



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003239

First-tier Tribunal No: EA/00834/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 July 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

ZAHOOR MUHAMMAD OMER
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Ahmed of Counsel instructed by Greenhall Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 12 June 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Judge Cole promulgated on 6 May 2022, in which Mr Omer's appeal against the decision to refuse his application for an EU Family Permit dated 19 November 2021 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Omer as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of Pakistan, born on 9 March 1991, who applied for an EU Family Permit to join his wife, a Spanish national, in the United Kingdom.

4. The Respondent refused the application the basis that there was an extant Deportation Order against the Appellant and there had been no application to revoke the same.
5. Judge Cole allowed the appeal in a decision promulgated on 6 May 2022 on the basis that there was no evidence before him to show that there was an extant Deportation Order against the Appellant and he had otherwise demonstrated that he met the requirements set out in Appendix EU (FP). At the time of the hearing, the Respondent had failed to comply with two sets of directions to file a bundle of documents for the appeal (although a bundle was filed later than required by a second set of directions, it did not contain the Deportation Order relied upon) and no Presenting Officer attended the hearing. Judge Cole noted in the decision that this may be a pyrrhic victory as if the Respondent is able to produce a valid and extant Deportation Order, then this will preclude the Appellant from entering the United Kingdom.

The appeal

6. The Respondent appeals on the grounds that there was in fact an extant Deportation Order, with a copy of the same as well as documents as to service of it on the Appellant in prison on 31 July 2015 and an application under rule 15(2A) to adduce this further evidence. The appeal is made on the basis of those documents that either the First-tier Tribunal should have adjourned the appeal with further directions to the Respondent in circumstances where the Judge could not be sure whether there was an extant Deportation Order or not; and/or there was a material mistake of fact.
7. At the hearing, on behalf of the Respondent, Mr Clarke acknowledged the difficult position that the Respondent was in given the failure to comply with directions in the First-tier Tribunal for which no explanation could be offered. It was acknowledged that the first limb of the test in Ladd v Marshall could not be satisfied as there was no good reason why the Deportation Order and associated documents had not been produced previously and instead sought permission for the further documents to be admitted on the basis of exceptional circumstances as it was in the interests of justice to do so. In the circumstances of this Appellant, the Deportation Order meant that he could not be admitted to the United Kingdom and to do so would be a criminal offence such that it would not be in the interests of justice to uphold the First-tier Tribunal decision which could be of no effect. The evidence of a Deportation Order, service and the application form for the Facilitated Returns Scheme in which the Appellant acknowledged deportation was clear and unequivocal and it was suggested that the Appellant had misled the First-tier Tribunal about this and about the nature of his offence.
8. On behalf of the Appellant, Mr Ahmed submitted that the Respondent had had multiple opportunities to file and serve the key documents in the First-tier Tribunal and had failed to do so. No application for any adjournment of the hearing was made and there was no basis in these circumstances for suggesting that the First-tier Tribunal were wrong in law to proceed. There was no unfairness and no error of law by the First-tier Tribunal. It was however agreed that there was potentially a difficulty in the First-tier Tribunal decision remaining in place which does not and could not assist the Appellant in any meaningful way.

Findings and reasons

9. The Respondent's conduct in this case before the First-tier Tribunal is woeful and has led to a situation where a decision from the First-tier Tribunal has been made which is of no benefit to either party. There has not even been any attempt to explain the deficiencies in this case which on multiple occasions meant that the Respondent failed to adduce the key document(s) upon which the refusal was made and which were self-evidently the only relevant documents required in this appeal. This has led to an inevitable waste of time and resources of both the First-tier Tribunal and the Upper Tribunal, as well as the Appellant. There is no arguable basis on which the First-tier Tribunal should have adjourned the appeal with yet further directions given the non-compliance by the Respondent by the date of hearing.
10. That being said, I do however find that there are exceptional circumstances in this case that means that it is in the interests of justice to admit the further documents from the Respondent under rule 15(2A) even though the first limb in the Ladd v Marshall test has not been satisfied. I do so because it can not be in the interests of justice for a First-tier Tribunal decision, albeit made entirely properly on the evidence before it, to stand when it includes a mistake of fact in relation to the existence of an extant Deportation Order which is itself determinative of the application and appeal. As recognised in the First-tier Tribunal decision itself, this was a pyrrhic victory only and the decision is of no benefit to the Appellant when he could not in any event be granted an EU Family Permit or be admitted to the United Kingdom whilst the Deportation Order remains. Mr Ahmed acknowledged that the Appellant needs to make an application to revoke the Deportation Order before he could succeed on any application for a Family Permit, which he will now do.
11. In the unfortunate circumstances of this case, it is necessary to set aside the decision of the First-tier Tribunal and remake the decision on the appeal to dismiss it as the Appellant can not meet the suitability criteria in Appendix EU(FP). However the other findings of fact that the Appellant meets the remaining criteria in Appendix EU(FP) are preserved, there is no challenge to those findings and no reason to disturb them.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

I remake the decision under appeal as follows:
The appeal is dismissed

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29th June 2023