IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001233
UI-2024-001234
First-tier Tribunal No: EA/00008/2023
DA/00337/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of November 2024

Before

MR JUSTICE JULIAN KNOWLES SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MB
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr R Fakhoury, of Counsel,
instructed by Advice on Individuals Rights in Europe (The AIRE Centre)

Heard at Field House on 29 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the respondent/claimant and members of his family, likely to lead members of the public to identify the respondent/claimant or his family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Germany born in 1993. He came to the UK aged 2 years in 1995. He joined family, including his mother, Ms NB, and older half-sister, in this country. He attended school in the UK between 1996 and 2010. He suffered with mental health problems, was placed in care due to abusive family circumstances, and formed a close relationship with his foster carer Ms PC.

2. In 2009 the claimant met and then formed a relationship with Ms MG, a British citizen with whom he now has three children: EB born in 2012, KB born in 2014 and a baby born in 2023. The relationship ended in 2018 but they continue to co-parent their children together. Ms MG also has an older child from a previous relationship, KN, whom the claimant treats as his own.

3. From 2009 the claimant started to have problems with criminal type behaviour against a background of abusing drugs and alcohol, which led to his first conviction in June 2011 for possession of cannabis, and then to other convictions for violent disorder and common assault. The claimant was convicted of supply of a controlled drug class A crack cocaine and sentenced to 38 months imprisonment at Woolwich Crown Court on 16th August 2019.

4. A deportation order was signed against the claimant under the Immigration (EEA) Regulations 2016 (henceforth the EEA Regulations) on 7th October 2020 as a result of his 38 month sentence in 2019. On 9th October 2020 the Secretary of State refused a human rights claim made by the claimant and justified his deportation under the EEA Regulations; and on 23rd November 2022 the Secretary of State refused the claimant's EUSS claim, made on 6th July 2022 for settled status based on five years' residence prior to his period of imprisonment. The claimant appealed these decisions.

5. The claimant's appeal against the decisions was allowed by First-tier Tribunal Judge Abdar under the EUSS Immigration Rules, the EEA Regulations and on human rights grounds in a decision promulgated on 7th February 2024.

6. Permission to appeal was granted by First-tier Tribunal Judge Curtis on 13th March 2024 on the basis that it was arguable that the First-tier judge had erred in law on the following basis.

7. It was found to be arguable that the first ground discloses a material misdirection of law in relation to the claimant's residence and therefore to the level of protection he was entitled to under the EEA Regulations. Judge Curtis found it arguably unclear how the claimant had a continuous five year qualifying period to give him serious ground protection from deportation given that it was accepted that he had not

exercised Treaty rights in accordance with the EEA Regulations, and found that the First-tier Tribunal had arguably failed to take into account the fact that the term of imprisonment imposed in August 2019 broke his period of continuous residence. In addition, the First-tier Tribunal had found that the claimant was entitled to imperative grounds protection when the claimant himself only argued for serious grounds, so arguably the First-tier Tribunal had gone beyond determining the issues between the parties.

8. The second ground argues that there was is a material misdirection in law with respect to the proportionality assessment in the Article 8 ECHR assessment, and in particular regarding the application of the second exception to deportation, in s.117C of the Nationality, Immigration and Asylum Act 2002, that the deportation of the claimant would be unduly harsh to his qualifying children. This was arguably because it is only said that they would be "devastated" by his removable and arguably this was not a high enough test to satisfy the exception.

9. The third ground was found to be arguable as it is argued that allowing the appeal under the Immigration Rules, in relation to the appeal of the EUSS decision, was an error of law because it should not have been found that an appeal amounted to meaning that the deportation order under Regulation 23 of the EEA Regulations was not a supervening event.

10. The matter now comes before us to determine whether the First-tier Tribunal erred in law, and if so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

11. Ms Ahmed applied to amend the grounds to include the fourth ground set out in Mr Clarke's skeleton argument (who previously had conduct of the case for the Secretary of State) and also applied to lift the anonymity order. We refused the application to lift the anonymity order as this had been made to protect the identities of the claimant's minor children which we found would be easily identifiable were the anonymity order not in place as they have the same name as the claimant and as extensive detail of his family life is given in the decision of the First-tier Tribunal. We granted permission to add the fourth ground as it had been put in writing in April 2024 in the skeleton of Mr Clarke, and communicated to the claimant's representatives who had not opposed it in their skeleton argument, and further Mr Fakhoury accepted that the material was relevant to arguments over materiality in any case and so pragmatically accepted that it was reasonable to allow the ground to be argued.

