Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00086/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 May 2017	**On 5 June 2017**

Before:
UPPER TRIBUNAL JUDGE GILL

Between

Secretary of State for the Home Department Appellant

And

Tomasz Wiatrek Respondent
(ANONYMITY ORDER NOT MADE)

Representation:

For the appellant: Mr. S Staunton, Senior Home Office Presenting Officer.
For the respondent: Mr E Fripp, of Counsel, instructed by Lawrence & Co Solicitors.

DECISION AND Directions

Introduction and background facts:

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal Cockrill who, following a hearing on 9 January 2017, allowed the appeal of Mr Wiatrek (hereafter the "claimant"), a national of Poland born on 2 July 1976, against a decision of the Secretary of State of 2 February 2016 to make a deportation order against him on the ground of public policy in accordance with regulation 19(3) and regulation 21 of the Immigration (European Economic Area`) Regulations 2006 (the "EEA Regulations").

2. The claimant claimed to have arrived in the UK in 2004. There was no specific evidence to confirm the actual date of entry. He has been convicted of the following offences:

   i) On 7 April 2003, prior to his arrival in the United Kingdom, he was convicted in Poland of offences relating to the illegal trafficking of narcotics, possession of firearms and ammunition without the required licence and concealment of documents. He was sentenced to a total of 4 years' imprisonment. He spent a significant period of time in prison but had an outstanding period of 2 years 9 months and 3 days left to serve.

ii) In the United Kingdom, he has been convicted of the following offences:

a) In October 2006, he was brought before Ashford Magistrates Court for an offence of fraudulently using a vehicle licence. He was fined £150 and ordered to pay £35 in costs. This offence related to the use of a Road Fund Licence that was not attributable to the relevant vehicle.

b) On 26 March 2012, he appeared before Isleworth Crown Court and was convicted of possessing, controlling or improperly obtaining an identity document belonging to someone else. A sentence of 4 months' imprisonment, wholly suspended for 12 months, with a 4-week curfew requirement was imposed. He was also ordered to pay costs of £85.

3. In her decision letter, the Secretary of State contended, inter alia, that the claimant had not provided documentary evidence to establish the length of his residence in the United Kingdom, he had not shown that he had exercised Treaty rights in the United Kingdom for a continuous period of 5 years and therefore had not shown that he had acquired a permanent right of residence. The Secretary of State highlighted the lack of documentation produced by the claimant to show both presence in the United Kingdom and working in the United Kingdom. The Secretary of State drew the conclusion, with reference to the three levels of protection afforded to EEA nationals under regulation 19, that the lowest level of protection was relevant in the claimant's case.

The claimant's late submission of documents

4. This case was listed for case management review on 5 July 2016 when a Designated Judge directed that the case be listed for substantive hearing on a suitable date after 10 October 2016. The case was subsequently listed for 14 October 2016. Directions were given for the Secretary of State and the claimant to file and serve their evidence in advance of that hearing. The hearing on 14 October 2016 was adjourned, on the claimant's application, on the ground that the forensic psychologist who had been identified at that point was going to charge too much and an alternative had been found who could prepare the report by the end of November 2016.

5. The Secretary of State's representative at the hearing before Judge Cockrill, Mr M Lowton, received two bundles of documents from the claimant on Friday 6 January 2017. This was the last working day prior to the hearing taking place on Monday 9 January. The principal bundle was described by the judge as a substantial bundle of documents that ran to about 1,800 pages. There was a supplementary bundle which the judge described as much smaller. The claimant said at the hearing that he had given the documents to his solicitor in October 2016.

6. I have examined the bundles of documents. It is evident that there were a large number of documents that were potentially relevant to the issue of residence. There were many invoices for work on a self-employed basis said to have been carried out by the claimant over the years, tenancy agreements going back to 2004 and information submitted to HM Revenue & Customs that included self-assessment statements and calculations spanning the period January 2005 to 2016 as well as bank statements. The documents were photocopies.

7. The grounds of appeal to the Upper Tribunal state that Mr Lowton undertook to verify the documents. Mr Fripp did not take issue with this at the hearing before me.

