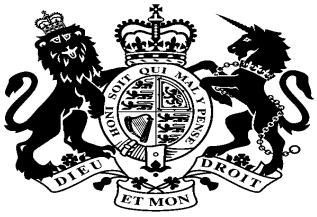

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00001/2018

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunal Liverpool	**Determination Promulgated**
On 17 September 2018	**On 25 September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

FEEC
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Patel, Counsel, instructed by GMIAU
For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1 This is an appeal against the decision of Judge of the First tier Tribunal O R Williams dated 20 June 2018, dismissing the appellant's appeal against the decision of the respondent dated 14 December 2017 refusing her human rights and protection claim.

2 The appellant is a citizen of El Salvador who prior to 2017 had lived in the USA for a prolonged period with Temporary Protection Status ('TPS'), which has been granted to citizens of El Salvador from time to time for reasons of political turmoil or environmental disaster. For reasons which I set out below, her TPS residency in USA is no longer relevant.

3 The appellant had returned to El Salvador in or around May 2017 with her husband, who is a citizen of Guatemala, and who had previously been residing in the USA unlawfully. The appellant has two children who are citizens of the USA. After a relatively short period of time in El Salvador, they left with their two children and travelled to the United Kingdom and claimed protection.

4 The appellant's claim for protection from serious harm in El Salvador was based on her fear of gangs. The respondent refused the appellant's application for protection for reasons set out in a decision dated 14 December 2017. Amongst the reasons given is the following:

> "31 As considered above your claim has not been accepted. However further consideration has been given to your claim at its highest. This means that it is not accepted that you will face the risk of persecution or real risk of serious harm on return to El Salvador because the option of relocation to with *(sic)* your family to Guatemala where you *(sic)* husband is a citizen (AIR 41). Or returning to the US where you have temporary status (AIR 27 – 30) and seeking to resolve your husband's immigration status through the appropriate channels. Both of these options are considered to be entirely reasonable."

5 After the numbered paragraphs within the respondent's decision letter is a section entitled 'Right to appeal' and 'Removal from the United Kingdom'. The respondent states there:

> "You do not have leave to remain in the United Kingdom and therefore can be removed to El Salvador. We may review via a transit point in an EU member state.
>
> …
>
> If you do not appeal and do not have leave to remain in United Kingdom you can be removed to El Salvador. We may review via transit point in an EU member state."

6 When the appeal came before the judge, he was satisfied that the appellant was at risk of serious harm for a refugee convention reason, in El Salvador, for reasons set out at [19]–[32]. However, the judge stated as follows at [33] onwards:

> "Risk in Guatemala/naturalization by marriage

> 33 It is not reasonably likely that the appellant and her family face a risk of persecution in Guatemala. It is reasonably likely that the appellant/family could apply for naturalization in Guatemala. I reach that conclusion for the following reasons [34 – 36]"

7 The judge's observations at [34] discuss potential dangers from organised crime in the area of San Jeronimo, Guatemala, where the appellant's husband originated.

8 The judge continued:

> "35 Secondly, the family have previously travelled to Guatemala to settle (Q 54); no satisfactory evidence has been provided as to why they could not again return and live away from San Jeronimo – and the danger outlined [34], in safety in, say, Guatemala City.
>
> 36. Thirdly, the appellant has not provided any satisfactory evidence as to why the family could not return to Guatemala where the appellant's husband is a citizen and where the appellant could apply for naturalization by marriage (applying **KK** (ii) – *is not of that nationality but is entitled to acquire it*). And applying **MA Ethiopia** I am not satisfied that the appellant has acted with bona fides and taken all reasonably practical steps to seek to obtain the requisite documents to enable her to return to Guatemala, such as by attending the Guatemala Embassy and making an application for naturalization."

9 The judge also found at [37] that it was reasonably likely that the appellant could apply for naturalization in the USA, reaching that conclusion for reasons set out at [38]:

> "38. Firstly, again applying **MA (Ethiopia)** I am not satisfied that the appellant has acted with bona fides and taken all reasonably practical steps to seek to obtain the requisite documents to enable her to return to the USA where the appellant had temporary protection status and her children have US citizenship, such as by attending the embassy and making an application."

10 The appeal was dismissed.

11 The appellant appeals to the Upper Tribunal in grounds of appeal dated 4 July 2018 arguing, in summary that the judge had erred in law in:

(i) failing to have adequate regard to evidence relating to the potential risk of harm to the appellant and her family in Guatemala;

(ii) failing to have adequate regard to evidence as to why the family could not return to Guatemala

(iii) failing, when opining that the appellant may be entitled to Guatemalan citizenship, to consider whether such an application had to be made in country, whether there was any minimum residence requirement for entitlement to such nationality, or whether she would be obliged to revoke any other nationality;

(iv) failing, when considering the appellant's proposed residency in the USA, to have adequate regard to expert evidence that upon the family leaving the USA, the appellant's Temporary Protection Status would no longer be valid.

