



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003691
First-tier Tribunal Nos:
DA/00058/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 November 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

JOSHUA LAVAL
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms E Turnbull, Counsel; instructed by Turpin Miller Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 16 November 2023

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge T Lawrence dismissing his appeal against the Respondent's decision to refuse his human rights claim, prompted by the Secretary of State having decided to deport him from the United Kingdom under the Immigration (EEA) Regulations 2016, following his convictions for possession with intent to supply class A drugs in October 2019, and possession of cannabis, possessing an offensive weapon, and s20 wounding. The judge's decision was promulgated on 7 July 2023.
2. The Appellant sought permission to appeal on several grounds which was refused by First-tier Tribunal Judge Parkes.
3. The Appellant renewed his application for permission to appeal on the following bases:

- (i) Ground 1: Error in approach to the mother's evidence and in the assessment of whether the Appellant has acquired a right of permanent residence
 - (ii) Ground 2: Failure to apply the correct threshold of protection under the EEA Regulations 2016
 - (iii) Ground 3: Error in approach to the Appellant's evidence in respect of his most recent offending
 - (iv) Ground 4: Failure to give weight to relevant factors, and to consider factors collectively, in the EU proportionality assessment
 - (v) Ground 5: Failure to consider matters collectively in the Article 8 proportionality assessment
4. Permission to appeal was granted by Upper Tribunal Judge Macleman in the following terms:
- 1. In the FtT, Judge Lawrence dismissed this appeal, and Judge Parkes refused permission to appeal to the UT.
 - 2. This renewed application focuses on whether the tribunal at [22 - 24] misunderstood the evidence, written and oral, from the appellant's mother, and did not perceive that she was saying (or at least implying) that HMRC records were inaccurate.
 - 3. Arguably, there was a conflict of evidence to be resolved.
 - 4. Without that point, the application might not have succeeded; but the grant is not restricted. We were provided with a Rule 24 reply from the Respondent which we have taken into account in reaching our decision.

Discussion

5. At the close of the hearing, we reserved our decision which we shall now give. We find that the grounds of appeal demonstrate a material error of law for the following reasons.
6. In respect of Grounds 1 and 2, the parties accepted that they stand and fall together, given that Ground 2 will only have purchase if Ground 1 is made out.
7. The complaint in Ground 1 is that the judge erred in his approach to the appellant's mother's evidence and the consequent assessment of whether the Appellant has acquired a permanent right of residence as the dependant of a parent who was exercising Treaty Rights for a continuous period of five years. This was a key part of the Appellant's case as if he could establish that his mother had exercised Treaty Rights for five years and that he was her dependent child during that time, then he could benefit from protection from deportation solely on imperative grounds of public security under Regulation 27 of the Immigration (EEA) Regulations 2016. It is with that context in mind that we assess the evidence before us of the events at the First-tier Tribunal hearing which Ground 1 complains was not correctly assessed.
8. Ms Turnbull's grounds purported to give evidence as to the events that took place on the day of the hearing which without more is inconsistent with the judicial guidance in BW (witness statements by advocates) [2014] UKUT 568 (IAC). Her instructing solicitors had not prepared a witness statement for her in order that she could provide oral evidence before us as a witness of truth as to

the facts that occurred before the First-tier Tribunal in order to establish an error of law; nor had they sought a copy of any relevant recording of the hearing to negate this need; nor were we provided with any other record of proceedings before the First-tier Tribunal. Additionally, Ms Ahmed could not immediately agree that Ms Turnbull's grounds were factually correct.

