



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/12197/2016

THE IMMIGRATION ACTS

**Heard at Newport
On 22 August 2017**

**Decision & Reasons
Promulgated
On 08 September 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H A K

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer

For the Respondent: Ms A Williams, instructed by Asylum Justice

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent ("HAK"). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

2. Although this is an appeal by the Secretary of State, I will for convenience refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Somalia who was born on [] 1991. She left Somalia in 2007 and travelled to Kenya. In 2008, she left Kenya arriving in Switzerland in October 2008. There, she met her husband and their marriage was registered in Switzerland in 2012. They now have three children. The appellant's husband is a citizen of Italy. The appellant came to the United Kingdom in April 2014 and subsequently applied for an EEA residence card as the spouse of an EEA national, namely her husband. That residence card was granted by the Secretary of State on 17 December 2014 valid until 17 December 2019. On 18 November 2015, she returned to Switzerland where she remained until the Swiss authorities returned her and her three children to the UK on 19 April 2016. On that date, the appellant claimed asylum.
4. On 18 October 2016, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds. Although the Secretary of State accepted that the appellant could not safely return to Somalia, she concluded that the appellant was a citizen of Italy where she could reside.
5. The appellant appealed to the First-tier Tribunal. Judge Frazer concluded that the appellant was not a citizen of Italy although she could seek to apply for citizenship based upon her marriage to an Italian citizen. Given the Secretary of State's acceptance that the appellant was at risk on return to Somalia, Judge Frazer allowed the appellant's appeal on asylum grounds and under Art 3 of the ECHR.

The Appeal to the Upper Tribunal

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that, in finding that the appellant was not an Italian citizen, the judge had failed to have regard to the fact that the appellant had not taken all reasonable steps to ascertain "whether she has the disputed right of entry/residence". Reliance was placed on the cases of MA (Ethiopia) v SSHD [2009] EWCA Civ 289 and KK and Others [2011] UKUT 92 (IAC).
7. On 17 May 2017, the First-tier Tribunal (Judge Grant-Hutchison) granted the Secretary of State permission to appeal. The basis of that permission is set out in paragraph 2 of the decision granting permission as follows:

"It is arguable that the Judge has misdirected himself by failing to consider in terms of MA (Ethiopia) v SSHD [2009] EWCA Civ 289 and KK & Others v SSHD [2011] UKUT 92 (IAC) whether the Appellant has taken all reasonable steps to ascertain whether she has the disputed right of entry or residence to enter Italy. Her minor children are Italian nationals. She is married to an Italian national even though she is separated and he is presently serving a prison sentence."

Discussion

8. The point at issue in this appeal is whether the judge was entitled to find that the appellant was not an Italian citizen. If she is an Italian citizen, of course, then her refugee claim fails as one of her countries of nationality is safe and likewise she is not at risk of treatment contrary to Art 3 as she will not be removed to Somalia. The issue is not whether the appellant can reside in Italy; it is solely a question of whether she holds Italian citizenship.
9. In KK, the Upper Tribunal distinguished between three categories of case where an individual's nationality was in issue for the purposes of the Refugee Convention. In paragraph 1 of the head note the Tribunal said this:
- “1. Law
- (a) For the purposes of determining whether a person is “of” or “has” a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (i) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.
- (b) Cases within (i) and (ii) are cases where the person is “of” or “has” the nationality in question; cases within (iii) are not.
- (c) For the purposes there is no separate concept of “effective” nationality; the issue is the availability of protection in the country in question.
- (d) Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.
- (e) As eligibility for Refugee Convention protection is not a matter of choice, evidence going to a person's status within cases (i) and (ii) has to be on “best efforts” basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance.”
10. In other words, where an individual already has a particular nationality or is entitled to acquire it, then for the purposes of the Refugee Convention they have that nationality and, if safe within that country, they cannot be a refugee despite being at risk in another country of which they are also a national. By contrast, where an individual may be able to acquire nationality, they do not presently hold that nationality and so it is irrelevant for the purposes of determining whether they are outside their country of nationality with a well-founded fear of persecution.
11. In her determination, Judge Frazer concluded that the appellant fell within category (iii) and thus her only country of nationality was Somalia.

12. At para 19, Judge Frazer set out an extract from the relevant Italian citizenship law. Before me, both Mr Diwnycz, who represented the Secretary of State and Ms Williams, who represented the appellant (neither of whom appeared in the First-tier Tribunal), acknowledged that the judge had been entitled to look up the relevant law in Italy by reference to the footnote cited in the refusal letter.

