Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/06136/2014

THE IMMIGRATION ACTS

Heard at UT (IAC) Bennett House, Stoke on Trent On 5th October 2015

Determination Promulgated On 7th October 2015

Before

UPPER TRIBUNAL JUDGE COKER

Between

ENTRY CLEARANCE OFFICER - Paris

Appellant

And

MUSLIM ASUEV

Respondent

Representation:
For the Appellant: Ms C Johnstone, Senior Home Office Presenting Officer
For the Respondent: Ms J Elliot-Kelly instructed by Paragon Law.

DETERMINATION AND REASONS

1. The Entry Clearance Officer (ECO) was granted permission to appeal a decision of the First-tier Tribunal allowing Mr Asuev's appeal against a decision of the ECO refusing him entry clearance as a returning resident.

2. The grounds relied upon by the ECO are that the FtT judge failed to resolve what is said to be a conflict, namely:

> "..whereby the appellant was refused asylum in Belgium and has failed to give reasons why the appellant was issued with a new Russian passport, given his

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claimed fear of return. Additionally no evidence has been produced regarding his father."

3. The relevant immigration Rules are as follows:

> Returning Residents
>
> 18. A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:
>
> (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and
>
> (ii) has not been away from the United Kingdom for more than 2 years; and
>
> (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and
>
> (iv) now seeks admission for the purpose of settlement.
>
> 18A. Those who qualify for admission to the United Kingdom as returning residents in accordance with paragraph 18 do not need a visa to enter the UK.
>
> 19. A person who does not benefit from the preceding paragraph by reason only of having been away from the United Kingdom too long may nevertheless be admitted as a returning resident if, for example, he has lived here for most of his life.

4. As background the ECO relies upon the following:

> "The appellant was issued with ILR in October 2006. He then returned to Russia and live with his father. The appellant then returned to the UK in 2010 upon re-entry told the Immigration Officer his absence was outside of his control. One week later he went to Belgium and lost his passport. He claimed asylum there which was refused. The applicant found his passport in 2012, however it had expired. The appellant's mother went to Russia to obtain a new Russian passport. Another 14 months passed to make the current application"

5. The FtT judge set out the material relied upon by the ECO and by Mr Asuev. There has been no challenge to the evidence as set out by the judge. The summary of that evidence as relied upon by the ECO in the grounds seeking permission to appeal is incorrect – Mr Asuev did not return to Russia to live with his father and that was not relied upon by the respondent in the hearing before the First-tier Tribunal. The judge heard oral evidence from Mr Asuev's mother. The judge was aware that there were two protracted periods of absence to be considered. The judge considered the evidence both oral and documentary before him and accepted as credible the reasons given for the delay in submitting the application after receipt of the new passport. He accepted as plausible the reasons given for the length of stay outside the UK and that the duration of those periods were outside Mr Asuev's control.

6. In so far as the grounds are concerned it is difficult to understand what relevance the failed asylum claim in Belgium has on whether Mr Asuev should be treated

as a returning resident. Ms Johnstone said that for the judge to accept that the explanations given by Mr Asuev for the lengthy delay in applying to return as a returning resident included a failed asylum claim required detailed rasons which had not been given. That claim had been on the basis of military service and his father's activities and that he had failed to give adequate reasons for his claim for asylum. That however is not the case. Mr Asuev gave as a reason for claiming asylum, the need to regularise his stay in Belgium because he did not have a passport to return to the UK – see paragraph 5(h) of the First-tier Tribunal decision. That record of the evidence has not been challenged. The fact that a person makes an unsuccessful application for asylum, whether based upon a subjective fear of return to country of origin or not, does not render the reason given for the making of that claim not credible. The First-tier Tribunal judge was not determining Mr Asuev's asylum claim but was determining the reason he gave for claiming asylum before him, namely an attempt to regularise his stay in Belgium. The First-tier Tribunal judge accepted that. The judge further accepted the reason given for the application not being made as soon as the new passport was obtained (set out in paragraph 6g) – see paragraphs 10 to 12.

7. Ms Johnstone did not submit that the findings were perverse but relied upon a 'reasons' challenge. The findings by the judge were open to him on the evidence before him- another judge may not have reached the same finding but this was one that was plainly within the range of reasonable conclusions to draw. It was not perverse or unreasonable or inadequately reasoned.

8. The second limb of Ms Johnstone's submissions was that if the judge had not erred in law in making his findings of fact, he had erred in law in failing to simply allow the appeal as not in accordance with the law and thus enabling the respondent to take a lawful decision. She submitted that the judge had purported to exercise a discretion that it was not open to him to exercise; she submitted there was no discretion in the Rules and that any discretion was not justiciable in this appeal. Ms Elliot- Kelly relied upon the wording of the Rule itself and **Ukus [2012] UKUT 00307 (IAC)** the headnote of which reads as follows:

> 1. If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).
>
> 2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.
>
> 3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's

decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion.

9. The Entry Clearance Officer in the decision states (where relevant):

- I have considered your application under paragraphs 18 and 19 of the United Kingdom Immigration Rules
- I have taken account of
  * the financial and employment information
  * passport and travel history
  * family circumstances
  * supporting documents provided
- I have assessed your application against the Returning resident Paragraphs of the Immigration Rules
- I am not satisfied that you have not been away from the United Kingdom for more than two years Paragraph 18(ii) of HC395
- I am not satisfied that you qualify under paragraph 19 as a person who does not benefit from Paragraph 18 by reason only of having been away from the United Kingdom too long. Paragraph 19 of HC395.

10. From these extracts it is plain that the ECO recognised the Rules he was considering in deciding the application; acknowledged that he was exercising a discretion vested in him; identified the factors he was required to take into account and took his decision taking account of all the factors before him. Thus he exercised the discretion in the Rules and the decision he reached is susceptible to appeal in the statutory scheme.

11. It was open to the First-tier Tribunal judge to decide that discretion should have been exercised differently.

12. There is no error of law in the decision of the First-tier Tribunal.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal stands.

Date 6th October 2015

Upper Tribunal Judge Coker