IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00233/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 December 2020	**On 28 January 2021**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUSA ALI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: In Person

DECISION AND REASONS

This is an appeal by the Secretary of State. For convenience I will refer to the parties as they were before the First-tier Tribunal.

This is an appeal against a decision of First-tier Tribunal Judge Kimnell promulgated on 19 August 2019, in which he allowed an appeal by the appellant, a citizen of the Netherlands born in 1992, against a decision of the Secretary of State dated 11 April 2019 to deport him pursuant to the

Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

Factual Background

The claimant entered the United Kingdom in 2002. Since then he has received a number of convictions, the most serious of which were in 2018. First, he was convicted of possession of an offensive weapon, namely a machete, for which he received six months' imprisonment. In August of that year, he was convicted of the possession of a class B drug, namely cannabis, and the possession of an offensive weapon. For those offences he received a sentence of fifteen months' imprisonment.

The appellant represented himself before the First-tier Tribunal and before me at the appeal hearing. At the outset of the hearing, the appellant had not attended and so, after having waited for around 45 minutes, and consistent with Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I decided at that stage that I was satisfied that he had been notified of the hearing and that it was in the interests of justice to proceed with the hearing. Before completing the hearing in the appellant's absence, the appellant arrived. At the hearing in his absence I had sought to put to Ms Isherwood, the presenting officer, the submissions I would have assisted the appellant to make, had he attended in person. In any event, as the appellant arrived before the conclusion of the hearing, and certainly before I had given my final decision, I was content that it was in the interests of justice, and consistent with the overriding objective to start the proceedings again from scratch and enable the appellant to respond fully to the submissions made by Ms Isherwood on behalf of the Secretary of State.

During the hearing, I ensured that I took all reasonable steps to explain to the appellant what the process was, what the considerations to which I would have to have regard would be, and ensured that I answered any additional questions that he had. I gave my decision at the hearing and answered questions from the appellant concerning the onward steps in this process and any possibility of his applying for permission to appeal from my decision to the Court of Appeal.

The decision of the First-tier Tribunal

Turning to the findings of the judge below, the judge outlined the case that had been advanced by the appellant in which he acknowledged that he had had a cannabis problem in the past, but that he had "*done with it*". The judge noted that the appellant claimed not to be a violent man, and had acknowledged before him that he needed to be sent to prison for his own good: see [11] of the decision. The judge recorded the appellant's evidence that he had no family in the Netherlands and no connection there. Although he was born in the Netherlands, his parents had travelled there from Somalia. He had received some education in Holland and was able to understand Dutch, but he had no real links.

As part of the proceedings before the First-tier Tribunal, the appellant had relied on a number of documents from his education in order to establish that he had been resident in this country since some time before September 2007. That led to a concession from the Presenting Officer on behalf of the Secretary of State before the First-tier Tribunal that the appellant had indeed been in the United Kingdom for at least ten years. The implication of that concession goes to the heart of this appeal.

The judge, having found that the appellant had been resident here for in excess of ten years, concluded that he enjoyed protection from removal on grounds of "imperative grounds of public security". He said this at [28]:

> "Under Regulation 23 of the [2016 Regulations] a person is not to be removed if a person has leave to remain in the UK under the 1971 Act unless that person's removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 27. Under Regulation 27 a decision to remove may not be taken except on imperative grounds of public security in respect of an EEA national who has resided in the UK for a continuous period of at least ten years prior to the relevant decision. I find that the appellant has been present in the UK for a period of ten years and is entitled to the benefit of that provision in Regulation 27(4)."

The judge found that the offences for which the appellant had been convicted, whilst they were to be "deplored, discouraged and if possible prevented for the wellbeing of the majority", nevertheless did not meet the "imperative grounds" threshold. The judge said:

> "The appellant expressed remorse. He was and, it is evident from this hearing, is an intelligent young man with a number of GCSEs who has been attending college and has a bright future ahead which he has put entirely at risk by his misconduct. He is committed to his family. Having regard to those sentencing remarks [of HHJ Edmonds in the Crown Court at Isleworth] I have no alternative but to find that the imperative ground threshold is not met. Any decision to remove must also comply with factors (a – f) of Regulation 27(5) but to make findings on those matters is, in a sense academic, since the imperative threshold is not reached in this case. Had the appellant not achieved the ten years' continuous residence threshold, many of the limbs of 27(5) would have been decided against him because he has been a persistent offender, but because the protection bestowed by Regulation 27(4) applies, the appeal is allowed under the 2016 Regulations."

