness statement, this could not have been established. The ground of appeal repeats the same error in that, as was argued below, it seeks to suggest that the issue of her status was determined by the certificate dated 1 June 2018. It was not, and the concession recorded in **ex parte Hubbard** is of no relevance. Equally, we see nothing in the point about the sentence in paragraph 38 of the judgment. However that sentence was expressed, the judge had clearly concluded that IK was not exercising treaty rights in respect of work, nor therefore was a qualified person, at the date of the hearing.

12. We should add that if there were anything in this point and the decision were set aside, the question of whether a residence card should be issued to the appellant would in any event require the Secretary of State to consider whether to exercise his discretion within the meaning of Regulation 18(4)(c).

13. Turning to the appeal against the refusal of the appeal in respect of the appellant's human rights claim, the judgment recorded the acceptance by the Secretary of State that the appellant had a genuine and subsisting relationship with IK as well as their three children (paragraph 35). That concession evidently reflected the language of paragraph 399(a) and (b) of the Rules. However, the judge noted that the application was refused pursuant to paragraph 399D. That provides :

> "Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."

14. The judge noted that the appellant clearly could only succeed if he could establish "very exceptional circumstances" within the meaning of paragraph 399D. As its language makes clear, this Rule applies where a foreign criminal has been deported and then re-entered the UK in breach of the deportation order. This the appellant had done twice. The judge then considered the evidence and concluded that it did not amount to exceptional circumstances (paragraph 38). That paragraph included reference to the three young children. He concluded that the appellant was unable to meet the requirement of paragraph 399D (paragraph 39).

15. However, when considering whether the appellant might have an exceptional and freestanding basis to defeat deportation under Article 8 ECHR, and concluding that he did not, the judge observed that "The only factor I appear not to have taken into account is the best interest of her children". He concluded (paragraph 41):-

> "The authorities are now well established which very clearly state the children's best interests lie with their parents. In this case the appellant's children who are British citizens are very young having been [born] in 2013, 2014 and 2015. They are still of an age where the focus of their life would revolve around their parents. I see no reason why the children's interest which I have to consider without any regard to the parents' conduct would be better served by them being allowed to stay in this country without their parents. In the circumstances, the conclusion to which I have come is that the appellant's appeal does not succeed outside of the Immigration Rules either."

16. The central ground of appeal against this decision relies on that passage and submits that the judge took no account of the best interests of the children, and in any event, by his reference to their remaining in the UK without their parents made a decision which was perverse. In her skeleton argument on behalf of the appellant Ms Claire Litchfield also submits that, having recorded the respondent's acceptance of the genuine and subsisting relationship between the appellant and his partner and children, the judge should have gone on to consider within paragraph 399(a)(ii)(a) and (b) whether it would be "unduly harsh for the child to live in the country to which the person is to be deported" and "unduly harsh for the child to remain in the UK without the person who is to be deported". In oral submissions she pointed to the absence of an assessment of best interests in the circumstances where the children remained in the UK with their mother but separated from their father. The skeleton argument, consistently with the witness statement before the FTT, pointed to the fact that the eldest child was attending school in the UK; that all the children were well-settled in the UK and have never lived anywhere else; that the appellant's partner is employed full-time and the appellant is the primary carer and that if he were deported she would have to give up her job and that the children would be without direct contact with the father. The evidence in the further statements dated 18 April 2019 is to the same essential effect.

17. In argument Ms Litchfield acknowledged the more stringent requirement in paragraph 399D, as was confirmed by the decision in **Secretary of State for the Home Department v SU [2017] EWCA Civ 1069**, in particular at paragraph 45. In that case the Court of Appeal considered the interplay between paragraphs 398/399 and 399D. It concluded that the difference in language imposed a more stringent requirement under 399D, reflecting a real difference in the circumstances which each covered. 399D addressed the very different case where the person had been deported and had then re-entered illegally.

18. On behalf of the respondent Mr Kotas emphasised the elevated standard that was imposed by paragraph 399D. He submitted that the grounds of appeal did not reflect a fair reading of the judgment. Having recorded that he had not yet considered the best interests of the children, the judge went on to do so. His unchallenged finding in paragraph 38 was that there was no reason why the appellant's partner and children could not live together within Albania or in her home country of Latvia. There was no basis on the evidence for a finding of 'unduly harsh' within the meaning of paragraph 399, let alone for the very exceptional circumstances which were required by paragraph 399D. The evidence that was provided in the witness statements to the Tribunal was exiguous and reflected the sort of consequences which typically apply in any case of deportation where a family, including a family with young children, is separated. Paragraph 399D imposes a particularly onerous burden on the applicant who has been deported and re-entered unlawfully. That was this case.

19. In our judgment the judge did take account of the best interests of the children. He accepted that their best interests were to be with their unseparated parents. It could have been better expressed in paragraph 41, but on a fair reading of the judgment and in the context of paragraph 38, it was taken into account as part of the overall assessment of the human rights claim. However the crucial question, on which the judge correctly focussed, was whether the evidence demonstrated the 'very exceptional circumstances' required by paragraph 399D. The judge concluded that there was no good reason why the family should not move together to Albania or Latvia. True it is that there was no separate assessment of the effect on the children if they stayed in the UK with their mother. However, there is in our judgment no basis upon which the Judge could have concluded that the separation of the children from the father within the meaning of paragraph 399 (a)(ii)(b) would be unduly harsh, let alone satisfy the more stringent requirement of very exceptional circumstances, as imposed by paragraph 399D. If there is a structural error in the approach of the judge, it is not material to the outcome. It is not the appellant's case that the Judge failed to take into account material evidence. In truth there was very little evidence before the judge relating to the children.

20. In her able submissions Ms Litchfield was unable to point to any factors going beyond those which would typically obtain in any case where there is a separation of family, including separation involving young children.

The factors identified in the witness statement before the First-tier Tribunal, and then referred to again in the subsequent statements of 18 April 2019, fall within the category of typical consequences. Beyond assertion they do not begin to establish a case of 'unduly harsh' let alone of 'very exceptional circumstances. In reaching these conclusions we of course take into account the observations on the meaning of 'unduly harsh' by the Supreme Court in **KO (Nigeria) v. SSHD [2018] UKSC 53**.

21. In all these circumstances, and set against the demanding test of paragraph 399D, we see no error of law by the judge, nor perversity of conclusion, nor, in any event, any basis upon which a properly directed Tribunal could have reached a different conclusion on the facts of this case.

Notice of Decision

22. Accordingly, the appeal must be dismissed on all grounds.

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Signed Mr Justice Soole Date 10 May 2019

Mr Justice Soole