Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00201/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On Tuesday 19 February 2019	**On 28 March 2019**

Before

MR JUSTICE WAKSMAN SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE SMITH

Between

MR RAPHAEL ALEXANDRE PIRES CORREIA VARELA
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Caseley, Counsel instructed by Bail for Immigration Detainees (London)
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Telford promulgated on 1 June 2018 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 14 March 2016 making a deportation order against him. It is

common ground that, as the Appellant is a Portuguese national, his appeal fell to be determined by application of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The only ground of appeal is whether deportation would breach the Appellant's EU law rights.

2. By the Decision, Judge Telford dismissed the appeal on Article 8 ECHR grounds and against the decision to deport. The Appellant appealed on the basis that the EEA Regulations were not properly considered or applied by the Judge and/or that the Judge failed to provide adequate reasons for the Decision and made various factual errors in the findings.

3. Permission to appeal was refused by First-tier Tribunal Judge Saffer on 10 October 2018 but granted on further application by Upper Tribunal Judge Hanson on 19 December 2018 in the following terms so far as relevant:

> "…The Judge was made aware the decision under challenge is an order for the appellant's deportation to Portugal made on the basis that the appellant had been convicted in a period of 13 months on more than one occasion of criminal offences which carried with them an immediate term of imprisonment of up to 6 months and that the offences exhibited a pattern of criminality which will continue unless an order was made to remove the appellant. The Judge sets out issues at [16]. The Judge noted at [18] the appellant did not accept his convictions and sentences and minimised his criminal involvement. The Judge does find at [19] that the appellant tried to complete courses when in prison which the appellant claims is factually incorrect as he has never been to prison. The Judge had available to him a printout of the Police National Computer record in relation to the appellant which arguably supports the appellant's assertion that he has not been sentenced to imprisonment in the UK. The grounds are arguably correct in identifying the issues the Judge was required to consider which was whether the appellant's future conduct represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society which the Judge refers to at [25]. This is, unfortunately, preceded by a comment at [24] that the appellant relied on the fact he had spent some time at least "inside" which is not supported by the PNC. The Judge refers to a number of cases some of which do not relate to EEA cases but which the Judge indicates had been referred to him.
>
> The Judge notes the appellant is not exercising treaty rights and not studying and had shown no reason for qualifying under the Treaty, indicating the level of protection was at the lower level. The difficulty at this stage is that it does appear at least arguable, for the reasons set out in the grounds, that the decision of the Judge is difficult to understand in light of what appear to be factual errors that may have been material to the Judge's decision. Whether, on further analysis at an Initial Hearing this is so or whether any errors are found not to be material to the decision to dismiss the appeal, is a matter the Upper Tribunal can consider at that stage. Permission is granted on all grounds submitted by BID."

4. The matter comes before us to assess whether the Decision does disclose an error of law and to re-make the decision or remit to the First-tier Tribunal for re-hearing.

Decision

5. By a rule 24 response dated 22 January 2019, the Respondent concedes that the Decision contains errors of law in the following terms so far as relevant:

> "…2. The respondent does not oppose the appellant's application to set aside the judgment of the FtT. The SSHD accepts that the FtJ has applied numerous legal schemes which were not applicable either at all (see the reference to the refugee claim at [47]) or which were not the main analysis of the appeal – that being the constant reference to Article 8 deportation caselaw and IRs etc.
>
> 3. It may well be as UTJ Hanson points out, that the Appellant's underlying claim under any legal scheme is a very weak one but the SSHD accepts that the FtJ has manifestly failed to lawfully dispose of the case under the EEA Regs and as such the judgment is flawed."

6. We accept the Respondent's concession. Although the Judge refers at [1] of the Decision to the fact that the Appellant's case falls to be considered applying the EEA Regulations (albeit the 2006 regulations and not the 2016 regulations) there is very limited reference thereafter to the EEA Regulations at all. The statement of the issues arising at [16] fails to mention the EU law aspect but instead refers to Article 8 ECHR (which would arise only if there were also a refusal of a human rights claim which, consistently with the Respondent's decision letter, the Appellant says there was not). The only issue which the Judge was required to determine therefore is whether the decision to deport the Appellant is in breach of his EU law rights. The Judge makes reference to regulations 27 and 23 of the EEA Regulations at [28] of the Decision but, for reasons which are not clear to us goes on to say that "[w]hen it comes to the wider principle of a discretion to not follow that which is concluded as made out or proved through the Regulations, namely deportation, it is very much 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". Thereafter, the Judge resorts to case law and factors relevant to Article 8 ECHR rather than considering the position under the EEA Regulations.

7. It may be that the Judge considers that he is not required to consider the test for deportation under the EEA Regulations, having regard to the findings made at [38] and [40] of the Decision that the Appellant is not and never has exercised Treaty rights. However, if that was his reason, it was incumbent on him to make that finding and thereafter to reach a conclusion about the effect of deportation and whether that would breach the Appellant's EU law rights (since that was the only ground of appeal). Instead, the Judge returns to consideration of factors material only to

Article 8 ECHR and dismisses the appeal on two grounds which are not (and could not be) raised.

8. For those reasons, we are satisfied that the Decision contains a material error of law. We therefore set aside the Decision. The parties' representatives were agreed that we should remit the appeal to the First-tier Tribunal for the appeal to be considered afresh.

9. We have had regard 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."

10. In light of the multiplicity of findings which are not relevant to the consideration whether the deportation decision breaches the Appellant's EU law rights and the lack of findings on issues which are material, we agree that it is appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing before a Judge other than Judge Telford.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Telford promulgated on 1 July 2018 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed D. Waksman Dated: 20 February 2019

Mr Justice Waksman sitting as an Upper Tribunal Judge