8. Paras 15 and 16 of the judge's decision indicate that Mr Lowton first requested that these documents be excluded. This was refused by the judge. Mr. Lowton then asked for the hearing to be adjourned. This was also refused by the judge. The judge said that he then gave Mr Lowton "*an appropriate opportunity to prepare the matter further*" but Mr Lowton did not consider that that was necessary. The relevant part of the decision of the judge is para 17, where the judge said as follows:

> "It seemed to me that, looking at the matter overall and keeping very much at the forefront of my mind the overriding objective, and the overall period of time that had been available to both the [claimant's] solicitors and the [Secretary of State] to prepare their respective cases, I considered that this bundle was not quite as daunting as would appear at first sight. The [Secretary of State] made the point that originals had not been produced but, notwithstanding that state of affairs, I considered that the interests of fairness were plainly that the matter ought to proceed before me and that I would make an assessment of the evidence which was presented to me on 9 January 201 and make findings of fact in relation to the appropriate level of protection for this [claimant]. It was plainly a failure on the part of the [claimant's] solicitors to file this large amount of material so late and I was told, by way of excuse for that state of affairs, that the fee earner concerned had been unwell and under pressure. Looking at the overall circumstances, I refused the adjournment and afforded Mr Lowton an appropriate opportunity to prepare the matter further. He did not consider that that was necessary and basically no specific points were going to be taken upon the papers now to be relied upon by the claimant. The point was repeated that they were not originals and the respondent was not going to engage with that material."

9. During the course of the hearing, the judge permitted another document to be submitted. This was a letter from a company of purported accountants, Atena Accounting Services Ltd. Para 29 of the judge's decision states that Mr Lowton criticised the terms of this letter by saying that there was no company registration and no VAT registration on the letter-heading.

10. The judge considered the documents that were before him. He said, at para 32:

> "The [claimant] brings an appeal against this decision of the Secretary of State taken on 2 February 2016 to make a Deportation Order against him. I have set out in some detail the specific requirements contained in Regulation 21 of the 2006 Regulations. I think it is vital, first of all, to make an assessment and finding as to what is the appropriate level of protection that needs to be afforded to this [claimant], given that he is an EEA national. The highest level of protection follows when an EEA national has resided in this country for a continuous period of at least ten years prior to the relevant decision. We know that the relevant decision was taken on 2 February 2016 and so, in the first place, it is a question of going back in time from that date to see whether or not the [claimant] has indeed been residing here. That, of course, is a question of fact. I have been provided with a very large body of material and that was, for practical purposes, only presented to me at Hendon Magistrates' Court and only came to the attention of the [Secretary of State] on the Friday preceding the appeal hearing. The documents were photocopies and I did not see originals. The solicitor that had conduct of this case is from a highly respectable firm and I heard an explanation and excuse for why these bundles were served so late on both the Tribunal and the Respondent. I accepted them in evidence as I have already explained but, unquestionably, they were served late and that is not creditable. **I have thought carefully as to whether or not the copy documents that I have seen, which as has been stressed ran to about 1,800 pages, form what could be described as a fiction or really whether they are copies that have been taken from original documents that were placed in the solicitor's hands and which serve to show principally that the [claimant] has been living in this country, as he has claimed, since 2004. I conclude that the latter is the likely position, that it really would be wholly incredible, it seems to me, for this wealth of information to have been manufactured in some manner. That is simply not feasible, as I see it. By way of example, the bank statements that have been supplied by Barclays are in, what I might term, the original form, and that does speak volumes to me then about the reliability of the information that is produced. Putting the matter slightly differently, they are photocopies of what are clearly Barclays Bank statements and not some later printout from Barclays of the state of an account."**
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> (My emphasis)

11. At paras 33 and 34, he said:

> "33. … the overall conclusion I draw, looking at the totality of the material, is that the [claimant] has been in this country, residing here, for more than ten years prior to the date of decision.
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> 34. If, for any reason, that is incorrect as an analysis, then what has been shown, again by reference to the substantial body of material supplied, is that the [claimant] has been exercising Treaty Rights for a period in excess of five years continuously and, accordingly, he would be entitled to the intermediate level of protection afforded by the 2006 Regulations being entitled to a permanent right of residence. That would mean, then, that the test would be serious grounds. I make plain that my primary finding is that imperative grounds are the relevant test. What is clear to me, though, is that it really cannot be said that the lowest level of protection is the appropriate one and that was the position contended for by the [Secretary of State]."
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> (My emphasis)

12. At para 35 onwards, the judge considered whether the circumstances were such that the claimant could be removed on imperative grounds of public security. He considered the offences committed in Poland. He said that the offences committed in the United Kingdom did not approach the level of criminality as the offences committed in Poland. He considered the claimant's explanation for the offence committed in 2012, i.e. that he was embarrassed at disclosing his true identity to girlfriends or potential girlfriends, and rejected it as lacking in credibility. Nevertheless, he considered that the sentence of 4 month's imprisonment wholly suspended for 12 months acted as a *"proper barometer"* of the gravity of the offence. At the end of para 37, he said:

> "It seems to me that those offences, when looked at individually and collectively, cannot, as I see it, add up to a state of affairs where the conduct of this [claimant], and that is the critical feature, the conduct of this [claimant] could come anywhere near reaching that highest level of imperative grounds of public security. I do not think that it comes close, then, to reaching the intermediate level of serious grounds of public policy or public security. Miss Asanovic said that it would be straining the matter, in effect, to be trying to say that he had even reached the lowest level of simple public policy or public security."