Submissions – Error of Law

12. In the grounds of appeal, in the skeleton argument from Mr Clarke, and in oral submissions from Ms Ahmed it is argued, in short summary, that the First-tier Tribunal erred in law as follows.

13. In the first ground of appeal, it is argued that the First-tier Tribunal erred by making a material misdirection of law with respect to the claimant's period of residence and level of protection he qualifies for under the EEA Regulations. The First-tier Tribunal found the claimant was entitled to imperative grounds protection. It is argued that there was no evidence the claimant had been exercising Treaty rights under the EEA Regulations as, although he was schooled in the UK, there was no evidence his German mother had exercised Treaty rights because HMRC records showed no employment records for his mother, NB, for the period 1995 to 2022 and showed only her earning £712 in the tax year 2015/2016, and so the claimant was not entitled to either permanent residence or imperative grounds protection.

14. In the skeleton argument of Mr Clarke it is further argued it was not correct to find that the claimant met the residence requirements, and therefore was entitled to these enhanced levels of protection through an application of the EUSS, because it was not correct to have found that the deportation order was made under s.3(5) of the 1971 Act and so fell within (b) of Annex 1 of Appendix EU, when in fact it fell within (a) of Annex 1 of Appendix EU because the deportation order was made under s.5(1) by virtue of the Regulation 32 of the EEA Regulations, as is clear from the wording of the deportation order for the claimant.

15. It was argued by Ms Ahmed that the First-tier Tribunal had wrongly confused the EUSS Immigration Rules and the EEA Regulations, and that as a result the First-tier Tribunal had compiled a composite amended Regulation at paragraphs 53 reading the EUSS into the Regulation 27 of the EEA Regulations which was not a permissible thing to do. Ms Ahmed also argued that a deportation order was a supervening event if it existed at the date of application as per the definition from the EUSS, set out at paragraph 56 of the decision, and that it was wrong for the First-tier Tribunal to have put a gloss on this that it needed to be lawful and settled and not subject to challenge as is done at paragraph 57 of the decision. She relied upon Abdullah & Ors (EEA; deportation appeals; procedure) [2024] UKUT 66 to argue that conclusions F-H mean that the EEA Regulations appeal must have been dealt with first, and only after the resolution of that appeal should the EUSS appeal be considered.

16. In the second ground, it is argued that there is an error of law by virtue of the First-tier Tribunal finding that the decision to deport would be disproportionate. The grounds do not specify whether this ground is addressed to the EEA Regulations appeal or to the human rights appeal, but do go on to contend that the unduly harsh test in the second exception to deportation under s.117C of the 2002 Act had not been properly applied, as the findings that the children would be "devastated" were insufficiently reasoned given the claimant's partner was their primary carer. It is argued there is no direction that unduly harsh means something severe or bleak, and that an elevated standard applies as per KO (Nigeria) v SSHD [2018] UKSC 53. It is argued that the

First-tier Tribunal wrongly equates the unduly harsh test with the best interests test at paragraphs 97 and 98 of the decision. The focus of the skeleton argument from Mr Clarke is entirely on the second exception to deportation under s.117C of the 2002 Act, and thus on the human rights appeal, bar a single sentence in the skeleton argument that the proportionality assessment could not stand due to the level of protection errors. Ms Ahmed argued that the ground was addressed to both the proportionality assessments, and argued that in accordance with AA (Poland) [2024] EWCA Civ 18 and MC (Essa Principles recast) Portugal [2015] UKUT 520 that absent a right of permanent residence the future prospects of integration in the UK cannot be a weighty factor. As a result, it is argued, the proportionality assessment is infected by errors made in the level of protection assessment by the First-tier Tribunal.

17. In the third ground, it is argued that there is an error of law because of a material misdirection in relation to the appeal relating to the EUSS application as outlined above in ground one. It is argued that because the claimant should not have succeeded in his EEA Regulations appeal, the First-tier Tribunal erred in finding that he the requirements of Appendix EU and thus in allowing his EUSS appeal.

18. In the fourth ground, as set out in the skeleton argument dated 19th April 2024 it is argued that the First-tier Tribunal erred in law when assessing whether the claimant is a threat to a fundamental interest in society, and thus in finding that the claimant was entitled to succeed in his appeal even if he only had the basic level of protection. It is argued that there was a failure to adequately set out the reasons for not placing weight on the OASys report At paragraph 68 of the decision it is said that it is not very reliable in assessing risk because it was "relatively old", being dated 18th May 2020. The report identified 10 risk factors going to a risk of future offending and placed him in the medium risk of reoffending category, the report also documented continued drug taking and violence in prison. The claimant had only been finally released from prison, after a recall due to continued substance abuse, 12 months prior to the hearing before the First-tier Tribunal. It is argued that it was also inadequately explained why the claimant's partner and children are protective factors, when the OASys report finds that they are at risk and they have not previously been protective factors. It is also argued that the decision fails to identify why the claimant is not a risk to public order, and why his deportation is not justified as necessary to protect the public and prevent wider societal harm beyond simply offending. It is argued that findings made in the context of a higher level of protection are contaminated with error as a result.

