IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000896
UI-2024-000898

First-tier Tribunal Nos:
HU/53611/2023
EU/51660/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26th of November 2024

Before

UPPER TRIBUNAL JUDGE GREY

Between

KHALIL HERAWI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Akinbolu, Counsel instructed by Ata & Co Solicitors
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 7 November 2024

DECISION AND REASONS

1. This is an appeal brought by appellant against the decision of First-tier Tribunal Judge Bennett ('the Judge') dated 20 December 2023, in which he dismissed the appellant's appeal against the respondent's decision to deport him and the refusal of his application under the EU Settlement Scheme ('EUSS').

Factual Background

2. The appellant is a national of the Netherlands and arrived in the United Kingdom with his wife and two children in 2016 and has remained lawfully here since then. He is 51 years old. The appellant and his wife had a third child in December 2016 and are currently expecting a fourth child.

3. On 14 December 2021 at Isleworth Crown Court, the appellant was convicted of two counts of facilitating the acquisition or possession of criminal property and one count of having counterfeit currency notes. On 4 February 2022, he was sentenced to three years imprisonment. He was released from the custodial element of his sentence in January 2023 and released on immigration bail on 23 February 2023.

4. On 5 April 2022 the appellant was served with notice of liability to deportation in accordance with the Immigration (European Economic Area) Regulations 2016 ('the Regulations'), as saved. The appellant made representations in relation to the respondent's proposed deportation on 28 April 2022 and 30 May 2022, raising a claim under the Regulations and a human rights claim. These representations were refused by the respondent in a decision letter dated 1 March 2023. His EUSS application was refused and the appellant became subject to a deportation order against him on the same date.

5. The appellant brought an appeal against the respondent's decision to deport him and the refusal of his EUSS application which was heard on 23 November 2023 by the Judge.

6. The Judge dismissed the appellant's appeal finding that the appellant was only entitled to the 'basic' level of protection from deportation under the Regulations. Although the appellant had not re-offended since he was released from prison, the Judge found that this did not mean that he had *"turned over a new leaf"* because during this period he had every incentive to behave whilst the deportation proceedings were pending. Consequently, the Judge found that he was not satisfied that the risk of the appellant reoffending could be discounted as being low, and found the appellant presents a genuine, present and sufficiently serious threat to society to be deported on public policy grounds.

7. The Judge proceeded to consider the appellant's family life with his wife and three children. The Judge found that whilst the appellant's children may well have been upset when the appellant was in custody, he was not satisfied that their health, behaviour, well-being or academic progress were adversely affected to any material extent by the appellant's absence. The Judge also found that he was not satisfied the appellant's wife's mental health was adversely affected to any significant degree whilst the appellant was in prison. The Judge did not accept that the appellant's deportation would be unduly harsh for the appellant's wife or for any of the children, or that there were any exceptional circumstances which would make deportation disproportionate. Further, the Judge was not satisfied

that deportation would have any adverse consequences for the appellant in terms of his prospects of rehabilitation.

8. Having dismissed the appellant's appeal against the decision to make a deportation order against him, it followed that the appeal against the refusal of leave to remain under Appendix EU was also dismissed.

The grounds of appeal

Ground 1 – application of the 2016 Regulations

9. The appellant maintains that he exercised rights under the Regulations for a continuous period of five years between arriving in the United Kingdom on 28 April 2016 and his conviction on 14 December 2021, gaining permanent residence under the Regulations at some point before 14 December 2021. Thus, it is the appellant's position that he is entitled to intermediate protection under the Regulations and deportation is permissible only if justified on serious grounds of public policy or security.

10. The grounds of appeal assert that the Judge failed to direct himself correctly as to the relevant legal principles applicable, or address the legal definitions for the terms worker, jobseeker, self-employed or family member of a qualified person, in determining whether the appellant met the criteria for acquisition of permanent residence under regulation 15 of the Regulations.

11. Detailed submissions are set out in the grounds, the Rule 25 response and the skeleton argument for the error of law hearing. Where required and relevant these are referred to below in my analysis and decision.

12. It is apparent from the respondent's Rule 24 response, and was confirmed by Ms Cunha, that the contested period between the parties is the tax year 2018/2019. As such, my assessment of the grounds shall focus on the arguments made in relation to this period.

