IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002965
UI-2024-002966

First-tier Tribunal No:
EU/50486/2023& EU 53424/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of October 2024

Before

UPPER TRIBUNAL JUDGE MAHMOOD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JENNIFER ODETTE HELENE RENEE FATAH

Respondent

Representation:
For the Claimant: Mr T. Lowenthal, counsel instructed by The AIRE Centre
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 24 September 2024

DECISION AND REASONS

Introduction

1. At the First-tier Tribunal, Ms Jennifer Fatah was the Appellant, and the Secretary of State was the Respondent. For ease in following this decision, I shall refer to Ms Jennifer Fatah as the Claimant and the

Secretary of State as the Respondent. It is the Secretary of State who brings this appeal.

Permission to Appeal

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Groom dated 20 May 2024, against the decision of the Respondent to make a deportation order pursuant to the Immigration (European Economic Area) Regulations 2016 and to refuse leave to remain on suitability grounds in respect of Appendix EU of the Immigration Rules.

3. Permission to appeal was granted by Upper Tribunal Judge Perkins by way of a decision dated 15 July 2024.

4. The grounds of appeal to the Upper Tribunal rely in reality on the grounds to the First-tier Tribunal with some brief comments on the refusal of permission to appeal of First-tier Tribunal Judge Lawrence.

Secretary of State's Grounds of Appeal

5. Those grounds to the First-tier Tribunal are difficult to follow. Whilst there are two grounds, they seem to overlap and each then has numerous sub-paragraphs. I will only refer to parts of those grounds which contend that there was an error of law by:

   (a) *"Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake and where unfairness resulted from the fact that a mistake was made/ making a material misdirection of law on any material matter & Failing to give reasons or any adequate reasons for findings on material matters-in relation to the appellant's absences from the UK and whether she was a qualified person to be entitled to permanent residence and the enhance (sic) level of protection*"

   (b) "*Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake and where unfairness resulted from the fact that a mistake was made/ making a material misdirection of law on any material matter & Failing to give reasons or any adequate reasons for findings on material matters-in relation to the appellant's 10 year continuous period of residence and integrative links within the UK that would entitle her to permanent residence and the enhanced level of protection."*

The Parties' Submissions Before Me

6. Mr Melvin on behalf of the Secretary of State said that he was not able to provide an explanation why the bundle for the hearing was sent so late and why it was sent to the Claimant's solicitors only yesterday morning. Mr Melvin assured me that he would pass on the message that procedural rigour will be applied and that it remains essential that both the standard directions of the Principal Resident Judge and the Practice Direction for the Immigration and Asylum Chambers of the Upper Tribunal in respect of CE-File are complied with. He said he knew that directors and others had been summoned to appear at the Upper Tribunal previously. Mr Melvin understood clearly that the overriding objective requires the parties, including the Secretary of State, to assist the Upper Tribunal and to co-operate with the opposing party.

7. Mr Melvin apologised, and I accepted that apology on the basis that this will be taken seriously and will not occur again, especially since there were numerous chasers from the Claimant's solicitors to the Secretary of State asking for the bundle.

8. In respect of the appeal, Mr Melvin said he relied on the grounds of appeal. He mentioned that the heading of the grounds was not actively encouraged to be authored in the way drafted within his team. He said that the first ground was in respect of the making of a mistake as to a material fact. Mr Melvin made brief submission that the issue was the apparent acceptance by the judge of what appeared to have been said or a misunderstanding of what appeared to be said. Mr Melvin said, he thought that the Presenting Officer took the view that whilst accepting the Appellant had been in the UK for a 10-year period, it was not "indicative of an imperative grounds type of challenge". He said ground 1A said the HMRC evidence was not really contested. He said it was clear that issue was taken within the 10-year period that the claimant was not exercising any treaty rights or was perhaps absent from the UK and it was set out in the presenting officers' minutes. He said paragraph 'B' of the grounds related to residence and that the ground was more of a continuation of what was said in part a of the grounds and that it was same in parts 'C' and 'D'. He said that was ground 1.

9. Mr Melvin said of ground 2 that in reality it was perhaps an extension of ground 1 by failing to mention schedule A which was in the refusal notice but may not have been in the review. He said it was the 'fundamental interests of society point' and this rather contentious issue. He referred to the date of imprisonment, rather than initial decision to exclude the Appellant from the UK. Mr Melvin said that points 'C' and 'D' took issue with the integrative links and rehabilitation points. Mr Melvin also said that ground 2E was more of a statement than an error of law challenge. He concluded by saying that was the challenge against the decision in a nutshell.

