



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

Appeal Number: DA/00290/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 14 November 2017**

**Decision & Reasons
Promulgated
On 21 February 2018**

Before

**THE HON. MR JUSTICE KNOWLES
UPPER TRIBUNAL JUDGE RINTOUL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

P T

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Ms S Wawrzynczak,

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Ford promulgated on 20 September 2017 in which she allowed the appeal of PT against the decision of the Secretary of State to make a deportation order against him pursuant to the Immigration (European Economic Area) Regulations 2016. It is, we consider, unnecessary to set out in any detail the factual background to this case as it is not disputed that he has a history of convictions for drugs which is set out at paragraph 2 of the decision the First-tier Tribunal nor is it in dispute

that the index offence in this case was the supply of Class A controlled drugs for which the respondent was sentenced to 24 months' imprisonment. It is on the basis of that index offence that the Secretary of State took the decision to deport him.

2. It appears that the initial consideration of the case by the Secretary of State was under the Immigration (European Economic Area) Regulations 2006 which were in force at the time that the respondent was invited to make representations. It is however, we consider, uncontroversial that the decision letter in this case is clearly made pursuant to the 2016 Regulations. Indeed these are referred to in significant detail. It is also apparent from the decision notice that that it was taken pursuant to the Immigration (European Economic Area) Regulations 2016.
3. The judge for whatever reason does not appear to have appreciated that there had been a change in the Regulations and at no point does she refer to the 2016 Regulations referring instead to the 2006 Regulations at paragraph 9. That is clearly an error. It is also noted that the error in this could not have been a slip of the pen as the judge clearly sets out at paragraph 10 Regulation 21(6) from the 2006 Regulations.
4. The Secretary of State sought permission to appeal on the ground first that the judge had made a material misdirection of law in that she had failed to apply the correct Regulations and as a result she had failed properly to assess the fundamental interests of society as defined in Schedule 1 of the 2016 Scheme Regulations and in addition had failed to consider properly the requirements of Regulation 27 of the 2016 Regulations.
5. The second ground is that the judge failed to take into account material matters, firstly in that she had erred in not taking into account the fact that the appellant was still serving a criminal sentence when assessing his ability to reoffend and thus had failed properly to apply the decision in **Restivo (EEA - prisoner transfer) [2016] UKUT 449 (IAC)**; and, second that the assessment of the reoffending in the OASys Report had been overlooked and that the judge had materially erred in failing to make a complete assessment of risk posed by the respondent to society as a whole.
6. We consider it is clear that the judge made an error in applying the 2006 Regulations rather than the 2016 Regulations. We are satisfied also for the reasons which we now give that this error was material. We consider that whilst **Restivo** is not directly relevant to the facts of this case it is significant in that what the judge did not do is consider what was likely to happen were the respondent to be released. We consider that there is no sufficient consideration of those matters and we consider also that there was no comprehensive consideration of the factors which may or may not affect the respondent's propensity to reoffend, if released. There was no consideration of how he was going to live, where he would live and that he would not lapse into criminal behaviour again, given that he has a history

of drug abuse which had escalated in seriousness. There was no indication that these were considered in assessing his propensity to reoffend. Further, there appears not to be a proper assessment of the general harm which is caused by dealing with drugs in particular to society as a whole rather than an identification of harm to an individual.

7. Taking these matters together, we consider that dealing with the decision as a whole, that the error which began with the direction to follow a previous set of the Regulations which were no longer in force and on which the decision has not been reached, was material in that it could not be said that the outcome would be the same. Further, for the reasons given, the judge failed properly to make the assessments necessary.
8. We have considered therefore to set the decision aside on the basis that it involved the making of an error of law. We have considered whether in the circumstances we should remake the decision in the Upper Tribunal. There is we consider a difficulty in doing so and that is that the appellant has now been released. That is we consider a significant change of circumstances and it is of course inevitable that there will have to be evidence as to how he has behaved, where he is living, those he has associated with and support which would form part of the picture as to whether the factors which had led him into drug offending in the past were no longer present. It would also inevitably involve the reassessment in the propensity to reoffend given the change of circumstances. We consider that there would have to be such a wholesale remaking of this case that the appropriate course of actions would be, bearing in mind the relevant guidance, to remit the decision to the First-tier Tribunal.
9. We have considered in doing so whether we should exercise a discretion to make directions preserving findings of fact. Whilst we note that the appellant's representative has indicated the factors should be found will not be preserved we are not satisfied that the circumstances of this case would be appropriate to make such findings given the substantial change in the circumstances which we find has occurred in this case and accordingly we remit the decision to the First-tier Tribunal without making any further directions as to the preservation of findings of fact.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remit the decision to the First-tier Tribunal for a fresh decision on all issues.

Signed

Date: 15 February 2018

A handwritten signature in black ink, appearing to read "James Rintoul". The signature is written in a cursive style with a large initial 'J' and 'R'.

Upper Tribunal Judge Rintoul