



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001050
First-tier Tribunal No: DA/00359/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 October 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

ROLAND HORVATH
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. R. Toal, Counsel instructed by Turpin & Miller LLP
For the Respondent: Mr. P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 17 October 2023

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Lodato (“the Judge”), promulgated on 23 February 2023. The Appellant is a national of Slovakia who appealed against the Respondent’s decision to deport him from the United Kingdom. The Appellant claimed that it would breach his retained free-movement rights as an EEA citizen and further breach his rights to a private and family life under Article 8 ECHR. The Judge dismissed his appeal on both grounds.
2. Permission to appeal was granted by First-tier Tribunal Judge Thapar in a decision dated 24 March 2023. She stated that the first ground raised an arguable error of law. Although stating that the other two grounds amounted to a disagreement with the findings of the Judge, she did not restrict the grant of permission.
3. Ground 1 asserts that the Judge misdirected himself in law. The grounds state:

"2. The burden lay on the Respondent Secretary of State to demonstrate that, given that the Appellant had a right of permanent residence in the United Kingdom, the decision to remove the Appellant was to be taken on 'serious grounds of public policy and public security'.

3. However, at paragraphs 28, 29, 43, the Judge repeatedly directed himself in law by asking whether the Respondent had discharged the burden to establish that:

' ...there are *serious grounds to conclude* that the Appellant poses a genuine, present and sufficiently serious threat to at least one of the fundamental interests of society' (emphasis added)."

The hearing

4. At the outset of the hearing we indicated that our preliminary view was that Ground 1 was made out, and that the Judge had applied the wrong test.
5. Mr. Lawson opposed the appeal submitting that the grounds referred to the phraseology used by the Judge but, from reading the decision as a whole, it was clear that the Judge had applied the correct test.
6. We rejected this submission, for reasons set out in further detail below. We found the decision involved the making of a material error of law and set the decision aside.

Error of Law

7. At [4] of the decision, the Judge states:

"Firstly, at the ineffective substantive hearing on 4 April 2022, the respondent, then represented by Ms Lamb, conceded that the evidence disclosed that the appellant enjoyed the EEA rights which flowed from 5 years' permanent residence in the UK. The legal effect of this concession is that the appellant benefits from 'middle-tier' protection such that the respondent must show "serious grounds" of public policy to justify his removal. Mr Thompson did not seek to resile from this concession. The appellant did not suggest that he was entitled to the highest level of protection."

8. The Judge acknowledged that as it had been accepted that the Appellant had acquired a permanent right of residence, the Respondent had to show serious grounds of public policy to justify his removal. Regulation 27(3) of the Immigration (European Economic Area) Regulations 2016 (the "2016 Regulations)" states in full:

"A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.

9. However, when making his findings, at the Judge does not apply this test. At [28] he states:

"The fundamental task I must perform in deciding this appeal is to assess whether the respondent has discharged her burden to establish that there are serious grounds to conclude that the appellant poses a genuine, present and sufficiently serious threat to at least one of the fundamental interests of society."

10. At [29] he repeats this:

"In analysing whether there are serious grounds to conclude that the appellant presents a genuine, present and sufficiently serious threat to one of the fundamental interests of society"

11. At [43] he finds that “there are serious grounds to conclude that the appellant presents a genuine, present and sufficiently serious threat to several fundamental interests of society”. Again at [44] he states:

“The proportionality assessment is finely balanced in this case. The persistency, seriousness and likely recurrence of the appellant’s offending amounts to serious grounds to justify his removal as a genuine, present and sufficiently serious threat to the fundamental interests of society.”

12. We find that the Judge has repeatedly misdirected himself as to the test to be applied in making his assessment. We reject Mr. Lawson’s submission that he has applied the correct test but used the wrong phrase. When making his findings he has not once directed himself to the correct test which must be applied. Regulation 27(5)(c) contains the wording used by the Judge – “the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. The Judge appears to have amalgamated this wording with “serious grounds” from regulation 27(3). He has not made any reference to “public policy and public security”.
13. Regulation 27(5)(c) is a test to be applied to all removals. However, given that the Appellant had a permanent right of residence, the Respondent was required to show something more than this, as set out at regulation 27(3). It cannot be said from the decision that the Judge considered this, or that he had the correct test in mind when making his findings. The Judge acknowledged at [44] that the proportionality assessment was “finely balanced”. It is therefore even more significant that he did not direct himself to the correct test.
14. We find that the Judge’s failure to apply the correct test is a material error which vitiates the whole decision. Given this, it is not necessary to consider the other grounds of appeal.
15. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade, we have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

“(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal.”

16. With reference to the exceptions in 7(2)(a) and 7(2)(b), given that there are no findings that can be preserved as the Judge misdirected himself as to the correct test to be applied, we consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

17. The decision of the First-tier Tribunal involves the making of a material error of law. We set the decision aside.

18. The appeal is remitted to the First-tier Tribunal to be reheard afresh with no findings preserved.
19. The appeal is not to be listed before Judge Lodato.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 October 2023