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

Appeal Numbers: DA/00528/2017
& DA/00532/2017

**THE IMMIGRATION ACTS**

| **Heard at George House, Edinburgh** | **Decision & Reasons Promulgated** |
| --- | --- |
| **On 6 July 2021** | **On 12 October 2021** |

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**ROBERT HAVRILA (FIRST APPELLANT)**
**RENATA HAVRILOVA (SECOND APPELLANT)**
**(NO ANONYMITY DIRECTION MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the First Appellant: Mr Bradley, Solicitor
For the Second Appellant: Mr E Mackay, Solicitor
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal with permission against the decision of First-tier Tribunal Judge Agnew promulgated on 6 March 2018.

2. Although I gave an extempore decision at the end of the hearing on 6 July 2021, the recording was damaged and it was not possible to recover it.

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This decision was dictated some time after the hearing and was circulated to all the representatives with directions for them to suggest any amendments, corrections or additions by 12 August 2021. There has been no response and accordingly, I am satisfied that there is nothing that any of the parties wish to add.

3. Permission to appeal against the decision of the First-tier Tribunal was refused by the First-tier Tribunal and, on renewal, by the Upper Tribunal on 5 September 2018. Both appellants, who are separately represented, challenged those decisions of the Upper Tribunal by way of judicial review. In both cases, the decisions were reduced, albeit at separate times, and permission to appeal was subsequently granted by the Vice President on 17 July 2020 in respect of the second appellant and 12 May 2021 in respect of the first appellant. A decision was taken not to list the appeal of the second appellant until a decision had been reached in respect of the petition brought by the first appellant.

4. The appellants are both citizens of Slovakia and are husband and wife. They have lived in the United Kingdom, in Glasgow, for a number of years and have a large number of children. Some of them are now adults.

5. Although the first appellant was sentenced to a term of imprisonment for six years in Slovakia in 2006 and the second appellant has a conviction for which she was sentenced to two years in 2013, and was extradited to Slovakia to serve that sentence, they do not have convictions in the United Kingdom.

6. The reasons the Secretary of State gave for making deportation orders against the appellants are on the basis that their behaviour in the United Kingdom including the criminal behaviour and antisocial behaviour of their children is such that it was justified on grounds of public policy, public security pursuant to Regulation 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”).

7. The judge found the appellants had not established a right to reside under the EEA Regulations, they had not exercised their treaty rights [82] and concluded that the evidence established that the appellants’ conduct and that of their children represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [83] and that their removal and that of their children was required to prevent future risk to the community. She found this to be justified, and also that the deportation would not be in breach of Article 8 of the Human Rights Convention.

8. The grounds of appeal focus on two areas: procedural matters, including a failure to adjourn the hearing, and to follow the principles set out in Farquharson (removal – proof of conduct) [2013] UKUT 00146; and, failing to take into account evidence which was before her at paragraph [79] and in effect also, reversing the burden of proof.

**Procedural Errors**

9. Mr Bradley submitted that the judge had not properly applied the criteria set out in Nwaigwe and that fairness had also required, following Farquharson, for the Secretary of State on whom the burden lay to produce detailed evidence, in the form of witness statements from the police and/or Social Services, setting out the entirety of the material rather than the “cherry picking” which had occurred here. In not adjourning, the appellants’ ability to deal with the case against them had been hampered.

10. Mr Mackay adopted the same submissions.

11. Mr Diwnycz did not accept that Farquharson was directly applicable in a case such as this but did accept that the letter referred to at paragraph [79] was in the bundle and did tend to show other considerations may have been in play.

12. In assessing the two issues regarding procedural fairness, it is, I consider, artificial to separate the issues around the fairness of the hearing as required by Nwaigwe from what is required by Farquharson.

13. While I accept that Farquharson and the principles set out in that are in relation to a deportation appeal under domestic law rather than under European law, nonetheless the principles in respect of fairness are equally applicable and the fact that the burden is on the Secretary of State does not alter that. I note in this respect that the second appellant’s solicitors had had a very short time to prepare for the hearing, albeit that that was because of the change in representatives. But equally it had not been possible for them to accurately obtain relevant material held by Social Services and the police upon which the Secretary of State had sought to rely. Further, it appears from the decision that the judge placed significant weight on the limited material that had been produced and the appellants were entitled to know precisely what the case against them was. The judge has not properly explained [25] how the appellants had had ample time to produce further evidence and that paragraph is to an extent indicative of an improper approach.

14. I note also that paragraph [76] appears to indicate a view from the judge that her role was for review rather than appeal on the merits.

15. It was relevant for the judge to take into account the letter from the respondent which indicated that the intention in removing the appellants was that their children would be removed with them. The judge’s explanation for not taking that material point into account is that she could not find it. It was clearly in the bundle and this is not a sufficient reason for not taking it into account.

16. Further, much of the discussion in the decision is about the children rather than the parents. It is difficult to equate that with the requirement that

decisions of this sort should be taken only on the basis exclusively of personal conduct.

17. Taking these matters together, I am satisfied that there was a failure to permit a fair hearing in this case which is required by an adjournment. On that basis alone, the decision falls to be set aside to be remade in its entirety.

18. In the circumstances it is unnecessary for me to make any findings with regard to the other grounds of appeal although I do consider it made out that the judge erred in accepting the translations of the relevant parts of the Slovak Penal Code given that the translations appear not to bear any relationship to the convictions, instead describing somewhat different offences. I consider also that the judge erred, as noted above, in her approach to the email from the respondent it is unnecessary to make a separate finding on that given my earlier findings.

**Notice of Decision**

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remit the decision to the First-tier Tribunal for a fresh decision on all relevant facts.

No anonymity direction is made.

Signed Date 15 September 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul