Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Shehu) v Secretary of State for the Home Department (Citizens Directive: no suspensive appeals) IJR [2016] UKUT 00287 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
On: 24 May 2016

Decision signed: 26 May 2016
Handed down: 7 June 2016

Before

Upper Tribunal Judge John FREEMAN

Between

The Queen on the application of Mexhun SHEHU

Applicant

and

The Secretary of State for the Home Department

Respondent

Representation:

Counsel for the applicant: Sandra Akinbolu (instructed by Malik & Malik)
Counsel for the respondent: William Irwin (instructed by GLD)

The redress procedure required by articles 31 and 35 of the Citizens Directive does not make it necessary to treat EEA appeals of any kind as suspensive, since arrangements can be made, on the conditions set out in article 31.4, for allowing the subject to submit his defence in person, which is reason enough for declining to treat the decision of the Court of Appeal in Ahmed *as* per incuriam *for not dealing with article 35.*

JUDGMENT

1. This is an application for judicial review of the decision of the respondent on 7 July 2015, to make removal directions against a citizen of Albania, born 27 May 1995, being maintained while he had an appeal pending against refusal of an EEA residence card. The respondent had made that removal decision on the basis that the

applicant was an overstayer; but she proceeded, on 14 July, to refuse a residence card, on the basis that she was not satisfied that he had a 'durable relationship' with an EEA citizen, as he had claimed; or that the EEA citizen concerned was a 'qualified person', in terms of the Immigration (European Economic Area) Regulations 2006 [the EEA Regulations].

2. As the law stands since 6 April 2015, the removal decision carried no right of appeal, either in or out-of-country. The EEA decision was appealable; but the point raised was whether or not such an appeal had suspensive effect. On that basis, following the grant of a stay on removal on 15 July, permission was given on 2 December. The Upper Tribunal decision in *Bilal Ahmed* (EEA/s 10 appeal rights: effect (IJR) [2015] UKUT 436 (IAC) had already been sent out, on 24 July, so had not been referred to in the grounds filed. However, those representing the applicant should not have allowed the permission judge to make the order he did, without referring him to that decision. It has since been comprehensively upheld in *Ahmed* [2016] EWCA Civ 303.

3. It follows that the challenge to the decision to remove, because there was an EEA appeal pending, can only succeed if Miss Akinbolu can distinguish, or otherwise avoid the effect of that decision of the Court of Appeal. She sought for the first time in her skeleton argument, produced for the first time on the date of the present hearing, without previous notice to the respondent or to the Tribunal, to raise another ground, which was that the respondent was obliged to make a full examination of the applicant's EEA rights before deciding to remove him, which entitlement raised a question of precedent fact, as in *Khawaja* [1983] UKHL 8, and other well-known authorities. This point appears also to have been disposed of by the Court of Appeal in *Ahmed*, at paragraphs 24 – 27; but, even if I am wrong about that, and it is arguable, the interests of justice require that it should be dealt with in a case where both sides, and the Tribunal, have had a proper opportunity to prepare to do so.

4. Returning to the pending appeal point, Miss Akinbolu's main argument was that the Court of Appeal had reached their decision without adequate consideration of Directive 2004/38/EC of the European Parliament and of the Council [the Citizens Directive] on which the EEA Regulations were based. It would be a bold decision on my part to hold that one by a Court of Appeal composed of three judges, the author of the leading judgment being Laws LJ, whose experience in this field is unrivalled by anyone, was in effect *per incuriam*. However, since permission was granted on the basis it had been, even though (or even because) the applicant's representatives had neglected their professional duty to keep the Tribunal informed of relevant decisions, especially those which went against their client's interests, I shall have to deal with Miss Akinbolu's submissions.

5. Laws LJ dealt with the Citizens Directive point as follows: it is worth citing what he had to say in full.

> 17. The appellant next has a submission arising out of the terms of the Directive. He relies particularly on Article 31.4:
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> > "Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

18. However, this provision has to be seen in context. It is succinctly explained in the reasoning of the Upper Tribunal at paragraph 28:

> "Mr Karim's attempt to invoke Article 31 as in some way covering an appeal against the refusal of a residence card must fail. That Article occurs within Chapter VI of the Directive, which is headed 'RESTRICTIONS ON THE RIGHT OF ENTRY AND THE RIGHT OF RESIDENCE ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH'. Article 27 (general principles) states that, subject to the provisions of Chapter VI 'Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health'. Article 27, together with Article 28 (protection against expulsion) and Article 29 (public health) accordingly informs who are the 'persons concerned' referred to in Article 31(1). They are Union citizens and their family members, subject to expulsion or removal measures. As a result, Article 31 has nothing whatsoever to say about a person who is not being expelled as a Union citizen or family member but who is appealing against a decision that he or she is not such a family member."

19. I do not think that this reasoning is affected by Article 15, to which Mr Malik referred this morning. That Article is concerned effectively with prohibitions as such. In my judgment the Upper Tribunal's reasoning is plainly correct. I note, as the Upper Tribunal did at paragraph 27, that in an observation by the Commission on an earlier version of what became the Directive, COM/2001/0527 final, it was stated that:

> "Giving appeals automatic suspensory effect would not be a suitable solution, since it would lay the arrangements open to abuse."

