Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00100/2015 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2021	**On 22 March 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AO
(ANONYMITY DIRECTION MADE)

Respondent

Representation
For the Appellant: Mr Walker, Senior Home Office Presenting Officer
For the Respondent: Ms McCarthy, Counsel instructed by Elder Rahimi Solicitors

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties, and neither party expressed any concern, with the process.

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellant is a citizen of Russia with Armenian heritage who was born in March 1991. In October 2004 he entered the UK with his father and was joined shortly thereafter by his mother and brother.

3. The appellant's mother applied for asylum with the rest of the family (including the appellant) as her dependents. Although the asylum application was refused, in 2007 an appeal was successful. In a decision promulgated on 16 April 2007, a panel comprising of Immigration Judges Carroll and Herbert found that:

> "30. …The objective material and Dr Nesvetalova's reports all paint a very bleak picture of violent xenophobia in the Russian Federation. We are satisfied that the experiences of the appellant, both in terms of the violence and abuse suffered by herself and members of her family together with the official and mafia sponsored obstacles to her successful running of a business, have given rise to a well-founded fear of persecution, arising out of her ethnicity coupled with her dark skinned non-Slavic appearance. We have also seen the appellant's husband and one child. They are both clearly very dark skinned and non-Slavic in appearance. We are satisfied that the treatment suffered by the appellant and her family has crossed the line from discrimination to persecution…
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> 31.We find also that there is no internal flight option available to the appellant and her family. All of the objective evidence points to the widespread nature of the violence xenophobia from which they have suffered.…"

4. In February 2013 the appellant was granted Indefinite Leave to Remain.

5. In March 2014 the appellant was convicted for the crime of false imprisonment and sentenced to 2 years imprisonment. The sentence was increased to 4 years in June 2014.

6. In May 2014 the appellant was notified of his liability to deportation under section 32 of the UK Borders Act 2007 ("the 2007 Act").

7. In June 2014 the appellant was notified that section 72 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") applied, as he was presumed to have been convicted of a particularly serious crime and to constitute a danger to the community.

8. In March 2015 the respondent notified the appellant of her intention to cease his refugee status under Article 1C(5) of the Refugee Convention on the basis that the circumstances in which he had been recognised as a refugee had ceased to exist and he could now avail himself of the protection of the authorities in Russia.

9. In October 2015 a deportation order was made against the appellant and, following consideration of submissions from the appellant as well as UNHCR (who were notified of the intention to cease the appellant's refugee status) a decision was made by the respondent that the appellant did not fall within any of the exceptions to deportation specified in section 33 of the 2007 Act. The respondent stated that (a) the appellant had not rebutted the presumption under section 72 of the 2002 Act and therefore the Refugee Convention did not prevent his removal; (b) Article 1C(5) of the Refugee Convention (as well as paragraph 339A(v) of the Immigration Rules) applied; and (c) the appellant's removal would not breach article 8 ECHR.

10. The appellant appealed to the First-tier Tribunal where his appeal was heard – and allowed - by Judge of the First-tier Tribunal Morron. This decision was set aside by Upper Tribunal Judge Jackson and remitted to the First-tier Tribunal.

11. The matter then came before Judge of the First-tier Tribunal Divittie, who also allowed the appeal. This decision was set aside and remitted to the First-tier Tribunal by a panel comprising of the Hon. Lady Rae and Upper Tribunal Judge Perkins.

12. The appeal then came before Judge of the First-tier Tribunal Clarke, who also allowed the appeal. It is Judge Clarke's decision that is now being challenged by the respondent.

The decision of Judge of the First-tier Tribunal Clarke ("the judge")

13. The judge firstly considered whether the appellant successfully rebutted the presumption under section 72 of the 2002 that he had been convicted of a particularly serious crime and constituted a danger to the community such that Article 33(2) of the Refugee Convention was applicable. The judge found that the presumption was rebutted as although the appellant had committed a very serious crime he did not constitute a danger to the community. The judge reached this conclusion on the basis of the psychological report of Dr Davies and the OASYs report categorising the appellant as being at low risk as well as the evidence of the appellant and his witnesses about the efforts the appellant has made with the support of his family since the offence. At paragraph 14 the judge stated:

> Having regard to all of the evidence before me, I find that the appellant could not be said to be a danger to the community when the evidence before me all points to completely the opposite conclusion, and even when taking into account fully the details about the offence and the final sentence imposed, I conclude that he does not pose a danger to the community in the UK and the statutory presumption is displaced.

14. With respect to cessation of protection under Article 1C(5), the judge found that the circumstances in connection with which the appellant had been recognised as a refugee had not ceased to exist. The judge observed that the appellant and his family had been granted asylum on the basis of the risk they faced in Russia because of their non-Slavic dark appearance. The judge rejected the respondent's argument that the position of dark skinned minorities in Russia has fundamentally changed. At paragraphs 21 - 22 the judge stated:

> 21.I conclude that the circumstances in connection with which the appellant was recognised individually and together with his family have not changed. This is what the UNHCR letter reads, and the US country report is relied upon in part because it also highlights serious human rights abuses occurring throughout Russia. I have the benefit of a recent country expert report prepared by Dr Rano Turaeva-Hoehne dated 30 September 2019 which not only reads that the circumstances in which the appellant was recognised as a refugee had not changed, if anything they have become worse because of the escalating conflicts in the region of Ukraine and in the Middle East, economic stagnation, the increasing numbers of migrants in Russia and the increasing power and activities of the ultranationalist groups not only within the government, security system and army but also generally within society.
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> 22.The appellant was granted refugee status in his own right and not as a dependent under the family reunion policy. The respondent has failed to discharge the burden of proof upon her that the clause applies. The removal of the appellant would amount to a breach article 3.

