



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/14361/2018**

**THE IMMIGRATION ACTS**

**Decision Under Rule 34 Without a  
Hearing  
On 1<sup>st</sup> October 2020**

**Decision & Reasons  
Promulgated  
On 6<sup>th</sup> October 2020**

**Before**

**UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**ADRIAN GERANGCO**

Appellant

**and**

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

Respondent

**DECISION AND REASONS (P)**

1. The appellant is a national of the Philippines. On 5<sup>th</sup> January 2018 a decision was made to make a deportation order under s5(1) of the Immigration Act 1971 and on 19<sup>th</sup> June 2018 a decision was made to refuse the appellant's human rights claims. The appellant's appeal against that decision was dismissed by Designated Judge of the First-tier Tribunal, McCarthy for reasons set out in a decision promulgated on 3<sup>rd</sup> October 2018.
2. Because of the delay that has followed, it is appropriate for me to say a little about what has happened since. Permission to appeal was refused

by First-tier Tribunal Judge Woodcraft on 7<sup>th</sup> November 2018 and following renewal of the application, by Deputy Upper Tribunal Judge Roberts on 21<sup>st</sup> January 2019.

3. The appellant challenged the decision to refuse permission in the Administrative Court and permission to claim Judicial Review was refused. The appellant was granted permission to appeal to the Court of Appeal by Lord Justice Richards on 4<sup>th</sup> December 2019 and subsequently, the refusal of permission was quashed. As set out in the decision of the Vice President of the Upper Tribunal dated 3<sup>rd</sup> February 2020, permission to appeal was granted in the light of the comments made by Lord Justice Richards.
4. The hearing of the appeal was listed before a panel of Upper Tribunal Judge's on 10<sup>th</sup> March 2020, but the hearing could not proceed on that occasion. The parties agreed directions for further case management. There were then delays caused by the need to take precautions against the spread of Covid-19. The respondent filed and served a Rule 24 response to the grounds of appeal on 9<sup>th</sup> April 2020. The respondent also made an application to withdraw a concession said to have been made at the hearing of the appeal before Judge McCarthy on 2<sup>nd</sup> October 2018 by the Presenting Officer. The appellant filed and served a response dated 29<sup>th</sup> April 2020 to the submissions made by the respondent, supported by a number of attachments.
5. On 5<sup>th</sup> May 2020, Upper Tribunal Judge Pitt reviewed the matter and made directions extending time for compliance with the previously agreed directions. Unbeknown to her when she reviewed the matter, the parties had sent their written submissions to the Tribunal, and they had been received by the Tribunal. By email sent to the Upper Tribunal on 6<sup>th</sup> May 2020, Mr Deller, a Senior Home Office Presenting Office within the Specialist Appeals Team, reminded the Tribunal that the parties had served initial responses as previously directed. He also informed the

Tribunal that it had subsequently come to his attention that there is a decision of the Upper Tribunal that had been promulgated but not yet reported, that may be relevant to the outcome of this appeal. He also drew attention to 3 appeals listed before the Court of Appeal in May 2020 that may be relevant to the outcome of this appeal.

6. The appeal was reviewed by Upper Tribunal Judge Lindsley and she made further directions that were sent to the parties on 2<sup>nd</sup> July 2020. She directed that the parties may file any further submissions setting out the impact of the cases that had been drawn to the attention of the Upper Tribunal, on this appeal, and inviting the parties views as to how the issue of whether the FtT erred in law, and if so, whether it should be set aside, should be determined in light of the Covid-19 pandemic.
7. On 16<sup>th</sup> July 2020, the appellant provided the Upper Tribunal with submissions relied upon in support of his appeal and regarding the progress of this appeal. In reply, Mr Deller for the respondent now agrees that the FtT determination is flawed by error of law and should be set aside.
8. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal may make any decision without a hearing, and the Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing. The directions issued by Upper Tribunal Lindsley provided the parties with an opportunity to set out their view as to whether a hearing is necessary, and for that party to submit reasons for that view. In the appellant's submissions dated 16<sup>th</sup> July 2020, the appellant submits, at paragraph [16], that it would be appropriate for this appeal to be listed for physical, face-to-face hearing because of the nature of the issues raised. The respondent's position on the future conduct of the appeal is neutral. Neither the appellant nor the respondent has expressed a view as to whether a hearing is necessary in order for the

Tribunal to determine whether the decision of Designated First-tier Tribunal Judge McCarthy is infected by a material error of law.

