Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00490/2019

THE IMMIGRATION ACTS

Decided without a hearing under rule 34 (P)

Decision & Reason Promulgated On 02 July 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMIR HUSSAIN

Respondent

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (Mr Hussain) appealed the respondent's decision dated 16 January 2019 to refuse to issue a residence card recognising a retained right of residence as a family member under European law.

3. The decision was made with reference to regulation 10(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). The appeal was brought under regulation 36 of the same regulations on the sole ground of whether the decision breached the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom (Schedule 2(2)(4)). There is no evidence to suggest that the appellant was issued with a notice under section 120

of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") or that the Secretary of State made a 'human rights decision' that might give rise to a right of appeal under section 82(1)(b) NIAA 2002.

4. First-tier Tribunal Judge K.R. Moore ("the judge") allowed the appeal in a decision promulgated on 02 January 2020.

5. The Secretary of State appealed the decision on the following grounds:

   (i) The judge erred in appearing to determine the appeal with reference to human rights grounds, when he had no jurisdiction to do so under the EEA Regulations 2016: see *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091;

   (ii) The judge erred in appearing to consider a 'new matter' relating to Charter rights, which was raised for the first time at the hearing, without the Secretary of State's consent (section 85(5) NIAA 2002); and

   (iii) The judge failed to give adequate reasons and/or failed to make clear the legal basis upon which he allowed the appeal.

6. In view of the need to take precautions following the outbreak of Covid-19, the Upper Tribunal reviewed the case and sent directions to the parties on 29 May 2020. The Upper Tribunal encouraged the parties to discuss the case to see if there was any agreement as to whether the First-tier Tribunal decision involved the making of an error on a point of law such that the decision needed to be set aside. Having reviewed the First-tier Tribunal decision and the arguments put forward in the grounds of appeal the Upper Tribunal gave the following preliminary indication.

> "In particular, the parties may wish to note my preliminary indication of the merits of the appeal (without prejudice to further submissions). There is some force in the appellant's (SSHD) submission that the First-tier Tribunal judge may have failed to distinguish between the jurisdiction to determine domestic human rights issues (with reference to the Human Rights Act 1998) and citizens' rights under European law. It is arguable that the judge may have been misled by the appellant's muddled arguments relating to *Amirteymour v SSHD* [2017] EWCA Civ 353, which only related to the scope to argue domestic human rights issues in an appeal brought under the EEA Regulations 2006. The decision in *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091 explained why the changes to the Nationality, Immigration and Asylum Act 2002 and the introduction of the Immigration (European Economic Area) Regulations 2016 altered the position. The judge seemed to make confused references to principles of domestic and European law throughout the decision. He wrongly referred to it as an appeal brought under the 2002 Act when it was brought under the EEA Regulations 2016 [1] and incorrectly referred to "the immigration rules" throughout. The judge had no jurisdiction to allow the appeal on the ground that it was "not in accordance with the law".
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> It is possible that the judge failed to give adequate reasons to explain how or why the appellant succeeded in relation to the sole ground of appeal, which was whether the decision breached the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom. Although the judge did not appear to conduct an assessment under domestic human rights law with

> reference to Article 8, and was likely to be entitled to consider rights issues relating to the Charter within the context of an appeal brought under the EEA Regulations 2016, it is arguable that the judge failed to analyse how the child's rights as a European citizen were engaged within the context of relevant European and domestic authorities such as *Alfreso Rendón Marín v Administración del Estado* [2016] EUECJ C-165/14, *Chavez Vilchez v Raadvanbestuur van der Sociale Verzekeringsbank & others* [2018] QB 103 and *Patel v SSHD* [2019] UKSC 59 and how that impacted on the appellant's rights, if any, under European law given that he is not a European citizen.
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> The decision that was the subject of the appeal did not consider human rights issues. At the date of the decision the evidence showed that the appellant did not have contact with his daughter. The Secretary of State had not previously been asked to consider Charter rights and no arguments were put forward in the grounds of appeal. It is also strongly arguable that the judge failed to consider whether the Charter rights issue raised by the appellant for the first time at the hearing was a 'new matter' that required the Secretary of State's consent with reference to section 85(5) of the 2002 Act even if that meant adjourning the case to seek the Secretary of State's written opinion in the absence of a representative. If the respondent does not accept that the First-tier Tribunal decision may have involved the making of errors of law, then he should address these concerns in his written argument (see paragraph 4(iv)).

7. The parties complied with the direction to discuss the issues raised in the appeal and were able to come to an agreement that the First-tier Tribunal decision involved the making of an error of law such that it needed to be set aside. Mr Hussain's representative sent an email to the Upper Tribunal on 03 June 2020 confirming that they had no objection to the decision being set aside and suggested that the appeal should be remitted to the First-tier Tribunal for a fresh hearing. A representative of the Secretary of State sent email correspondence on 11 June 2020 confirming that the parties agreed that the appeal should be remitted to the First-tier Tribunal for a fresh hearing with no findings preserved.

Decision and reasons

8. Although neither party identified the basis upon which they agreed that the First-tier Tribunal decision involved the making of an error of law, it is reasonable to infer that both parties considered the indication given by the Upper Tribunal in the directions and agreed, for those reasons, that there was an error of law in the First-tier Tribunal decision.

9. For the reasons I gave in my preliminary indication, I conclude that the First-tier Tribunal decision involved the making of an error on a point of law and must be set aside.

10. I have considered the guidance given in paragraph 7.2 of the Practice Statement dated 25 September 2012. The normal course of action would be for the Upper Tribunal to remake the decision even if it involves further fact finding.

11. At the hearing before the First-tier Tribunal the appellant's representative accepted that the appellant did not meet the requirements of regulation 10(6) because he was

unable to produce evidence, at the time, to show that he was a worker, self-employed person or self-sufficient person as if he were an EEA national at the date of the termination of the marriage on 28 December 2018. It seems that this was because he could not produce relevant evidence at the time. If the appellant has further evidence to show that he was likely to be working at the relevant time, I see no reason why the issue should not remain open for determination. The Secretary of State did not seek to challenge the First-tier Tribunal's findings of fact relating to the family court proceedings and the extent of the appellant's contact with his daughter, who is likely to be an Italian citizen. Given the terms of the family order it is likely that the situation might have developed since the hearing in the First-tier Tribunal. The appellant will need to provide an up to date witness statement outlining the extent of his current contact with his daughter.

12. Although these issues could be determined by the Upper Tribunal, I am conscious of the fact that, despite the misleading arguments relating to human rights issues put forward by the appellant's representative in the First-tier Tribunal, other issues relating to Charter rights were raised that have not been considered by the Secretary of State. Given that the Secretary of State was also absent from the First-tier Tribunal hearing, it seems inappropriate for her to tackle the issue of Charter rights for the first time in the Upper Tribunal. For this reason, I find that it is appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing.

13. The question of whether the Secretary of State consents to Charter rights issues being considered by the First-tier Tribunal will need to be resolved before the next hearing. To this end I make the following directions:

    (i) **The appellant** shall file on the First-tier Tribunal and serve on the Secretary of State, written submissions relating to Charter rights with reference to relevant evidence and case law within **28 days** of the date this decision is sent.

    (ii) **The respondent** shall consider the appellant's written submissions and shall file and serve a response confirming whether she gives consent for the First-tier Tribunal to consider the issue no later than **14 days** before the next hearing in the First-tier Tribunal.

14. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The appeal will be remitted to the First-tier Tribunal for a fresh hearing.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal will be remitted to the First-tier Tribunal for a fresh hearing

Signed *M. Canavan* Date 23 June 2020

Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email