19. In the Rule 24 response, skeleton argument and in oral submissions from Mr Fakhoury it is argued, in short summary, for the claimant as follows.

20. Mr Fakhoury made submissions relating to the role of the Upper Tribunal when considering if an error of law was made out, and the deference to be given to First-tier Tribunal Judges in this specialist jurisdiction, particularly with respect to grounds arguing insufficient reasoning and that tests had not been explicitly set out within the decision or factors mechanistically recited.

21. With respect to the first ground it is argued that this is not made out because even if the claimant was not entitled to serious grounds or imperative grounds protection, the appeal was in any case allowed because the claimant was entitled to succeed on the basis of the basic level of protection. It is argued that there is no appeal against this finding at paragraph 80 of the decision of the First-tier Tribunal, so any errors in relation to the level of protection are immaterial to the outcome, absent a finding that the Secretary of State succeeded in showing an error of law in ground four. In addition the grounds do not set out errors in the EEA Regulations appeal proportionality assessment, so even if the claimant had been found to be a genuine, present and sufficiently threat to a fundamental interest of society then the First-tier Tribunal found in the alternative that his deportation would be unlawful as it is disproportionate, and this finding is not challenged, so again the ground discloses no material error of law. The claimant argues that the proportionality assessment is a discrete assessment which is not in any way linked to the assessment of the level of protection, and relies upon the judgement in B v SSHD [2000] EWCA in support of the proposition.

22. Further the effect of the Citizens' Rights (Restrictions of Rights of Entry and Residence)(EU Exit) Regulations 2020 (the Brexit Regulations) is to amend the operation of the EEA deportation regime with respect to conduct committed before 31st December 2020 for decisions made from 1st January 2021 so that entitlement to serious or imperative grounds protection is assessed by reference to the claimant's entitlement to EU settled status. This modification gives rise to a 'chicken and egg' problem in circumstances such as that of the claimant where an appellant has a simultaneous appeal against both a deportation order and an EUSS refusal, refused solely on the basis of the deportation order but the decision under the EAA Regulations is made prior to 31st December 2020. It is accepted that this is a thorny legal issue. However it is argued that the approach the First-tier Tribunal took was lawful. The Tribunal, in accordance with its jurisdictional framework, must consider any matter which is relevant to the substances of the decision arising up to the date of the hearing in an appeal under the EEA Regulations. It is argued that the First-tier Tribunal properly found that the standard of protection was such a matter. It was therefore correct for the First-tier Tribunal to have assessed the standard of protection by reference to the EUSS scheme, but for the deportation order, and then to have applied the resulting protection standard to the deportation appeal. Whilst the Brexit Regulations did not apply to the decision, because it was made prior to 1st January 2021, it was the right approach

in relation to this appeal because it was heard after the 1st January 2021 and so the correct legal framework at the time of hearing was utilised.

23. With respect to the second ground it is argued that this ground is not actually aimed at the EEA proportionality assessment, but if it were interpreted to be so then there is no error of law as there is no point of principle challenged and so it is, at its highest, just a challenge to overall judgement of the First-tier Tribunal which ought not to be interfered with lightly. The First-tier Tribunal Judge makes clear reference to considering all of the evidence and taking a holistic approach and it is argued this decision is unimpeachable.

24. When the second ground is viewed, as it is argued it properly should be, as a challenges the human rights assessment then as the appeal is properly allowed under the EEA Regulations this challenge must fail because the decision would not be in accordance with the law and so s.117A-D of the 2002 Act considerations do not arise. However, in any case reference is made to s.117C(5) and the unduly harsh test and there is no reason to go behind the findings of First-tier Tribunal. The best interests of the children were clearly lawfully an essential part of considering whether the claimant's deportation would be unduly harsh to those children, and were properly placed in the balance when determining this issue. There was no need for the test for unduly harsh to be explicitly recited in the decision, particularly as HA (Iraq) v SSHD [2022] UKSC 22 was cited in the claimant's skeleton argument and this judgment contains the relevant test, and so the First-tier Tribunal clearly considered the test when making the decision.

