



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003099
UI-2022-003100
First-tier Tribunal No:
EA/13517/2021
HU/04864/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 June 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Mirosław Boczek
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms C Jones, counsel instructed by NLS Solicitors
For the Respondent: Ms S Rushmore, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 22 June 2023

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge C E Roblin promulgated on 13 June 2022.
2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge Adio on 27 June 2022.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The appellant is a national of Poland now aged forty-one who was granted indefinite leave to remain under the EU Settlement Scheme on 22 October 2019. On 17 May 2021, he was convicted of assault occasioning actual bodily harm for which he was sentenced to 12 months' imprisonment. The offence was carried out on 17 April 2017. On 17 August 2021 the appellant was invited to make representations in response to a decision to deport him. The appellant did so, with reference to his family and private life in the United Kingdom. A deportation order was made under section 32(5) of the UK Borders Act 2007 and signed on 16 October 2021.
6. On 18 October 2021, the Secretary of State wrote to the appellant to inform him that his human rights claim had been refused. It was not accepted that the appellant had family life with his child because they were no longer a minor. It was not accepted that the appellant's partner was British or settled in the United Kingdom nor that the appellant had a genuine and subsisting relationship with her, it being noted that the partner was the appellant's victim. The respondent considered whether the appellant met the private life exception to deportation and concluded that he had not spent most of his life in the United Kingdom, he was not socially and culturally integrated and there were no very significant obstacles to his integration in Poland. The respondent considered there to be no very compelling circumstances which outweighed the public interest in his deportation.

The decision of the First-tier Tribunal

7. The appellant and his partner gave evidence before the First-tier Tribunal. The judge recorded that the representatives agreed that the case came within the Immigration (European Economic Area) Regulations 2016. The appeal was allowed on that basis, with the judge finding that the appellant did not present a genuine, present and sufficiently serious threat as required by Regulation 27 and that the decision under challenge was disproportionate. The judge did not consider the appeal in respect of Article 8 ECHR.

The grounds of appeal

8. The sole ground of appeal is that the judge materially misdirected themselves in the following respect.

2. At [49] the FTTJ states that the applicable law in this case are the EEA Regulations 2016, particularly Regulations 23 and 27. This statement is made despite the fact that the reasons for the deportation letter were clearly set out in terms of a decision to make a deportation order under section 32(5) of the UK Borders Act 2007, subject to consideration of section 33 of the same Act, pursuant to section 3(5) of the Immigration Act 1971.

3. At [62] the FTTJ seeks to clarify the position with the representatives and it was agreed that the EEA Regulations applied. It is noted that the appellant was exercising treaty rights as an EEA national prior to the Withdrawal Agreement, however the FTTJ (and representatives) have failed to have regard to the fact that the EEA deportation regime

continues to apply only in relation to conduct before the end of the transition (ie before 11pm on 31st December 2020).

4. The appellant's behaviour which led to this decision took place on 17 April 2021. Consequently, the Regulations do not apply in the Appellant's case.

9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

Despite the agreement sought from the representatives by the judge that the EEA Regulations apply the grounds give rise to an arguable error of law. The Respondent identifies the arguable error of law as stated at paragraph 4 of the grounds for permission to appeal. The Regulations were revoked following the abolition of the free movement rights to which they gave effect on 31st December 2020 and the Regulations and the right of appeal have been preserved in circumstances which are limited, and the present appeal does not come within any of those circumstances. In the First-tier Tribunal (Immigration and Asylum Chamber) Case No: EA/13517/2021 HU/04864/2021 Decision by Judge of the First-tier Tribunal Adio IAC-AH-SAR-V1 There is no indication that the EEA decision was made in response to any application made before 31st December 2020. The grounds give rise to an arguable error of law.

10. The appellant did not file a Rule 24 response.

11. In advance of the error of law hearing, the Secretary of State served the minute of the presenting officer who attended the hearing before the First-tier Tribunal. Of note was one of the preliminary issues which was described in the following way, 'Confirmed that the decision to deport was under the Immigration Acts and not the EEA regs.' It is further notable that neither representative's submissions made any reference to the EEA Regulations.

The error of law hearing

12. When this matter came before me, Ms Jones immediately conceded that there was a material error in the judge applying the EEA Regulations and urged me to remit the appeal to the First-tier Tribunal for a de novo hearing. Given the parties rightly made agreement, I announced that the decision of the First-tier Tribunal contained a material error of law and remitted the matter to the First-tier Tribunal.

Decision on error of law

13. There was no dispute between the parties that the judge wrongly determined the appeal with reference to the EEA Regulations. At [62] of the decision and reasons, the judge records

At the outset of the hearing, I asked for clarification as to whether this was agreed by both representatives and that the EEA Regulations applied. Both confirmed this was the agreed position.

14. The presenting officer's minute records the opposite view and there was nothing in the documents before the judge, on either side, to suggest that the Regulations applied. Notwithstanding the judge setting out evidence, at [65-66] showing that the appellant carried out the index offence on 17 April 2021, the judge did not realise that part 5A of the 2002 Act (as amended) applied. Owing to the error as to the ambit of the appeal, the judge decided not to carry out an assessment of the proportionality of the decision to deport the appellant, as can

be seen from [90]. It is rightly conceded on behalf of the appellant that this amounts to an error of law.

15. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that there was an inadequate consideration of the appellant's human rights appeal.
16. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal (Newport) to be reheard by any judge except First-tier Tribunal Judge C E Roblin.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 June 2023