



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/02759/2014
OA/02761/2014

THE IMMIGRATION ACTS

Heard at Field House
On 12th July 2016

Decision & Reasons Promulgated
On 21st July 2016

Before

UPPER TRIBUNAL DEPUTY JUDGE ROBERTS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MIKHAIL SHTORM (FIRST APPELLANT)
[D S] (SECOND APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Respondents

Representation:

For the Appellant: Mr Walker, Senior Home Office Presenting Officer
For the Respondents: Miss Akinbolu, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department, on behalf of the Entry Clearance Officer, Moscow, against the decision of a First-tier Tribunal (Judge Emerton) allowing the appeals of the Respondents against the Entry Clearance

Officer's decision of 28th January 2014 refusing them entry as the dependent spouse and daughter of a Tier 1 (Investor) Migrant "the Sponsor"

2. For the sake of clarity I shall refer throughout this decision to the Respondents as "the Appellants" and to the Entry Clearance Officer as "the Respondent" reflecting their respective positions before the First-tier Tribunal.
3. The Appellants are father and daughter. The second Appellant's appeal is dependent upon that of her father and consequently stands or falls in line with his appeal. The First Appellant is the spouse of a PBS Tier 1 Investor, Mrs Oxana Shtorm. [DS] is their daughter and is 5 years of age. Mr & Mrs Shtorm and [DS] are all citizens of Russia.

Background

4. The sponsor was granted entry clearance as a Tier 1 (Investor) Migrant valid until April 2016. Her husband and daughter applied for entry as her dependants. The Entry Clearance Officer refused both applications in accordance with paragraph 320(2)(b) of the Immigration Rules, on account of the First Appellant having received a conviction in Russia, for an offence for which he had been sentenced to a period of imprisonment of at least four years.
5. Both Appellants appealed the Entry Clearance Officer's decision on the grounds that he had wrongly applied paragraph 320(2)(b). This was because the previously registered conviction had gone in that the Russian courts had effectively declared Mr Shtorm to be a person without conviction.

First-tier Tribunal Hearing

6. The appeals came before the First-tier Tribunal. That Tribunal identified that the matter under consideration revolved around the application of Section 320(2)(b) with a need for particular regard to the situation in Russian law.
7. In reaching its assessment the FtT approached the matter (incorrectly) on the footing that the burden lay upon the Appellant to demonstrate that paragraph 320(2) did not apply. She took into account two expert reports, in particular one from a Robert Yuryevich, a member of the Moscow Bar Association who gave an expert opinion outlining the processes adopted by the Criminal Code in Russia.
8. The First-tier Tribunal also took account of the documentary evidence produced, most importantly the documents showing Mr Shtorm's original conviction and the "resolution" document expunging the original conviction.
9. At [24] the FtT said this:

"24. I note (from the translation of the 'resolution') that the district court found that the first Appellant had obeyed the parole rules, and had evidence of good behaviour, and having taken into account *'the convict's personal characteristics and his behaviour after the release, the court deems it possible to*

withdraw the conviction of Mr M V Shtorm, such as his improvement is confirmed by his behaviour'. The relevant parts of the Criminal Code are quoted, and the Court resolved 'To withdraw the conviction of Mikhail V Shtorm previously imposed by the Nagatinsky District Court of the City of Moscow, and to treat the said person as a person without conviction'."

10. The FtT then looked at the two expert reports, those of Robert Yuryevich and the legal opinion of Patricia Scotland QC. Having considered those, the FtT correctly cautioned itself at [27] saying it was for the FtT to make up its own mind as to the merits of the appeal. Having considered all the evidence before it, the FtT allowed the Appellants' appeals on the basis that the First Appellant is under Russian law a man without a conviction and therefore paragraph 320(2)(b) does not apply to him.

Permission to Appeal

11. The Respondent sought permission to appeal the FtT's decision. The original grounds seeking permission asserted that the FtT had misdirected itself because:
 - The decision of the Russian court, contained in "the resolution" was tantamount to showing the offence as being spent under the Rehabilitation of Offenders Act 1974 and therefore the Entry Clearance Officer was entitled to rely on information about a spent conviction when considering an application.
 - The judge adopted the wrong approach in that she looked at the conviction through the lens of Russian law, when it was necessary to consider this case through the prism of UK legislation.
12. Permission was refused initially by the FtT, but was granted on a renewed application to the Upper Tribunal. The relevant parts of the grant of permission are set out here:
 - "3. The Grounds contend that Judge of the First-tier Tribunal erred in his assessment of paragraph 320(2) of the immigration rules with respect to the 1st Appellant's previous conviction on 01 August 2005 and the nature and effect of the subsequent decision of a Russian Court in August 2009 to cancel his conviction and treat him as 'a person without conviction'. The Respondent contends that the August 2009 decision was essentially based on the 1st Appellant's good behaviour, that his earlier conviction had been validly reached, and that the effect of the August 2009 decision was similar to that of the Rehabilitation of Offenders Act 1974.
 4. From [22] to [27] the Judge undertook a thorough assessment of the evidence and arguments advanced by the parties. At [25] the Judge specifically considered whether the August 2009 decision was analogous to the Rehabilitation of Offenders Act, and at [26] he considered two expert opinions in respect of the effect of the August 2009 decision in Russian law and the approach that English courts would take in respect of that decision.

5. The Judge's decision is undeniably well reasoned. It is nevertheless arguable that the Judge may have erred in his legal assessment of the effect of the August 2009 decision vis-à-vis the requirements of paragraph 320(2). The Upper Tribunal may wish to consider, *inter alia*, whether the determination of whether a person 'has been convicted of an offence' should be considered exclusively by reference to the law of the Appellant's country or nationality in circumstances where the initial conviction was lawfully reached."

Thus the matter comes before me to determine whether the FtT's decision contains such error that the decision must be set aside and re-made.

Error of Law Hearing

13. Before me Mr Walker appeared for the Respondent; Miss Akinbolu for the Appellants. Mr Walker's submissions kept to the lines of grounds seeking permission. Miss Akinbolu prepared a Rule 24 response which she relied upon.

Consideration

14. I am satisfied that the decision of the FtT is sustainable for the following reasons. Miss Akinbolu argues, quite properly, that the Respondent bears the burden of proving that the First Appellant is for the purposes of the Immigration Rules "a person who has been convicted". The FtT in fact wrongly reversed the burden of proof, but clearly that cannot have been to the Respondent's disadvantage, therefore no material error occurs there.
15. In reaching its decision the FtT placed reliance on the evidence of the two experts and gave full reasons why it concluded that the effect of the "resolution" document of August 2009 means that the First Appellant's conviction is withdrawn.
16. The FtT was entitled to place reliance upon the experts' report, since no other evidence was produced outlining the Russian criminal code and processes. As the FtT found, Robert Yuryevich's report notes that in accordance with Russian law, the resolution has the legal effect of cancelling "all legal consequences related to the conviction" for Russian law purposes.
17. Further I find that the FtT expressly considered the question of whether the resolution should be treated as a "spent conviction" but rejected that proposition and gave full reasons why it did so.
18. The original grounds seeking permission put forward the proposition that it is necessary to consider Section 320 through the "prism of UK law" since to look through the lens of Russian law would be conceivably perverse. This is because to adopt this approach suggests that persons rehabilitated under Russian law would be in a more favourable position than persons convicted in England and Wales. This seems to be the point outlined by Judge Blum in paragraph [5] of his grant of permission.

19. However I find force in Miss Akinbolu's submission that it is not open to the United Kingdom to unilaterally reassess a decision that the Russian courts have reached. I heard nothing that would allow me to do so. In any event I find that the FtT dealt with that point fully at [26] again giving full reasons why it was accepted that it was for the Russian authorities to determine whether or not the conviction should be expunged in accordance with their legal systems.
20. Accordingly for the foregoing reasons I find that the decisions of the FtT allowing the Appellants appeals contains no error of law requiring it to be set aside. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

The appeal of the Secretary of State against the FtT decisions of 9th December 2015 is dismissed.

The decisions of the FtT stand.

No anonymity direction is made.

Signed

C E Roberts

Date

20 July 2016

Upper Tribunal Deputy Judge Roberts