IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: RP/00078/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 1st September 2020	**On 7th September 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr A Eaton of Counsel, instructed by Fadiga & Co

DECISION AND REASONS

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

Although no anonymity direction was made by the First-tier Tribunal ("the FtT"), as the appeal raises matters regarding a claim for international protection and the interests of young children, it is appropriate for an anonymity direction to be made. 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 his 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.

Introduction

1. This is an appeal by the appellant, who was the respondent before the First-tier Tribunal, and who I will refer to as the Secretary of State ("SSHD"). The respondent was the appellant before the First-tier Tribunal, and to avoid confusion, I will continue to refer to AB as the appellant in the course of this decision. The SSHD appeals against the decision of First-tier Tribunal Judge Plumptre ("the judge"), promulgated on 24th March 2020, by which she allowed the appellant's appeal on the basis that the Secretary of State's decision to revoke the appellant's status as a refugee under the Refugee Convention breached the UK's obligations under the same convention, that the appellant has rebutted the presumption under section 72(2) of the Nationality, Immigration and Asylum Act 2002 and that the deportation of the appellant is contrary to the Immigration (European Economic Area) Regulations 2016.

2. The hearing before me on 1st September 2020 took the form of a remote hearing using skype for business. The hearing room and the building was open to the public. The hearing and starting time were publicly listed. The appellant was represented at the hearing by counsel and the respondent was represented by a Senior Presenting Officer. I was addressed by the representatives in exactly the same way as if we were together in the hearing room. Neither party objected to a remote hearing, and I was satisfied that it was in the interests of justice and in accordance with the overriding objective to proceed with a remote hearing because of the present need to take precautions against the spread of Covid-19, and to avoid delay. I was satisfied that a remote hearing would ensure the matter is dealt with fairly and justly in a way that is proportionate to the importance of the case, the complexity of the issues that arise, and the anticipated costs and resources of the parties. At the end of the hearing I was satisfied that both parties had been able to participate fully in the proceedings.

Background

3. The appellant is a national of the Russian Federation. He arrived in the United Kingdom on 31 July 2002 and claimed asylum. The claim was refused by the

respondent but an appeal against that decision was allowed by Judge McCarthy for reasons set out in a decision promulgated on 11th August 2004. On 4th October 2004, the appellant was granted asylum and leave to remain in the UK.

4. The appellant was convicted on 22nd March 2017 at Wolverhampton Crown Court of two counts of acquiring/use/possession of criminal property. He was sentenced to a three-year period of imprisonment on each count to run concurrently.

5. On 18th March 2019 the SSHD made a decision under Article 1C(5) of the Refugee Convention that the appellant has ceased to be a refugee. The SSHD noted that the appellant had claimed asylum on the basis that he had been arrested by the Russian authorities and accused of being involved in terrorism. The respondent considered the background material now available and observations made by the UNHCR in a letter dated 31st January 2018. The SSHD considered whether the circumstances in which the appellant had been granted refugee status had changed, and whether the appellant would be at risk on return to Chechnya. The SSHD did not accept the appellant would be at risk upon return due to any activity or perceived activity in the past, and considered that the background material demonstrates that even those who were active in the first and second war in Chechnya would not now, as a general rule, face any particular adverse attention from the authorities. The SSHD concluded that the appellant can no longer, because the circumstances in connection with which he had been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the Russian Federation.

6. On 25th July 2019, the SSHD made a decision to deport the appellant on the grounds of public policy, public security or public health in accordance with Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016. The respondent noted the appellant has been convicted of an offence and has been sentenced to a period of imprisonment of at least two years. The respondent certified that the appellant was presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the United Kingdom.

7. It was the respondent's decision of 25 July 2019 that was the subject of the appeal before the First-tier Tribunal. Judge Plumptre's findings and conclusions are set out at paragraphs [17] to [40] of her decision. She allowed the appeal.

The appeal before me

8. The SSHD advances four grounds of appeal. First, Judge Plumptre fails to provide adequate reasons for her decision that the appellant remains at risk upon return to the Russian Federation on Refugee Convention and/or Article 3 grounds notwithstanding the respondent's claim that the security landscape in the Russian Federation has improved fundamentally and durably since the grant of refugee status to the appellant. Second, Judge Plumptre erred, at paragraph [38] of her decision, in finding that the appellant is not a danger to the community, having found, at paragraph [35], that the appellant's offending has caused serious harm. The SSHD claims that in reaching her decision, Judge Plumptre also failed to consider that the appellant has only recently been released from prison and not shown any remorse. Third, in so far as Judge Plumptre considered the Article 8 rights of the appellant and his family, she failed to consider whether the appellant can be separated from his family and whether it would be unduly harsh for the appellant's partner and children to remain in the UK without the appellant. Fourth, Judge Plumptre failed to properly address whether the deportation of the appellant would be contrary to the Immigration (European Economic Area) Regulations 2016. In particular, Judge Plumptre does not engage with the claim made by the SSHD that the appellant does not benefit from enhanced protection under the Regulations, but simply concluded that the SSHD has not discharged the test of serious grounds of public policy.