Grounds of Appeal

The Secretary of State appeals on the basis that the judge erred in finding that the imperative grounds threshold was engaged. Pursuant to amendments made to the 2016 Regulations following the decision of the Court of Justice in FV (Italy) (Case C-424/2016), it was necessary for a person to have acquired the right of permanent residence before being able to benefit from the imperative grounds protection from removal.

In addition, the Secretary of State contends that the judge failed to address the issue of whether the appellant's imprisonment during the ten years prior to the expulsion decision had the effect in principle of breaking his integration in the United Kingdom, such that it was nevertheless appropriate to extend the imperative grounds threshold to him in any event.

In support of her grounds of appeal the Secretary of State relied on a skeleton argument dated 16 December 2019. Permission to appeal was granted by Upper Tribunal Judge McWilliam on both grounds.

The Law

Regulation 3 of the 2016 Regulations provides as follows:

> "(3) Continuity of residence is broken when -
>
> (a) a person serves a sentence of imprisonment;
>
> (b) a deportation or exclusion order is made in relation to a person; or
>
> (c) a person is removed from the United Kingdom under these Regulations.
>
> (4) Paragraph (3)(a) applies in principle to an EEA national who has resided in the United Kingdom for at least ten years, but it does not apply where the Secretary of State considers that -
>
> (a) prior to serving a sentence of imprisonment, the EEA national had forged integrating links with the United Kingdom;
>
> (b) the effect of the sentence of imprisonment was not such as to break those integrating links; and
>
> (c) taking into account an overall assessment of the EEA national's situation, it would not be appropriate to apply paragraph (3)(a) to the assessment of that EEA national's continuity of residence."

Regulation 27(4)(a) provides as follows:

> "A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who … has a right of permanent residence under Regulation 15 and who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision …"

Discussion

It is plain from the judge's analysis of the 2016 Regulations that he considered the appellant to enjoy the highest level of protection from removal. In reaching that conclusion, it appears the judge relied on what he considered to be a concession from the presenting officer who appeared before the First-tier Tribunal to that effect. The judge said this at [21]:

> "I heard a submission from Mr Williams [the presenting officer] who relied on the refusal letter. In view of the additional documents submitted by the appellant at the hearing Mr Williams was obliged to accept that the appellant has probably been in the United Kingdom since some time before September 2007 and he achieves the ten years necessary under the 2016 Regulations."

Ms Isherwood submits that the judge conflated the distinct issues of the *length* of residence, on the one hand, and the *quality* of that residence, on the other. She relies on a minute provided by the Presenting Officer who appeared at the First-tier Tribunal which records the appellant having produced GCSE and other educational certificates covering the period from September 2007 to June 2011. The note from the Presenting Officer also states that he relied on the refusal letter issued by the Secretary of State, commenting that none of the educational evidence had been made known to the Secretary of State. The note records that the evidence provided did not demonstrate any evidence of comprehensive sickness insurance for the period from 2003 to 2008, and nor was it therefore possible to conclude that the appellant had been present "in accordance with" the 2016 Regulations for a continuous period of five years. As such, he was unable to rely on the ten years' imperative grounds threshold, according to the note.

The Presenting Officer's note also records that he relied on the refusal letter issued by the Secretary of State. At [26] to [29] of the refusal letter, the Secretary of State explained why she did not accept the appellant to have resided in accordance with the 2016 Regulations for a continuous period of five years. The reason given was that the appellant had failed to provide documentary evidence of lawful residence and, as such, had not acquired the right of permanent residence.

In refusing permission to appeal from the First-tier Tribunal, First-tier Tribunal Judge Osborne observed that these proceedings are adversarial and it is not now possible for the Secretary of State to seek to resile from the concession made on her behalf by her representative in the First-tier Tribunal.

The question therefore arises as to what the concession made by the Secretary of State was.