10. Mr Lowenthal relied on his skeleton argument and on the Rule 24 Response to the Notice of grounds of appeal. He took me through those documents and referred me to the authorities within his documents. I shall not rehearse those documents or the arguments at any great length except in so far as is necessary in for reaching my decision. I observe though that both of the documents that he had drafted were helpful and set out the submissions clearly. There was also an attempt within those documents to decipher the Secretary of State's grounds of appeal, which grounds it appeared to me that even Mr Melvin struggled with.

11. Mr Melvin in reply said that much of ground 2 depended on the high threshold being met. Mr Melvin said that there were insufficient reasons for the judge to conclude that there is an imperative threshold in this particular case. He said that the focus in the grounds of appeal was on the HMRC documents and there was no record of benefits, but there was continuous working between 2007 and 2017 and there was reliance on that particular year. He said that there was no evidence of the claimant being in the United Kingdom.

Analysis and Conclusions

12. I shall refer to some of the law cited to me. Much of it is well-known, but it is worth referring to some of it so that it is clear that lawful consideration has been applied to this case.

13. I refer briefly first to some of the background to the Claimant's basis for seeking to remain in the United Kingdom. The Claimant arrived in the United Kingdom in 2004 when she was aged 18 to join her eldest child's father who was already in the United Kingdom. She later had a relationship with a man in the United Kingdom and they had to children born to them. One in 2009 and another in 2014. In 2015 she suffered various difficult life events, including miscarriage, her relationship broke down and she became homeless. She turned to alcohol. She then committed a serious offence of wounding contrary to section 20 of the Offences Against the Person Act 1861 and was given a sentence of imprisonment of 2 years and 3 months. I give very serious consideration to the criminality in this matter.

14. On 19 May 2024 the Secretary of State made two decisions. A deportation decision and an EU Settled decision. The Judge at the First-tier Tribunal allowed the appeal in respect of each decision and did not accept the Secretary of State's case that the Claimant posed a sufficiently serious threat to make expulsion imperative.

15. It is important to highlight what I as the Upper Tribunal Judge can and cannot do in an appeal. I can consider the grounds of appeal and allow the Secretary of State's appeal if I am satisfied that a material error of law is shown in the First-tier Tribunal Judge's decision. What I cannot do is to allow the appeal merely because I disagree with the

Judge's decision, even if I consider that the decision of the First-tier Tribunal was generous and even if I would not have made that decision myself. As the case law highlights and which I refer to below, the First-tier Tribunal's decision must be noted to be one in which that Judge saw and heard from the witnesses and not me.

16. The Court of Appeal's judgment in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [2005] I.N.L.R. 633 explains when an appeal on a point of law will be entertained.

17. More recently, the Court of Appeal's judgment in *Volpi v Volpi* [2022] EWCA Civ 464 makes clear that a first instance Judge's decision should not be picked over or construed as though it was a piece of legislation. Lewison LJ, who provided the only reasoned judgment and with whom Males and Snowden LJJ agreed said at paragraphs 65 and 66 as follows and which, in reality, encapsulates what has been happening in this appeal before me:

> "65. This appeal demonstrates many features of appeals against findings of fact:
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> - (i) It seeks to retry the case afresh.
> - (ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").
> - (iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
> - (iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.
> - (v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.
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> 66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. The question for us is whether the judge's finding that the money was a loan rather than a gift was rationally insupportable. In my judgment it was not. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal."

18. It is also clear from various authorities that appeal judges must remind themselves that the Judge who dealt with the matter at first instance is a specialist judge. This is highlighted, for example, in the judgment Lord Hope in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678. His Lordship made clear in his judgment that,

> "30. …This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security [2002] 2 All ER 279,* para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently…"

19. In *South Bucks District Council and another v Porter (No2)* [2004] UKHL 33, [2004] 1 WLR 1953 Lord Brown had provided a clear judgment with which their Lordships' House agreed. That refers to an appellant having to show on appeal that a lacuna in the stated reasons was such as to raise a 'substantial doubt' as to whether the decision was based on relevant grounds or otherwise free from any flaw.

