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Nagdev (Procedural safeguards; expulsion; Chenchooliah)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 14 November 2023
Promulgated on 15 February 2024

Before

UPPER TRIBUNAL JUDGE GILL
and
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

(1) PRITAM KUMAR NAGDEV
(2) JAYA NAGDEV

Respondents

Representation:
For the Appellant: Peter Deller, Senior Presenting Officer
For the Respondent: Zainul Jafferji, of Counsel, instructed via the Direct Access Scheme

The decision of the CJEU in Chenchooliah v Minister for Justice and Equality [2019] EUECJ C-94/18 (10 September 2019); [2020] Imm AR 80 extended the procedural safeguards in the Citizens' Rights Directive to protect third country nationals against decisions to expel them, where expulsion was on the ground that they no longer have a right of residence under the

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Directive. Where there has been no expulsion decision, the procedural safeguards are of no application and no question of proportionality arises.

DECISION AND REASONS

1. The Secretary of State appeals with the permission of First-tier Tribunal Judge Saffer against the decision of First-tier Tribunal Judge Freer. By his decision of 9 February 2022, Judge Freer ("the judge") allowed the appeals of Mr and Mrs Nagdev against the Secretary of State's refusal of their applications for permanent residence cards under regulation 21(5) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). Those applications were made on 5 November 2020 and were refused by the Secretary of State on 4 January 2021.

2. To avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Mr and Mrs Nagdev as the appellants and the Secretary of State as the respondent.

Background

3. The appellants are Indian nationals who were born on 13 and 19 September 1955 respectively. The first appellant is the second appellant's husband.

4. The appellants' son, Kapil Nagdev, is their sponsor. He was born in India on 21 April 1980. In 2005, he acquired Austrian citizenship after his marriage to an Austrian citizen. He renounced his Indian citizenship in order to acquire Austrian citizenship. The sponsor and his Austrian wife subsequently divorced, however, and he moved to the United Kingdom in June 2006. He married again in 2009. His wife subsequently naturalised as a British citizen and their twin daughters are also British.

5. The sponsor sought and was granted a residence card in 2009. On 9 June 2014, he was granted a permanent residence card. In October 2015, he went to the Austrian Embassy in London to renew his passport and was told that it had been cancelled. He was informed that his Austrian citizenship had been revoked on 2 January 2012.

6. The sponsor sought but was refused leave to remain as a stateless person. On 20 July 2020, the Secretary of State revoked his permanent residence card on the basis that he had ceased to have, or had never had, a right of permanent residence: regulation 24(4) of the 2016 Regulations refers. The sponsor appealed against that decision.

7. The sponsor's appeal was allowed by the First-tier Tribunal on 4 October 2021. We need not set out much of the reasoning; it suffices to note the following. The judge concluded that there was no evidence to suggest that the sponsor's Austrian citizenship had been obtained by fraud or that the Austrian authorities had decided that his citizenship had never been valid. The judge accepted, therefore, that the sponsor had been an Austrian citizen until 2 January 2012. As he had been working in the UK since his arrival in 2006, he had acquired a right to reside permanently before he was deprived of his Austrian citizenship in 2012. The loss of his EEA citizenship was not 'fatal to permanent residence' and there was no basis to infer such an approach. There was accordingly no basis on which to revoke his permanent residence card and his appeal was allowed. There was no appeal to the Upper Tribunal.

8. In the meantime, the appellants had entered the United Kingdom as visitors on 12 September 2011. They began living with the sponsor. They sought residence cards as his dependent family members. Their first applications were refused and appeals were dismissed in January 2012. They made further applications which were refused in September 2012. The appellants appealed to the First-tier Tribunal again. The only matter in issue was whether they were dependent on the sponsor. The judge of the First-tier Tribunal found that they were dependent upon him and allowed their appeals on 12 November 2012. There was no appeal to the Upper Tribunal and they were duly granted residence cards which were valid from 1 March 2013 to 1 March 2018.

9. On 5 November 2020, the appellants applied for permanent residence cards. The application and the covering letter were prepared by Mr Jafferji, who has been assisting the family throughout. His letter set out something of the background we have rehearsed above before submitting that the appellants continued to be dependent upon the sponsor and that the sponsor was 'continuing to exercise Treaty rights by working in the United Kingdom'. It was submitted that the appellants had consequently acquired the right to reside permanently in the United Kingdom by 12 September 2016.

10. The Secretary of State refused the applications on 4 January 2021. There was a single ground of refusal, which was that the appellants had not provided adequate evidence of the sponsor's identity or EEA nationality. The Austrian passport which had previously been submitted had expired on 20 October 2015 and the respondent noted that the appellants had not sought to submit that they had adequate alternative evidence of the sponsor's nationality.

The Appeal to the First-tier Tribunal

11. The respondent stated in her decision that the appellants had no right of appeal against the decision. They lodged an appeal in any event and the Duty Judge in the First-tier Tribunal issued a short decision on 11 August 2021 in which he stated that there was a right of appeal.

12. The appeals then came before the judge, sitting in Birmingham, on 7 February 2022. Mr Jafferji represented the appellants. The respondent was represented by a Presenting Officer (not Mr Deller). The appellants spoke only to adopt their witness statements and the judge proceeded to hear submissions.

13. The judge summarised the submissions at [20]-[54]. It was accepted by Mr Jafferji that the appellants were no longer beneficiaries under Directive 2004/38/EC but it was clear that they had previously been beneficiaries. Their case was on all fours with Chenchooliah v Minister for Justice and Equality [2019] EUECJ C-94/18; [2020] Imm AR 80 and it was accordingly for the respondent to establish that any restriction imposed on them was proportionate. It was submitted for the respondent that Chenchooliah was distinguishable because the sponsor had not been a Union Citizen since 2012. No question of proportionality arose, therefore.

14. The judge began his findings by setting out an eleven-page excerpt from Chenchooliah. In the final two pages of his decision, he set out his reasons for allowing the appeals under the EEA Regulations. He found at [59] that

> "because the appellants are connected to a former EU citizen and relied on that in the past to enjoy rights, the test of proportionality in EU law (not human rights law) has direct applicability in this appeal."

15. The judge then took account of a number of matters which he considered to be relevant to the proportionality of the respondent's decision. Those matters included the fact that the sponsor had previously demonstrated his Austrian nationality; the length of legal residence the appellants had enjoyed with the sponsor and his family in the United Kingdom; and their diminished ties to India and the deterioration in their quality of life on return to that country. In all the circumstances, the judge found that the respondent's decisions were disproportionate, and he allowed the appeals accordingly.

The Appeal to the Upper Tribunal

16. The Secretary of State's grounds of appeal are concise. It was contended that the appellants had not on any proper view accrued five years residence as the family members of a qualified EEA national. The sponsor had retained his right of permanent residence after the revocation of his Austrian citizenship but that could not avail his parents, whose access to the Treaty on the Functioning of the European Union had ended on his loss of EU citizenship. He had immediately ceased on revocation to have the status required to render his parents beneficiaries of the Directive. There had in any event been no removal or expulsion decision and what was said in Chenchooliah was irrelevant.

17. Judge Saffer considered the grounds to be arguable and granted permission accordingly.

18. Mr Jafferji provided an initial response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 13 September 2023. The Secretary of State provided a detailed position statement on 31 October 2023. For the hearing before us, however, both parties had produced consolidated written statements of their competing positions. Mr Deller provided a skeleton argument dated 6 November 2023, and Mr Jafferji produced a replacement response dated 13 November 2023.

19. We indicated at the outset of the hearing that we were content, in the absence of any opposition from either party, to extend time for the filing of the skeleton argument and the replacement rule 24 notice.

Submissions

20. Mr Deller's written and oral submissions for the respondent were, in summary, as follows. Chenchooliah was about expulsion and was irrelevant to a case such as the present, in which no expulsion decision had been taken. Mr Jafferji seized on a sentence in the decisions under appeal which told the appellants that they should leave the United Kingdom but that did not suggest that the decisions were expulsion decisions. Decisions taken under Part 4 of the 2016 Regulations were a different class of EEA decision and carried a right of appeal. It was quite clear that there was no such decision in respect of either appellant.

21. The applications were for permanent residence cards, but the applicants were entitled to pursue in their appeals a submission that they had any available entitlement under the 2016 Regulations. The applicants had succeeded before the FtT in reliance on proportionality considerations, but the crux of the case was whether those considerations arose when an individual ceased to be a beneficiary or whether an expulsion decision was also required. In the Secretary of State's submission, an expulsion decision was clearly required. There was no

requirement for the Secretary of State to make an expulsion decision when faced with a request for a permanent residence card.

22. Mr Jafferji confirmed that he pursued no argument in reliance on Lounes v SSHD (C-165/16); [2018] Imm AR 502, which was only included in the bundle of authorities because there had been some reference to it by the Secretary of State. He also confirmed that he had not contended before the FtT, and did not intend to contend before us, that the appellants were entitled to permanent residence. He had accepted throughout that the appellants were not beneficiaries. The real issue was whether the appellants were deprived of the procedural safeguards in the Directive because the Secretary of State had failed to make a removal decision. The appellants did not submit that the respondent was obliged to make such a decision, merely that the FtT was entitled to consider those procedural safeguards in the absence of an expulsion decision.

23. Mr Jafferji submitted that it was necessary to consider the saving provisions made by Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020. By reference to paragraph 5(3)(d) and paragraph 6(cc)(bb) thereof, the only basis upon which the appellants could succeed in their appeal was under the preserved 2016 Regulations. Regulation 23(6)(a) entitled the Secretary of State to remove an EEA national or the family of such a person if they did not have or ceased to have a right to reside under the Regulations but she had chosen to make no such decision; the only decision which had been taken in respect of the appellants was under regulation 24.

24. The factors of the sponsor's case were highlighted in the rule 24. He had had no opportunity to make representations and it had been accepted in his appeal that he had not used fraud to obtain his Austrian citizenship. The Secretary of State had been aware of his situation since 2016 because he had made a statelessness application then. It was only later that the Secretary of State had sought to revoke his Permanent Residence Card, and his appeal against that decision had been successful. In the appellants' cases, however, no steps had been taken to cancel their residence cards. The only way in which the appellants could have triggered consideration of their circumstances was by making the applications they had made. (Mr Jafferji accepted in answer to Judge Blundell's question, however, that the appellants had asked the Secretary of State to issue permanent residence cards.) They had always sought to comply with immigration control, even though any rights they enjoyed under the Directive were inherent. The Secretary of State had not sought to expel them even after she was alerted to the revocation of the sponsor's citizenship.

25. Mr Jafferji submitted that the question was whether the absence of a decision to remove the appellants was fatal. It was not, in his submission, because the FtT was entitled to consider the question of proportionality in order to provide effective protection against the appellants falling into limbo. The mirror image of a right to remain was a right not to be removed. There was some doubt over whether the Secretary of State's decision making was even complete where she had not considered expulsion. It seemed that the appellants would now lose any right not to be removed as a result of the Secretary of State's inaction. That was contrary to the principle of effectiveness.

26. Mr Deller made two points in response. Firstly, it was suggested that it was relevant that the Secretary of State had not revoked the appellants' residence cards. It was not; it was clear from regulation 18(7)(c) of the 2016 Regulations that a residence card was no longer valid if the holder ceased to have a right to reside under the Regulations. Secondly, it was not always incumbent on the Secretary of State to make a removal or expulsion decision. As the Court of

Appeal had observed in Daley Murdock v SSHD [2011] EWCA Civ 161; [2011] Imm AR 500, it was always open to a person unlawfully present in the UK to leave. Although it was said that a right to remain and a right not to be removed were the mirror image of one another, the reality was that they arose 'in different parts of the book'.