Properly understood, looking at the documentary evidence that was referred to by Judge Kimnell, the notes of the Presenting Officer's attendance at the hearing before the First-tier Tribunal, the Secretary of State's decision, and the operative analysis conducted by the judge, I do not consider it can be said that the Secretary of State was conceding that the appellant had resided "in accordance" with the Regulations for a total of five years. The Secretary of State did not concede that the appellant had acquired the right of permanent residence, as required in order to benefit from the "imperative grounds" threshold based on ten years' residence. The most that can be said about the materials before the Secretary of State were that the judge was able legitimately to find that the appellant had been physically present in the United Kingdom for a period exceeding ten years, but there was no rational basis upon which it was open to the judge in the absence of further evidence as to the

quality of the appellant's residence at the relevant time to conclude that he was present "in accordance with" the 2016 Regulations.

Even if the judge had been entitled to conclude on the basis of his misunderstanding of what he considered to be the Secretary of State's concession that the appellant benefitted from the imperative grounds threshold for protection in principle, it was in any event incumbent on the judge to perform an assessment of the appellant's situation before deciding that he was entitled to have the benefit of the "imperative grounds" threshold.

Under Regulation 3(4), the judge was required to address the following matters. First, whether prior to his sentences of imprisonment in 2018, the appellant had forged integrating links with the United Kingdom. Secondly, whether his imprisonment was such as not to break those integrating links. Finally, taking into account an overall assessment of the appellant's situation, residence and integration, the judge was required to address whether it would be appropriate for the appellant to enjoy the imperative grounds threshold. The judge did not conduct any of that analysis. It appears the judge had regard to the legal threshold applicable prior to the amendment of the 2016 Regulations in light of FV Italy. The effect of having failed to apply Regulation 3(4) is that, even if the Presenting Officer *did* concede that the appellant had resided "in accordance with" the 2016 Regulations for a period exceeding five years, the judge's analysis of whether to extend the "imperative grounds" threshold to the appellant was flawed in any event.

I note that the judge made a number of high level but nevertheless extremely favourable findings in relation to the appellant. I quoted those at some length earlier in this decision. The judge did not, for understandable reasons, address whether the appellant's family circumstances, economic situation, links with the Netherlands, his social and cultural integration into this country and the other factors required to be considered under regulations 27(5) and (6) were met, because on his analysis, it was not necessary to do so. Had the judge made findings on the matters referred to at Regulation 27(5) and 27(6), it may well have been the case that any error in relation to the applicability of the imperative grounds threshold would have been immaterial. However, it is not possible for me to reach that conclusion. While it is clear to me that the judge's observations about the appellant being an intelligent young man with a bright future ahead were entirely within the range of legitimate observations the judge was entitled to make, there is insufficient detail in order for me to extrapolate from that a finding that the error of law I have just outlined was immaterial.

For my own part, I everything I saw about the appellant presenting his case in person before me was consistent with the factors outlined by Judge Kimnell. The appellant also spoke of a role that he has recently acquired with a well-known courier service which is keeping him occupied for a large amount of the time, indeed in those times when he is not caring for his father, and those are all matters which, combined with his extensive residence in this country, fall to be considered upon the reconsideration of this matter.

However, as a number of findings of fact must be reached which go to the core of the threshold applicable to the appellant's deportation it is not appropriate for those findings to be made in this Tribunal and instead, pursuant to [7.2(b)] of the *Practice Statements of the First-tier and Upper Tribunal of the Immigration and Asylum Chamber*, it is appropriate for this matter to be remitted to the First-tier Tribunal for a contemporaneous assessment of the appellant's circumstances. I therefore find that the decision of the First-tier Tribunal involved the making of an error of law and is set aside with no findings of fact preserved.

If the Secretary of State seeks to resile from her concession concerning the length of the appellant's residence in future proceedings, it will be necessary for her to seek to do so by reference to the established jurisprudence on the withdrawal of concessions.

Notice of Decision

The appeal is allowed on EU law grounds.

The matter is remitted to the First-tier Tribunal to be heard by a different judge, with no findings of fact preserved.

No anonymity order is made.

Signed *Stephen H Smith* Date 21 December 2020

Upper Tribunal Judge Stephen Smith