20. In this case, the Secretary of State also relies on the Court of Appeal's decision in *E and R v Secretary of State for the Home Department* [2004] QB 1044. Carnwath LJ, as he then was, handed down the judgment on behalf of the Court. It is important to note what the Court of Appeal actually decided in that case because in my judgment, in this appeal before me, the Secretary of State's contention about a 'mistake of fact' are wrong in law. The Court of Appeal held,

> "66… In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law… First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

21. The Supreme Court's judgment in *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204 makes clear that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point if they wished to submit that the evidence should not be accepted. This was basic it was fair all round to do so.

22. In *Lata (FtT: principal controversial issues)* [2023] UKUT 00163 (IAC) it was made clear that the parties are under a duty to provide the First-tier Tribunal with relevant information as to the circumstances of

the case and that required constructive engagement with the First-tier Tribunal. It was also made clear that it was a misconception for a party to remain silent upon or not to make express consideration and then to place the burden upon the Judge to consider all potential issues.

23. I shall therefore consider the Secretary of State's grounds, such as they are, with those binding authorities in mind.

24. In my judgment the Secretary of State's grounds that the Judge was wrong to conclude that the Appellant was continually resident in the United Kingdom since 2004 is hopeless. The Judge accepted the Appellant's evidence in a clear manner. The Judge accepted that any time away was limited to up to one week at a time. The Judge was clearly entitled to come to that finding, having seen and heard from the witness. In any event, the documentary evidence such as the HMRC records, employment and presence generally provided further support.

25. Further, if it was necessary, it appears to me that the Secretary of State's representative was specifically asked about this at the outset of the hearing by the Judge and the reply was that continuous residence was not accepted because of the 'integration point'. Namely, not in respect of the duration of time. Therefore, this is in my judgment is an additional reason to dismiss that ground of appeal.

26. I do not accept that there was a mistake of fact. Not least because the matters are contentious and the *E & R v Secretary of State* test which I refer to above is not met when the alleged mistake is contentious.

27. In respect of the alleged miscalculation of 10 years' residence, the grounds are clearly wrong. *Secretary of State for the Home Department v MG (Portugal)* [2014] 1 WLR 2441 makes clear that 10 years residence is calculated back from the decision to deport.

28. In my judgment the Secretary of State's grounds of appeal in respect of the Appellant's low income and the integration point were adequately dealt with by the Judge with cogent reasoning. The Judge was entitled to conclude, when noting the Appellant's history of employment in the United Kingdom and matters connected with her family and more generally. It is not possible for me to interfere with such a finding, noting the case law states that I must not do so, just because I might disagree with the findings. In any event, I note that the decisive criterion for integration for the purposes of imperative grounds protection is ten years' residence as can be seen in Case C-145/09 *Land Baden-Wurttemberg v Tsakourudis* [2011] 2 CMLR 11. The Judge specifically referred to this at paragraph 21 of the decision.

29. The challenge based on inadequate reasoning, be it in respect of the arguments relating to the fundamental interests of society or other matters in respect of integration, have no merit. Similarly, with the overlap in respect of the severing of integration. The Judge dealt with all of these aspects fully at paragraphs 25 to 32 and 34 to 37. The Judge noted both sides of the balance and noted the OASys assessment. Some of the matters raised now by the Secretary of State were not raised previously. In my judgment, read as a whole, the Judge dealt cogently with these matters.

30. In my judgment the Secretary of State's grounds which contend that the Judge was wrong to find that imperative grounds were not shown is hopeless. The Judge correctly cited the case law at paragraphs 32, 46 and 51 and then correctly applied it. Including the case of *LG Italy v Secretary of State for the Home Department* [2008] EWCA Civ 190 and at paragraph 9 the Judge referred to Hafeez *v Secretary of State for the Home Department* [2020] EWCA Civ 406.

31. In reality much of what is said on behalf of the Secretary of State seeks to re-argue the case advanced at the First-tier Tribunal. That is not a valid ground of appeal, as *R(Iran)* makes clear.

32. Therefore, despite having to decipher the Secretary of State's grounds, presented as they were, I conclude that there is no material error of law identified in the written or oral submissions presented to me.

33. I therefore dismiss the Secretary of State's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law.

The decision of the First-tier Tribunal allowing the appeal shall stand.

Signed Date: 27 September 2024

Abid Mahmood
Judge of the Upper Tribunal