13. At para 20, the judge said this:

“20. The Appellant did not make any attempt to obtain her residence rights in Italy prior to the hearing. I find that she falls within category (iii) of **KK** in that she is not Italian but may be entitled to acquire it. She may be legally married but there is an issue about the permanency of her marriage bond in view of her expressed intention to having nothing to do with her husband and on account of his incarceration. Her children will be Italian nationals. In all likelihood she would derive a right of residence in Italy on account of her parentage of them; however, in the circumstances this is not a certainty, and it is not known what sort of right that would be: it would not necessarily be an entitlement to nationality.”

14. Then, having cited from MA (Ethiopia) and KK, the judge continued at paras 22-23 as follows:

“22. The Appellant’s children are entitled to Italian nationality on account of their parentage. In all likelihood the Appellant will have a derivative right as their sole carer but not necessarily an entitlement to Italian nationality. In terms of her own status as a spouse of an Italian national, there may be some issue concerning the permanency of her marriage which could vitiate her entitlement to Italian nationality through her relationship with her spouse. In either case, there may be suitability requirements and as Mr. Rees has pointed out, there may be suitability requirements which will not be fulfilled because of the husband’s criminality.

23. The Appellant has not made any enquiries of the Italian embassy as to her entitlement or her children’s entitlement to Italian nationality. However the question, it seems, is not clear cut. There is no evidence before me that she will have an automatic entitlement to Italian nationality on account of her status as the children’s sole carer. She may have an entitlement through marriage but the permanency of that relationship is in issue, so there is no definite answer to whether she will acquire it in that way. Taking into account the dicta at paragraph 83 of KK, notwithstanding the Appellant’s failure to make enquiries of the Italian embassy about her status, I find that she is not an Italian national or has a de facto entitlement to nationality. In those circumstances she is in the United Kingdom and is at real risk of persecution for a Convention reason, as has been accepted by the Respondent in the reasons for refusal letter. The United Kingdom must therefore honour its obligations under the Refugee Convention. I allow the appeal.”

15. The Secretary of State’s grounds, in effect, contend that the judge erred in law by failing to take into account that the appellant had not sought to determine from the Italian authorities whether she was an Italian citizen. Leaving aside, the irrelevant issue of residence, the judge had before her evidence that the appellant could apply and might acquire Italian

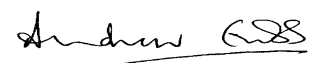
citizenship based upon her relationship with her husband. But that was not because she already was an Italian citizen (KK category (i)) or because she was entitled to acquire it (KK category (ii)). It was because if she satisfied the relevant requirements (including three years or perhaps one and a half years' residence in the UK as her husband's spouse), she could apply and might acquire Italian citizenship. That, as the judge found, falls within category (iii) of KK.

16. The judge was alive to the argument that the appellant had not made enquiries of the Italian embassy as to her status. However, that is, in truth, no more than a matter of evidence (see MA (Ethiopia) at [50] and KK at [83]). It is not a legal requirement. Here, the judge had the full text of the Italian citizenship provisions. What was the applicable Italian law was a question of fact based upon the evidence. It was, in my judgment, properly open to the judge to conclude that the appellant was not now an Italian citizen nor did she have the right to acquire it. As the judge noted, the law is hedged about with conditions and the judge was entitled to find that not all these conditions were established on the evidence. Whilst the appellant could make a claim to citizenship, this was not a case where she had an established right to that citizenship. The fact that the appellant had not approached the Italian embassy was not determinative. The terms of Italian law were clearly before the judge and the judge's findings in relation to the surrounding circumstances, which Mr Diwnycz accepted could not be successfully challenged, entitled the judge to conclude that the appellant had established that she was not an Italian citizen or was entitled to acquire it.
17. In my judgment, that finding is legally unassailable and determinative of the appeal in the appellant's favour given the Secretary of State's concession that she would not be safe on return to Somalia.

Decision

18. For these reasons, the First-tier Tribunal's decision to allow the appellant's appeal on asylum and Art 8 grounds did not involve the making of an error of law. That decision stands.
19. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed



A Grubb

Judge of the Upper Tribunal

7 September 2017

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", with a horizontal line underneath.

A Grubb
Judge of the Upper Tribunal

7 September 2017