12 Permission to appeal was granted on 19 July 2018 on the basis that such grounds were arguable.

Discussion

13 In preparation for this matter, I caused directions to be emailed to the parties on the morning of Friday 16.9.18, in the following form (correcting here a slight paragraph numbering issue in the direction):

> "The parties are hereby directed to provide, if possible, a written skeleton argument emailed to Deputy Tribunal Judge O'Ryan at (email given), by 4.00pm 16.9.18 (or whenever possible thereafter) addressing the following issues in the appeal. If time does not permit a written skeleton argument to be prepared, the Tribunal will expect the parties' oral submissions to address the issues.
>
> 1 The appellant does not appear to presently possess any nationality other than that of El Salvador. Notwithstanding the fact that at paragraph 31 of the refusal letter the respondent asserts that the appellant has the option of relocating with her family to Guatemala, or returning to the US where the respondent asserted she still held temporary status, what is the legal consequence to the appellant's appeal under section 82, Nationality, Immigration and Asylum Act 2002 of the fact that the respondent appears to intend to remove the appellant only to El Salvador (refusal letter, page 12 of 14)? No other removal destination appears to be proposed. Please refer to relevant authority.
>
> 2 If and insofar as the respondent advances her case that the appellant is not entitled to international protection on the basis that, applying KK Korea, headnote para 1, she is "of" or "has" Guatemalan or US nationality, and the respondent advances the case that the appellant (i) is (already) of one or both of those nationalities; or (ii) is not of

those nationalities, but is entitled to acquire one or both of those nationalities, whose burden is it to establish, as a matter of law, that the appellant is of, or has such nationality? Please refer to relevant authority.

3 Was the appellant to be treated as being of, or having Guatemalan or US nationality, or was she in fact to be considered as a person, as per KK Korea headnote para 1(a) (iii), to be not of those nationalities, but that she may be able to acquire one or both of those nationalities? If the appellant in fact fell into this third category, does MA (Ethiopia) have any application?

4 What evidence was there before the First-tier Tribunal as to the provisions of the nationality or residency laws of either Guatemala or the USA?

5 What evidence was there before the First-tier Tribunal as to the temporary protection status granted to citizens of El Salvador in the USA?"

14 Ms Patel has provided a short skeleton argument addressing those issues and I am grateful to her for provided that document at short notice. Mr Whitwell had not been able to provide a written response, but, again, given the short notice, no criticism can be placed at his door for that. However, he said that he was in a position to provide oral submissions on the points raised.

15 I heard oral submissions from the parties.

Discussion

16 I find that the judge materially erred in law in dismissing the appeal in a number of respects.

17 Article 1A(2) of the Refugee Convention provides that for the purposes of the Convention, the term "refugee" shall apply to any person who:

> "... owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a

> national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

18 A further fundamental question in determining whether a person is to be treated as a refugee is to consider where it is proposed they be removed upon removal from the United Kingdom.

19 In the present case, the respondent's decision letter of 4 December 2017 states that it is the respondent's intention to remove the appellant to El Salvador. Irrespective of whether or not appellant possesses any other nationality, I find that the appellant is entitled to international protection on that basis. The appellant has been found to face a real risk of serious harm in El Salvador, and the respondent proposes to remove her there. Irrespective of whether the appellant is 'of', or 'has' another nationality, I find that the respondent's proposal to remove her to El Salvador entitled her to have her appeal allowed without more at that juncture, and the judge erred in law in failing to so find.

20 However, if I am wrong in law in making such a finding, I further find that insofar as the judge has found within his decision that the appellant is 'of', of 'has' nationality of Guatemala or the USA, he errs in law.

21 Relevant here is the headnote in KK and others (Nationality: North Korea) Korea CG [2011] UKUT 92:

> "1 Law
>
> (a) For the purposes of determining whether a person is "of" or "has" a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (I) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.
>
> (b) Cases within (Ii and (ii) are cases where the person is "of" or "has" the nationality in question; cases within (iii) are not.
>
> (c) For these purposes there is no separate concept of "effective" nationality; the issue is the availability of protection in the country in question.
>
> (d) Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.
>
> (e) As eligibility for Refugee Convention protection is not a matter of choice, evidence going to a person's status within cases (I) and (ii) has to be on "best

efforts" basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance."