9. However, upon our invitation, Ms Ahmed contacted the Presenting Officer who appeared before the First-tier Tribunal. He emailed his Note of the Proceedings from the hearing before the First-tier Tribunal which was served upon Ms Turnbull and provided to ourselves for consideration. Ms Turnbull accepted that the account given by the Presenting Officer was predominantly in harmony with her own grounds and agreed that it could be taken into account by us as an agreed factual position of the questions and answers posed of the Appellant's mother before the First-tier Tribunal. Thus, Ms Turnbull was able to continue in her role as counsel at the hearing before us.
10. Considering the agreed note of proceedings, it appears that Ms Turnbull asked the Appellant's mother, Ms Djallo, to adopt her statement as her evidence-in-chief followed by further examination-in-chief which included clarification of where (a) she worked in the years 2007-2008, (b) when she returned to work in 2008, (c) whether she sought housing support and Jobseeker's Allowance ("JSA"), and (d) when she resumed her seasonal work for the Royal Society of Medicine. Perhaps the most pertinent question asked below was clarification of the written evidence at paragraph 21 of Ms Djallo's witness statement that she was reliant upon JSA from February 2008 to March/April 2009, whereas her examination-in-chief revealed she was only so reliant for 3-4 months from January 2008 until April 2008, when she began work for Somerfield.
11. Thus, the cumulative effect of Ms Turnbull's submissions was that Ms Djallo's evidence was that she had worked in the United Kingdom and exercised treaty rights by working at the following places or seeking JSA for the following approximate periods of time which arguably covered a continuous five year period:
 - Café Bienvenue: 2004 to early 2005
 - Reef Bar: early 2005 to 2006
 - Crystal Clean Services: 2006 to 2007
 - QX Services: Late 2006 to 2007
 - Royal Society of Medicine: May 2007 to December 2007
 - Royal Society of Medicine: May 2008 to December 2008
 - Jobseeker's Allowance: January 2008 to March/April 2008
 - Somerfield: March 2008 to 2011
12. The claim to have claimed JSA at the end of the 2007/2008 tax year is in direct conflict with the judge's finding at §24 that "Ms Djallo's account, consistent with the documentary evidence, includes that there were gaps in her employment during the period in question, and she has not suggested that the HMRC is incorrect in recording that she only claimed Job Seekers Allowance in the years

2008/09 and in 2010/11, nor has she suggested that she was registered as a jobseeker during any other of those years...”.

13. The inconsistency lies in the fact that the Appellant’s case was that there were no gaps during that period. Although the judge was not bound to accept what was said orally and in Ms Djallo’s witness statement, given that this evidence could have potentially established that the Appellant could only be removed on imperative grounds of public security, it was incumbent upon the judge to engage with that evidence and reach a conclusion upon it at the very last. Consequently, we accept that the judge has erred as argued at Ground 1.
14. Given that Ground 1 has been established, Ground 2 is also consequently established which points out that the judge may have applied the incorrect threshold of protection under the Immigration (EEA) Regulations 2016 had the oral evidence of Ms Djallo’s five year exercise of treaty rights been accepted by the judge and not omitted from consideration.
15. Thus, considering the grounds against the Presenting Officer’s note and the judge’s decision, there is an inconsistency in the judge’s findings at §§22-25 of the decision contrasted with the evidence before him, thus rendering the outcome infected by material error of law requiring the decision be set aside in its entirety.
16. Although we have found a material error in Grounds 1 and 2, we shall briefly consider the remaining Grounds for the sake of completeness.
17. In respect of Ground 3 that the judge erred concerning the Appellant’s most recent offending, we find that the judge’s finding at §38 and acceptance that the recent offending represents a “significant elevation” were open to him to make. The judge identified as a fact at §32 that the appellant “has convictions for serious and repeated offending” which was not challenged on appeal and further considered the appellant’s history of offending at §§34-38 and noted that no professional risk of re-offending assessment had been made available since the reoffending had occurred. Thus, we find that it was open to the judge to analyse the risk for himself at §39, considering the evidence in the round.
18. Turning to Ground 4, the complaint is not as headed but in fact argues that the judge failed to give weight to various factors such as integration as well as the prospects of rehabilitation in France. As to the assessment the judge gave to the factors before him, the question of weight is one for the individual judge and in relation to the prospects of rehabilitation, the Appellant’s argument is tied to the continued application of Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC), whereas Ms Ahmed rightly pointed to the more recent decision in MC (Essa principles recast) [2015] UKUT 520 (IAC) and the 8th headnote which establishes that: “Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59])” whilst also highlighting that there was no evidence as to the prospects of rehabilitation in France. Consequently, we do not find an error in respect of this ground.
19. Finally, concerning Ground 5 and the argument that the judge failed to consider matters collectively in the Article 8 proportionality assessment, we find that this ground is no more than a disagreement with the outcome of the judge’s

assessment and does not identify any omission within the reasons given. Therefore, we do not find an error in respect of this ground.

20. In light of the above findings, we find that the decision of the First-tier Tribunal contains a material error of law requiring it to be set aside in its entirety.

Notice of Decision

21. The Appellant's appeal is allowed.
22. The appeal is to be remitted to be heard *de novo* by any judge of the First-tier Tribunal other than Judge T Lawrence.

Parminder Saini

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2023