



**UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)**

**APPEAL NUMBER: IA/19206/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On 10 November 2015**

**Decision and Reasons Promulgated  
On 25 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**MR JOSEPH MARODZA  
NO ANONYMITY DIRECTION MADE**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**Representation**

**For the Appellant: Mr R Khubber, counsel, instructed by Turpin and Miller  
For the Respondent: Ms N Willcocks-Briscoe, Senior Home Office Presenting  
Officer**

**DECISION AND REASONS**

1. The appellant is a national of Zimbabwe, born on 23 December 1993. His appeal against the decision of the respondent dated 8 April 2014 refusing his application for permanent residence pursuant to Regulation 20(1) of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations") and human rights was dismissed by the First-tier Tribunal Judge in a decision promulgated on 24 February 2015.
2. On 6 July 2015, Upper Tribunal Judge Pitt granted the appellant permission to appeal. She noted that the appellant was already subject to a deportation order. The

earlier appeal against the making of that order did not address his status as the dependant of an EEA national during his childhood. Although the First-tier Tribunal Judge was aware that the appellant's case was that he was entitled to permanent residence having lived in the UK as the dependant of an EEA national between 2003 and 2008, it was arguable that at no point did the determination show whether he assessed the question of permanent residence and the higher "serious" level of threat required for exclusion of an individual with EEA permanent residence.

3. At the error of law hearing, Mr Khubber relied on his written submissions dated 6 November 2015 and his grounds seeking permission to appeal.
4. He noted that the chronology provided to the First-tier Tribunal and the application for a permanent residence card asserted that the appellant had been in the UK "pursuant to his rights under EU law" for a number of years prior to his conviction which led to deportation action against him. He had been granted leave to remain under EU law by the Home Office for the period between 2 October 2003 and 13 November 2008.
5. Had the appellant established permanent residence previously, by the time the appeal came before the First-tier Tribunal, the correct threshold for his right not to be removed by the deportation order was the higher one, namely the second level, requiring the respondent to establish "serious grounds of public policy" pursuant to Regulation 21 (3) of the 2006 Regulations.
6. The Judge however failed to address that important issue and appeared to have proceeded on the assumption that the general lower, first level test, applied in this case. However, there was no explanation as to why the Tribunal started from this position. There had been no explicit or proper reference to the threshold under Regulation 21(3). Accordingly, the question of the level of protection that he was entitled to was relevant to whether he should have been refused a permanent residence card.
7. He submitted that the reality of this case, however, was that although it was formally for a permanent residence card, what needed to be considered was whether the deportation order should have been revoked such that the appellant was entitled to a permanent residence card at the date of his application in February 2014 as the relevant threshold justifying his removal pursuant to the extant deportation order, had not been satisfied.
8. He submitted that the criminal history of the appellant and his subsequent conduct did not show that the higher (second level) threshold set out in LG and CC v SSHD [2009] UKAIT 00024, had been established. What was required was a carefully structured examination of the criteria which the First-tier Tribunal did not undertake.
9. He also referred to the judgment of Lord Justice Sullivan in BR (Portugal) v SSHD [2009] EWCA Civ 923 at [3] where he referred to the decision in MG and VC [2006] UKAIT 00053 which stressed the introduction of the word "serious" into the regulations.

10. Mr Khubber submitted that the second level threshold was not satisfied. In any event, even if the first level threshold was applicable, the First-tier Tribunal Judge erred in concluding that the threshold had been satisfied in this case.
11. There was also a related risk of compromising rehabilitation in this case as the appellant would not be being removed to another member state – MC (Essa principles recast) Portugal [2015] UKUT 520.
12. He also made submissions relating to alleged misdirections with regard to Article 8, ECHR.
13. In his further written 'outline submissions' produced at the hearing, he submitted that the First-tier Tribunal's error in his approach to a case where there are "dual grounds of appeal", namely EU law and Article 8 ECHR is reinforced by the Upper Tribunal's emphasis in Badewa (SS117AD and EEA Regs) [2015] UKUT 329 of the importance of appreciating the distinction between the two systems of protection.
14. He accordingly submitted that the decision is materially flawed and must be set aside and remade. This was an appropriate case to remit to the First-tier Tribunal.
15. On behalf of the respondent, Ms Wilcocks-Briscoe accepted that there had been an error of law regarding the appropriate threshold which had to be applied.
16. She nevertheless relied on the respondent's Rule 24 response and contended that the appellant had several convictions including one of "knife point" robbery. That type of offence is enough to reach the "serious grounds" threshold in any event. Accordingly, the proportionality test within the Regulations is unlikely to result in a different outcome in this case.

### **Assessment**

17. It is correctly accepted by the respondent that the second level of protection is applicable in the appellant's case. However, it is contended that the error is not material, because when regard is had to the offences committed, the second level threshold was satisfied in his case.
18. It is however not clearly the case that the second level threshold would inevitably be satisfied. In making the assessment required, the Tribunal would have to consider the fact that the appellant's most recent conviction concerned a burglary resulting in a sentence of 12 months in prison. Although serious, it was not, as submitted by Mr Khubber, at the most serious level of offending.
19. In addition, the appellant has been at liberty and has not re-offended for a period of 18 months. Accordingly, the Tribunal would have to assess whether in the light of the current clean record, he nevertheless constitutes a genuine, present and sufficiently serious threat as required by Regulation 21(5).
20. Moreover, the Tribunal would have to factor into the assessment the asserted potential risk of compromising his future rehabilitation, despite previous failures in that respect, if the appellant were to be removed to Zimbabwe and whether any comparable support that he has in the UK would be available on return to Zimbabwe: Batista v SSHD [2010] EWCA Civ 896 at [27].

21. In any event, the appellant was entitled to expect that the Judge would direct himself appropriately and assess the appeal in accordance with the correct threshold. It is not obvious that even if he had directed himself appropriately, the Judge would inevitably have reached the same conclusion.
22. In the circumstances, I am satisfied that there was a material error of law. The decision of the First-tier Tribunal is accordingly set aside and will have to be re-made.
23. Ms Wilcocks-Briscoe did not seek to argue that this was not an appropriate case to be remitted to the First-tier Tribunal.
24. The appellant has not had the benefit of having his case assessed and decided on the basis of the applicable removal provisions under the 2006 Regulations. Having regard to the overriding objective, I find that it would accordingly be in the interests of justice and fairness to remit the case.

**Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The case is remitted to the First-tier Tribunal (Birmingham) for a fresh decision to be made.

No anonymity direction is made.

Signed

Date 22 November 2015

Deputy Upper Tribunal Judge Mailer