Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20175/2018

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**
On 30 May 2019 On 11 June 2019

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SIYABONGA [T]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ell, instructed on Direct Access
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

This is the appellant's appeal against a decision of First-tier Tribunal Judge Birrell promulgated on 24 January 2019 dismissing on all grounds his appeal against a decision of the Secretary of State to deport him and to refuse his human rights claim.

First-tier Tribunal Judge O'Keeffe granted permission to appeal on 18 February 2019.

As a result, the matter came before me sitting in the Upper Tribunal on 30 May 2019.

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Error of Law

In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside.

In granting permission to appeal Judge O'Keeffe stated:

> "It is arguable that where the appellant was sentenced to nine months' imprisonment, the judge erred by not making any finding as to whether or not the appellant was a foreign criminal as defined in Section 117D(c) of the Nationality, Immigration and Asylum Act 2002. The appellant does not accept as recorded by the judge that there was no dispute that he was a foreign criminal."

At paragraph 26 of the decision of the First-tier Tribunal Judge Birrell stated: "There is no dispute that the appellant is a foreign criminal and is liable to deportation." Mr Ell tells me that that is not accurate in that when he represented the appellant before the First-tier Tribunal he challenged and took argument before the Tribunal as to whether the appellant is a foreign criminal. It is clear that the issue as to whether the appellant is a foreign criminal is an important point.

As defined by Section 117D(2), a foreign criminal under the 2002 Act is:

a person who is not a British citizen,

a person who has been convicted in the United Kingdom of an offence and

who

(i) has been sentenced to a period of imprisonment of at least twelve months

(ii) has been convicted of an offence that has caused serious harm or

(iii) is a persistent offender.

The judge appears to have assumed that there was no dispute that the appellant is a foreign criminal. It is clear from the submissions made to the Secretary of State by the appellant's representatives set out, for example, at E6 of the respondent's bundle, that it was challenged as to whether the appellant was a foreign criminal. It is clear from the refusal decision that the Secretary of State relied on the conviction for drugs offences, being an offence that has caused serious harm. It is not suggested that the appellant is a persistent offender, neither had he been sentenced to a period of imprisonment of at least twelve months. He was in fact sentenced to a period of imprisonment of nine months for a variety of offences in relation to a class C controlled drug, namely cannabis. The judge did not engage with the issue as to whether the offence caused serious harm, despite the arguments put before the Tribunal at the First-tier Tribunal hearing.

I accept that the judge moves on at [27] of the decision to consider the seriousness of the offence but that is under a different provision, Section

117C(2), where the Act provides that the more serious the offence, the greater the public interest in deportation. I accept Mr Ell's argument that what follows, particularly at [29] of the decision, is an assessment of seriousness but not an assessment of seriousness within the meaning or within the assessment required to determine whether the appellant is a foreign criminal. For example, at 29] the judge begins, "Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them." Whilst this is in a way an assessment of seriousness, it does not appear to me that the judge engaged with the issue as to whether the appellant was a foreign criminal in the first place. Clearly, if he is not a foreign criminal, then the provisions of Section 117D and C do not apply to him.

I have considered the counterargument of Mr Tan that [29] of the decision is sufficient to address the issue of seriousness. I do not accept that submission and I find that the decision fails to adequately engage with the matter in issue, whether the appellant is indeed a foreign criminal. The rest of the appeal and the issues turn on that primary consideration, namely whether or not the appellant is a foreign criminal.

In all the circumstances, I am driven to the conclusion that in an otherwise careful decision that there is an error of law, which is material, and which affects the balance of the decision, so that it cannot stand and must be set aside.

I have considered Mr Ell's submissions in relation to the second, third and fourth grounds but I find that in large measure, as submitted by Mr Tan, these are little more than disagreements with the judge's findings. It is not required of the judge to make a list of every single factor that is relevant, it is clear that the judge took into account relevant factors both for and against the appellant's removal. In any event, given my findings in relation to the first ground in relation to the issue as to whether the appellant is a foreign criminal, it is not necessary for me to address these any further.

Where a decision of the First-tier Tribunal has been set aside Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions or it must be remade by the Upper Tribunal. The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of the appeal, as they are in this case, effectively there has not been a valid determination of those issues. The errors of the First-tier Tribunal vitiate all other findings and the conclusions from those facts so that I am satisfied there has not been a valid determination of the issues in the appeal.

In the circumstances, I relist this appeal for a fresh hearing in the First-tier Tribunal sitting at Manchester and do so on the basis that this is a case which falls squarely within the Senior President's practice statement at paragraph 7.2.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached direction.

Signed

Upper Tribunal Judge Pickup

Dated 30 May 2019

Consequential Directions

The appeal is remitted to the First-tier Tribunal sitting at Manchester.

The appeal is to be decided afresh with no findings of fact preserved. The appeal may be listed before any First-tier Tribunal Judge with the exception of Judge Birrell and Judge O'Keeffe.

There has been no request for anonymity. In the circumstances, I make no anonymity direction.

To the Respondent
Fee Award

I make no fee award as the outcome of the appeal remains unresolved.

Signed

Upper Tribunal Judge Pickup

Dated 30 May 2019