Grounds of appeal and submissions

15. Mr Walker relied on the respondent's grounds of appeal and written submissions. He did not elaborate on them orally. The grounds and submissions fall into three categories: a challenge to findings in respect of the presumption under section 72 of the 2002 Act; a challenge to the findings in respect of cessation of refugee status; and a challenge to the finding in respect of article 3.

16. In respect of section 72 the following arguments have been advanced:

    a. The judge failed to give adequate reasons as to how the appellant rebutted the presumption that he constitutes a danger to the public.

b. The reference in paragraph 22 to the respondent failing to discharge the burden of proof indicates that the wrong burden was applied in respect of the presumption under section 72 of the 2002 Act.

17. With respect to cessation, the respondent argues:

a. The judge failed to give adequate reasons as to how the documents referred to in paragraph 21 of the decision apply to the appellant.

b. The judge erred by finding that the appellant was granted refugee status in his own right when in fact he was granted refugee status as a dependent of his mother's asylum claim. It is argued that the mother's asylum claim was based not solely on ethnicity and skin colour but also on the basis of her relatively prominent economic status in the local area.

c. The judge failed to take into consideration that the appellant's mother returned to Russia on three occasions without issues arising, which indicates that the appellant's fear of persecution is not well-founded.

18. Regarding article 3 ECHR, the respondent contends that the decision contains no reasons or explanation for finding that the appellant's removal would breach article 3 ECHR.

19. Ms McCarthy argued that the judge addressed both the section 72 and the cessation issue in a clear and structured way. In respect of section 72, she argued that the judge gave clear and sustainable reasons for finding that the appellant would not be a danger to the community and that it is plain that the correct burden of proof was applied.

20. With respect to cessation, Ms McCarthy argued that the judge made clear findings that were consistent with the UNHCR report and the objective evidence which showed that the appellant would be at risk because of his skin-tone. She argued that the respondent's grounds fail to acknowledge that in the 2007 appeal it was recognised that the risk to the appellant and his family arose from their skin tone. She argued that this case is entirely different to cessation cases where a child has been granted refugee status solely because of the risk to their parent as in this case the basis for granting refugee status (skin colour) was as applicable to the appellant as to his mother.

21. Ms McCarthy argued that the visits by the appellant's mother to Russia did not indicate an absence of risk to the appellant. She maintained that the appellant's mother had made short visits for less than a week (solely to visit her son's grave) and had done so with the protection of a British passport.

This, argued Ms McCarthy, is entirely different to, and has no relevance to the risk arising from, living permanently as a Russian in Russia.

Analysis

Section 72 of the 2002 Act

22. The issue in contention before the judge was whether the appellant had rebutted the presumption that he constitutes a danger to the community of the UK. It is plain from paragraph 14 (where the judge stated that "the statutory presumption is displaced") that the judge recognised that the burden fell on the appellant to displace the presumption that he is a danger to the community. The respondent contends that at paragraph 22 the judge referred to the burden being on the respondent. However, it is clear from how the decision is structured that at paragraph 22 the judge was referring to the cessation issue and not the presumption under section 72 of the 2002 Act. There is therefore no merit to the contention that the wrong burden of proof was applied.

23. Nor is there merit to the contention that the judge failed to give adequate reasons as to why the presumption was rebutted. The judge gave several reasons at paragraphs 10 – 14 for finding that the appellant had rebutted the presumption including, in particular, that the OASYs report and the report of Dr Davies both concluded that the appellant is a low risk. The reasons are plainly adequate and therefore the "reasons" challenge to this part of the decision cannot succeed.

Cessation

24. The judge did not err in finding that the appellant was granted refugee status in his own right as although his application for asylum was made as a dependent of his mother the findings of the panel in 2007 make clear that the appellant was personally at risk because of his "dark skinned, non-Slavic appearance" (see paragraph 30-31 of the 2007 decision, which is cited above in paragraph 3).

25. The "reasons" challenge to the cessation findings cannot succeed because at paragraph 21 the judge gave several sustainable and clear reasons. These, in short, were that there was evidence (in particular, the letter from UNHCR and the expert report of Dr Rano Turaeva Hohne) supporting the view that a person with the appellant's appearance would be at risk of persecution in Russia. Another judge might have reached a different conclusion based on the evidence about the current situation in Russia, but that does not mean the reasons given by the judge were inadequate.

26. I agree with Ms McCarthy that the visits to Russia by the appellant's mother are immaterial and therefore the judge did not err by failing to consider them. The appellant's mother made only short visits and did so as a British citizen. This is entirely different to living permanently (and having to find work and accommodation) in Russia without the protection of British citizenship.

Article 3

27. The finding at paragraph 22 that removal of the appellant would breach article 3 is not supported by any reasons and therefore is erroneous in law. However, the error is not material because, for the reasons set out above, the judge was entitled to find that the decision to revoke the appellant's protection status breached the UK's obligations under the Refugee Convention, given the sustainable and adequately reasoned findings that (a) the appellant rebutted the presumption under section 72 of the 2002 Act and (b) the respondent had not discharged the burden of showing a change in circumstances in Russia such that Article 1C(5) of the Refugee Convention was applicable.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and stands.

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 the appellant or any member of the appellant's 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.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan Dated: 11 March 2021