



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

Appeal Number: DA/01058/2012

THE IMMIGRATION ACTS

Heard at Manchester (Piccadilly)

**Determination
Promulgated**

On 14 November 2013

On 06 January 2014

Before

**THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE SOUTHERN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAWEL WYKOWSKI

Respondent

[No Anonymity Direction requested or made]

Representation

Appellant: Ms Rutherford (of counsel), instructed by Dixons Solicitors

Respondent: Mr McVeety, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

INTRODUCTION

[1] This judgment contains the fuller grounds and reasons articulated in our *ex tempore* judgment at the conclusion of the hearing of 14th November 2013, when we summarised why we had decided to allow this appeal.

- [2] The Secretary of State for the Home Department (hereinafter "*the Secretary of State*") appeals, with permission, against the Determination of the First-Tier Tribunal (hereinafter "*the Tribunal*") promulgated on 18th April 2013. By its decision, the Tribunal allowed the Respondent's appeal against the Secretary of State's decision, dated 12th December 2012, to deport him from the United Kingdom. The Tribunal allowed the appeal on the ground that deportation would breach the Respondent's rights as a European citizen under the Immigration (European Economic Area) Regulations 2006 ("*the 2006 Regulations*"). While the appeal had been pursued on a second ground, namely infringement of the Respondent's rights under Article 8 ECHR, the Tribunal did not determine this ground, on the basis that it was considered unnecessary to do so.

FIRST GROUND OF APPEAL: THE PERMANENT RESIDENCE ISSUE

- [3] By regulation 15(1)(a) of the 2006 Regulations, the right to reside permanently in the United Kingdom is conferred on, *inter alios*, an EEA National who has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. One of the elements of the definition of "*EEA decision*", enshrined in regulation 2(1), is a decision that concerns "*a person's removal from the United Kingdom*". Regulation 21 employs the terminology "*relevant decision*", defining this as "*an EEA decision taken on the grounds of public policy, public security or public health*".
- [4] We elaborate on the above as follows. The scheme of the 2006 Regulations in respect of those falling within their scope and who face removal as a consequence of a relevant decision, as defined, is to provide three levels of protection from removal. The lowest level of protection afforded is provided by regulation 21(1) which requires that a relevant decision, which includes a decision to remove, is to be taken on the grounds of public policy, public security or public health. Turning to the intermediate level of protection, which applies to a person who has acquired a permanent right of residence under regulation 15, such a decision can be taken only on *serious* grounds of public policy or public security: per regulation 21(3). Finally, the third, and highest, level of protection applies to a person who has accumulated at least ten years continuous residence prior to the date of the relevant decision. In this case, such a decision cannot be taken except on *imperative* grounds of public security: per regulation 21(4).
- [5] For the purposes of this appeal we are concerned only with the first two levels of protection. In paragraph [3] of its determination, the Tribunal stated:

"The [Secretary of State] accepted the [Respondent] has acquired a right of permanent residence by being in the United Kingdom for over a continuous period of five years."

This finding was repeated in paragraph [18]. It is, however, confounded by the text of the Secretary of State's deportation decision, which recites:

"There is no evidence of residence in accordance with the regulations for a continuous period of 5 years or of 10 years continuous residence ...

It is considered that you have not acquired the right of permanent residence in the United Kingdom."

The letter then rehearsed, correctly, the Regulation 21(1) test. Thus the Tribunal made a notable error on this issue.