25. With respect to the third ground it is argued that as the appeal is properly allowed under the EEA Regulations it was lawfully allowed under the EUSS/ Appendix EU of the Immigration Rules because the only basis for refusal of this application was suitability due to his being subject to a deportation order, rather than eligibility, and if this was not lawful then the claimant was entitled to succeed under these Immigration Rules.

26. With respect to the fourth ground it is argued that this is simply a disagreement with the overall judgment of the First-tier Tribunal and the weight given to various factors. This ground therefore discloses no error of law. The First-tier Tribunal is clear that all the evidence has been taken into consideration and that a holistic approach was adopted, as per paragraph 9 of the decision. Consideration is given to the OASys report and it is taken into account. It was produced more than 3 years prior to the hearing date, and there are found to have been significant intervening events including the claimant's recall to prison which is found to have had an constructive rehabilitative effect on the claimant. It was open to the First-tier Tribunal to give weight to the certificates for courses undertaken in prison as supporting the contention that the claimant was at lesser risk of reoffending as these were taken together with the other witness evidence which is found to be credible. The First-

tier tribunal looked both at the seriousness of the claimant's offending and the likelihood of his reoffending and properly considered the fundamental interests of society in the decision. There was no requirement for the First-tier Tribunal to mechanistically enumerate the various aspects of the fundamental interests of society, and reference is made to the fundamental interests of society as a whole, for the reasons set out in Pigowska v Pigowski [1999] 1 WLR 1360, at paragraph 76 of the decision.

Conclusions – Error of Law

27. It was found with reasoning, and not challenged, that the claimant is a German citizen who has lived in the UK since the age of two years, in 1995, having entered with his mother and brother and joined his older half-sister. He has an ex-partner and three qualifying British citizen children, and a British citizen step son. He faces deportation after being convicted of supply of a controlled drug class A crack cocaine and being sentenced to 38 months imprisonment at Woolwich Crown Court on 16th August 2019.

28. The challenge in grounds one and three centres around a contention that the wrong and higher level of protection was found to apply to the claimant, and as a result the EEA Regulations and EUSS appeals were wrongly allowed. It was accepted that the claimant was a EEA citizen entitled to be considered under the EEA Regulations in the August 2019 notice of intention to deport but that his deportation was justified because of his criminal offending, and in the October 2020 deportation decision the position is that it was not accepted that the claimant had serious grounds or imperative grounds protection but it was argued that his deportation was justified as against the lowest level of protection. Similarly the Secretary of State's response to the claimant's skeleton argument before the First-tier Tribunal dated 5th November 2023 considers his period of time in the UK and concludes at paragraph 8 that he is not entitled to permanent residence but the "lesser test therefore applies to justify his deportation" under the EEA Regulations.

29. Whilst the First-tier Tribunal concluded that the claimant was entitled to imperative grounds protection we find that it also allowed the appeal on two alternative bases: firstly, on the basis that the Secretary of State had not discharged the burden on her to justify the claimant's deportation against the basic level of protection (the level of protection the Secretary of State agreed he was entitled to), as set out at paragraph 80 of the decision, and secondly on the basis that even if the deportation of the claimant was so justified, his deportation was not proportionate, as per the conclusion at paragraph 90 of the decision.

30. We find that the original ground two did not challenge the EEA Regulations appeal proportionality assessment. We find that the only material misdirection of law set out in relation to the second ground, which appears at paragraphs 8 and 9 of the grounds, is with regards to

the s.117C 2002 Act 'unduly' harsh test, found in the second, family life, exception to deportation, which is only relevant to the determination of the human rights appeal. What is said at paragraphs 6 and 7 of this ground is simply a recitation of facts with respect to the claimant's residence and children. There is also, we find, no error of law as suggested in paragraph 18 of the skeleton argument of Mr Clarke, it simply asserts, without any legal argument or substantiation, that as the level of protection was unclear, that the proportionality assessment cannot stand. As there is therefore no challenge in the grounds to the decision that the claimant's deportation would not be proportionate under the EEA Regulations, then the other challenges to the decision allowing the appeal under the EEA Regulations are not material to the outcome of the appeal allowing it on this basis.

31. For completeness we also find that the consideration of the appeal based on the lowest level of protection was not an error of law as argued in the fourth ground of appeal. As Mr Fakhoury argued, this is a reasons challenge and care must be taken for this not to be a guise for finding an error of law where none properly exists, as per the guidance in VV (grounds of appeal) Lithuania [2016] UKUT 53. The decision should be "read fairly and as a whole and without excessive legalism", and to find an error the matter should be a substantial issue before the parties at first instance which the First-tier Tribunal should have failed to deal with it at all or have given reasons that are so unclear as to disclose an error of law.

