IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002756

First tier number: HU/07197/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 28th of June 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAMIAN DOHUR
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms Doerr, Counsel instructed by Wilsons Solicitors

Heard at Manchester Civil Justice Centre on 18 March 2024

DECISION AND REASONS

1. The Respondent is a national of Nigeria born on the 11th March 1994. On the 24th March 2023 the First-tier Tribunal (Judge Frantzis) allowed his appeal. The Secretary of State now has permission to appeal against that decision.

2. The matter in issue between the parties is, in simple terms, whether or not the Respondent should be deported. On the facts, the reason that question is being asked is straightforward: the Appellant has been convicted of various offences including wounding with intent to do grievous bodily harm. The litigation necessary to answer that question is unfortunately not so straightforward. Although the Respondent is a Nigerian national, he is the son of an EEA national and they have both lived in the UK since 2009. What, if anything, turns on this family relationship with an EEA national?

Case History and Decision of the First-tier Tribunal

3. I think it is worth recording that this matter had a lengthy case history before it ever came before First-tier Tribunal Judge Frantzis. The relevant history, which places her decision in context, includes the following

i) Mr Dohur, then aged 15, entered the UK on the 21st July 2009

ii) On the 22nd May 2013 he was granted a EEA residence card

iii) On the 21st December 2017 he was convicted and sentenced to 6 ½ years imprisonment

iv) A decision to deport was taken on the 2nd September 2020

v) A decision to refuse a human rights claim was served on the 3rd September 2020

vi) Mr Dohur filed grounds of appeal which included reliance on the Immigration (European Economic Area) Regulations 2016

vii) At a date unrecorded the FTT directed the SSHD to respond to Mr Dohur's assertions that the Immigration (European Economic Area) Regulations 2016 applied to him

viii) The Secretary of State's response to directions is dated the 27th May 2021. Mr Dohur's assertion is rejected

ix) On the 10th June 2021 a Case Management Review was held at which First-tier Tribunal Judge Cole pointed out that the Secretary of State's letter of the 27th May "fundamentally misunderstood the operation of EU Law". Judge Cole issued further directions requiring the Secretary of State to address the stated facts that Mr Dohur had been living in the UK in accordance with the Regulations since 2009

x) A further CMR on the 23rd February 2023 revealed that the Secretary of State had not complied with the Directions of Judge Cole. Judge Frantzis, presiding on that day, issued further directions specifically requiring the Secretary of State to set out his position in writing.

4. On the 6th March 2023 when the matter came back before Judge Frantzis, the Secretary of State had still not complied with directions. Mr Ogbewe, the Home Office Presenting Officer, applied for a further adjournment, which Judge Frantzis, having had regard to the overriding objective, denied. Mr Ogbewe was left to state the Secretary of State's position in oral submissions. These were:

(a) That if Mr Dohur could establish that he had accrued a right of permanent residence, then the Immigration (European Economic Area) Regulations 2016 would apply [FTT §13]

(b) That a decision had been taken under the Immigration (European Economic Area) Regulations 2016 [§18]

5. Those concessions notwithstanding, Judge Frantzis was not satisfied that either was correct. She rejected the suggestion that there had been an appealable decision under the Immigration (European Economic Area) Regulations 2016 and so concluded [at her §19-21] that there was therefore no appeal under those Regulations; nor was there any mechanism to challenge an erroneous application of the automatic deportation procedure; the only ground of appeal in this case was 'human rights'.

6. Having so directed herself Judge Frantzis went on to consider the effect of the decisions in Charles (human rights appeal: scope) [2018] UKUT 89 (IAC) and R (on the application of Connell) [2018] EWCA Civ 1329.

7. In Connell the Court had noted that 'Exception 3' to the automatic deportation procedures, set out at section 33 of the Borders Act 2007, had then read "where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU treaties". Having considered the meaning of that provision the Court had held that it did not require an investigation on the part of the decision maker whether or not the deportation would be lawful under the Immigration (European Economic Area) Regulations 2016: if the Regulations applied then the simple effect of Exception 3 was that the case fell outwith the automatic deportation process altogether. The appeal would fall to be allowed, on human rights grounds, on that basis. In Charles the Tribunal had taken a slightly different route to reach the same conclusion. There the Tribunal considered the case of a putative deportee who turned out to be a British national. It is no longer open to the Tribunal to allow an appeal on the basis that the decision under appeal is "not in accordance with the law". The only ground of appeal post-2015 was whether the decision was unlawful pursuant to s6(1) of the Human Rights Act 1998. Insofar as a claimant relied upon his Article 8 rights to submit that it is, it was open to the Tribunal to take all relevant information into account when assessing proportionality. That could include a finding that the deportation order was unlawful.

