Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00723/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Wednesday 31 October 2018	**On Tuesday 27 November 2018**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE SMITH

Between

MR DOMINIK GLADIC (AKA COMPTON)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel instructed on a direct access basis via 36 Civil
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Telford promulgated on 21 June 2018 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 14 November 2017 making a deportation order. The Appellant is a national of Germany. As such, the deportation order was made under the Immigration (European Economic Area) Regulations 2016.

2. Although the Appellant has been in the UK for some considerable time (having arrived in about 1997, aged fourteen or fifteen years), he does not assert an entitlement to any higher level of protection based on his length of residence because of his continual offending since shortly after his arrival and the CJEU judgment in Vomero.

3. The Judge dismissed the appeal under the EEA Regulations and on Article 8 grounds.

4. Permission to appeal was granted by First-tier Tribunal Judge Hodgkinson on 2 August 2018 in the following terms (so far as relevant):

> "...[2] The grounds argue that the Judge erred in various respects as set out therein. A reading of the Judge's decision indicates that the grounds as a whole disclose arguable errors of law. Permission is granted on all grounds pleaded."

5. The matter comes before us to decide whether the Decision contains a material error of law and, if we so find, either to re-make the Decision ourselves or remit the appeal to the First-tier Tribunal to do so.

SUBMISSIONS

6. Mr Harding adopted the pleaded grounds. In essence, the Appellant's case is that the Judge has failed to make findings applying regulation 27 of the EEA Regulations but instead has applied domestic immigration law provisions, namely section 32 UK Borders Act 2007 and the Immigration Act 1971.

7. By way of illustration of that challenge, Mr Harding drew our attention to the following parts of the Decision:

   (1) At [38] of the Decision, the Judge directs himself in accordance with case-law concerning the domestic immigration law provisions that there is a "need to weigh deterrence of foreign criminals of committing serious crimes". As Mr Harding points out, that is not relevant to the EU law context where what the Respondent is required to show is that there is a genuine, present and sufficiently serious threat based on the danger posed by the individual and even then based not simply on past convictions.

   (2) At [42] and [43] of the Decision, the Judge refers to the cases of MF (Nigeria) [2013] EWCA Civ 1192 and Chege (Section 117D – Article 8 – Approach) [2015] UKUT 00165 (IAC). He does so in the context of there being no need to show exceptional circumstances in order to deport. The Judge says at [43] of the Decision that "I know and fully appreciate that this case is not four square with the considerations under the Regulations which

I have to take into account as the legal background was quite different but it is employed by me to emphasise the basic point here which was the assessment by a judge of the competing interests of the appellant with public interest". That might suggest that the Judge has appreciated the difference between deportation under the EEA Regulations and deportation under domestic immigration law. However, he nowhere sets out the appropriate EU law test in the findings and reasons which follow (at least not in so many words: the nearest one comes is at [29] of the Decision).

(3) In similar vein, the Judge at [30] to [32] of the Decision (which paragraphs as Mr Harding submits are difficult to comprehend in any event), the Judge directs himself as to the exercise of discretion and, again, to exceptionality. Again, he states at [31] of the Decision that "[t]his should not be confused with the requirement which I observe to consider those matters under Regulation 27 when decided if the deportation is justified under Regulation 23". That might indicate a recognition of the different legal context of deportation to another EU member state. However, he then goes on to say that "[w]hen it comes to the wider principle of discretion to not follow that which is concluded as made out or proved through the Regulations, namely deportation, it is the case that I can and should take into account the law of the land and the common law principles influencing a decision of discretion." We observe that, if and insofar as that is intended to suggest that the Judge can apply domestic authorities to the EU law context, that is only permissible insofar as those authorities are consistent with EU law.

8. Mr Harding acknowledged that the Judge does set out regulation 27 of the EEA Regulations at [25] of the Decision. He submitted however that the Judge had failed to engage with the test laid down by that regulation.

9. Mr Harding's challenge was concerned mainly with the Judge's findings in relation to the appeal under the EEA Regulations. He did though observe that, when dealing with the Article 8 claim at [48] to [51] of the Decision, the Judge failed to make a single mention of Section 117C Nationality, Immigration and Asylum Act 2002 which applies in this regard.

