



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/07272/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 7 December 2017**

**Decision & Reason
Promulgated
On 8 December 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**GEORGE CHRISTIAN BABA
[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Ian Jarvis, a Senior Home Office Presenting Officer

For the respondent: Mr Patrick Diavewa, legal representative with Calices Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal to allow the claimant's appeal against her decision to remove him from the United Kingdom pursuant to Regulation 23(6)(a) and 32(2) of the Immigration (European Economic Area) Regulations 2016. The claimant is a citizen of Romania.

Factual matrix

2. The claimant's account is that he came to the United Kingdom in 2015. He says that he studied during 2016 at the UK College of Business & Computing, but not in accordance with the Immigration (European Economic Area) Regulations 2016 (as amended), as Mr Diavewa conceded at the hearing, because he never met the requirements in Regulation 4(1)(d)(ii) and (iii) since he did not have comprehensive sickness insurance, nor did he make a declaration to the Secretary of State that he had sufficient resources not to become a burden on the social assistance system of the United Kingdom during his intended period of residence here.
3. For some part of 2016, the claimant worked for Zaha Plastering. In July 2016 he was cautioned by the police for theft. In April 2017, following a conviction on 19 March 2017, the claimant received a 16 weeks' suspended sentence, with an unpaid work requirement, and curfew with electronic tagging. He failed to comply with the community requirements of his suspended sentence and on 13 July 2017, the claimant was sentenced to 8 weeks' imprisonment. During his imprisonment, he was interviewed by an immigration officer to investigate his activity while in the United Kingdom. He did not mention a partner, children, or any family ties in the United Kingdom.
4. The Secretary of State was satisfied that the claimant had not acquired a permanent right of residence in the United Kingdom: she considered that he had not established that he had been exercising Treaty rights before his incarceration, and that in any event, at the date of decision, his sentence had interrupted any preceding exercise of Treaty rights.
5. The claimant was served with notice that she considered him to have no right to reside in the United Kingdom and that the claimant was a foreign criminal whom she proposed to remove from the United Kingdom pursuant to Regulations 23(6)(a) and 32(2) of the 2016 Regulations.

First-tier Tribunal decision

6. The claimant appealed to the First-tier Tribunal. The grounds of appeal stated that the Secretary of State had not considered that he had a sister in the United Kingdom, and a nephew, or that his partner Ms Elena Gabriela Moldovencei was living in the United Kingdom and exercising Treaty rights of her own here. The grounds raised Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009. The claimant said that he was not a serial offender and regretted his actions. He was seeking a second chance.
7. The First-tier Tribunal Judge clarified with Mr Diavewa at the hearing that Article 8 and section 55 were not relied upon. For the respondent, Ms Afzal said that this was not a decision based on misuse of rights under Regulation

26(3)(c); rather, the Secretary of State considered that the claimant had not, or had ceased to have, a right under the Regulations to reside in the United Kingdom, pursuant to Regulation 23(6)(a).

8. The Judge was satisfied that at the date of hearing, the claimant had resumed study and was therefore a student. The Judge recorded that the claimant's previous job as a plasterer remained open to him, but allowed the appeal on the basis that the claimant was a student.

Permission to appeal

9. The Secretary of State appealed, relying on the entirety of Regulation 4(1)(d). First-tier Tribunal Judge Grant-Hutchinson granted permission to appeal on the basis that:

"2. It is an arguable error of law that by finding that the [claimant] qualified as a student under the EEA Regulations, the Judge has failed to consider all the relevant criteria, including (a) whether the [claimant] has comprehensive sickness insurance cover in the United Kingdom and (b) has assured the Secretary of State, by means of a declaration, or by such equivalent means as a person may choose, that the person has sufficient resources not to become a burden on the social assistance of the United Kingdom during the person's intended period of residence."

Rule 24 Reply

10. There was no Rule 24 Reply for the claimant.
11. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

12. At the hearing today, Mr Diavewa for the claimant agreed that the claimant had never had comprehensive sickness insurance, nor made the relevant declaration. He attempted to argue Article 8 ECHR, although it was pointed out to him that at [16] in the decision, the Judge said expressly that it was agreed that Article 8 ECHR was not relevant to this decision.
13. Mr Diavewa also said that there were 'other factors' but when pressed, these came down again to Article 8 ECHR and the possibility that the claimant might be treated as the extended family member of his partner, Ms Moldovencei, who is said to be working in a factory in the United Kingdom and exercising Treaty rights in her own right. No such application has been made, either under Article 8 ECHR or the extended family member provisions of the 2016 Regulations. Mr Diavewa said that the claimant would rely on the decisions of the European Court of Human Rights in *Boultif v Switzerland* - 54273/00 [2001] ECHR 497 and *Maslov v. Austria* - 1638/03 [2007] ECHR 224. As human rights were not in issue before the First-tier Tribunal, neither *Boultif* nor *Maslov* now assists the claimant.

Relevant provisions of the EEA Regulations 2016

14. The definition of 'student' is found in Regulation 4(1)(d) of the Regulations:

"4(1)...(d) "student" means a person who—

- (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is—
 - (aa) financed from public funds; or
 - (bb) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located;
- (ii) has comprehensive sickness insurance cover in the United Kingdom; and
- (iii) has assured the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that the person has sufficient resources not to become a burden on the social assistance system of the United Kingdom during the person's intended period of residence."

15. Regulation 23(6), so far as relevant, is as follows:

"23...(6) ...an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—
(a) that person does not have or ceases to have a right to reside under these Regulations; ..."

Discussion

16. The language of the EEA Regulations is plain. To be considered a 'student' for the purpose of the 2016 Regulations, a person must show three things: that he is studying at an educational establishment which is either financed from public funds or accredited by the Secretary of State; that he has comprehensive sickness insurance; and in addition, that he has made a declaration or equivalent to the Secretary of State that he has sufficient resources such that he would not be a burden on the United Kingdom's social assistance system during his studies.

17. The claimant, at best, can meet the first of the three requirements. He is not a 'student' for the purposes of the Regulations. Nor is he the family member of an EEA national who has entered the United Kingdom and remains here exercising Treaty rights. The Home Office Presenting Officer at the First-tier Tribunal hearing erred in [18] in conceding that the claimant was a qualifying person and agreeing to minute her file accordingly.

18. The claimant at the date of decision, when he was in detention, was a person whose right to reside, if it existed, had ended by reason of his sentence. After he was released, the claimant did not return to work but

recommended his study, but continued not to qualify as a 'student' because he still did not meet of the requirements of Regulation 4(1)(d). I am satisfied that the First-tier Tribunal Judge fell into error in failing to consider all of those requirements, and that such error was material, since had he considered them, he would have reached a different conclusion.

19. The First-tier Tribunal Judge did not err in failing to consider Article 8 ECHR at the hearing or in failing to decide whether the claimant is an extended family member of his partner or his sister, since neither argument was relied upon at the First-tier Tribunal hearing, nor has it been advanced in this appeal by way of a Rule 24 Reply to the grant of permission.

DECISION

20. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Date: 7 December 2017

Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper