Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/03919/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 18 July 2013	**On 26 July 2013**

Before

UPPER TRIBUNAL JUDGE KEKIĆ
UPPRT TRIBUNL JUDGE KEBEDE

Between

ANATOLIE KOUIS

Appellant

and

SECRETARY OF STATE

Respondent

Representation
For the appellant: Mr N Nason, Solicitor
For the respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before the Upper Tribunal following the grant of permission by Upper Tribunal Judge Chalkley on 24 January 2013.

2. The appellant is an ethnic German from Belarus but claims to be stateless. His date of birth is 15 August 1949. He has been granted discretionary leave to remain valid until 25 March 2015 but his asylum application was refused on 26 March 2012. His appeal against that refusal was heard by

First-tier Tribunal Judge Levin and dismissed by way of a determination promulgated on 3 October 2012. That determination sets out his immigration and litigation histories in detail and it is not necessary to repeat them here. The salient features shall be included in our assessment and findings. The appellant was unrepresented at that hearing.

3. The appellant's case is that he has been politically active since the 1970s, initially against the Soviet government and then against President Lukashenka. He was a member of the Belarus Popular Front. He was beaten several times by the KGB on account of his politics and his anti-government writings and, eventually, fearful of the threats he had received, he left the country in March 1999, leaving behind his family. Thereafter, he spent time in many European countries trying to obtain asylum and finally entered the UK in 2002. He maintains that his family in Minsk have been harassed by the authorities. He has been to the Belarus Embassy on several occasions but has been refused a passport. As a result, he maintains that he is a refugee.

4. The First-tier Tribunal took as its starting point the determination of First-tier Tribunal Judge Irvine dismissing the appellant's earlier asylum appeal on 2 August 2005. The findings in that determination are summarised at paragraph 32 of Judge Levin's decision. Judge Levin took note of the appellant's oral evidence but concluded that in the absence of any further evidence, the earlier findings stood. He then went on to consider the issue of statelessness and found that on the basis of the report on Belarusian citizenship submitted by the respondent and the fact that there was no official confirmation of termination of citizenship, the appellant was not stateless. He found that there was no credible evidence to show that the authorities would have sufficient interest in the appellant to terminate his citizenship and that he had fabricated the account of his family being visited by KGB agents. He considered that the appellant's failure to submit his passport to the Belarusian Embassy further indicated that he was seeking to thwart the renewal process. He also considered that the appellant's willingness to go back to Belarus was evidence that he had no fear of return. Accordingly, he dismissed the appeal.

5. Permission to appeal was granted on the basis that the judge did not make findings on the letters from the International Organisation of Migration (IOM) which had tried to assist the appellant to obtain a passport and return to Belarus.

The hearing

6. Prior to the hearing an application was made by the appellant's representatives for a fresh document to be admitted into evidence under Rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. no decision appears to have been made on that. At the hearing Mr Nason explained that this was evidence obtained from the respondent's file

obtained following a subject access request made under the Data Protection Act and so its admission would not prejudice the Secretary of State. Mr Tarlow did not object and the evidence was admitted. It consisted of a Case Record Sheet of two pages from the UKBA file. On the first page there is an entry dated 20 March 2007 which reads:

"Fax rec'd from Belarus Embassy confirming that sub is not a Belarus national".

On the second page, the entry dated 5 December 2007 reads:

"As per our discussion. There is a letter from the Belarus Embassy dated 06/03/07 saying that the claimant is not a citizen of Belarus but it doesn't say why. You may wish to clarify".

It is followed by the following note dated 23 October 2008:

"As per chat with (redacted) please could you arrange an interview for Mr Kouis who has submitted further reps on the grounds of being stateless. As sub has previously had a Belarus passport, it is believed that an interview would be beneficial in order to establish why the authorities are now refusing him a new passport".

Suggested lines of enquiry are listed and there follows a further note dated 23 October 2008:

"I agree with decision of caseworker outlined above having discussed this case and the issue of statelessness which requires investigation at interview".

The appellant, who was present at the hearing, confirmed that he had never been called for an interview in 2008 or thereafter.

7. Mr Tarlow also submitted a file note. This is dated 26 March 2012. It confirms the grant of discretionary leave to the appellant. It briefly sets out the basis of his claim and then states:

Consideration
"There are no reason (sic) to grant asylum and applicant is not stateless".
Decision
I have therefore decided to make a discretionary grant of limited leave... for 3 years until 25.03.2015".

8. Mr Tarlow tried to find the letter/fax from the Embassy referred to in the first note but was unable to do so. Mr Nason confirmed that having retained the appellant's passport since February 2002 when he made his initial asylum claim, the respondent returned it to him in 2011. The appellant had then tried to renew it by sending it to the village council in Belarus but this proved unsuccessful and he had now received it back.