9. However, in light of the sensible and pragmatic course proposed by the appellant and the position adopted by the respondent, and the view I have taken on the error of law, I am satisfied that it is in accordance with the overriding objective and the interests of justice for there to be a timely determination of the question whether there is an error of law in the decision of the FtT. Taking into account the position adopted by the respondent, it is entirely appropriate for the error of law decision to be determined on the papers, to secure the proper administration of justice. There is in my judgement, no prejudice to the appellant in my proceeding in this way.
10. It is common ground between the parties that the decision of the First-tier Tribunal is flawed by error of law and should be set aside, in light of the clarification regarding the test to be applied to such a case, as now set out in the authorities. It is also agreed that there should be a de novo hearing of the appeal, and the appellant has indicated a preference for the matter to be remitted to the First-tier Tribunal. I am satisfied that there is a material error of law in the decision of Designated Judge McCarthy and the decision must be set aside. In the circumstances I need say nothing more about the grounds of appeal.
11. As to the concession previously made by the respondent before the FtT, the respondent accepts that it would be disingenuous to now suggest there was no concession at all, but the Tribunal is asked to consider the overall context in which the question arose. The appellant has provided a witness statement from counsel that appeared on behalf of the appellant at the hearing on 2<sup>nd</sup> October 2018 and a copy of the record of proceedings that record the concession. In the appellant's further submissions dated 16<sup>th</sup> July 2020, the appellant submits the fact of that concession should be known to the Tribunal that the matter is remitted to,

but its existence will not preclude further consideration of whether the appellant satisfied the “serious harm” definition in light of the guidance given in the recent case law. At paragraph [15] of the appellant’s written submissions, the appellant submits:

“... In simple terms, the appellant does not seek to bind the next Tribunal or the SSHD to the concession made because of the clarification given by the Court of Appeal to the approach to be taken to consideration of the definition and which none of the parties previously had the benefit of.”

12. In order to ensure there is no ambiguity and for the avoidance of any doubt, this is an appeal in which it is appropriate for the Upper Tribunal to exercise its discretion to allow any concession that had been made before the FtT, to be withdrawn. First, there is in my judgement nothing to be gained by the fact of the concession being made known to the Tribunal that the matter is remitted to, where the appellant does not seek to bind the Tribunal or the SSHD to the concession. Second, I accept that the context in which the question arose is relevant and there is no evidence that particular consideration was given to the legal question as to whether the appellant is a “foreign criminal” before the concession was made at the hearing of the appeal in October 2018. It is clear from the way in which the authorities have since developed that the question whether an individual is a “foreign criminal” within the relevant legal framework can sometimes be a difficult one. Third, there is no evidence before me to suggest that it would be unjust to allow the concession to be withdrawn because of any reliance by the appellant upon the concession, to his detriment. Finally, the point in question is a pure point of law as to the definition of ‘foreign criminal’, and it is entirely proper where the decision of the First-tier Tribunal promulgated on 3<sup>rd</sup> October 2018 is to be set aside, that when the appeal is heard *de novo*, the decision of the Tribunal is made upon a correct legal footing so that the law is properly applied.
13. As to disposal, there is now a clearer legal framework against which the appeal must be considered. Given the lengthy passage of time since the

decision of Judge McCarthy, and the evidence that the Tribunal will have to consider, I am satisfied that the nature and extent of any judicial fact-finding necessary will be extensive, and in my judgment, the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing *de novo*.

14. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

### **Notice of Decision**

15. The appeal is allowed and the decision of Designated Judge McCarthy promulgated on 3<sup>rd</sup> October 2018 is set aside.
16. The appeal is remitted to the FtT for a fresh hearing of the appeal with no findings preserved.

Signed **V. Mandalia**  
October 2020

Date: 1<sup>st</sup>

**Upper Tribunal Judge Mandalia**