13. Amongst the detailed grounds argued the following matters are raised (inter alia):

    a. The decision contains no statement or summary of the relevant law and the Judge at no point directed himself as to the meaning of any of the terms "worker" or "self-employed person" or "jobseeker" as employed in the Regulations.
    b. The Judge misdirected himself, fettering his understanding of the term "worker" under the Regulations.
    c. The Judge incorrectly stated that counsel for the appellant at the hearing did not submit that unremunerated work carried out whilst the appellant was setting up a business in the tax year 2018/2019 could make a person a "worker" under the Regulations, or refer to any authorities for this proposition.
    d. In finding that he was not satisfied the appellant's wife had been working throughout the tax year 2018/2019, the Judge erred in

finding that her gross income for this tax year was £6,036 rather than £9,771.84, as confirmed by her P60 for that period.

Ground 2

14. The second ground of challenge relates to the Judge's assessment of the risk of reoffending in determining whether the appellant presents a "genuine, present and sufficiently serious threat" for the purposes of regulation 27(5)(c).

15. The Judge rejected the submission that he should accept the evidence of low risk of reoffending in part because the absence of reoffending since his conviction *"does not mean that he has probably turned over a new leaf because he has every incentive to behave while these proceedings are pending"* – [85].

16. The grounds assert that the Judge should have recognised that "precisely parallel reasoning" provides a long term restraint against the appellant reoffending because he would not be protected by the effect of EU law in the event of future offending as a result of the UK's withdrawal from the EU. On this basis the grounds contend that the Judge's finding on whether the appellant presents a genuine, present and sufficiently serious threat is unsound and should be set aside.

17. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Kamara in the following terms:

> "It is arguable that the First-tier Tribunal, in concluding that the appellant had not achieved permanent residence in the United Kingdom erred in the multiple ways set out in the detailed grounds."

Analysis and decision

Ground one

18. I will focus on the position in relation to the tax year 2018/2019 for the reasons referred to at [12] above.

19. It is the appellant's position that during this period he was preparing to set up a new business, Herat Money Services, which involved a venture in a regulated activity (money services) and he was waiting for approval by the Financial Conduct Authority and clearance by a private collection agency, "Choice Forex". The appellant's account is that whilst awaiting this approval and clearance he set up an office and attended it on a daily basis in preparation for his new business, such as carrying out marketing activities and preparing the office space. The decision records at [33] that the appellant accepted in evidence that he was not in paid work during this period but stated that his wife was working.

20. The evidence in relation to the appellant's wife is that she was in work from 2016 until May 2019, at which point she started studying. At [80] of

the decision the Judge addresses the economic activity of the appellant's wife during the period in question (tax year 2018/2019). It states:

> "The only evidence that the wife worked in this tax year is her P60 from Shariff Cars Limited which shows a gross earnings of £6,036. It is possible that she worked for this company throughout the tax year but I'm not satisfied that she probably did so because her P45 from this company (SB1084) shows that she left its employment on 30 April 2019 having been paid £853.84 which indicates an annual gross salary well in excess of £10,000. Which means there is another gap in the five year period. As there is no evidence that she was a jobseeker during the tax year before she started this employment I'm not satisfied that the appellant probably lived in this country in accordance with the regulations throughout this tax year."

21. It appears from the documentation before the First-tier Tribunal that the appellant's wife was employed by Shariff Cars Limited from 1 May 2018 until 30 April 2019. She worked prior to this with three separate employers from 2016. The wife's P60 adduced in relation to this period of employment records that she received gross earnings from Shariff Cars of £9,771.84. This figure for her actual earnings is over 50% higher than the earnings recorded by the Judge for this period. At [80] of the decision the Judge incorrectly records the wife's gross earnings for this period as £6,036.

22. I find that the Judge proceeded to draw inferences and make findings concerning whether the appellant's wife was working throughout this key period, based on a factual inaccuracy and perceived discrepancy between the earnings recorded in the wife's P45 upon termination of her employment with Shariff Cars on 30 April 2019, and the incorrect reading of her P60 for the preceding tax year.

23. Ms Cunha accepted in oral submissions before me that the Judge did not address the situation regarding the appellant's wife "sufficiently", although she sought to persuade me that the Judge did appear to take account of the appellant's position and the evidence, and appeared to not accept that the wife's employment position was as she claimed.

24. I conclude that the Judge's findings in relation to the appellant's wife's economic activity during the period in question was based upon a significant factual error. I find this error was material to the assessment of whether the appellant's wife was working during the contested period and whether the appellant could therefore be regarded as a family member of an EU citizen exercising Treaty rights at this time. In respect of this matter alone, I find the Judge made a material error of law, quite apart from the assessment of the appellant's own economic activity for this period. It is not disputed that the appellant and his wife were lawfully married and that he is, and was, a family member of an EU national.

