IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000507
First-tier Tribunal No:
HU/00809/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 May 2023

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

Mr Hamza Shah
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M West, counsel instructed by Kalam Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 5 May 2023

DECISION AND REASONS

Introduction

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Ford promulgated on 30 January 2023.

2. Permission to appeal was granted by First-tier Tribunal Judge Landes on 22 February 2023.

Anonymity

3. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

4. The appellant is an Italian national who states he entered the United Kingdom when he was aged 11, during June 2011. He was issued with a Registration Certificate on 6 December 2011. The appellant studied in America between 2017 and 2018 and returned to the United Kingdom in January 2019. The appellant was convicted of an offence involving disclosing private sexual photographs and films with intent to cause distress on 15 July 2019 and sentenced to 26 weeks imprisonment in a young offender's institution. He was also made the subject of a restraining order. On 30 January 2020, the appellant was also convicted of conspiring to supply crack cocaine and cannabis. He was also convicted of possessing articles for use in fraud as well as possession of controlled identity documents with intent and subsequently sentenced to 54 months' imprisonment for all these offences.

5. The appellant was notified that the respondent intended to deport him, in response to which he provided representations and supporting documents. In representations dated 25 January 2022, it was said that the appellant was reformed, remorseful, that he had no support network in Italy as his family now lived in America and that he wished to remain in the United Kingdom on Article 8 ECHR grounds, relying on his private life, albeit passing reference was made to the appellant having a partner and children, albeit no particulars were given.

6. On 12 May 2022 the respondent decided to deport the appellant and a deportation order was signed on the same date. In the decision letter, the respondent did not accept that the appellant had been resident in the United Kingdom for a continuous period of five years because there was insufficient evidence of his educational attendance and there was a possibility that he was not in the United Kingdom between his entry and February 2017. In any event, any residence had been broken by his two-year absence from the United Kingdom. Therefore, it was not accepted that he had acquired a permanent right of residence in the United Kingdom. It was decided that none of the exceptions to deportation applied and that, with reference to the appellant's mental state, there were no very compelling circumstances present.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the appellant was the only witness. There was no medical evidence submitted to support the appellant's claim that he had PTSD. The judge concluded that the appellant had not obtained a permanent right of residence prior to leaving the United Kingdom in February 2017. It was also found that the appellant had broken the continuity of his residence owing to his absence from the United Kingdom for a period of six months.

The grounds of appeal

8. The grounds of appeal made one point, that the First-tier Tribunal failed to consider the correct level of protection to be afforded to the appellant under regulations 23 and 27 of the Immigration (European Economic Area) Regulations 2016. The grounds referred to regulation 15(3) which referred to absence from the United Kingdom for a period exceeding two years. It was contended that the appellant had not left the United Kingdom for this length of time and therefore the judge was wrong to find that his continuous residence was broken. It was said that the judge erred in finding there was no evidence of the appellant's attendance at primary school because he was aged twelve when he entered the

United Kingdom and there was evidence of his attendance at secondary schools which was unchallenged by the respondent's representative at the hearing.

9. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

> I consider it arguable as set out in the grounds that the judge's reasoning is insufficient to support her conclusion that the appellant had not acquired 5 years' residence in the UK before he left the UK for the US. She finds at [31] that she did not have evidence of the appellant's attendance at primary school in the UK, but given the appellant's age (contrary to the grounds the appellant was 11 not 12 when he arrived in the UK and would therefore have been of an age to conclude primary school in the summer of 2011) he would have been starting secondary school in September 2011, and there was evidence in the appellant's witness statement (the school letter with the grounds postdates the hearing) that he had attended Lealands Academy for two years. I do not rely on Mr West's assertion as to what did or did not take place in cross-examination, but regardless, the judge makes no reference at all to the appellant's own evidence that he attended Lealands Academy from September 2011. The judge should have explained why she did not accept the appellant's own evidence as to his school attendance as it was potentially critical evidence.
>
> Although the appellant's offences are serious, whether the appellant was entitled to the higher level of protection will inevitably have affected the judge's approach, and so any error as to the level of protection acquired will be arguably material.
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> Whilst I do not limit the grounds which may be argued, I cannot see how the judge erred in law so far as continuity of residence was concerned; she appears to have been aware from the wording of [32] that leaving for the US for a maximum of 23 months would not have broken the continuity of residence if the appellant had already acquired permanent residence. I do not consider the judge's reference to regulation 19 (3) was a material error, it was reference to the formerly relevant part of the 2006 regulations relating to removal.

10. The respondent filed a Rule 24 response dated 8 March 2023. In it, the appeal was opposed, it being argued that there was no challenge to any of the factual findings other than regarding the appellant's primary education and that if a material error was made out, the case could be remade in the Upper Tribunal without need for further oral evidence. It was submitted that the appellant's deportation would be proportionate whether the lower or intermediate level of protection was afforded to him.

The error of law hearing

11. I heard detailed submissions from the representatives which I considered in reaching my decision. At the end of the hearing, I announced that I was satisfied that there was a material error of law in the decision of the First-tier Tribunal which was such to render the decision unsafe. I accordingly set aside the decision in its entirety. I give my reasons below.

Decision on error of law

12. The focus of the hearing was on whether the judge erred in her consideration of the length of the appellant's residence in the United Kingdom prior to his departure for America. As indicated above, the appellant's account is that he entered the United Kingdom during June 2011. In paragraph 6 of his witness statement, he provided details and dates of his education and his residential addresses. At [31] of the decision, the judge records that there were no details

relating to the appellant's primary education however, he does not claim to have attended primary school in the United Kingdom. Indeed, in his statement, the appellant says that he started year 7 in September 2011. The judge gave no indication whether the appellant's evidence as to his schooling between 2011 and 2013 was accepted. All the indications are that his evidence was not challenged by the respondent and in any event the judge ought to have addressed the account he gave of his residence.

13. The judge's error in overlooking this evidence was plainly material given the conclusion that the appellant had been unable to demonstrate that he had acquired a permanent right of residence. That finding led the judge to assess the risk posed by the appellant on the wrong basis, that is on the lowest level of protection under the 2016 Regulations.

14. I have carefully considered the respondent's somewhat surprising submission that the appellant's length of residence would have made no difference to the outcome of the appeal. It is apparent from the various findings from [34] onwards that the judge had in mind that the appellant was entitled to the lowest level of protection. Furthermore, not all the judge's findings were negative, for instance, it was noted that the appellant was young when he offended, that he had not reoffended since 2019, that the risks of reoffending and of harm were low according to professionals, that he had addressed the causes of his offending and was no longer using substances. I conclude that in view of the many positive findings, combined with an assessment of whether there were serious grounds for deportation, that without the error the judge might have reached a differing conclusion.

15. I canvassed the views of the representatives as to the venue of any remaking. Ms Isherwood had no view and Mr West thought that the matter ought to be remitted. I considered that there were also other issues with the decision of the First-tier Tribunal as well as a lack of clarity regarding the length of the appellant's absence from the United Kingdom. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that the appellant was deprived of an adequate consideration of his deportation appeal. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House by any judge except First-tier Tribunal Judge Ford.

T Kamara

Case No: UI-2023-000507
First-tier Tribunal No: HU/00809/2022

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 May 2023