9. We then heard submissions. Mr Nason submitted that the judge had not properly considered the evidence from the IOM which had been assisting the appellant for some time. There were no findings on the letters or the telephone call from the IOM to the Embassy during the course of which the Embassy official had confirmed that the appellant was not entitled to Belarusian citizenship. He argued that given the lack of findings on a key issue of the appeal, the entire determination was undermined. Mr Nason further submitted that the law on statelessness and citizenship was very complicated. He relied on ST (Ethnic Eritrean – nationality – return) Ethiopia CG [2011] UKUT 252 (IAC) and MA (Ethiopia) [2009] EWCA Civ 289 and submitted that if the appellant could show that he had been deprived of citizenship for a Convention reason then he was entitled to refugee status; he did not have to establish a real risk of persecution. Mr Nason submitted that the respondent had not provided any reasons for continuing to maintain that the appellant was not stateless and had still failed to provide the skeleton argument that she had been directed to submit. Despite those shortcomings in the respondent's case, the judge had made findings on primary Belarusian law. He was not an expert in that and had not received any assistance from anyone who was. He pointed to ST where the Tribunal had benefited from expert evidence. Finally, he submitted that when applying Devaseelan the judge had failed to include all the appellant's attempts to obtain a passport when he made his assessment.

10. Mr Tarlow responded. He submitted that the determination was sustainable. The appellant had failed to provide any evidence that his citizenship had been terminated. The judge was entitled to find that the appellant had attempted to thwart the passport renewal procedure. He submitted that he was unclear as to the circumstances of the retention of the passport by the Secretary of State. He submitted that even if the appellant was not entitled to Belarusian citizenship, he had not shown a link between that denial and the Refugee Convention and nor had he shown any real risk of persecution. He asked that the decision of the judge be upheld.

11. In reply, Mr Nason argued that an individual could be denied citizenship for a Convention reason yet not be at risk of persecution; the two issues were mutually exclusive. He submitted that the decision should be set aside and remade; there was sufficient evidence for the appeal to be allowed without the necessity of further oral evidence. He submitted that the appellant had always claimed to be politically active. Findings had been made that he had expressed political views. The Embassy refused to provide reasons for refusing to issue a passport; this suggested that something was amiss. The appellant had never been given even an oral explanation.

12. That concluded the proceedings. We reserved our determination which we now give.

Findings and Conclusions

13. Having carefully considered the evidence and the submissions made, we are satisfied that the First-tier Tribunal Judge made errors of law. Whilst he was of course obliged to take the determination of Judge Irvine as his starting point, he failed to consider the previous findings in the light of all the subsequent evidence. Given that some eight years had passed since that determination was promulgated and that the appellant had since then made many unsuccessful attempts to obtain a passport from the Belarusian authorities both in London and in Belarus, the judge should have considered those matters as part of the consideration of the earlier findings. Instead, it may be seen that he only considered these matters after upholding the previous findings.

14. The judge had a number of letters from the IOM before him. These detailed the many times the appellant applied for voluntary repatriation and a passport. The IOM also confirmed that it had been told by the Embassy that the appellant was not a Belarusian national. The judge referred to this information in his determination but made no findings on this evidence other than reaching a conclusion that the appellant had deliberately sought to thwart the passport renewal process. No good reasons are provided for this conclusion and given the material from the IOM, the finding that the appellant continues to be a Belarus citizen is unsupported by any evidence.

15. We are also of the view that the judge misdirected himself as to the law. There is no consideration of the country guidance decision in ST or of MA, a leading Court of Appeal decision on statelessness. The test set out at paragraph 57 of the determination is unsupported by any case law and his conclusion that the appellant's application for voluntary return undermines his claim for protection is contrary to the guidance in MA and ST where it is expected that a claimant will at least attempt to establish his claim to statelessness by visiting the Embassy and applying for documents.

16. For all these reasons the determination is unsustainable and the decision is set aside.

17. We now proceed to assess the evidence with a view to remaking the decision. We are bound to say, at the outset, that notwithstanding our decision to set aside Judge Levin's determination, we agree fully with his description of the manner in which the respondent has dealt with this case as a "public disgrace". Details are set out at paragraphs 7-14 of his determination and include the respondent's failure to attend the hearing, failure to have access to the Home Office file, failure to respond to repeated directions and a failure to prepare for hearings, all of which resulted in several adjournments and more delays for the appellant. We would add that Mr Tarlow was not responsible for any of these failings and had prepared for the hearing before us.