8. Having had regard to these authorities, Judge Frantzis was satisfied that she could allow the appeal without further enquiry. It was not in issue that Mr Dohur was the family member of an EEA national; the unchallenged evidence was that he had been living in the UK in accordance with the Regulations and he therefore fell outwith the automatic deportation procedures. The Immigration (European Economic Area) Regulations 2016 should have been considered in his case and the decision was therefore an unjustified interference in his family and private life and it fell to be allowed on that basis too.

9. Then at her paragraph 37 Judge Frantzis said this:

> "37. In case I am wrong in my approach to Connell I explain why, in light of the protection afforded to the Appellant under the 2016 Regulations, I would also allow the appeal on the basis the refusal of the Appellant's human rights claim is disproportionate. This is because for the reasons that I set out below I am not satisfied that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society when Regulation 27 and Schedule 1 of the 2016 Regulations are applied. I have taken account of authority of Strazewski [2015] EWCA Civ 1245 in addition to the substantive

> submissions made on the part of the Respondent by Mr Ogbewe on this point.…"

10. The decision then goes on to consider the facts in respect of Mr Dohur's offending, and rehabilitation. Having considered all of that evidence the conclusion is reached that the Secretary of State has not shown that the Appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The decision concludes:

> 50. As Article 8 ECHR is engaged and because (i) I am satisfied that the Appellant's deportation should have been considered under the 2016 Regulations, and this was not done, and/or (ii) I also consider that the Appellant's personal conduct does not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, the decisions dated 3rd September 2020 and 27th May 2021 are disproportionate and the Appellant's appeal succeeds.
>
> 51. I those circumstances, given my findings, I need not go further to consider the Appellant's arguments under Article 3 ECHR or Article 8 ECHR more widely.

The Challenge

11. The Secretary of State's grounds are lengthy, confusing and somewhat repetitive. They can be distilled, for the purpose of this decision, as follows:

i) There had been no EEA decision so there was no EEA right of appeal;

ii) The Tribunal therefore had no jurisdiction to embark on a substantive consideration of the Immigration (European Economic Area) Regulations 2016;

iii) It should not have "allowed the appeal under the EEA Regulations law at [50]";

iv) The only right of appeal was under s6(1) HRA 1998;

v) The Tribunal made no findings on whether Mr Dohur was a 'relevant person'

vi) The Home Office Presenting Officer had been wrong to concede that the Immigration (European Economic Area) Regulations 2016 might have application;

vii) There was in any event a lack of evidence that Mr Dohur had continued to live lawfully in UK in accordance with the Immigration (European Economic Area) Regulations 2016;

viii) Even if the Immigration (European Economic Area) Regulations 2016 did apply, the Tribunal made no findings on whether his criminal offending had broken Mr Dohur's integrative links with the United Kingdom;

ix) The Secretary of State has established that Mr Dohur does pose a genuine, present and sufficiently serious threat to the fundamental interests of society, for the reasons set out at Schedule 1 of the EEA Regulations 2016 7(b), (c), (e), (f) and (j).

12. Those were the grounds which attracted the grant of permission made by UTJ Sheridan on the 31st August 2023. The day before I heard the appeal the decision in Abdullah & Ors (EEA; deportation appeals; procedure) [2024] UKUT 00066 (IAC) became available. In that decision the Upper Tribunal considered the position of a number of EEA nationals facing deportation post-Brexit. Both parties therefore referred me to elements of that decision, and the case of Mr McVeety, gave rise to an additional ground of appeal, articulated as follows. In Abdullah the Tribunal, recognising that there are likely to be cases like this, make the following recommendation [at 105(l)]:

> If the deportation decision against an EEA citizen arises in a human rights appeal under section 82 of the 2002 Act, then that appeal should be stayed pending resolution of any outstanding application under the EUSS to allow an appeal against a negative decision to be determined as the same time as a human rights appeal.