13. At para 42, the judge said:

> "My overall assessment of this [claimant], and I come to this in the light of all the material that has been provided to me, and having listened to the [claimant] give his oral evidence, is that his personal conduct does not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The situation is that his deportation to Poland would not be consistent with the proper application of the principle of proportionality. The test that I consider is the relevant one is the highest level of protection, namely a relevant decision may not be taken except on imperative grounds of public security, because he has resided here for a continuous period of at least ten years prior to the relevant decision. Alternatively, if it is only the intermediate level of protection that is afforded to the [claimant], then the test would be one of serious grounds of public policy or public security and for all the reasons I have expressed the [claimant's] criminality, his misconduct, is not of sufficient gravity, at a sufficient level, he does not represent such a risk that those tests could sensibly and properly be said to be met in my judgment."

14. It is therefore clear that the judge's primary finding was that the claimant was entitled to the highest level of protection. In the alternative, that he was entitled to the medium level of protection. The judge said that what was clear to him was that it could not really be said that the lowest level of protection was the appropriate one (para 34).

15. It is also clear that, in reaching these findings, the judge relied upon his assessment of the two bundles of documents received by the Secretary of State one working day prior to the hearing day. He may also have relied upon the document submitted during the course of the

hearing that was purportedly from Atena Accounting Services Ltd, although there was no direct reference to this document in his assessment from para 32 onwards.

The grounds

16. The Secretary of State's grounds maybe distilled into five arguments as follows:

    i) As a matter of fairness, the Secretary of State's adjournment request was wrongly refused despite an undertaking by the Secretary of State's senior case worker that she would seek to verify the documents. The claimant had obtained an unfair advantage. His solicitors had received the documents in October 2016. Given that the claimant had previous convictions regarding false documents, the adjournment request should have been granted due to the potential impact of the documents as there was no opportunity to seek verification.

    ii) The judge erred in permitting the claimant to rely upon the letter said to be Atena Accounting Services Ltd. In the alternative, the judge should have adjourned the hearing to allow the Secretary of State to verify the contents of the document.

    iii) The judge erred in his approach in assessing the documents. At para 32, he said that "*it really would be wholly incredible … for this wealth of information to have been manufactured in some manner*" and that this was "*simply not feasible*". In reaching this conclusion, the judge failed to address the fact that the claimant had previously used false documents, that he had only provided copies of the documents and that the documents had been provided late. The judge failed to consider the use of modern computers and photocopies to produce multiple copies. The judge failed to consider the lengths to which those facing expulsion/deportation will go in order to remain in the UK and fell into the trap of what he believed was reasonable.

    iv) The judge failed to consider the reliability of the documents in line with the guidance in Tanveer Ahmed v. SSHD * [2002] UKIAT 00439, in that, he failed to reconcile the apparent conflict between his acceptance of the documentary evidence and that he found at para 37 that the claimant's explanation of events incredible. He failed to explain why he accepted the documents.

    v) Even if the judge was correct in his assessment that the claimant was entitled to the highest level of protection, he failed to deal with the authority of Land of Baden-Württemberg v Panagiotis Tsakouridis (23 November 2010, C-145/09).

Submissions

17. Mr Fripp submitted a skeleton argument immediately prior to the commencement of the hearing before me. The skeleton argument contends, inter alia, that although it was unfortunate that a large volume of documents was served late, the Secretary of State had to demonstrate both an error of law and that such an error was material. There was no material unfairness. The refusal to adjourn was balanced by an offer to the Secretary of State's representative of extra time to allow for preparation and examination of the documents, an offer which was declined. The skeleton argument suggests that it was likely that several hours could have been made available to the Secretary of State's representative to examine the documents and prepare for the hearing. It was not rational for the Secretary of State's representative not to engage with the documents. If the Secretary of State's representative had attempted to address the documents constructively but was unable to do so, a renewed application for an adjournment could have been made. The Secretary of State has not conducted verification checks in the period of 4 ½ months that have elapsed since the hearing took place on 9 January 2017. There was therefore no evidence that the Secretary of State had suffered injustice. The absence of such evidence or any apparent effort to verify the documents is relevant to the question whether there was a material error of law.