27. We rose to consider our decision. On resuming, we stated that we were satisfied that the judge had erred materially in law in considering proportionality in the absence of an expulsion decision. We indicated that the decision of the FtT would be set aside as a result. We noted that Mr Jafferji had accepted that the appellants were no longer beneficiaries under the Directive and that they were not entitled to permanent residence. We asked, therefore, whether there was anything which might properly be said to persuade us to allow the appeal on the limited grounds available to the appellants. Mr Jafferji said that he could not muster any argument, but he invited us to receive further submissions after we had issued our decision. We declined to do so and indicated that we would substitute a decision to dismiss the appeals. Our reasons for reaching those conclusions are as follows.

Analysis

28. It was common ground before us that the sole permitted ground of appeal available to the appellants was that the decisions breached their rights under the 2016 Regulations insofar as they continued in effect. Mr Jafferji and Mr Deller agree, and we accept, that this is the effect of the savings provisions in Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, particularly paragraphs 5(3)(d) and 6(cc)(bb). Given the agreement between the parties, we do not propose to set these provisions out in full.

29. The appellants' claim underwent something of a transformation between the date on which their applications were made to the Secretary of State and the date on which their appeals were presented to the First-tier Tribunal. The applications which were made to the Secretary of State were for permanent residence cards and it was positively asserted in the letter which accompanied those applications that the appellants had acquired permanent residence and were entitled to permanent residence cards as a result.

30. Before the First-tier Tribunal, however, Mr Jafferji did not contend that the appellants had acquired the right to reside permanently in the United Kingdom. The short skeleton argument which he provided to the judge contended, instead, that the respondent had failed to consider the principle in Chenchooliah and that 'refusing to grant them a right of residence would be disproportionate' for seven stated reasons. As such, Mr Jafferji submitted that the appeals 'should be allowed' without giving any clear indication of the provisions of the 2016 Regulations which were said to be satisfied or to justify that outcome.

31. The appellants were evidently not entitled to permanent residence and Mr Jafferji was correct not to advance that submission to the First-tier Tribunal. The sponsor ceased to be a Union citizen in 2012 and the appellants ceased to be beneficiaries under the Directive at that point. It is immaterial that the sponsor was subsequently found to have permanent residence. He was not a Union citizen, and the appellants could derive no benefit from the fact that they were related to a non-Union citizen with permanent residence. For the same reason, the appellants were unable to contend before the First-tier Tribunal that they were entitled to residence cards as the dependent family members of a qualified person.

32. Mr Jafferji therefore sought to submit that it would be disproportionate to expel the appellants, but we do not consider that submission to have been available to him in the absence of an expulsion decision. As Mr Deller submitted, the suggestion that refusing to grant someone a right of residence is disproportionate is based on a conflation of different provisions and different processes under the Directive and the Regulations. Rights of residence and permanent residence are set out in Chapters 3 and 4 of the Directive and are transposed by Part 2 of the 2016 Regulations, whereas restrictions on those rights are governed by Chapter 6 of the Directive and Part 4 of the 2016 Regulations. It is no part of the scheme under the Directive or (more importantly in the context of an appeal such as this) the Regulations that a decision maker who does not accept that an applicant has a right to reside must also consider whether it would be disproportionate so to hold.

33. Chenchooliah was of no assistance to the appellants and the judge erred in concluding otherwise. Ms Chenchooliah was a Mauritian national who married a Portuguese gentleman who was exercising Treaty rights in Ireland. She was entitled to a right of residence for up to three months under Article 6(2) of the Directive but when she came to make an application for a residence card, it was refused on the basis that her husband had stopped working. He subsequently returned to Portugal. The Irish authorities also made an expulsion decision, however. Ms Chenchooliah accepted before the Grand Chamber of the Court of Justice that she was not a beneficiary under the Directive, but she submitted that she could only be expelled from Ireland in compliance with the rules and safeguards laid down in Chapter 6 of the Directive. The Court of Justice accepted that submission, holding that the procedural safeguards in Article 15 extended to an expulsion decision which was made on the ground that the individual concerned had lost their right of residence as a result of the departure of the Union citizen from the host member state.

