Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43968/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st September 2017	**On 27th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

HK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Lee of Counsel, instructed by Patricks Solicitors
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge Norton-Taylor of the First-tier Tribunal (the FtT) promulgated on 16th June 2017.

2. The Appellant is a male national of the Netherlands, born 7th October 1986. He appealed against the Respondent's decision, dated 5th November 2014, to make a deportation order with reference to regulations 19(3)(b) and 21 of the Immigration (European Economic Area) Regulations 2006.

3. The FtT heard the appeal on 12th May 2017. At the hearing the FtT took the view that the appeal should be considered with reference to the Immigration (European Economic Area) Regulations 2016, not the 2006 Regulations. Both representatives agreed.

4. The FtT found that the Appellant had not accrued continuous ten years' residence, had not proved that he was entitled to permanent residence, and found that the Appellant represented a genuine, present and sufficiently serious threat affecting several fundamental interests of society. The FtT found there was a strong likelihood that the Appellant would resume his offending behaviour and did not accept that he was a reformed individual. The FtT attached little weight to the Appellant's claimed integration into the United Kingdom, and found that he had in fact re-established himself in the Netherlands.

5. The FtT concluded that the Respondent's decision was not, and is not, a breach of the Appellant's rights under EU law. The FtT found that the Appellant's family could relocate to the Netherlands and join him there, without that being unreasonable or contrary to the best interests of the children. In the alternative, even if the Appellant's partner and children did not relocate, the FtT found that separation of the family was, on the facts of this particular case, justified by the threat to the fundamental interests of society.

6. The Appellant applied for permission to appeal to the Upper Tribunal. In summary Counsel who prepared the grounds, contended that the FtT had erred in law in applying the 2016 Regulations, rather than the 2006 Regulations, and Counsel accepted that she had erred by conceding that the 2016 Regulations were appropriate.

7. It was contended that the FtT, having unlawfully applied the 2016 Regulations, went on to err in considering regulation 3(3), paragraph 4 of Schedule 1, regulation 29(3), and paragraph 7 of Schedule 1 to the 2016 Regulations.

8. It was contended the FtT had erred in law by making erroneous findings, in concluding that the Appellant was not entitled to permanent residence, and the FtT had failed to take into account material considerations and had acted unfairly by concluding that the Appellant could not be believed about his regret and his change in outlook on life, because this allegation had not been made in the refusal decision, and the Appellant was not present to give evidence and be cross-examined.

9. Permission to appeal was granted by Judge Doyle who found it arguable that the FtT had "applied the wrong set of regulations to the Appellant's case." Judge Doyle found that the Grounds of Appeal raised an arguable error of law.

10. Following the grant of permission the Respondent submitted a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008, accepting that the appeal should have been considered with reference to the 2006 Regulations, but contending that it was not a material error to have considered the 2016 Regulations.

11. Directions were issued making provision for there to be a hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

12. Mr Tarlow, on behalf of the Respondent, did not rely upon the rule 24 response. Mr Tarlow accepted that the FtT had materially erred in law, because the appropriate regulations which should have been considered in this appeal, are the 2006 Regulations, and not the 2016 Regulations. Mr Tarlow accepted that the FtT decision was materially flawed and must be set aside. It was accepted that application of the incorrect regulations had infected the findings made, and Mr Tarlow accepted that no findings should be preserved.

13. Mr Lee agreed that no findings of the FtT should be preserved, commenting that the application of the incorrect regulations had infected the findings made.

14. Both representatives were therefore in agreement that the FtT decision should be set aside with no findings preserved and re-made. There was however a difference of opinion as to which Tribunal should re-make the decision.

15. Mr Lee argued that the appeal should be remitted to the FtT, notwithstanding that Judge Norton-Taylor, was the third FtT Judge to have adjudicated in this appeal. Two previous appeals had been found to be wrong in law, and had been remitted back to the FtT by the Upper Tribunal.

16. Mr Lee submitted that the fact finding required, should be carried out by the FtT, and in addition, submitted that a fair hearing had not taken place, because the incorrect regulations had been applied. Mr Lee also made the point, that the Appellant had not yet had an opportunity to give live evidence before a Tribunal. He had been removed to the Netherlands, and had made an application to be allowed to return to the UK in order to give evidence at his appeal before the FtT, but his application had been refused by the Respondent.