18. The production of the UKBA file notes at the hearing before us, by the appellant and not the respondent, only serves to reinforce the view taken by the First-tier Tribunal. It is the case that although the respondent rejected the appellant's claim that he had submitted his passport at his first asylum interview, it had been on the Home Office file all along, remaining there for nine years until February 2011 when it was returned to him without explanation. Further, whilst the Secretary of State was continuing to maintain that the appellant had not established statelessness and the Presenting Officer made submissions to Judge Levin in that vein, the respondent *had already been informed in writing* by the Belarus Embassy that the appellant was *not* a Belarus national. It is difficult to see what clearer evidence there could be of statelessness given that it is not suggested by the Secretary of State that the appellant is entitled to citizenship from any other country. The evidence is all the more compelling as it was received directly by the Home Office from the Embassy. We note that it is corroboration of the information obtained by the IOM which was submitted by the appellant to the First-tier Tribunal.

19. We further note that the passport the appellant had, which expired in 2001, was from the Union of Soviet Socialist Republics. The appellant gave evidence to Judge Irvine that he had tried to obtain a Belarusian passport whilst still in Belarus but that had been refused. This account was accepted both by the respondent and the judge (see paragraphs 15 and 23 of that determination) but the judge found that *"the fact that the Belorussian authorities did not give him a Belorussian passport does not indicate that the authorities were interested in him for any reason including his anti-government opinion"*.

20. We can see nothing in the respondent's case to support the contention that the appellant has failed to show he is stateless. We note that in 2005 the respondent had accepted that the authorities had refused to issue a Belarusian passport and only agreed to issue a Soviet passport. Despite this and contrary to the recommendation of at least two Home Office officials in 2007-2008, the appellant was not interviewed about his statelessness. Curiously, having maintained he was not stateless, the respondent then proceeded to grant him discretionary leave in 2012. Mr Tarlow refused to concede the issue before us but gave no reasons for his stance given the compelling evidence that is now available.

21. We find that clear, incontrovertible evidence has been provided to show that the appellant has been refused citizenship by the Belarus authorities, is not entitled to citizenship of any other country and is therefore stateless.

22. Statelessness does not of course automatically mean that a claimant is a refugee and we are guided by the case law set out above in this matter. Contrary to what was argued by Mr Tarlow, we find that an appellant does not need to establish a risk of persecution in order to qualify as a refugee once his claim of statelessness has been made out. We are supported in

this finding by the authorities of EB (Ethiopia) [2007] EWCA Civ 809, MA and ST (*op cit*); in certain circumstances the act of removal or denial of citizenship can itself constitute persecution. We are required to consider the circumstances in which that act occurred particularly when read against the background evidence.

23. Judge Levin summarises the country background at paragraph 45 of his determination. He notes that, as the appellant has maintained, the power is concentrated in the hands of the president and a small circle of advisers and that it has been consolidated as such through authoritarian means. He observes that the president introduced measures intended to stifle and intimidate any form of anti-regime political activity and placed severe restrictions on the freedom of citizens to express political views. Significantly, he notes that citizenship issues prove to be politically motivated, domestically and internationally, and that the implementation of citizenship law is dependent upon the will of those in power. He accepts that despite the provisions of the Citizenship laws, the deprivation of citizenship is likely to be subject to the will of the president and his advisers.

24. It is against that evidence that we consider the appellant's case. He was never given a Belarusian passport despite his requests for same in Belarus and in the UK where repeated attempts were made and are documented. Whilst he was issued with a Soviet passport, that has expired and all attempts to have it renewed or replaced have proved fruitless. The Belarus Embassy has confirmed in writing to the respondent that as far as they are concerned the appellant is not a Belarusian national. No reasons were given for their decision either to the respondent or the IOM Immigration Rules, for that matter, to the appellant himself despite attempts certainly by the IOM and the appellant's previous representatives, Jackson and Canter (on 11 May 2012) to obtain same. Mr Nason is right to say that if an application were lawfully refused, then one would expect a written refusal with reasons. The appellant plainly has strong links with Belarus and it was his place of residence prior to his flight in 1999. Indeed, on the face of it, according to Judge Levin, he met the requirements of the Citizenship Act. In our view, the only conclusion that can, therefore, be reached is that he has been arbitrarily deprived of his entitlement to citizenship. That has prevented him from returning to be reunited with his four children and his third wife whom he has not seen since 1999, and his grandchildren whom he has never met. The decision has deprived him of his right to return and as per ST and in the circumstances of the appellant's case, that constitutes persecution.

25. For all these reasons and in the unusual and specific circumstances of the appellant's case, we find that he has been arbitrarily deprived of his citizenship for no good reason. We find that this deprivation constitutes persecution.

Decision

26. The determination of the First-tier Tribunal is set aside as it contains errors of law. We remake the decision and allow the appeal on asylum grounds.

Signed:

Dr R Kekić
Upper Tribunal Judge

23 July 2013