22 See also, within KK (Korea):

"4 The phrasing of the references to nationality in Article 1A(2) is in the present tense: "has more than one nationality"; "countries of which he is a national". It may be necessary to draw clear distinctions between three possible situations. The first is where a person has nationality of more than one country: that is to say each of the countries in question recognises him as a national. The second is where a person is entitled to nationality of a second country: that is to say that recognition of his nationality will depend on an application by him, but on the facts his nationality is a matter of entitlement, not of discretion. The third is where a person may be able to obtain nationality of a second country: that is to say, where it cannot be said that, on application, he would be recognised as a national, but that he might be granted nationality. The difference between the first and the second situation is of status, not of documentation. A person may be a national of a country that has not yet issued him with any documentation evidencing that nationality. Such a person exemplifies the first situation, not the second.

...

79. At the beginning of this determination we drew attention to three possible scenarios in the interpretation of the multiple nationality provisions in Article 1A(2) of the Refugee Convention. A person may have the nationality in question; or he may not have it but be entitled to have it; or he may be a potential beneficiary of a discretion to grant him the nationality in question. The appellants fall within the first category in relation to South Korea, and it is therefore not strictly necessary to consider the others. In the light of the submissions we heard, however, it is right to give our views briefly. We have little doubt that, where a person's acquisition of nationality depends on the exercise of a discretion by the State whose nationality he seeks to acquire, he cannot be regarded without more as for the purposes of the Refugee Convention having the nationality in question.

80. If support for that view is required, it can be found in the Israel Law of Return Cases, MZXLT, NAGV and Katkova. The Law of Return, passed by the Knesset in 1950, gave all Jews a right to emigrate to Israel, but does not make even those Jews who seek to settle in Israel nationals of Israel by that very act: there are provisions initially for the grant of visas and then for the determination of whether nationality is to be granted. The finding of McKeown J in Katkova was that

> "the Law of Return confers a wide discretion on the Israeli Minister of the Interior to reject applications for citizenship".

> As a result, courts have found (though not in every case, as discussion in Katkova makes clear) that a person who may be able to obtain nationality of Israel under the Law of Return is not to be regarded as being a national of Israel. Similarly, we can see no general basis for treating persons as nationals of a state of which they are not presently nationals, and of which they have presently no entitlement to nationality."

23 Further, the headnote of MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032 provides:

> "In any case of disputed nationality the first question to be considered should be: 'Is the person de jure a national of the country concerned?'. This question is to be answered by examining whether the person fulfils the nationality law requirements of his or her country. Matters such as the text of nationality laws, expert evidence, relevant documentation, the appellant's own testimony, agreement between the parties and Foreign Office letters may all legitimately inform the assessment. In deciding the answer to be given, it may be relevant to examine evidence of what the authorities in the appellant's country of origin have done in respect of his or her nationality.
>
> If it is concluded that the person is de jure a national of the country concerned, then the next question to be considered is purely factual, i.e. 'Is it reasonably likely that the authorities of the state concerned will accept the person, if returned, as one of its own nationals?'"

24 Also relevant is the case of MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289 (the same appellant as in MA (Disputed Nationality) Ethiopia [2008] UKAIT 00032). MA was a national of Ethiopia and was of Eritrean origin. She had left Ethiopia on an Ethiopian passport in her name [77]. Although she was de jure a national of Ethiopia, i.e. she evidently satisfied the legal requirements for entitlement to Ethiopian nationality, she argued that would not in practice be afforded the rights of a national, and one way in which that denial of nationality would be made manifest was by denying her the right to return. In that context, the Court of Appeal held:

> "49 However, this is a highly unusual case in which it became apparent during the hearing before the AIT that the outcome depended upon whether the Ethiopian authorities would allow the appellant to return to Ethiopia. I do not accept the appellant's submission that the AIT simply had to determine this question to the usual standard of proof. It is a question which can, at least in this case, be put to the test. There is no reason why the appellant should not herself make a formal application to the embassy to seek to obtain the relevant documents. If she were refused, or she came up against a brick wall and there was a failure to respond to the request within a reasonable period such that a refusal could properly be inferred, the issue would arise why she had been refused. Again, reasons might be given for the

> refusal. Speculation by the AIT about the embassy's likely response, and reliance on expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary.
>
> 50. In my judgment, where the essential issue before the AIT is whether someone will or will not be returned, the Tribunal should in the normal case require the applicant to act bona fide and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties, such as relatives of the applicant who may be at risk in the home state if it is known that the applicant has claimed asylum. That is not this case, however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers. Indeed, as I have said, she did so but wrongly told the staff there that she was Eritrean."

