



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-003992

First-tier Tribunal No:
EA/50050/2022
IA/02807/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 20th November 2024**

Before

UPPER TRIBUNAL JUDGE GREY

Between

DMYTRO MYKHAILYTSKYI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L. Rahman, Counsel

For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 14 November 2024

DECISION AND REASONS

1. This is an appeal brought by appellant against the decision of First-tier Tribunal Judge Scott-Baker ('the Judge') dated 13 June 2024, in which she dismissed the appellant's appeal in respect of the respondent's decision to make a deportation order against him under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations').

Factual Background

2. The appellant is a national of Ukraine who is 45 years old. He was issued with a residence card as a family member of an EEA national wife on 9 October 2014, valid until 9 October 2019.
3. On 20 July 2018 the appellant was convicted of conspiracy to make or supply articles for use in fraud; possession or control of an article for use in fraud; possession or control of identity documents; and, the acquisition, use or possession of criminal property. The appellant was sentenced to a total of 64 months imprisonment.
4. Following a notice of liability to deport dated 20 November 2018 the appellant became subject to a deportation order on 29 December 2020 made in accordance with the 2016 Regulations on the grounds that he represents a genuine, present and sufficiently serious threat to the fundamental interest of the society of the United Kingdom. The appellant brought an appeal which was heard at Taylor House on 31 May 2024 and his appeal was dismissed by a decision promulgated on 13 June 2024.

The grounds of appeal

5. In Ground 1 the appellant asserts that the Judge failed to take into account material evidence, namely the birth certificate of the appellant's third child. It is asserted that this amounts to a material error of law because the Judge found that the appellant may not be the father of the youngest child as claimed by him.
6. In Ground 2 the appellant submits that there was an absence of consideration by the Judge of the evidence of the appellant's partner who attended the hearing and gave oral evidence. It is argued that this amounts to a material error of law because the Judge found that the appellant had not established he was in a genuine and subsisting relationship with his claimed partner.
7. It is submitted that these errors are significant and material because they are central to the consideration of family life which the appellant claims he has established in the United Kingdom, and which is a relevant factor in assessing regulation 27 of the 2016 Regulations and the consideration of any risk of reoffending presented by the appellant.
8. Permission to appeal was granted by Upper Tribunal Judge Pinder on all grounds.

Analysis and decision

9. Having heard submissions from the representatives, I indicated at the hearing that I found the Judge had made material errors of law and provided summary reasons which I now confirm whilst providing more detailed reasons.

10. At [35] of the decision the Judge states *“I make the express finding that I do not have evidence that [the appellant] is the father of the youngest child”*.
11. It is accepted by the respondent that the Judge erred in finding the birth certificate of the appellant’s third child was not produced. It is clear from the documentation before me that the birth certificate was produced in the appellant’s bundle at the hearing (page 498 of the stitched hearing bundle; C146 appellant’s bundle) together with birth certificates for the other children. Although Ms Ahmed sought to persuade me that this did not amount to a material error, I am not persuaded by her submissions.
12. The appellant’s account is that he was previously in a relationship with Ms Semenel during which period they had two children together, and that after a period of separation he and Ms Semenel reunited and had a third child who was born in 2018. The birth certificate confirming the appellant’s claim that he is the third child’s father is also capable of supporting his account of his relationship with Ms Semenel. In view of the Judge’s finding at [35] that the appellant had failed to establish he has a current and subsisting relationship with Ms Semenel and his three children, I reject the submission that the Judge’s error in respect of the birth certificate was not material to the outcome of the appeal. It is clear from the decision that this finding was a material factor in assessing the appellant’s risk of reoffending.
13. Further, and significantly, at [69] of the decision the Judge states:

“The declaration of 2018 coupled with the fact that the youngest child’s birth certificate has not been produced together with the lack of any cogent evidence seriously undermines the appellant’s credibility.”
14. In light of this finding, it is apparent that the erroneous finding that the child’s birth certificate had not been produced impacted the Judge’s assessment of credibility.
15. I find this error, and the consequential effect on the Judge’s assessment of credibility, is impacted further by the Judge’s failure to make findings on the oral evidence of Ms Semenel. In what is in many respects a carefully written decision, the Judge assesses the documentary evidence adduced in relation to the appellant’s relationship with Ms Semenel at [33]. There is, however, no reference whatsoever to the written statement or oral evidence of Ms Semenel, before the Judge stated at [35] that *“In the light of the totality of the evidence”* she did not find the appellant has a current and subsisting relationship with Miss Semenel and his three children. It is apparent from the decision that Ms Semenel’s statement went beyond the short written statement dated 26 March 2024 adduced in the bundle. At [54] and [70] of the decision there is a reference to Ms Semenel stating in evidence that her sister helped her when the appellant was in prison. But for this reference to her evidence, which appears to have been accepted, there is no other assessment of Ms Semenel’s evidence in the decision.

16. I find that the Judge's error in relation to the birth certificate was a significant part of her reasoning in finding that the appellant did not have a current and subsisting relationship with Miss Semenel and his three children, as well as finding that the appellant's credibility was seriously undermined. I find the Judge's assessment of the appellant's credibility and lack of familial support were material matters in the assessment of the appellant's risk of reoffending and the Judge not accepting the assessment of the appellant's Offender Manager as being at low risk of re-offending and of harm to others. These matters would have been material to the conclusion that the appellant presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society for the purposes of regulation 27 of the 2016 Regulations.
17. I am not persuaded that the Judge's findings at [54] of the decision, where the 'stay' and 'go' scenarios are considered and the Judge finds that it would not be unduly harsh for Ms Semenel and the children to remain in the UK without the appellant, indicate that any error made in relation to the lack of birth certificate or failure to address Ms Semenel's evidence are not material. Although the Judge considers the alternative scenarios in relation to the issue of undue hardship, this assessment has been conducted having found that the appellant is not in a genuine and subsisting relationship with his claimed partner and his children.
18. I find for these reasons that the decision involved the making of material errors of law. In view of the nature of the errors and the impact I find they had on the Judge's assessment of credibility, the decision must be set aside with no findings preserved. The appeal will be remitted to the First-tier Tribunal for there to be a hearing on the merits.

Notice of Decision

The appellant's appeal is allowed. The decision of Judge Scott-Baker involved the making of an error of law and is set aside. The appeal is to be remitted to be heard by a Judge other than Judge Scott-Baker.

Sarah Grey

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 November 2024