34. It could not be any clearer from the decision of the Grand Chamber that Ms Chenchooliah's challenge was to the expulsion decision and that it was this decision which brought considerations of proportionality into play: [68] and [77] refer. The importance of the expulsion decision as a 'trigger' for the consideration of proportionality is also clear from the concise *dispositif*:

> Article 15 of Directive 2004/38/EC […], is to be interpreted as being applicable to a decision to expel a third-country national on the ground that that person no longer has a right of residence under the directive in a situation, such as that at issue in the main proceedings, where the third-country national concerned married a Union citizen at a time when that citizen was exercising his right to freedom of movement by moving to and residing with that third-country national in the host Member State and, subsequently, the Union citizen returned to the Member State of which he is a national. It follows that the relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38 are applicable when such an expulsion decision is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory.

35. In the appellants' cases, however, there has been no expulsion decision and the procedural safeguards are of no application.

36. There was some suggestion on Mr Jafferji's part that the respondent had 'failed' to consider expulsion, thereby depriving the appellants of the opportunity to access the procedural safeguards in the Directive. We do not accept that submission for two reasons.

37. Firstly, it is entirely appropriate and in keeping with the Directive for the Secretary of State to confine himself to considering an application for a residence card or a permanent residence and, where such an application is refused, not to consider whether to expel the individual

concerned. A person who is informed that they have no right to reside under EU Law might properly decide to leave the United Kingdom without an expulsion decision being taken, after all.

38. Secondly, on the facts of this case, there was no suggestion whatsoever in the letter which accompanied the appellants' applications that the respondent should consider whether to expel them. It was instead positively asserted that they had acquired a permanent right to reside in the United Kingdom, and there was no reference to expulsion, or to proportionality, or to Chenchooliah. The Secretary of State therefore considered what she was invited to consider, and it lies ill in the mouth of the appellants to suggest that she 'failed' to consider the separate question of expulsion.

39. Mr Jafferji also submitted that the statement in the refusal letters that the appellants 'should make arrangements to leave the UK' was of significance because it 'contemplated the departure of the appellants from the UK'. In our judgment, however, this part of the refusal letter merely contemplated the possibility that the appellants might themselves seek to comply with the law by leaving the United Kingdom. It certainly did not mean that the Secretary of State had decided to expel them from the United Kingdom. Nor did it mean that "enforcement would inevitably follow", as Mr Jafferji submitted at [7] of his skeleton. The Secretary of State has not turned his mind to the question of expulsion and if he does so, he might decide not to expel the appellants; there is no proper basis for assuming that he would reach an adverse decision.

40. Mr Jafferji also sought to submit in his skeleton argument that the respondent's stance in this case was contrary to the principle of effectiveness in Article 19(1) of the Treaty on European Union ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"). Given the limited right of appeal which is available to the appellants, we doubt whether that submission is even available to Mr Jafferji. Even assuming that it is, however, we consider it to be unmeritorious. As we have seen, the appellants asserted before the Secretary of State that they had a right to reside permanently in the United Kingdom. They had a right of appeal against the refusal of that application, during which they were entitled to contend that they had a right of residence or a permanent right of residence. No wider remedy was required to ensure effective legal protection of the right asserted to the Secretary of State.

41. For all these reasons, therefore, we conclude that the judge erred in law in considering the question of proportionality in this case. There had been no expulsion decision and no question of proportionality arose. Chenchooliah, to which the judge attached significance, was readily distinguishable, and he erred in concluding otherwise. We therefore set aside the decision of the judge to allow the appellants' appeals.

42. We announced our decision at the hearing and invited Mr Jafferji to indicate whether there was any other basis on which he sought to submit that the appellants' appeals might properly be allowed on the limited grounds available to them. He did not advance any alternative submissions. Given that the appellants are accepted not to have a right to reside or a right to reside permanently in the United Kingdom, we therefore substitute a decision dismissing their appeals.

Notice of Decision

The Secretary of State's appeal is allowed and the decision of the First-tier Tribunal is set aside. We substitute a decision dismissing the appellants' appeals.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
12 February 2024