Mr McVeety relied on this passage to submit that what Judge Frantzis should have done would be to adjourn this case. Her failure to do so, he submits, is an additional error of law, obviously unknown to the drafter of the pre-Abdullah grounds

Discussion and Findings

13. I start by addressing the Secretary of State's contention that the First-tier Tribunal misunderstood the task before it, and that it erred by 'allowing' the appeal on EEA grounds when in fact there was no EEA appeal.

14. This is in my view simply unarguable. The Tribunal expressly found, contrary to the submission made by the Home Office on the day, that there had **not** been an EEA decision. There could therefore be no EEA appeal. It understood that it could not allow the appeal under the Immigration (European Economic Area) Regulations 2016, and it did not seek to do so. In particular paragraph 50 of its decision does not purport to do any such thing.

15. What the Tribunal did was to expressly consider a human rights appeal under s82 Nationality, Immigration and Asylum Act 2002. It is perfectly clear from its decision that it understood this to be its task. The relevance of the reasoning and commentary on Mr Dohur's rights under EU law went only to that matter, in particular to the proportionality balancing exercise conducted under Article 8. In other words his rights under EU law fell to be considered through the prism of Article 8. The Tribunal found:

(i) That the Secretary of State should have considered this deportation under the Immigration (European Economic Area) Regulations 2016 but had failed to do so;

(ii) That on the facts the Secretary of State had failed to demonstrate that Mr Dohur's personal conduct represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.

The sum of those findings was that had this been an appeal under the Immigration (European Economic Area) Regulations 2016, Mr Dohur would have succeeded. It was therefore obviously an unjustified interference with his Article 8(1) rights because it was unlawful to deport him.

16. I note that in taking this approach the First-tier Tribunal, although it did not have the decision in Abdullah before it, acted in harmony with commentary made in that decision:

> "103. Taking all of these factors into account and applying the principles set out in Bridges, we consider that because of the particular nature of the two deportation regimes, that it flows from a finding that a deportation decision is contrary to the EUSS rules because it is not justified by reference to reg. 27 will result in a finding that it is "not in accordance with the law" and thus any article 8 appeal would succeed on that basis. This should not, however, be understood as applying to those situations where other provisions of the Immigration Rules are met; that still requires an assessment of proportionality in line with TZ (Tanzania)".

17. I therefore find that grounds (i), (ii), (iii), and (iv) are entirely misconceived, and fail to establish any error on the part of the Tribunal. Ground (vi) has novelty value in that it simply seeks to establish that the Home Office was wrong. As I say, the Tribunal understood that to be the case, and so that ground takes matters no further.

18. Next is the submission that there was a lack of evidence about whether Mr Dohur had been living in the UK lawfully. This is simply not correct. At its paragraph 31 the First-tier Tribunal sets out the evidence before it concerning the years between Mr Dohur's arrival in the UK in 2009 and him being sent to prison in 2017. Focusing on the five year period between July 2009 and July 2014 the Tribunal concludes that his mother was a qualified person, and that he himself was either a student or a worker at this time. None of that evidence was challenged by the Home Office Presenting Officer. It was therefore plainly open to the Tribunal to conclude that Mr Dohur had been living here lawfully and that he had accrued a right of permanent residence in the relevant period prior to completion day.

19. The interrelated grounds of (viii) and (ix) in essence argue that the Tribunal was wrong, in its Connell-alternative analysis, to find that the Secretary of State had not discharged the burden upon her to show that there were serious grounds for deportation here. These grounds exemplify the Secretary of State's scattergun approach in this appeal. The Tribunal quite properly addresses the question of risk at its 37-48, and I note that in doing so expressly directs itself to consider the factors set out in Schedule 1 of the Regs (at its 41). I am unable to say that the Tribunal failed to follow its own direction.

20. Finally that leaves the amended ground, that the Tribunal erred in law in not adjourning this matter to enable the Secretary of State to deal with Mr Dohur's outstanding application under the EUSS. I am myself unsure as to whether the passage he relies upon in Abdullah amounts to a mandatary injunction on how Tribunal's should proceed in these circumstances, but if it were, then it is guidance that the First-tier Tribunal had in fact followed on three separate occasions, this appeal having been repeatedly adjourned over a two year period to permit the Secretary of State the opportunity to do just that. It presumably is not the Secretary of State's position that such appeals should be adjourned indefinitely. Taking into account the overriding objective I am unable to say that Judge Frantzis erred in law in not doing so on this occasion.

Decisions

21. The appeal is dismissed, and the First-tier Tribunal decision upheld.

22. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
24th May 2024