



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00760/2011

THE IMMIGRATION ACTS

**Heard at Field House
On 21 January 2014**

**Judgment delivered orally
on
21 January 2014
Promulgated
On 4 February 2014**

Before

**THE HON MR JUSTICE FOSKETT
UPPER TRIBUNAL JUDGE KOPIECZEK**

Between

BESNIK ZIU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B. Lams, counsel instructed by J.D. Spicerzeb solicitors
For the Respondent: Mr T. Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a 26-year old Albanian national subject to an automatic deportation order made following his conviction on 24th March 2009 at

Chelmsford Crown Court for possessing a false identity document which he had used to gain entry into the United Kingdom on 15th March 2009. He was sentenced to sixteen months' imprisonment thus rendering him liable to automatic deportation. We need not trouble, for present purposes, with the detailed history since then save to say that he claimed asylum, a claim that was rejected and initially certified as clearly unfounded. However, the certification was in due course withdrawn and a decision that the automatic deportation provisions of the UK Borders Act 2007 applied to the appellant, generating an in-country right of appeal, was served upon him on 6 October 2011.

2. He exercised his right of appeal and the appeal was heard by First-tier Tribunal Judge Andonian and a non-legal member on 16 September 2013. The First-tier Tribunal dismissed the appeal for the reasons given in a determination promulgated on 4th October 2013.
3. On 22nd November 2013 Upper Tribunal Judge McGeachy granted permission to appeal saying that the grounds of appeal drafted by Mr Barnaby Lams dated 14 October 2013 were arguable. The matter comes before us in the first instance to decide whether the First-tier Tribunal was guilty of a material error of law. We should say straightway that we are quite satisfied that there was a material error of law that requires the remission of the original appeal to be determined by another Judge of the First-tier Tribunal. Since it will be for that Tribunal to make the material findings of fact we will restrict the expression of our views to the minimum necessary to explain why we are taking the course we propose.
4. The essential submission of Mr Lams can be summarised in the proposition that the First-tier Tribunal made a number of assumptions and drew a number of inferences about the appellant and his case that were not evidence-based. A primary factual issue was and remains whether the appellant is Roma. His case is that he is and it represents the basis for his argument that he should not be returned to Albania.
5. Any Appellate Tribunal will be slow to interfere with the findings of fact made by the primary fact finding tribunal that has had the benefit of seeing and hearing from the relevant witnesses, including the appellant whose appeal is being heard. However, in this case the First-tier Tribunal expressed views about the credibility of some of the assertions made by the appellant (for example, about his education and work record in Albania) which appear to have been predicated upon a clear understanding of the way of life of an Albanian Roma which, having reviewed the material available to the First-tier Tribunal, we are not persuaded that the Tribunal had. The determination did refer to some of the objective evidence, but made no reference at all to the two expert reports relied upon by the appellant from experts with appropriate knowledge (and whose reports, we would add, were not the subject of challenge on behalf of the Secretary of State) which placed a different emphasis on certain of those matters

6. Those concerns would have been sufficient to conclude that a material error of law occurred because the reasoning leading to the apparent evidential conclusions could not be sustained. However, there is one very fundamental error that, in our view, led the First-tier Tribunal into error and, despite Mr Wilding's valiant attempt to disentangle it from other findings, we consider to be inextricably bound with those other findings. The beginning of the error appears in the Secretary of State's decision letter at paragraph 16. After suggesting in the decision letter that aspects of the appellant's account, aspects we should add that were identified later by the First-tier Tribunal as undermining his case, were not consistent with being a Roma gypsy, the following was then said:

"It is further considered that your client's appearance, with brown hair, brown eyes and fair skin, does not give any evidence to support his claim to be a Roma Gypsy. It is considered that your client's appearance is typically Caucasian."

Apart from that bald assertion there is nothing in the decision letter to make good that view.

7. The First-tier Tribunal picked up on this point in its reasoning at its own paragraph 16. Again, that paragraph in its early stages deals with other matters relating to the appellant's education and his work record, but the relevant passage for present purposes is as follows:

"The respondent considered that the appellant's appearance is typically Caucasian. There was no expert report before this tribunal on the appellant's appearance or about his Roma appearance. We would have thought that it would have been crucial to have such a report by the appellant as the allegation that he is a Roma gypsy is at the core of the appellant's claim."

8. The First-tier Tribunal appeared to be saying that because this issue has been raised by the Secretary of State it was incumbent on the appellant to produce evidence to displace the suggestion having been made in the decision letter. Mr Lams says, in our view with justification, that since the respondent asserted this, the burden of proof on such an issue ought to be upon the Secretary of State, whereas, so far as we understand Mr Wilding's submission, it is to the effect that it is a matter upon which the appellant should have produced evidence. As already indicated, we are inclined to agree that, having raised an issue such as this, the burden of establishing the matter lies upon the Secretary of State, or at least the Secretary of State has an evidential burden to produce some material which substantiates the general assertion.
9. It would of course have been open to the appellant to produce expert evidence to help boost his case, but we consider that the Secretary of State, if she wishes to make this kind of assertion, must do so with more

than a bald assertion based upon nothing more than what at first sight at any rate appears merely to be the opinion of the caseworker preparing the decision letter.

10. We accept that this kind of issue is one that can be raised in appropriate circumstances, but it is a very sensitive matter and the slippery slope of false stereotyping must be avoided.
11. In our view, we need say nothing further for present purposes. The reasoning of the First-tier Tribunal is, we regret to say, sufficiently inadequate for us to conclude that there has been a material error of law. We set aside the First-tier Tribunal's decision and direct that the appeal should be allowed and the substantive appeal against the decision of the Secretary of State will be remitted to a differently constituted First-tier Tribunal for a fresh hearing *de novo*, with no credibility findings preserved.

DIRECTIONS

1. The appeal is remitted to the First-tier Tribunal for hearing before a First-tier judge or Panel other than First-tier judge Andonian and non-legal member Mrs R.M. Bray JP
2. An Albanian interpreter is required.
3. The hearing is to take place on such date as the First-tier Tribunal directs.

Signed

Date

The Honourable Mr Justice Foskett