- [6] The Tribunal, in its first reference to the applicable test under the 2006 Regulations - in paragraph [15] - was clearly directing its mind, incorrectly, to the lower threshold prescribed by regulation 21(1). In the next relevant passage, in paragraph [18], the Tribunal recited, in terms, the higher (intermediate) threshold prescribed by regulation 21(3), but did so in the context of the aforementioned erroneous finding which, if correct, would have triggered the lower regulation 21(1) threshold. Ms Rutherford, on behalf of the Respondent, drew our attention to later passages in the Determination, in paragraphs [26] and [28]. We are unable, however, to accede to her submission that these passages had the effect of correcting (a) the articulation of the wrong test in paragraph [15], (b) the repeated statement - in paragraphs [3] and [18] - that there was no dispute between the parties that the Respondent had the status of a person enjoying a right of permanent residence or (c) the confused juxtaposition in paragraph [18] of this incorrect statement and the recitation of the test applicable to persons who have **not** acquired this right.
- [7] In summary, there is a fundamental error of fact in the Determination bearing on an issue of central importance, namely the Respondent's status under the 2006 Regulations, a significant misdirection in law concerning the applicable test and a demonstrable degree of confusion relating to these important issues. These combine to produce an unmistakable error of law. We consider that the first of the permitted grounds of appeal has been established accordingly.

SECOND GROUND OF APPEAL: THE RISK OF REOFFENDING ISSUE

- [8] While there are two permitted grounds of appeal under this umbrella heading, we consider that, properly analysed, they resolve to a single complaint, albeit with more than one manifestation, which we would summarise as a failure on the part of the Tribunal to correctly understand and properly engage with the evidence bearing on this issue.
- [9] While there was an OASYS report which made some contribution to this issue and to which our attention was correctly drawn by Ms Rutherford, it was agreed, in substance, that this ground of appeal falls to be

determined mainly by reference to the Probation Service "NOMS" report. Its salient contents may be summarised thus:

- (a) There was an assessment that the Respondent presented a low likelihood of reoffending.
- (b) The risk of inflicting serious harm, in the event of reoffending, was considered to be medium.
- (c) This latter risk was based on a lengthy menu of "*risk factors*".
- (d) The Respondent was assessed as presenting a risk to the victim of his index and previous offences **and** to the general public.
- (e) The Respondent was under the influence of alcohol when he committed the index offence.
- (f) The author considered the Respondent capable of behaving in an aggressive and impulsive manner due to his temperament. There was a related assessment that he –
".... needs to gain skills to deal with conflict situations in an assertive way as well as improve his problem solving and consequential thinking skills."
- (g) Employment, stable accommodation, engagement and compliance with community based orders were identified as "*protective factors in him leading an offence free lifestyle*".

[10] It is clear from its determination that the Tribunal became particularly preoccupied with the issue of where the Appellant continued to reside and whether an alternative place of residence might be available to him, as a possible antidote to reoffending. This is clear from paragraphs [23] – [28]. It is reinforced by the procedural course of the hearing, to which we have adverted above. Both parties were agreed that the hearing was initially conducted on 29th January 2013 and was concluded on the basis that judgment was reserved. However, subsequently, the Tribunal issued formal directions to the effect that the aforementioned issue should be specifically addressed. The Tribunal then convened a second day of hearing, on 15th April 2013. The reception of the further evidence thereby generated is recorded in paragraphs [26] – [28] of the Determination. The central issue being explored by the Tribunal was the risk of the Respondent reoffending. This was unquestionably an important issue to be considered. Furthermore, it was incumbent on the Tribunal to form its own view about this matter. We consider that what this required of the Tribunal was the demonstration in its determination of having fully addressed and understood the NOMS report and having properly engaged with its contents, to be followed by appropriate findings and conclusions, duly reasoned. We conclude that these requirements were not satisfied. There was inadequate engagement with the NOMS report and an evident

failure to appreciate that the reoffending and serious harm assessments in the report were neither based on the Respondent's place of residence nor restricted to a single putative victim. We consider these to constitute clear errors of law which, as they concerned an issue of fundamental importance, were of undeniable materiality.

[11]The second ground of appeal succeeds accordingly.