10. Mr Harding also drew our attention to inconsistencies between the Judge's findings and the evidence. At [47] of the Decision, the Judge asserts that the Appellant had claimed that he had never worked in the UK. That is contradicted by paragraphs [20], [23], [24], [25] and [30] of the Appellant's witness statement. There is no finding by the Judge that this evidence is to be rejected or why. Similarly, at [45] of the Decision, the Judge says that the Appellant "has provided no evidence he has ever exercised any Treaty rights when in the UK". That ignores

not only the evidence that the Appellant has worked in the UK but also evidence that he has studied in the UK (see [19] of the Appellant's statement).

11. Mr Harding also drew our attention to what is said by the Appellant at [52] onwards of his statement concerning his regret about becoming addicted to drugs, his rehabilitation, use of methadone, efforts to become clean, and other efforts to turn his life around. He concludes that:

> "[67] I have behaved terribly in this country and I am sorry for it. I have let my family down but mostly myself. If I return to Germany I really fear I will descend into hopelessness again and I worry for my life.
>
> [68] I ask to be given a chance that perhaps I don't deserve but will do my best to use if given it."

12. Mr Harding drew our attention to [40] and [41] of the Decision where the Judge says this:

> "[40] I was particularly worried by his uncompromising approach to the bald facts of his criminal record, his criminality and what was behind it. I find that he has not reformed and it is impossible to deal rationally with someone who cannot accept what they have done, why they have done it and then use logic in order to address it.
>
> [41] I am of the view that this man has had a full opportunity to rehabilitate but that was a wasted opportunity and he has failed to show he benefitted from any steps taken as his mind was not set on improving his life and taking himself out of drugs and violence. The withdrawal from drugs should of course have taken place in any event if he was in detention."

13. Mr Harding accepted that the Judge did not have to take at face value what the Appellant says in his statement. He accepted that it was open to the Judge to view the evidence in one of a number of ways. However, he submitted that it was not open to the Judge to simply ignore the evidence. He also pointed out that it was incumbent on the Judge to consider the evidence when determining the existence and extent of any current threat.

14. Mr Deller accepted without demur that the Decision contains an error of law, in particular the Judge's adoption of domestic case-law when assessing deportation under the EEA Regulations. Although the Judge had some limited regard to the EU law aspect, he had failed to engage with the relevant tests.

15. In relation to materiality, Mr Deller considered whether it could be said that the Judge had stumbled on the right result albeit by the wrong route. However, he said that he could have no real confidence that the Judge had adequately considered the evidence or the issues. He accepted that it was open to the Judge to consider Article 8 ECHR. However, even in that context, the Judge had failed to look at relevant

provisions. Mr Deller therefore accepted that the Decision was "not salvageable".

CONCLUSIONS

16. The Respondent concedes that the Decision contains material errors of law. We agree. The Judge has failed adequately to engage with the relevant EU law provisions. He has failed properly to consider the evidence and make findings on that evidence as it applies to the tests which are relevant in this context. There is a failure of reasoning in that regard. For those reasons, we set aside the Decision.

17. We sought submissions from the parties about the appropriate route for re-making the decision. Mr Harding submitted that the appeal should be remitted to the First-tier Tribunal. There are no/inadequate findings of fact on the evidence. As such, the Appellant has not had a proper determination of his evidence. If his appeal were once again determined adversely by the Upper Tribunal, he would be faced with having to satisfy the second appeals test in order to challenge the decision further. It was not fair that he should lose one level of appeal because of the Judge's failure to consider the evidence and make findings on that evidence adequately or at all.

18. Mr Deller agreed. He submitted that this is a case which meets the criteria set out in the Practice Direction for remittal to the First-tier Tribunal.

19. We have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
>
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

20. We agree with the submissions made to us that both elements of the Practice Direction are met. If we were to go on to re-make the decision, the Appellant would be deprived of the opportunity to have his case considered by the First-tier Tribunal due to the Judge's failure to engage with the relevant test(s) and make findings on the evidence. Further, as is evident from the foregoing, the nature and extent of the judicial fact finding necessary in order to re-make the decision is such that it is appropriate to remit the case to the First-tier Tribunal for that

fact finding to be carried out, having regard to the overriding objective of the fair and just disposal of the appeal.

DECISION

We are satisfied that the Decision contains material errors of law. We set aside the decision of First-tier Tribunal Judge Telford promulgated on 21 June 2018. We remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Telford.

Signed Dated: 20 November 2018

Upper Tribunal Judge Smith