25 In the present appeal there was no evidence of the provisions of Guatemalan nationality law before the judge. The respondent's case was, as set out at [31], quoted above, that the appellant had 'the option of relocation to (sic) with your family to Guatemala where you (sic) husband is a citizen". The respondent does not even make a positive assertion that the appellant is 'of', or 'has' Guatemalan citizenship, or even 'may be able to acquire it', and certainly not by reference to any provision of Guatemalan nationality law.

26 Neither party has been able to identify any relevant authority to answer the question posed at point 2 of my directions, above, ie , whose burden is it to establish, as a matter of law, that the appellant is 'of', or 'has' a particular nationality. Even accepting that an applicant for protection has the overall burden of establishing that they are entitled to international protection under the Refugee Convention, it would be unreasonable in my view to expect an applicant in the appellant's position to raise for herself an argument that she has potential entitlement to nationality of two countries in addition to the nationality of her country of origin, and then to demonstrate by evidence and argument that she is not 'of', or does not 'have' such nationalities. While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner (UNHCR Handbook, para 196).

27 In the present case, the respondent has done nothing whatever to put before the Tribunal any material which suggests as a matter of law that the appellant has, prima facie, de jure entitlement to Guatemalan citizenship. There can be no assumption, I find, that merely because the appellant has a Guatemalan spouse, and that she has previously entered Guatemala, that that will result in her being 'of', or 'having' Guatemalan nationality.

28 There was therefore no evidential basis for the judge's apparent finding at [36] that the appellant fell into category 1(a)(ii) of the headnote of KK Korea, and was a person who 'is not of that nationality but is entitled to acquire it'.

29 There was not even any evidence to suggest that the appellant might fall into the category set out in the headnote at paragraph 1(a)(iii) of KK Korea, i.e. that she was not 'of' that nationality but *may* be able to acquire it. Even if evidence had established that the appellant might, at the discretion of the Guatemalan authorities, be granted Guatemalan citizenship, it is clear from the head note, and paragraphs [4], [79] and [80] of KK Korea that there is no general basis for treating such persons as nationals of a state of which they are not presently nationals, and of which they have presently no entitlement to nationality. No issue of the appellant making 'best efforts' arose (see KK Korea headnote 1(e)).

30 I therefore find that the judge materially erred in law in appearing to find at [33] to [35] that the appellant was of Guatemalan nationality.

31 Mr. Whitwell helpfully clarifies to me today that insofar as the judge dismissed the appeal on the alternate basis that he found the appellant could relocate to the USA, where she could have the benefit of TPS or apply for citizenship there, this amounted to an error of law, on the basis that the judge had failed to have regard to the country expert report before him which demonstrated that upon leaving the USA, the appellant would no longer be treated as having TPS. Similarly, he accepted that there was no evidence that the appellant could re-enter the USA to obtain TPS, or, be granted US citizenship. My observations above in relation to the lack of any evidence of je jure entitlement to Guatemalan citizenship apply equally to potential US citizenship.

32 I therefore find that there were material errors of law in the judge's decision, and I set it aside.

Remaking

33 There was a tentative suggestion on the part of Mr. Whitwell that further evidence on the issue of Guatemalan citizenship should be put before either this Tribunal or the First tier Tribunal (if the matter were remitted) in order to remake the decision under appeal.

34 I decline to adjourn the appeal, if and insofar as Mr. Whitwell was requesting that I do so. The respondent's case in his letter of 14 December 2017 was opaque at best from the outset. It was not positively asserted by the respondent that the appellant is 'of' or 'has' Guatemalan citizenship and if (and it was still not positively asserted by Mr Whitwell that this was the case) the respondent now seeks to assert that the appellant is 'of', or 'has' Guatemalan citizenship, no effort has previously been taken during the course of these proceedings through the First-tier or Upper

Tribunal to make a positive assertion on those lines, or to provide any evidence to support such a proposition.

35 The appellant is it real risk of serious harm in her only country of nationality, El Salvador. The respondent intends to remove her to that country, which would amount to a breach of the United Kingdom's obligations under the refugee convention, and the appellant's appeal succeeds on grounds under section 84(1)(a) NIAA 2002.

Decision

The judge's decision involved the making of a material error of law.

I set the decision aside.

I remake the decision by allowing the appellant's appeal on refugee grounds.

Signed: Date: 21.9.18

Deputy Upper Tribunal Judge O'Ryan

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

This appeal concerns a protection claim and the interests of minor children. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: Date: 21.9.18

Deputy Upper Tribunal Judge O'Ryan