Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00154/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 November 2017	**On 11 December 2017**

Before

THE HON. LORD MATTHEWS
DEPUTY UPPER TRIBUNAL JUDGE J M HOLMES

Between

MR AHMED SALIH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Junior, Counsel instructed by Lawland Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. This appeal has an unhappy history, having already visited the Upper Tribunal once before with the result that it was remitted to the First-tier Tribunal for rehearing, and this was the context in which it came before First-tier Tribunal Judge Cockrill on 23 August 2017. Before him was the Appellant's appeal against the decision of the Secretary of State made on 2 March 2016 pursuant to the Immigration (European Economic Area) Regulations 2006 ["EEA Regulations"] to make a deportation order

pursuant to Regulation 19(3)(b). The Appellant is a citizen of Sweden. The trigger for the decision under appeal was his most recent conviction on 2 December 2015, for the possession of cannabis with intent to supply a class B controlled drug, upon his own guilty plea. The sentence that followed was one of eight months' immediate imprisonment. That conviction had however followed two earlier similar convictions for the possession of drugs with intent to supply them; on 19 June 2014 when the penalty imposed was a twelve month youth rehabilitation order, and on 22 January 2015 when the penalty imposed was a fine. The Judge allowed the appeal by decision promulgated on 7 September 2017, and permission to appeal that decision to the Upper Tribunal was granted to the Respondent by a decision of First-tier Tribunal Judge Cruthers on 28 September 2017. Thus the appeal comes before us today. This is the decision of us both.

2. The first central point of challenge to the Judge's decision is that he failed to properly analyse the evidence before him in order to resolve the disputed issue of whether or not the Appellant had established a permanent right of residence in the UK under the EEA Regulations. There was obviously concern raised at the hearing by both parties as to what the true circumstances were, so that notwithstanding the terms in which the decision had been written, and the previous hearings upon the appeal, the Respondent applied at the outset of the hearing before the Judge for an adjournment in order to seek to remedy what were perceived to be deficiencies in the evidence, and in the decision letter. The Judge refused that adjournment, but it is argued by the Respondent, he failed nonetheless to engage with the evidential difficulties that were identified to him, and failed to apply the EEA Regulations properly to the evidence that was before him.

3. The Appellant's case was that he had travelled to the UK in 2006 at the age of 10. He claimed to have resided in accordance with the EEA Regulations ever since, so that at a point in time which was not in fact identified in his evidence, he claimed to have acquired a permanent right of residence. His case was that he had done so, as the dependent son of his father, an EEA national exercising Treaty rights in the UK, before his conviction in December 2015, and thus before he had been sentenced to imprisonment. The Judge appears to have proceeded on the basis that this claim was correct, without asking himself why it was that all of the members of the Appellant's family had been refused the issue of a residence card to confirm that they enjoyed a permanent right of residence on 1 February 2012, and what the status of the different family members was thereafter. It was common ground before the Judge that the Appellant's father had made an application for a residence card to confirm that he enjoyed a permanent right of residence, which was refused on 1 February 2012. The Appellant's mother and siblings were dependents upon that application. A copy of the decision in question has been produced to us, and it states in terms that his father had failed to produce evidence to show that he had been exercising treaty rights prior to April 2010. The Appellant's father chose not to pursue his application for a residence card further by way of appeal. He had instead applied for, and

been issued with, a residence card to confirm his exercise of treaty rights in December 2012. Thus, to the extent that the Appellant claimed to have acquired prior to December 2015 a permanent right of residence in reliance upon his position as his father's son, it was by no means easy to see that this claim was tenable. Indeed, the evidence that was placed before the Judge, did not establish that this was the case.

4. There was also a second problem that the Appellant faced in establishing that he enjoyed a permanent right of residence, to the extent that he relied upon his own status as a "student". Although he had indeed been enrolled in full-time publicly funded education in the UK as a child both at secondary school, and latterly at university, he had never provided either to the Respondent or to the First-tier Tribunal any evidence to suggest that he had ever been the beneficiary of comprehensive sickness insurance cover in the UK. Thus, he had never produced the evidence required to demonstrate that at any date he met the definition of "student" provided for in Regulation 4(1)(d)(ii). The Judge failed to deal with that issue.

5. We note that the Judge was unlikely to be helped by a representative who neither conceded that a permanent right of residence had been acquired, nor advanced any argument as to why it had not. Nevertheless, in our judgment the Judge was obliged to consider the matter for himself, and having done so ought to have concluded that the evidence did not establish that a permanent right of residence had accrued prior to December 2015. He ought therefore to have considered the appeal in the context of the lower level of protection provided by the EEA Regulations.

6. Before us today has been advanced on behalf of the Appellant the argument that the decision could be read in such a way as to suggest that the Judge did indeed do so. The argument rests upon the references made by the Judge in paragraphs 12, 20 and 22 of his decision to Regulation 21(5). We are not satisfied that the argument has merit. There is no reference to Regulation 21(1), and when the decision is read as a whole it is plain that the Judge considered the Appellant's position upon the mistaken assumption that he was entitled to a permanent right of residence. We conclude therefore that the Judge simply failed to undertake the requisite fact-finding analysis in the correct context, and that the references to Regulation 21(5) cannot save the decision. The Tribunal would be bound to consider Regulation 21(5) if it were to properly direct itself, because the issue of proportionality arises whatever the level of protection enjoyed by the individual.

7. There is upon our analysis of the decision no adequate analysis of the Appellant's circumstances prior to the removal from the UK to Sweden, and nor is there any adequate analysis of the relevant public policy in favour of deportation. That being so, with regret, we conclude that the challenge to the decision is made out to the extent that there is a material error of law of such gravity that it requires the appeal to be remitted to the

First-tier Tribunal for rehearing *de novo*. We are not satisfied that any findings of fact can be preserved.

8. As set out above, it appears unlikely that the Appellant has acquired a permanent right of residence in the UK although we do not rule out the possibility of the Appellant being able to adduce evidence before the First-tier Tribunal at the remitted hearing to establish that that was in fact the case.

9. In the circumstances the decision discloses a material error of law that renders the dismissal of the appeal unsafe, and the decision must in the circumstances be set aside and remade. We have in these circumstances considered whether or not to remit the appeal to the First Tier Tribunal for it to be reheard, or whether to proceed to remake it in the Upper Tribunal. In circumstances where it would appear that the relevant evidence has not properly been considered by the First Tier Tribunal, the effect of that error of law has been to deprive the Appellant of the opportunity for her case to be properly considered by the First Tier Tribunal; paragraph 7.2(a) of the Practice Statement of 25 September 2012. Moreover the extent of the judicial fact finding exercise is such that having regard to the over-riding objective, it is appropriate that the appeal should be remitted to the First Tier Tribunal; paragraph 7.2(b) of the Practice Statement of 25 September 2012. Having reached that conclusion, with the agreement of the parties we make the following directions;
   i) The decision is set aside, and the appeal is remitted to the First Tier Tribunal for rehearing de novo at the Taylor House hearing centre. The appeal is not to be listed before either Judge Cockrill, or, Judge Barrowclough. No findings of fact are preserved.
   ii) An Arabic interpreter is required for the hearing of the appeal.
   iii) There are presently anticipated to be family members of the Appellant providing oral evidence, and the time estimate is as a result, 2 hours.

Notice of decision

10. The decision promulgated on 7 September 2017 did involve the making of an error of law sufficient to require the decision to be set aside and reheard. Accordingly the appeal is remitted to the First Tier Tribunal for rehearing de novo with the directions set out above.

Direction Regarding Anonymity – 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 their 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

Deputy Upper Tribunal Judge J M Holmes