20. I have not found any assistance in the cases of Secretary of State for the Home Department v Islam, Rahman & Ors [2013] WLR 230 or McCarthy [2015] QB 151 **(?)** [*sic: 651, or McCarthy and others [2014] EUECJ C-202/13*], both decided in the Court of Justice. Mr Malik referred to them in the course of his submissions this morning.

21. Accordingly in my judgment the Directive does not assist the appellant. His appeal against the refusal of a residence card had no suspensive effect, nor is there any provision conferring upon him a right not to be removed from the United Kingdom during the time provided for the giving of notice of appeal against a refusal of the residence card. Mr Malik contends otherwise at paragraph 25 of his skeleton.

6. Miss Akinbolu boldly submitted that the Court of Appeal's decision on this point in particular must be treated as *per incuriam*, since there was nothing to show that they had had the full text of article 31 before them. Lest I should be accused of the same failing, I shall set it out here: the title is 'Procedural Safeguards'.

1. The persons concerned shall have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health.
2. Where the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement of that decision, actual removal from the territory may not take place until such time as the decision on the interim order has been taken, except:
   - where the expulsion decision is based on a previous judicial decision; or
   - where the persons concerned have had previous access to judicial review; or

— where the expulsion decision is based on imperative grounds of public security under Article 28(3).

3. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28.

4. Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

7. Miss Akinbolu's best point seemed to be that Laws LJ could not have considered the exception "where the expulsion decision is based on a previous judicial decision", in saying what he did about the possibility of (serial) automatically suspensive appeals leading to abuse at paragraph 19. Both she and Mr Irwin took me to the text of the Commission's observations, referred to by Laws LJ and by the Upper Tribunal; however, I do not find it necessary to go there in this decision, for reasons which I shall go on to give.

8. The short answer to Miss Akinbolu's point at first sight seemed to lie in the closing words of article 31.1, which apply the article solely to decisions taken "on the grounds of public policy, public security or public health", which the present one was not. Her reply was to refer to article 35: the title is 'Abuse of rights'.

> Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

9. Here Miss Akinbolu relied, in general terms, on *Rosa* [2016] EWCA Civ 14: however the relevant passage (Richards LJ giving the only judgment) follows.

24. In my judgment, the legal burden lies on the Secretary of State to prove that an otherwise valid marriage is a marriage of convenience so as to justify the refusal of an application for a residence card under the EEA Regulations. The reasoning to that effect in *Papajorgji*, as endorsed in *Agho*, is compelling.

25. I do not accept Mr Kellar's submission that the burden of proof is a matter for national law alone. The EEA Regulations have to be interpreted and applied in line with the Directive which they implement. Although the Directive is silent as to burden of proof, the Commission's guidance (paragraph 20 above) provides the key to the correct approach under it. Article 35 of the Directive provides that the rights otherwise conferred by the Directive may be refused, terminated or withdrawn in the case of abuse of rights or fraud, such as marriages of convenience. As a matter of general principle, one would expect that the burden of proving that an exception applies should lie on the authorities of the Member State seeking to restrict rights conferred by the Directive – in this case, that it should lie on the Secretary of State when seeking to rely on the existence of a marriage of convenience as a reason for refusing a residence card to which the applicant is otherwise entitled. That is the approach set out clearly in the Commission's guidance, and there is no reason to doubt the correctness of the guidance on the point.

26. The guidance also shows the subsidiary role that national procedural rules have in this context. As a matter of EU law, the burden of proof lies on the authorities of the Member State seeking to restrict rights under the Directive, but it is for the national

> court to verify the existence of the abuse relied on, evidence of which must be adduced in accordance with the rules of national law. …

10. As the terms of the Court of Appeal's paragraph 26 make clear, that was a decision about the burden of proof in legal proceedings, in that case a statutory immigration appeal, as to which it confirmed previous authority with some clarity. If it also applies to administrative decisions, then article 35 of the Citizens Directive would have to be read as applying the procedural safeguards in article 31 to the decision under challenge in the present case; and Mr Irwin did not suggest any reason why that should not be so.

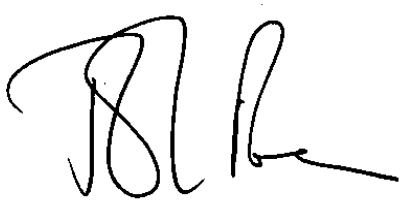
11. However, looking back at the terms of article 31.4, the following things are clear: there is a redress procedure (the EEA appeal, whether suspensive or not); and

> Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory.

12. While reg. 29AA 'Temporary admission in order to submit case in person' of the EEA Regulations will not apply in terms to this applicant, since it is not proposed to remove him under reg. 19 (3) (b), but under the general power to remove persons here without leave, its enactment, clearly in response to articles 31 and 35 of the Citizens Directive, is enough to show that the required redress procedure does not make it necessary to treat EEA appeals of this kind as suspensive, since arrangements can be made, on the conditions set out in article 31.4, for allowing the subject to submit his defence in person.

13. That in my judgment is reason enough for declining to treat the decision of the Court of Appeal in *Ahmed* as *per incuriam* for not dealing with article 35, and it follows that this claim cannot succeed.

Application dismissed



(a judge of the Upper Tribunal)