9. Permission to appeal on all grounds was granted by First-tier Tribunal Judge Foudy on 17th May 2020. The matter comes before me to determine whether the decision of Judge Plumptre is vitiated by a material error of law.

10. At the outset of the hearing before me, Mr Eaton submitted that a rule 24 reply dated 11th June 2020 had been sent to the respondent and the Tribunal. As a copy was not in the papers before me and had not reached Mr Clarke, Mr Eaton helpfully emailed a copy to the Tribunal and to Mr Clarke. I have carefully read the written response relied upon by the appellant.

11. During the course of the hearing before me, Mr Eaton candidly and quite properly in my judgment, accepted that he cannot defend any of the findings made by Judge Plumptre regarding the appeal under the Immigration (European Economic Area)

Regulations 2016. The focus of his submissions before me related to the first ground of appeal and he properly accepted that if I am satisfied that Judge Plumptre erred in her consideration of the issue of 'cessation', the appropriate course is to set aside the decision of Judge Plumptre and remit the appeal to the FtT for hearing afresh with no findings preserved.

12. At the conclusion of the hearing before me, I informed the parties that I am satisfied that the decision of Judge Plumptre is infected by material errors of law and must be set aside. In my judgment, this appeal should be allowed and the case remitted to the First-tier Tribunal for a fresh determination. I now set out my reasons for that decision.

Discussion

13. I entirely agree with the submission made by Mr Clarke that the decision of Judge Plumptre is not a decision that can easily be followed and it is impossible to work out from what is said at paragraphs [17] to [40] of the decision, the issue the judge was considering at any particular point, and the test that she was applying. The judge repeatedly conflates a number of issues and by way of example only, I refer to what is said at paragraphs [28] of the decision:

> "I am mindful that the sentencing judge considered it necessary to impose an immediate custodial sentence despite the adverse effect on the appellants family and that the courts have acknowledged that deportation of foreign criminals has an adverse impact on their families. I find the appellant's proposed removal is disproportionate for two main reasons, firstly that the appellant has an Estonian wife and four sons born on 3 December 2008, 23 January 2011, 4 March 2014 and 3 November 2015… of whom at least two are qualifying children under s117D having lived in the UK for more than seven years and secondly because I accept that the situation in Chechnya remains volatile and the appellant would suffer article 3 ill-treatment on return.".

14. It is not clear whether the judge was in that paragraph addressing Article 8, the 2016 Regulations, or cessation of refugee status. To the extent that the judge appears to accept that the appellant would suffer Article 3 ill-treatment on return, it is difficult to discern from the reasons set out at paragraphs [21] and [28] any rational basis upon which the judge allowed the Article 3 claim beyond the bare assertion that she accepts that the situation in Chechnya remains volatile.

15. Article 1A of the Refugee Convention defines the persons who qualify as a "refugee" for the purposes of the Convention. Where a person is recognised as a refugee

within the scope of the Refugee Convention, that status can only be lost in accordance with the terms of the Refugee Convention, in particular at Article 1C. Article 1C(5) provides:

> "This Convention shall cease to apply to any person falling under the terms of section A if:
>
> …
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; …"

16. The Qualification Directive establishes a common framework for EU Member States in applying the Refugee Convention. Article 11(1)(e) of the Directive reflects Article 1C(5).

17. In SSHD -v- MA (Somali) Arden LJ made clear that there should be a symmetry between the grant and cessation of refugee status. The proper approach to the 'cessation' decision was held to be:

> "…A cessation decision is the mirror image of a decision determining refugee status. By that I mean that the grounds for cessation do not go beyond verifying whether the grounds for recognition of refugee status continue to exist. Thus, the relevant question is whether there has been a significant and non-temporary change in circumstances so that the circumstances which caused the person to be a refugee have ceased to apply and there is no other basis on which he would be held to be a refugee…."

18. The Court of Appeal held that a State seeking to terminate a person's status as a refugee did not have to investigate whether there would be a violation of Article 3 if the refugee was returned to their country of origin. All that is required, on a proper construction of Abdulla -v- Germany (C-175/08), is for the circumstances leading to the grant of refugee status to have ceased to exist such that it could be described as 'significant and non-temporary' within the terms of article 11(2) of the Qualification Directive. At paragraph [47] Arden LJ stated:

> "….there is no necessary reason why refugee status should be continued beyond the time when the refugee is subject to the persecution which entitled him to refugee status or any other persecution which would result in him being a refugee, or why he should be entitled to further protection. There should simply be a requirement of symmetry between the grant and cessation of refugee status"

