Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02031/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision and Reasons Promulgated**
On 03 November 2015	**On 10 November 2015**

Before

The President, The Hon. Mr Justice McCloskey and
Upper Tribunal Judge Bruce

Between

GERRALD GOUALIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

Appellant: Mr R Amarasinha, of Counsel, instructed by Mordi & Company Solicitors
Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The origins of this appeal are traceable to a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*"), dated 17 October 2013, whereby it was determined to deport the Appellant, a French national aged 26 years, under regulations 19(3)(b) and

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24(c) of the Immigration (European Economic Area) Regulations 2006 (the "*EEA Regulations*"). The impetus for the impugned decision was the conviction of the Appellant of rape of a female aged 16 years or over, made on 16 December 2011, giving rise to a sentence of 7 years imprisonment.

2. The First-tier Tribunal (the "*FtT*") dismissed the Appellant's appeal. In his omnibus conclusion, the Judge stated:

> "... I find that there are very serious reasons in this case that justify the expulsion of this Appellant. Whilst the Appellant has been resident in the UK since the age of 11 and he is social [sic] and culturally integrated here, there are no significant obstacles to his integration in France. The decision to deport him is proportionate."

Permission to appeal to the Upper Tribunal was granted in the following terms:

> "The grounds submit that ... the Appellant was entitled to rely on regulation 21(4)(a) of [the EEA] Regulations, so that he could only be removed on imperative grounds of public safety; that insufficient consideration was given to the guidance in Essa [2012] EWCA Civ 1718; and that the Judge erred in failing to invite submissions on the Immigration Rules and Article 8 ECHR if she thought the EEA Regulations did not apply …
>
> All grounds may be argued …"

The permission Judge added the rider that the focus of the appeal may prove to be confined to the first ground, the substance whereof is a contention that the FtT erred in law in concluding that the EEA Regulations did not apply to the Appellant's case.

Factual Matrix

3. The material facts are brief and uncontroversial. The Appellant entered the United Kingdom in 1996, aged 11 years, accompanied by his mother and has resided here ever since. Between 2003 and 2008 he was convicted of possessing a Class B drug, handling stolen goods and battery. None of these convictions attracted a custodial sentence. The next significant event was the conviction described in [1] above. He was convicted by the verdict of a jury following a contested trial. In brief compass, this was a single count of rape committed in circumstances in which the Appellant had assaulted a woman who, in the words of the Trial Judge, had "*passed out*" due to consumption of drink and drugs.

FtT Decision

4. As noted above, the Secretary of State's decision was made under the EEA Regulations. In its decision the FtT posed the question of whether the Appellant had established a right of permanent residence under the Regulations. The Judge continued:

> "The Respondent accepts that the Appellant is an EEU [sic] national and that he has been in the UK since October 1996. Continuity of residence is

> accepted. I need to determine whether his residence from 1996 until 2015 has been in accordance with the EEA Regulations."

The Judge then reviewed in some detail the evidence relating to the Appellant's undergraduate education, postgraduate education and employment, all spanning the period 1996 to 2011. The key finding made is the following:

> "The Appellant has not established that he was working or actively seeking work in the period between completing his A Levels [circa 2003] and starting his job … on 01 November 2010."

This was the impetus for the following conclusion in law:

> "The Appellant's case does not fall to be assessed within the terms of the EEA Regulations as he has not established a right to permanent residence."

5. Accordingly, the FtT disagreed with the whole foundation of the impugned deportation order, namely that the EEA Regulations applied. Furthermore, the decision does not engage with two of the grounds of appeal to the FtT. One of these enshrined the contention that the Appellant had acquired permanent residence in the United Kingdom by virtue of continuous residence of more than five years, in accordance with regulation 15(1)(a). A separate ground embodied the contention that the Appellant could only be removed on serious grounds of public policy or public security, followed with the alternative contention:

> "Further, or in the alternative, as a person who has acquired the right of residence for over ten years pursuant to Regulation 21 of the [EEA Regulations], the Appellant may only be deported on imperative grounds of public security."

Finally, the grounds contended that the deportation of the Appellant would contravene the principle of proportionality.

Conclusion

6. The Secretary of State's Rule 24 Notice contains a somewhat opaque concession. When we probed this, it was confirmed that the Judge's conclusion that the EEA Regulations were of no application is conceded as erroneous in law. Mr Avery described the decision of the FtT as "*fundamentally flawed*". The effect of this failure is that the FtT failed to consider, and make necessary findings in respect of, a series of essential matters, including in particular, the Appellant's integration in the United Kingdom and the issue of rehabilitation. We note the clear concession that the Appellant has been residing in the United Kingdom since 1996.

7. We concur with the aforementioned characterisation of the decision of the FtT. It is unsustainable in law and must be set aside accordingly.

Decision

8. We decide and direct:

(a) The decision of the FtT is set aside.

(b) Having regard to the nature of the flaws identified, remittal is appropriate.

(c) The appeal will be reheard by a differently constituted FtT. In this context we record our understanding that appeals of this nature, by established convention, are heard by a full time salaried Judge.

Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 04 November 2015