18. Mr Staunton took me through the Secretary of State's grounds. In response to the suggestion in the skeleton argument that the judge had offered the Secretary of State's representative extra time to prepare, he submitted that this was an all-or-nothing situation given the large number of documents. Furthermore, the Secretary of State would not have been able to verify the documents. In relation to the fact that Secretary of State had not verified the documents in the period of 4 ½ months since the hearing before the judge, Mr Staunton submitted that the resources of government departments are stretched and steps would not be taken to verify the documents until it is known whether the appeal would be remitted for a re-hearing.

19. In response, Mr Fripp submitted that the judge was plainly unimpressed by the explanation for the late service of the documents. He had considered the overriding objective. The ultimate question was one of fairness. There was no unfairness in continuing with the hearing subject to the Secretary of State's representative being allowed extra time to prepare for the hearing. The question of fairness was ultimately one for the judge, subject to consideration on appeal.

20. Mr Fripp submitted that there was no material unfairness given that:

    i) The Secretary of State's representative had been offered extra time to prepare.

    ii) No attempt had been made to call the relevant banks and government departments on the hearing day.

    iii) No attempt had been made to explore the viability of making such calls.

    iv) The Secretary of State had therefore failed in her duty under rule 2(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "FtT Rules") to co-operate with the Tribunal.

    v) The Secretary of State has done nothing in the period of 4 ½ months since the hearing in January 2017 to verify the documents.

21. I asked Mr Fripp to address me on the question whether the Secretary of State had effectively been denied the opportunity of participating in any meaningful way in the hearing. Mr Fripp submitted that the question was whether any error was material. It had not been shown that the Secretary of State had been denied the opportunity to investigate anything material.

22. Mr Fripp asked me to note that the judge's decision was good and detailed. He took into account that the claimant had used false documents previously and there was nothing to show that the judge was unaware of the possible use of computers to produce multiple documents.

23. Mr Fripp submitted that the final ground, in reliance upon Tsakouridis, was no more than a disagreement.

24. I reserved my decision.

Assessment

25. As I have said at para 14 above, it is clear that the judge's primary finding was that the claimant was entitled to the highest level of protection and that, in the alternative, he was entitled to the medium level of protection. The judge said that what was clear to him was that it could not really be said that the lowest level of protection was the appropriate one (para 34). In other words, he rejected the Secretary of State's position, as stated in her refusal letter, that given the lack of documentary evidence to establish both residence and that the

claimant had been exercising Treaty rights, the appropriate level of protection was the lowest level.

26. I have also said at para 15 above that, in reaching his findings on the level of protection, the judge relied upon his assessment of the two bundles of documents received by the Secretary of State one working day prior to the hearing day. As I said, he may also have relied upon the document submitted during the course of the hearing that was purportedly from Atena Accounting Services Ltd.

27. At my para 10 above, I emboldened part of para 32 of the judge's decision. In my judgement, it is plain from this part of the judge's decision that his findings as to the appropriate level of protection were based on his view that it was simply not feasible for this wealth of information to have been manufactured. Although he went on to state that "*By way of example, the bank statements that have been supplied by Barclays are in, what I might term, the original form, and that does speak volumes to me then about the reliability of the information that is produced",* it is accepted that the judge did not have any original documents. Thus, what the judge was saying, in the sentence I have just quoted, is that the copies of the Barclays bank statements look like what one would expect original bank statements to look like and this fact *"spoke volumes …. about the reliability"* of the contents of the documents.

28. I make the following points. Firstly, it is plain from para 32 of the judge's decision, that his findings as to the appropriate level of protection was based entirely on his view, for the reasons he gave (i.e. that it was simply not feasible for the claimant to have manufactured so many documents and that, by way of example, the Barclays banks statements look like original Barclays bank statements) that the documents were either genuine documents or copies of genuine documents.

29. However, this was the very reason that the Secretary of State's representative requested an adjournment, so that the documents could be verified. In effect, therefore, the judge refused to allow the Secretary of State an opportunity to verify the documents but proceeded to make findings that turned on that very issue.

30. Secondly, the judge took an overly simplistic view. If an individual were to embark upon producing false bank statements, it is likely that he or she would try their hardest to make them look like genuine statements from the bank in question in the knowledge that their fraud would be readily discovered if they did not produce documents that look like the real article. Therefore, the point the judge made was in fact an empty one. Furthermore, as the grounds correctly state, it is simply not correct to state that the production of a large number of documents is simply not feasible, given modern technology. What the judge was required to do was to consider the contents of the documents and decide whether they demonstrate that the documents were copies of genuine documents, which he plainly did not do.