19. Judge Plumptre should have addressed the distinct issues that arise in the appeal before her. Insofar as cessation of refugee status is concerned, Mr Eaton submits that what is said by the Judge at paragraphs [29] to [32] of her decision must be read in the context of the claim for international protection that had previously been made by the appellant. He referred me to the decision of Judge McCarthy promulgated on 11th August 2004 in which, at paragraph [13], Judge McCarthy set out his conclusions:

> "13. … I find that there is a real risk that the appellant would face persecution or other serious harm should he return to Russia at this time. This is because I accept that it is reasonably likely that the Russian security system maintains an adverse record about the appellant which would result in his arrest and detention on return. The evidence before me indicates that there is a real risk of serious human rights abuses being carried out on Chechens detained by the Russian authorities and that the appellant would have inadequate resource (sic) to any means of redress. Given that the appellant's record arose after he was arrested and detained because of his ethnicity, I find there is a refugee convention reason behind the likely actions of the Russian authorities."

20. Mr Eaton submits it was for the respondent to establish that there had been a fundamental and durable change since those findings were made such that the appellant is no longer at risk upon return. He submits the respondent made the bold assertion in the respondent's decision that the situation in the Russian Federation has changed but failed to engage with the appellant's profile as someone that had been arrested by the Russian authorities previously following an incident in which a Russian armoured vehicle was caught in an explosion near where the appellant worked. Furthermore, the respondent had failed to consider the finding made by Judge McCarthy that the Russian security system is likely to maintain an adverse record about the appellant.

21. Mr Eaton submits that the use of the phrase "*in finding the appellant's removal to Chechnya disproportionate…*", at paragraph [30] of Judge Plumptre's decision is unfortunate, and the reference to proportionality is clearly an error, but an error that is immaterial. He submits Judge Plumptre was entitled to have regard to the opinion expressed by the UNHCR that the current situation in the Russian Federation does not warrant the application of Article 1(C)(5) on an individual or collective basis. He submits the background material referred to by the UNHCR demonstrates that those who are perceived to be separatists, are still targeted. The reference by Judge

Plumptre, at paragraph [30] to the UNHCR's views as to internal relocation, is in all the circumstances irrelevant, because the risk to the appellant is from the state. Mr Eaton submits that at paragraph [29] of her decision, the judge directed herself correctly by noting "*.. the Home Office must demonstrate that there has been fundamental and durable changes in the country of origin which can be assumed to have removed the basis of the fear of persecution and that these guidelines echo UNHCR's executive committee conclusion no. 69…".* He submits that there is sufficient in what is said at paragraphs [29] to [32] to draw a reasonable inference that Judge Plumptre concluded that the respondent has failed to discharge the burden that rests upon her to establish that there has been a significant and non-temporary change in circumstances, so that the circumstances which caused the appellant to be a refugee have ceased to apply.

22. Judge Plumptre was required to make relevant findings of fact on the basis of the evidence available in order to decide for herself whether there had been a sufficient change in the circumstances in connection with which the appellant has been recognised as a refugee as to engage Article 1C(5), and hence decide for herself whether the appellant's removal to the Russian Federation would breach the United Kingdom's obligations under the refugee Convention. She was undoubtedly entitled to have regard to the opinion set out in the letter from the UNHCR, but Judge Plumptre's finding at paragraphs [28] and [30] that the appellant's removal to Chechnya is disproportionate does not address the relevant question, with a proper examination of the evidence before the Tribunal. As Mr Eaton quite properly accepted, Judge Plumptre does not in the paragraphs that follow, make a finding that the respondent has failed establish that there has been a significant and non-temporary change in circumstances, so that the circumstances which caused the appellant to be a refugee, have ceased to apply.

23. A party appearing before a Tribunal is entitled to know, either expressly stated by it or inferentially stated, what it is to which the Tribunal is addressing its mind. In some cases, it may be perfectly obvious without any express reference to it by the Tribunal; in other cases, it may not. Here, the SSHD and the Upper Tribunal is entitled to know the test applied by the Judge and the basis of fact on which the conclusions have been reached. The question is not whether the appellant's removal to Chechnya is disproportionate and given the overall structure of the decision, I am not prepared to infer that Judge Plumptre properly directed herself and reached a

decision that was open to her on the evidence, without an express finding supported by reasons.

24. Whatever was in the mind of the judge when reaching her conclusions at paragraph [29] to [32], I simply cannot be satisfied that the judge addressed the question that arises when the respondent has made a cessation of refugee status decision, or that she applied the correct test. Mr Eaton accepted that in the circumstances, the decision of Judge Plumptre must be set aside. That is sufficient to dispose of the appeal and I set aside the decision of FtT Judge Plumptre without addressing the remaining grounds of appeal.

25. The matter will need to be heard afresh with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

26. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

Notice of Decision

27. The SSHD's appeal is allowed and the decision of FtT Judge Plumptre promulgated on 24th March 2020 is set aside.

28. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

29. I make an anonymity direction.

Signed *V. Mandalia* Date: 2nd September 2020

Upper Tribunal Judge Mandalia