32. Clearly the issue of whether the claimant posed a genuine, present and sufficiently serious threat affecting the fundamental interests of society was an issue between the parties in this appeal. The Secretary of State contends primarily that proper reasons were not given: when dealing with the evidence in the OASys report; for placing weight on the course certificates of the claimant; for finding that the claimant's children were now a protective factor; and on the other side by failing to give proper weight to likelihood and consequences of the claimant's offending and in identifying all of the fundamental interests. We disagree and find that in paragraphs 63 to 78 of the decision there is extensive and nuanced discussion of the claimant's offending, which it is concluded has been serious, citing details of the index conviction and the sentencing remarks of the Crown Court judge. The OASys report's conclusions that the claimant is a medium risk of harm and offending are considered at paragraph 68 of the decision but it is considered that as it was drafted in May 2020, it must be placed in the context of the other more recent evidence before the First-tier Tribunal. We find that this was entirely rational as the First-tier Tribunal was making its decision three and a half years after this report. It is concluded on the basis of evidence from the claimant, witnesses including references from prison officers, and witness evidence going to the claimant's current involvement in the lives of his children, evidence of drugs harm courses and engagement with therapeutic programmes in prison that he now has a "reformed mindset", is actively engaged with his family and particularly his

children and is abstaining from drugs and alcohol. We find that the legislative framework and all material evidence has been engaged with and that the conclusions are clear and rational. It goes without saying that the weight to be given to evidence is a matter for the First-tier judge absent irrationality.

33. It follows that we conclude that grounds one and four disclose no material errors of law and that we do not need to consider whether the approach taken to the levels of protection under the EEA Regulations was correct. We will simply observe that the approach adopted by the First-tier Tribunal appears a rational one for the reasons argued by Mr Fakhoury to us in the context of a complex legal situation.

34. Ground three also falls away as we have found that the EEA Regulations appeal is without legal error. We find that it was correct for the First-tier Tribunal to have allowed the EUSS appeal because there is no supervening event in the form of the deportation order, as the consequence of allowing the EEA Regulations appeal is that the deportation order is "set aside", as per (b) of the definition set out at paragraph 56 of the decision of the First-tier Tribunal.

35. This leaves ground two in relation to the allowing of the human rights appeal. We again find that the First-tier Tribunal did not err in law as argued by the Secretary of State. Firstly any error would be immaterial because as the claimant's deportation is now not lawful or proportionate under the EEA Regulations, it would not be in accordance with the law, and so the s.117A-D 2002 Act considerations do not arise, as per Badewa v SSHD (ss117A – D and EEA Regulations) [2015] UKUT 329.

36. Secondly, going on to consider the specifics of the ground, it is also clear that the First-tier Tribunal understood the correct statutory framework for this decision, as at paragraph 93 of the decision the second exception to deportation at s.117C(5) of the 2002 Act is set out in full, with the "unduly harsh" requirement, and the arguments regarding the "unduly harsh" test being considered at paragraphs 95 to 98 of the decision. As submitted by Mr Fakhoury, and accepted for the Secretary of State in the skeleton argument of Mr Clarke citing the Court of Appeal decision of AA (Nigeria) v SSHD [2020] EWCA Civ 1296, there is no need for the First-tier Tribunal to set out directions from the higher courts on the meaning of this test: as a specialist tribunal dealing routinely with this issue it can be assumed that the correct test was understood and was applied, unless it is clear that this was not the case. We conclude that the finding of the First-tier Tribunal that the deportation of the claimant would result in his children being "devastated", as made at paragraph 97 of the decision, is clearly consistent with the application of a test requiring consequences which are "severe" and "bleak", rather than just "uncomfortable, inconvenient, undesirable or merely difficult" and thus that the First-tier Tribunal was indeed applying the definition of unduly harsh as per KO

(Nigeria) v SSHD [2018] UKSC 53. We also conclude that the decision of the First-tier Tribunal found thereby that the impact went beyond the deportation simply being in the best interests of the children. There is no misdirection of law as argued for in ground two and therefore it follows that the appeal is properly allowed on human rights grounds.

37. As we find none of the grounds of appeal disclose material errors of law the decision of the First-tier Tribunal allowing the appeal is upheld.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. We uphold the decision of the First-tier Tribunal allowing the appeal under the EEA Regulations, Immigration Rules at Appendix EU and on human rights grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11th November 2024