17. Mr Tarlow accepted that judicial fact finding would be required in order to re-make this decision, and submitted that finality was required, in view of the previous history of this appeal, and therefore it was more appropriate for the decision to be re-made by the Upper Tribunal.

18. Mr Lee responded by submitting that there could be finality before the FtT, if a decision was made that could not be challenged by either party. He also submitted that there is a two-Tier system for dealing with appeals for a reason, and it would not be appropriate for the Upper Tribunal to act as a primary fact finder.

19. I announced at the hearing that I accepted that the FtT had materially erred in law and the decision must be set aside. I reserved my decision to reflect upon whether it would be more appropriate for the decision to be re-made by the Upper Tribunal, or remitted to the FtT.

My Conclusions and Reasons

20. My reason for setting aside the FtT decision is that the appeal should have been considered with reference to the 2006 Regulations, rather than the 2016 Regulations. This is confirmed by The Immigration (European Economic Area) (Amendment) Regulations 2017 and in particular paragraph 4 which states;

> "After paragraph 2 of Schedule 4 insert -
>
> **Appeals**
>
> 3 - (1) Notwithstanding the revocation of the 2006 Regulations by paragraph 1(1), those Regulations continue to apply -
>
> (a) in respect of an appeal under those Regulations against an EEA decision which is pending (within the meaning of regulation 25(2) of the 2006 Regulations) on 31st January 2017;
>
> (b) in a case where a person has, on 31st January 2017, a right under those Regulations to appeal against an EEA decision.
>
> (2) For the purposes of this paragraph, 'EEA decision' has the meaning given in regulation 2 of the 2006 Regulations and the definition of 'EEA decision' in regulation 2 of these Regulations does not apply."

21. I accept the submissions made by both representatives that application of the incorrect regulations infected the findings made by the FtT. The decision is therefore not safe and for that reason is set aside.

22. I have reflected upon the appropriate disposal of this appeal. I set out below paragraph 7 of the Senior President's Practice Statements;

> 7. **Disposal of Appeals in Upper Tribunal**
>
> 7.1 Where under section 12(1) of the 2007 Act (proceedings on appeal to the Upper Tribunal) the Upper Tribunal finds that the making of the decision concerned involved the making of an error on a point of law, the Upper Tribunal may set aside the decision and, if it does so, must either remit the case to the First-tier Tribunal under section 12(2)(b)(i) or proceed (in accordance with relevant Practice Directions to re-make the decision under section 12(2)(b)(ii).
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> 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.

7.3 Re-making rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

23. It is clearly undesirable for an appeal to be repeatedly considered by the FtT, and thereafter considered by the Upper Tribunal and sent back to be heard afresh. However, I take into account that it could be said that the FtT hearing was unfair, in that the incorrect regulations were considered. There is also a need for substantial judicial fact finding. I am also persuaded that Mr Lee has made a relevant point, in that the Appellant has not yet had the opportunity to give evidence in person before a Tribunal.

24. I have not found this to be an easy decision, but I conclude in the interests of fairness, the appropriate course is to remit this appeal once again to the FtT to be heard afresh. The only finding to be preserved, is a finding made from an earlier appeal (Judge Adio) in relation to the positive findings as to the Appellant's family life with his children and matters related to those children. This finding was preserved in an earlier Upper Tribunal decision made by Judge Kamara and promulgated on 20th September 2016 (paragraph 21).

25. It appears that the appropriate hearing centre would be Taylor House, as the Appellant's partner appears to live within the jurisdiction of that hearing centre. The parties will be advised of the time and date of the hearing in due course. The appeal is to be heard by an FtT Judge other than Judge Norton-Taylor. A time estimate of three hours has been given for the hearing, and it is understood that no interpreter is required.

Notice of Decision

The decision of the FtT involved the making of an error of law such that it is set aside. The appeal is allowed to the extent that it is remitted to the FtT.

Anonymity

The FtT made an anonymity direction because this appeal involves consideration of the best interests of children. I continue that direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies

both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 21st September 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

No fee award is made by the Upper Tribunal. The issue of any fee award will need to be considered by the FtT.

Signed Date 21st September 2017

Deputy Upper Tribunal Judge M A Hall