



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-001170
UI-2024-001171
FtT Nos: HU/00975/2023
EA/02104/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 June 2024

Before

UPPER TRIBUNAL JUDGE PICKUP
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Drilon SKURA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms E Blackburn, Senior Presenting Officer

For the Respondent: Mr M Murphy of Counsel instructed by Arlington Crown,
Solicitors

Heard at Field House on 23 May 2024

DECISION AND REASONS

Introduction

1. This is a 'Decision and Reasons' to which we have both contributed.
2. These are linked appeals arising from two decisions in respect of Mr Drilon Skura, a citizen of Albania born on 6 August 1987.
3. Although before us the Secretary of State is the appellant and Mr Skura is the respondent, for the sake of consistency with the proceedings before the First-tier Tribunal we shall hereafter refer to the Secretary of State as the Respondent and Mr Skura as the Appellant.
4. The Appellant's immigration history is summarised in the cover sheet to the Respondent's First-tier bundle. Although ultimately the issue that we are required to determine in the challenge to the Decision of the First-tier Tribunal is relatively narrow, in order to understand the context it is necessary to rehearse aspects of the history in some detail. We offer the following summary of salient points:
 - (i) The Appellant claims to have arrived in the UK on 21 April 2017, and is recorded as having made an asylum claim in May 2017; this was certified as 'clearly unfounded'.
 - (ii) At some point, on his case, he must have left the UK - although there is no apparent record as to when - because he seemingly underwent a marriage ceremony in Romania on 30 March 2019 with Ricarda Ardelean (d.o.b. 18 March 1990), a citizen of Romania.
 - (iii) The Respondent's records show that he was admitted to the UK on 15 April 2019 under the 2016 EEA Regulations.
 - (iv) However, on 2 September 2019 he was refused residency; a subsequent appeal was dismissed on 26 November 2019 with the Appellant eventually becoming 'appeal rights exhausted' on 23 June 2020. The Respondent's decision to refuse a residence permit was because it was considered that his was a 'marriage of convenience'. This was seemingly pursuant to the Appellant and Ms Ardelean being interviewed in connection with the application.
 - (v) Whilst the Appellant's application for permission to appeal against the decision of the First-tier Tribunal in those proceedings

was pending, on 24 December 2019 Ms Ardelean was granted pre-settled status under the European Union Settlement scheme (EUSS).

(vi) On 23 January 2020 the Appellant made his own application under the EUSS based on his marriage. On 15 September 2020 he was granted pre-settled status with leave to remain until 15 September 2025.

(vii) On 16 July 2021, at Reading Crown Court, the Appellant was convicted of offences in relation to the supply and production of cannabis; on 16 September 2022, he was sentenced to 55 months imprisonment.

(viii) The 'Trial Record Sheet', included in the Respondent's bundle before the First-tier Tribunal at Annex B, gives an 'Offence Start Date' of 1 May 2020 and an 'Offence End Date' of 4 March 2021 – (the Appellant was arrested on 3 March 2021). The Judge's sentencing remarks make a number of references to the extent and duration of the Appellant's involvement, including an express reference to activities in July 2020.

(ix) The Respondent initiated deportation procedures, in the course of which representations were made on the Appellant's behalf amounting to a human rights claim.

(x) The deportation process included service of a 'Notice of a Decision to make a Deportation Order (person with EUSS leave)' dated 14 October 2022. This decision is the subject of appeal EA/02104/2023.

(xi) On 3 November 2022 the Appellant's representatives sent to the Respondent a 'one stop notice' pursuant to section 120 of the NIAA 2002. Amongst other things it was argued that Exception 7 under section 33 of the United Kingdom Borders Act 2007 applied: *"Exception 7 applies where a foreign criminal is a Relevant Person and the offence/conduct took place prior to IP completion date. It is submitted that our client is a relevant person.... Our client informs us that his conviction pertains to his offence which was conducted, in part, prior to the IP completion day (from late 2020 over to 2021). It is therefore submitted that Exception 7 applies."*

(xii) The representations of 3 November 2022 were treated as a human rights claim; the human rights claim was refused by the Respondent on 11 April 2023; a deportation order was signed on the same date.

(xiii) Although the Exception 7 point was not addressed directly, it was stated in the Decision letter - *"It is not accepted that you fall*

within any of the exceptions set out in section 33 of the 2007 Act". It was also stated in the letter, "Furthermore, your claim relates to you having EUSS leave however as you committed your offence after 11pm on 31 December 2020, claims had not been considered under the EEA regulations".

(xiv) In respect of the relationship with Ms Ardelean the Decision letter was somewhat equivocal: *"It is not accepted that you have a genuine and subsisting relationship with Ricarda Ardelean. Although we cannot attest to the exact nature of your relationship, no evidence other than a marriage certificate has been provided, even though you claim to have been living together since April 2019. We are therefore unable to determine whether your relationship is still genuine and subsisting"*. This essentially amounts to a statement that the Appellant had not proved his relationship; this is very different from the Respondent's earlier position that the marriage was one of convenience - seemingly upheld in the earlier appeal proceedings. No reference to the earlier decision to refuse a residence permit, or the subsequent appeal, is made in the decision letter.

(xv) The refusal of the human rights claim is the subject of appeal HU/00975/2023.

5. The appeals were linked and heard together before the First-tier Tribunal. The appeals were initially heard on 3 October 2023, and decisions reserved at the conclusion of the hearing. However, for reasons explained in the 'Decision and Reasons' of the First-tier Tribunal the hearing was reconvened on 13 December 2023.
6. Both appeals were subsequently allowed for reasons set out in the 'Decision and Reasons' of First-tier Tribunal Judge Nightingale dated 17 December 2023.
7. The Respondent, pursuant to permission to appeal granted by First-tier Tribunal Judge Lester on 15 February 2024, now pursues a challenge focused on the procedural propriety of the decision to proceed with the resumed hearing on 13 December 2023 notwithstanding, firstly, an application for an adjournment and, secondly, the withdrawal of the decisions.

Discussion

8. As noted above, although the hearing of the appeal was seemingly concluded on 3 October 2023, the First-tier Tribunal Judge subsequently

decided that the hearing should be reconvened. The Judge states that this was because neither representative had addressed her on the issue of Exception 7 (Decision paragraph 30).

9. As an aside, and very much parenthetically, we find this puzzling. It is manifestly the case that Exception 7 was raised, and an argument articulated, in the Appellant's human rights representations of 3 November 2022 which were on file before the Judge. Moreover, Exception 7 was raised in the Appellant's Skeleton Argument dated 1 October 2023: paragraph 43 *et seq.* refers to the representations of 3 November 2022; paragraphs 58-60 cross refer to the raising of Exception 7 in those representations; paragraph 74 states "*A crucial issue in the appellant's case is when the offences were committed*" - which is a matter relevant to the application of Exception 7 - and see similarly paragraph 89. The Judge notes that counsel "*adopted his skeleton argument*" (paragraph 25). It may also be seen under the sub-heading 'Preliminary Matters' that at the outset of the hearing the Appellant's position was confirmed to be that his "*course of conduct primarily fell before 31 December 2020 and that, consequently, he was entitled to EU criteria*", whereas it was "*the respondent's view that the offending fell after the relevant date*" (paragraph 7). Submissions in amplification of the Appellant's position are noted at paragraph 27 of the Decision. The evidence required to evaluate whether or not for the purposes of Exception 7 "*the offence for which the foreign criminal was convicted... consisted of or included conduct that took place before*" 31 December 2020 was already present in the materials relating to the conviction - specifically the Trial Record Sheet and the sentencing remarks; there were written submissions on the point before the Judge, and it appears to be recorded in the Decision that both representatives stated their respective positions. It is unclear what more was required to determine the issue, and it is unclear why it was thought that the matter had not been addressed by the parties.
10. Be that as it may, the initial decision to reconvene the hearing is not the subject of challenge, and we say no more about it.
11. The Judge issued Directions in respect of reconvening the hearing: these are helpfully reproduced at paragraph 30 of the Decision. The Respondent twice applied for, and was twice granted, an extension of time to comply with the Directions (paragraphs 31 and 32). The reconvened hearing was listed for 13 December 2023.

12. On 11 December 2023 the Respondent made a written request for an adjournment: see paragraph 33. In that request it was acknowledged that Exception 7 applied. However, it was articulated that the Appellant only had the advantage of Exception 7 by reason of his status as a person with EUSS leave. In this context it was now, for the first time in these proceedings, the Respondent's position that such leave had been granted in error in circumstances where the Appellant's marriage had previously been deemed a marriage of convenience, such decision having been upheld in the earlier appeal. The adjournment request explained the procedures by which the Appellant's leave might be investigated and curtailed - it not being possible for it to be simply revoked. It was acknowledged that there would be a right of appeal against any curtailment of EUSS status. Whilst it was suggested that the investigation procedure could be completed "*within a reasonable time*", it was acknowledged that "*a precise timescale cannot be provided*", and it was suggested that the appeal be adjourned for a Case Management Review hearing after 12 weeks when an update could be provided. It was also indicated that if the EUSS leave remained in place the Respondent "*would seek permission to withdraw our deportation decision*".

13. The application for the adjournment was refused: see paragraph 34 -

"I refused that application on 11th December 2023 with a view to the overriding objective. This appeal was part-heard and the appellant and his witnesses had given oral evidence on which he was entitled to expect timely factual findings. No exact timescale was given and a suggestion of twelve weeks before a case management hearing was unreasonable. I also considered that the respondent had been granted sufficient time to address the issue and that it was also open to the respondent to seek to withdraw the decisions appealed if she considered them to be flawed. I did not consider that any further delay was merited in the interests of fairness."

14. The hearing was reconvened on 13 December 2023 accordingly. In the meantime, the Respondent withdrew both underlying decisions. This was communicated to the Tribunal in a message received by the Judge on the morning of the hearing, and also not seen by the Respondent's Presenting Officer until approximately 15 minutes before the listed hearing. The Appellant's counsel was not aware of this development until it was communicated to him by the Presenting Officer. Reasons for the withdrawal decisions were given: the Stage 1 deportation decision of

14 October 2022 was not lawful because Exception 7 was met; the decision of 11 April 2023, which was in substance a Stage 2 Deportation Order decision, could not be sustained given the unlawfulness of the Stage 1 decision. (See paragraphs 35 and 36.)

15. In the circumstances the Tribunal was obliged to have regard to rule 17(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014:

“The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision.”

16. The Judge entertained submissions on the issue of proceeding notwithstanding the withdrawals, and determined that the appeal should proceed: see paragraphs 37-45. Both appeals were then determined in the Appellant’s favour (paragraph 46-52).
17. Although the refusal on 11 December 2023 of the application for an adjournment is challenged in the Respondent’s Grounds of Appeal, Ms Blackburn indicated that she placed primary reliance upon the alternative basis of challenge in respect of the Judge’s subsequent decision to proceed with the appeals notwithstanding the withdrawal of the underlying decisions. Ms Blackburn did not otherwise seek to develop the Grounds in respect of the refusal to adjourn: we consider that this was sensible and would not have found error in this regard.
18. However, we find that there is merit in the challenge in respect of the decision to proceed with the appeals. We find that the First-tier Tribunal Judge did fall into error of law, and the decisions in the appeals must be set aside accordingly.
19. In reaching our decision we have been guided by the observations in **ZEI and others (Decision withdrawn - FtT Rule 17 - considerations) Palestine [2017] UKUT 00292 (IAC)** - referred to by the First-tier Tribunal Judge - and paragraphs in the judgement of Mr Justice Silber - particularly paragraph 36 - in **Zoolife International Ltd the Secretary of State for Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin)** brought to our attention by Ms Blackburn.

20. In our judgement there are two clearly identifiable errors in the approach adopted by the First-tier Tribunal.
21. It was an error to state that the Appellant was “*entitled to expect judicial findings of fact on the evidence which has been given*” (paragraph 43). There was no such entitlement as of right.
22. More particularly, and in any event, the Judge was wrong in finding that one of the ‘good reasons’ required under rule 17 identified as an example in **ZEI** - “*The appeal turns on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant’s favour*” - was applicable.
23. Plainly, in context, the reference in **ZEI** to an “*appeal turn[ing] on a pure point of law that the judge thinks that even after argument is certainly or almost certainly to be decided in the appellant’s favour*” has in contemplation a disputed point of law (*vide* ‘even after argument’). In the instant case it was not necessary for the Tribunal to determine a contentious point of law, the Respondent already having conceded the substance of the Appellant’s case. This is underscored by the fact that the Judge does not go on to make any determinative ruling on any pure point of law, but rather simply proceeds on the basis of the concessions made by the Respondent – e.g. see paragraph 51.
24. Indeed, notwithstanding the findings of fact made in respect of the Appellant’s relationship with Ms Ardelean, the ultimate *ratio* of the Decisions is confined to the Respondent’s concession in respect of Exception 7 and consequent concessions as to the unlawfulness of the two decisions. As such, the findings in respect of the relationship – to which the Judge had (wrongly) considered the Appellant was entitled – were academic to the inevitable outcome.
25. Drawing on earlier authorities, Mr Justice Silber stated the following at paragraph 36 of **Zoolife**:

*“In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in **Salem** (supra) that “a large number of similar cases exist or anticipated” or at least other similar cases exist or are anticipated and the second*

condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs."

26. Neither of the exceptions in respect of determining academic disputes applied here: there were no similar cases awaiting guidance; the outcome decision was 'fact sensitive' in that it turned on the specific period of the Appellant's offending; any issue in respect of the Appellant's relationship was not only academic, but necessarily fact sensitive.
27. Having determined that we should set aside the decision of the First-tier Tribunal, and having heard from the parties, we reconsider the issue of withdrawal of the appeal.
28. As discussed above, the Respondent had notified the Tribunal and the Appellant that both decisions to which these appeals relate had been withdrawn, and had set out the reasons for the withdrawal of the decisions: cf. rule 17(1).
29. Essentially for the same reasons that have informed our approach to the challenge to the Decisions of the First-tier Tribunal, we can identify no good reason not to treat the appeals as withdrawn. In consequence, with particular reference to rule 17(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, both appeals are to be treated as withdrawn, and the proceedings are no longer regarded by the Tribunal as pending.
30. This document stands as the written notice to the parties required under rule 17(3).

Notice of Decision on challenge to Decision of FTT

31. The decision of the First-tier Tribunal contained material error of law and is set aside.

Notice under rule 17(3) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

32. Pursuant to rule 17(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 withdrawals have taken effect in respect of both appeals herein: the proceedings are no longer regarded by the Tribunal as pending.

I Lewis
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 June 2024