25. In relation to the appellant's economic activity during the tax year 2018/2019 he accepted in evidence that he was not in paid employment but states that he was involved in preparatory work for his new business on a daily basis. At [74] of the decision the Judge records that *"Mr Fripp did not submit that unremunerated work setting up a business can make a*

person a worker or refer to any authorities for this proposition". As recorded in the grounds, this is resisted by the appellant.

26. It is stated in the grounds that it was plainly the applicant's case that unremunerated work setting up a business is capable of rendering an individual a "worker" or "self-employed person" and that it did in the appellant's case. The grounds assert that counsel's note of the hearing records that he addressed the Judge in oral submissions on the case of Levin v Secretary of State for Justice [1982] ECR 1035 as authority for establishing that a person's economic activity need not be such as to render them self-sufficient. Further caselaw is cited in the grounds at [7] regarding this matter and the meaning of "worker" for the purposes of the Regulations, which it is submitted includes a person engaged in unpaid preparatory training. It was submitted that what was key was whether any activities were "effective and genuine".

27. At the hearing before me Ms Cunha did not dispute the assertion in the grounds that the Judge had been addressed on Levin and it has not been addressed in the respondent's Rule 24 response. In relation to this issue, the Rule 24 response is limited to stated that setting up a business is "not a category" under the Regulations. In Ms Cunha's submission, a period during which a person is setting up a business is insufficient to be a worker or self-employed person for the purposes of the Regulations.

28. I find there is relevant caselaw which the Judge should have had in mind to assist in determining whether or not the period of setting up a business was sufficient, or not, for the appellant to be regarded as a worker or self-employed person. Although the decision records that the Judge is unaware of any authority to suggest that it is, I have no reason to doubt counsel's record from the hearing in the FTT that he did refer to relevant authority on this point. This was not disputed by Ms Cunha. This is not to say that the Judge was bound to accept the appellant's legal argument on this issue on the facts before him, but it was, it appears, incorrect to state that he had been referred to no authority on this issue.

29. It is noted that in the following tax year, 2019/2020, the appellant was receiving an income from his business Herat Money Services Ltd, of which the appellant had been a director since December 2017. In other words, it could be said that the preparatory period preceding this business operating has been "effective".

30. Having regard to ASO (Iraq) v SSHD [2023] EWCA Civ 1282 at [41], I must assume, unless I detect an express misdirection, or unless I am confident from the Judge's express reasoning that the decision is based on an implicit misdirection, that the First-tier tribunal, as a specialist tribunal, knows and had applied the correct law.

31. However, in respect of the decision in this case I am satisfied that the Judge has failed to direct himself at all in the decision on the meaning of "worker", "self-employed person" or "jobseeker". Further, based upon the

Judge's focus on the appellant's renumeration disclosed by the HMRC records during the periods under examination, I am persuaded that the Judge has fettered his understanding of the term "worker" under the Regulations to the extent that he has misdirected himself on the relevant law.

32. I find that the errors referred to above are material to whether the appellant is entitled to enhanced protection from deportation under the Regulations on account of having acquired permanent residence.

Ground two

33. This ground was addressed just briefly at the hearing. Ms Cunha expressed that she had some sympathy in respect of this ground but submitted that the issue was whether the appellant's rehabilitation would be impacted by his deportation. In her submission the Judge addressed this matter at [96] of the decision and correctly determined that it would not be impacted.

34. In Ms Akinbolu's submission the matter in question relates to the risk presented by the appellant and whether he presents a genuine, present and serious threat rather than the matter of rehabilitation.

35. I accept the submission on behalf of the appellant that the question raised in ground two relates to the risk the appellant presents and that the Judge's reasoning fails to take into account the potential deterrent effect of facing deportation in the future without the 'protection' of EU law. Having identified that the current deportation proceedings were relevant to why the appellant had not reoffended since the index offence, I accept that the Judge's reasoning is inconsistent in this regard. I find that the Judge erred in the manner asserted in Ground two.

36. I recognise that there was a significant amount of evidence adduced in this appeal and a certain amount of factual complexity, requiring detailed findings by the Judge. I would like to record that I find the Judge had clearly approached the evidence in this appeal in a conscientious manner and produced a detailed and well written decision. However, in view of the errors of law recorded above, the decision is set-aside in its entirety. The appeal will be remitted to the First-tier Tribunal to be heard by a judge other than Judge Bennett.

Notice of Decision

The appellant's appeal is allowed. The decision of Judge Bennett is set aside. The decision will be remitted to the First-tier Tribunal to be heard by a judge other than Judge Bennett.

Sarah Grey

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 November 2024