Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12516/2017

THE IMMIGRATION ACTS

Heard at Manchester (via Skype)
On 15 February 2021

Decision & Reasons Promulgated
On 01 March 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

YKA
(Anonymity direction made made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Parkin instructed by Barnes Harrild Dyer Solicitors.
For the Respondent: Mr A McVeety Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, who is recorded as having been born on 1 January 2001, claimed to be a national of Syria. A judge of the First-tier Tribunal ('the Judge') concluded at [28] of the decision promulgated on 24 September 2019:

> 28. Applying the lower standard of proof, I take into account the Appellant's age when he first claimed asylum and as at the date of the hearing. Considering the points made above namely being unable to infer answers are correct in

> the SAI, the Appellant's evidence being vague and inconsistent, not providing evidence which was easily obtainable and the language analysis report, in the round I do not accept the Appellant is Syrian.

2. The appellant applied for permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by a judge of the Upper Tribunal on 13 July 2020, the operative part of the grant being in the following terms:

> The grounds of appeal are that the First-tier Tribunal materially erred in law in failing to consider whether the Appellant is admissible to Egypt and/or removal there; the Appellant claiming to be Syrian and without any documentation in support of him being Egyptian and without the Respondent being able to obtain any travel document on his behalf either.
>
> Whilst it may not be material to all grounds of appeal before the First-tier Tribunal, it is arguable that the First-tier Tribunal simply failed to engage or make findings on an issue in the appeal as to whether regardless of the Appellant's nationality, he would be removable to Egypt. It will be for the parties to address the extent of such submission to the First-tier Tribunal as the record of proceedings shows this only as a short point and not developed in the way it had been in the grounds of appeal. Materiality may well be in issue as well given the factual findings by the First-tier Tribunal about the Appellant's attendance at the embassy.

3. Before the Tribunal Mr Parkin accepted the grounds of appeal were a very narrow and technical point but asserted the Judge had erred in law in relation to the same.

Error of law

4. The observation in the grant of permission relating to the very limited extent to which this point was raised before the First-tier Tribunal, as compared to the grounds of appeal, is factually correct, although there is limited reference to show this was a matter relied upon by the appellant.

5. The appellant's claim is recorded by the Judge at [22] where it is written:

> 22. The Appellant's oral evidence was limited with regards to his nationality. He has said he tried to go to the Egyptian embassy to prove he is not Egyptian. I do not have any evidence of an application or even a witness statement of the adult who should have accompanied him to submit this application, given his young age. In his witness statement dated 02 May 2019 he again asserts he is Syrian and claims his lack of knowledge is due to receiving no education and being kept at home by his mother. However as explained in paragraph 20, he was but I simply do not know if they are correct or not. Therefore, I find his evidence on this is inconsistent.

6. Contrary to the submission made by Mr Parkin, the Judge made a finding in relation to the appellant's claim he had visited the Egyptian embassy; namely that insufficient weight could be placed upon the claim the appellant had made. The specific finding by the judge "I do not have any evidence of an application" is clearly a finding within the range of those available to the Judge that it was not made out that the appellant's claim was true. It is also an important aspect of this case that the appellant's claim, which was based upon a real risk if he was returned to Syria as a Syrian national, was shown to be totally without merit, leading to a finding it was more likely, even to the lower standard applicable in an asylum appeal, that the appellant is Egyptian. The whole basis on which he had therefore claimed international protection had been found to be a lie. Although Mr Parkin submitted that his specific instructions are that his client does not agree with this finding, it has not been appealed.

7. Mr Parkin places reliance upon an argument that the appellant "probably falls within a category of individuals described as being impossible to remove for legal or practical reasons".

8. Mr Parkin in his grounds of 18 June 2020 relies upon two authorities being Neshanthan (cancellation or revocation of ILR) [2017] UKUT 00077 (IAC and Sapkota [2011] EWCA Civ 1320.

9. As noted by the headnote of Upper Tribunal in Patel (consideration of Sapkota – unfairness) [2011] UKUT 00484 (IAC), the decision in Sapkota [2011] EWCA Civ 1320 is based on a public law duty to exercise s.47 powers where fairness requires it, having regard to the factors considered in Mirza [2011] EWCA Civ 159 and TE (Eritrea) [2009] EWCA Civ 174. It does not amount to an inflexible rule that the power must always be exercised.

10. Before the Upper Tribunal and subsequent appeal to the Court of Appeal a new point had been taken by the appellants, namely the Secretary of State's failure to make a removal decision at the same time as, or shortly after, the decision to refuse leave to remain was unlawful. That argument, which failed before the Upper Tribunal and the Court of Appeal became the principal issue before the Supreme Court in Patel [2013] UKSC 72. At [27] of that judgment it is written *"……The powers to issue removal directions under section 10 of the 1999 Act and section 47 of the 2006 Act (like the power to issue notices under section 120 of the 2002 Act) are just that – powers. Their statutory purpose is as part of the armoury available to the Secretary of State for the enforcement of immigration control. Any extra protection provided to an appellant is incidental. Neither section can be read as imposing an obligation to make a direction in any particular case, still less as providing any link between failure to do so and the validity of a previous immigration decision. As Burnton LJ said in the Court of Appeal [2013] 1 WLR 63, para 73: "This language is clearly and unequivocally the language of discretion, not duty, and it is simply not open to the court to interpret it as imposing a duty. For the court to do so is to amend the legislation, not to interpret it.".*

11. There was no duty upon the Secretary of State to issue a removal direction and, indeed, none have been issued in this appeal. Indeed, the guidance to caseworkers' states:

You can only set removal directions (RDs) if the following criteria are met:

• no outstanding casework barriers

• detainee is fit to fly

• authority to conduct a family separation is obtained, where necessary - refer to the guidance on family separations for further information

• appropriate level of authorisation for removal is obtained

• valid travel document (or valid travel document agreement) held - as an exception if the detainee is to be removed on a charter flight, RDs may be set while the emergency travel document (ETD) is still pending agreement.