31. Thirdly, in the absence of an opportunity to verify the documents, the only remaining option left to the Secretary of State's representative was to explore the reliability of the documents by cross-examining the claimant on them. Mr Fripp relied upon the fact that the judge had offered Mr Lowton extra time to prepare for the hearing. Mr Fripp submitted that several hours could have been made available. However, it is usually the case that the Secretary of State arranges for one representative to appear on her behalf in connection with all of the cases in a particular statutory appeal list. In my own experience of sitting full-time over many years, an adjournment of several hours for a presenting officer to examine the documents in one case is very likely to impact upon the time available not only for hearing that case but also for hearing the remaining cases in the list. Accordingly, the reality is that it is very unlikely that Mr Lowton was offered several hours.

32. Given the large number of documents, one working day (on the assumption that the whole of the working day before the hearing had been available to the Secretary of State's representative upon receipt of the bundle) did not provide, on any reasonable view, a

sufficient and fair opportunity to the Secretary of State's representative to examine the documents and prepare for the hearing even if he or she decided to take no steps to verify their authenticity.

33. For the reasons given at paras 31 and 32 above, the option of exploring the reliability of the documents by cross-examining the claimant on them was effectively denied to the Secretary of State's representative. I agree that the claimant did obtain an unfair advantage by submitting his bundle of documents so late.

34. It is therefore entirely unsurprising that the Secretary of State's representative declined the opportunity the judge gave him "*to prepare the matter further*" and said that no specific points would be taken upon them. Once the judge had delivered his decision, the matter was best dealt with on appeal in the event the appeal was allowed.

35. Mr Fripp submitted that it was not rational for the Secretary of State's representative to refuse to engage with the documents and that she had failed in her duty to co-operate with the Tribunal. However, it is very clear to me that it is the claimant, through his solicitors, who failed to comply with his duty to co-operate with the First-tier Tribunal by submitting his documents on a timely basis. There is no substance in the argument that the Secretary of State's representative irrationally refused to engage with the documents.

36. I reject Mr Fripp's submission as wholly unrealistic that it was possible for the Secretary of State's to have made telephone calls on the hearing day itself to the bank and government departments.

37. The fact that the claimant had successfully obtained an adjournment of a previous hearing in order that he could obtain a report from an alternative forensic psychologist (my para 4 above) whilst the Secretary of State's request for an adjournment in order to verify documents produced at the eleventh hour notwithstanding that she had raised the fact that he had not produced documentary evidence in her decision letter and that the claimant's solicitors had had the documents from October 2016 leads me to the conclusion that the proceedings in the First-tier Tribunal in relation to this case were entirely one-sided and unfair.

38. In effect, and for all of the reasons given above, the Secretary of State was unable to participate in any meaningful way at the hearing before the judge. The hearing was therefore unfair. This is sufficient for me to set aside the decision of the judge in its entirety. I do not consider it necessary for me to deal with Mr Fripp's submission that the Secretary of State's failure to conduct any verification checks in the period of 4 ½ months since the hearing before the judge means that she is unable to demonstrate that she had suffered injustice. However, even if I am wrong about this, Mr Fripp's submission ignores the fact that government departments are overstretched and have limited resources,

39. For all of the reasons given above, I am satisfied that the judge materially erred in law, in that, his refusal of the Secretary of State's adjournment request led to the hearing before him being unfair. The Secretary of State was effectively unable to participate in any meaningful way in the hearing.

40. I therefore set aside the decision of the judge in its entirety.

41. It is not necessary for me to consider the remaining grounds.

42. In the majority of cases, the Upper Tribunal when setting aside the decision will be able to re-make the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at para 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it 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."

43. In my judgement, this case falls within para 7.2(b). In addition, having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal for a re-hearing on the merits on all issues is the right course of action. Mr Fripp and Mr Staunton agreed that, if I found that the judge had materially erred in law, the appropriate course of action would be to remit this case for a re-hearing on the merits by another judge.

44. The claimant submitted a large bundle of documents for the hearing before me. I was told that this contained original documents. I record that the entire bundle was returned to Mr Fripp so that he could make it available for the hearing before the First-tier Tribunal in the event of a remittal.

Decision

The decision of Judge of the First-tier Tribunal Cockrill involved the making of errors on points of law such that his decision is set aside in its entirety.

This case is remitted to the First-tier Tribunal for that Tribunal to re-make the decision on the appellant's appeal on the merits on all issues by a judge other than Judge of the First-tier Tribunal Cockrill.

Signed Date: 2 June 2017
Upper Tribunal Judge Gill