THIRD GROUND OF APPEAL: PROCEDURAL UNFAIRNESS

[12]We have mentioned briefly the procedural course of the hearing at first instance. In light of our exchanges with the parties' representatives, it is clear that the relevant sequence of events is the following:

- (a)The Tribunal, constituted by a Judge and a non-legal member, conducted a hearing on 29th January 2013. This hearing was concluded on the clearly shared understanding and expectation that a reserved judgment would be forthcoming in due course.
- (b)The hearing was followed by procedural directions issued by the Tribunal. These focused exclusively on the issue of reoffending, invited further evidence and explicitly stated that both parties would have the facility of making further representations.
- (c)The Tribunal then arranged a second day of hearing, which took place on 15th April 2013.
- (d)At the second hearing, the Respondent was permitted to adduce further evidence relating to the "relocation" issue. The Secretary of State's representative is recorded as having addressed two questions to the witness concerned.
- (e)The Tribunal did not permit the Secretary of State's representative to make submissions in relation to the new evidence.

[13]We are satisfied that, procedurally, it was appropriate for the Tribunal to issue the further directions and to reconvene subsequently for a second day of hearing. It lay within its margin of appreciation to conduct the appeal process in this manner. However, the Tribunal had an overarching duty to ensure that both parties' right to a fair hearing was fully respected. A party's entitlement to respond to the other party's case is an elementary, entrenched aspect of this hallowed common law right. We consider that in refusing to permit the Secretary of State's representative to make submissions concerning the new evidence the Tribunal failed to accord to the Secretary of State an indisputable aspect of this fundamental right. While we recognise that this kind of procedural impropriety must not be assessed in an abstract vacuum, the conclusion that the impropriety which occurred in the context under scrutiny was a matter of

some moment is inescapable. The simple analysis that the Secretary of State's representative *could have* formulated representations which *might have* influenced the Tribunal's determination of the appeal is unassailable. That fairness demanded such an opportunity to advance closing submissions is reinforced by the fact that more than ten weeks had elapsed since the date of the initial hearing. See, generally, **R v Chief Constable of Thames Valley Police, ex parte Cotton** [1990] WL 753309. We are impelled, inexorably, to the conclusion that this ground of appeal is also established.

THE CONSTITUTION OF THE TRIBUNAL

[14] We note with some concern that, on the first day of hearing, the Tribunal was composed of a judge and a non - legal member. On the second day of hearing, the non - legal member did not feature and the Determination is in the name of the judge only. In the text of the Determination, one finds a mixture of the judge's personal views and assessments and the **combined** views and assessments of the judge and the non - legal member: see paragraphs [24] - [28]. No order of any kind was made to regularise the alteration in the composition of the Tribunal. We are bound to comment that all of this was highly irregular. While this irregularity does not form one of the permitted grounds of appeal, we consider that, *per se*, it vitiated the outcome at first instance.

DECISION

[15] We allow the Secretary of State's appeal and we set aside the first instance decision.

[16] The effect of this is that the decision is to be remade, either by the Upper Tribunal or on remittal to the First-tier Tribunal by a different constitution of that Tribunal. In deciding this question we have had regard to the Senior President's Practice Statement, paragraph 7.2 whereof provides that the expectation is for the decision to be re-made by the Upper Tribunal except where the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Here, the effect of one of the errors made below was to deprive one of the parties of the opportunity to have its case considered because the judge misunderstood it. We bear in mind also that the appeal is to be decided afresh with no findings of fact preserved. For these reasons we are satisfied that the proper course is to remit this appeal to the First-tier

Tribunal so that the parties can now have the initial hearing to which they were entitled.

OMNIBUS CONCLUSION

[17] For the reasons elaborated above, the appeal succeeds on all grounds. We order remittal to the First-tier Tribunal, differently constituted, with no preserved findings.

[18] The appeal to the Upper Tribunal is allowed to the extent that it is remitted to the First-tier Tribunal to be determined afresh.

Signed: *Seamus McCloskey*

**The President
The Honourable Mr Justice McCloskey**

Dated: 6 January 2014