12. The respondent was therefore unable to set removal directions or to undertake the necessary checks and procedures to facilitate removal whilst the appeal process was ongoing. The criticism raised by Mr Parkin of the failure of the Judge to consider that the Secretary of State has had no more success in obtaining documentation than the appellant or showing that the Egyptian authorities are likely to accept the appellant is of Egyptian nationality misses the point that at that stage of the proceedings there was no obligation upon the Secretary of State to do so; any difficulties in the return process not being relevant to the protection appeal in which no evidence of a real risk if returned to Egypt had been made out.

13. Mr Parkin's submission that this is also a human rights appeal and that leaving the appellant in limbo may create a situation that will be contrary to his article 8 rights is noted, but such a submission is clearly premature at this stage. There was no obligation upon the Secretary of State to issue removal directions and to have ascertained whether the appellant will be admitted to Egypt until there was a clear finding by the First-tier Tribunal that his claim to be a national of Syria and a person entitled to a grant of international protection on that basis was either accepted or rejected.

14. As soon as it is practically possible to do so, to secure an Emergency Travel Document (ETD), the case worker will 1) Complete the ETD form, and 2) Email completed form to the Sheffield documentation team. If the requisite documents are obtained details of a removal window a notice of removal can be served.

15. In relation to Neshanthan, the scope of that hearing is clearly set out at [3-5] of that decision in the following terms:

3. This case raises two issues. The first issue is whether the judge materially erred in law in deciding that an immigration officer has power to cancel a person's ILR when the individual arrives at a port of entry after an absence abroad. The judge decided that the respondent had power to cancel the appellant's ILR following his

arrival in the United Kingdom on 23 September 2014 after a short absence abroad. The appellant contends that only the Secretary of State has power to cancel ILR.

4. If the first issue is decided in the appellant's favour, this would be determinative of the appeal before the Upper Tribunal. The judge's decision would be set aside and the appellant's appeal against the respondent's decision allowed on the ground that the decision was not in accordance with the law, a ground that was available to him at the time he lodged his appeal (on 2 October 2014) and which he did raise in his grounds of appeal. There would be no need to consider the second issue.

5. The second issue is whether permission to appeal to the Upper Tribunal should be granted on the appellant's renewed application, made at the hearing before me, for permission to challenge the judge's finding that the appellant had fraudulently obtained the English language test certificate which he had used in the previous application of 25 May 2012. If the renewed application for permission is granted, then whether the judge materially erred in law in reaching his finding that the appellant had fraudulently obtained his English language test certificate. UTJ Blum had refused permission on this ground.

16. In relation to the first issue the Tribunal found:

71. To summarise my conclusions on the first issue:

i) Article 13 of the 2000 Order applies to holders of ILR who travel to a country or territory outside the common travel area so that their ILR does not lapse but continues if Article 13(2)-(4) are satisfied.

ii) If the leave of such an individual continues pursuant to Article 13(2)-(4) of the 2000 Order, an immigration officer has power to cancel their ILR upon their arrival in the United Kingdom.

iii) The grounds upon which such leave may be cancelled are set out at para 321A of the Rules.

iv) Section 76 of the 2002 Act is an alternative and additional power, available to the Secretary of State, to revoke indefinite leave to enter or ILR in the circumstances described at s.76(1)-(3) of the 2002 Act.

17. At [104] of the decision, in respect of the second issue, the Tribunal wrote *"I therefore reject the renewed application for permission. Even if I have power to reconsider UTJ Blum's refusal of permission on paras d-f of the written grounds, paras d-f of the written grounds and paras 3-6 of the skeleton argument are wholly unarguable".*

18. Neither authority relied upon by the appellant supports the proposition that in a case in which there was insufficient evidence before the Judge to establish that the appellant fell within the category of a person it was impossible to remove for legal or practical reasons on the facts, the First-tier Tribunal materially erred in law by not so finding.

19. It may be the case that if an individual has been shown to fall within this category on the basis of cogent evidence of attempts to remove having failed for whatever reason, and the consequences of their situation of being in legal limbo resulting in circumstances sufficient to amount to a breach of that article 8 rights, an individual may be entitled to remain in the UK on that basis. It has not been shown on the facts before the First-tier Tribunal that this is such a case.

20. It was not disputed before the First-tier Tribunal that the burden of substantiating the claim is upon the appellant. I find on the basis of the findings of the First-tier Tribunal, considered in the round, and in light of the failure of the appellant to discharge the burden of proof upon him to establish that what he claims in relation to his alleged approach to the Egyptian Embassy or inability to be readmitted to Egypt is made out, that the Judge has made no arguable legal error material to the decision to dismiss the appeal.

Decision

21. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated 16 February 2021