Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/43276/2014

THE IMMIGRATION ACTS

Heard at Nottingham Magistrates Court	**Decision & Reasons Promulgated**
On 19th January 2016	**On 22nd January 2016**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

MR MOHAMED ZAKARIA LEZZOM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not Represented
For the Respondent: Mr M Dwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Appellant, with permission, against a Decision of First-tier Tribunal Judge Porter promulgated on 30th January 2015. The Appellant is a citizen of Algeria born on 24th January 1985. On 26th October 2014 he applied for a Residence card as the extended family member of his partner, a French national exercising Treaty rights in the United Kingdom. The couple are accepted to be in a durable relationship.

2. In her decision of 5th November 2014 the Secretary of State accepted the couple were in a durable relationship and therefore that the Appellant is an extended family member. However, she chose not to issue a residence card when considering the exercise of her discretion in that regard. She did so on the basis of the Appellant's criminal convictions and poor immigration history. She also found no exceptional circumstances justifying a grant.

3. At the appeal before the First-tier Tribunal the judge heard evidence from the Appellant and his partner and concluded that the Secretary of State had correctly applied the provisions of Regulation 17(4)(b) of the EEA Regulations in refusing to issue a residence card to the appellant.

4. The Appellant sought and was granted permission to appeal to the Upper Tribunal. At that time he was represented by solicitors.

5. The grounds asserted that the First-tier Tribunal Judge had erred at paragraph 25 of the decision when assessing the case in terms of the EEA Regulations by:-

   (i) Failing to take into account or assesses a relevant consideration the fact that the refusal will deter the post-partner from exercising their free movement rights

   (ii) Missapplying the law in finding that the Appellant's previous conviction represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society

   (iii) By taking into account an irrelevant consideration, namely the Appellant's poor immigration history and status

   (iv) By taking into account an irrelevant consideration, namely the EEA partners attitude and behaviour with regard to his immigration status

   (v) By failing to consider other material factors such as the length of residence in the UK, his relationship with the EEA national, the fact that she is working and his integration to the UK.

6. It is further asserted that the First-tier Tribunal Judge erred in his assessment of Article 8.

7. Permission to appeal was refused by a First-tier Tribunal Judge but then granted by a deputy judge of the Upper Tribunal saying only that the grounds of appeal particularly grounds (i) and (ii) raised arguable errors of law.

8. Reference was made to the Home Office guidance to its caseworkers dealing with such applications entitled "Extended Family Members of EEA Nationals" which is stated to apply and interpret the EEA Regulations which make sure that the UK complies with its duties under the Free Movement of Persons Directive 2004/38/EEC. That guidance must be taken into account by decision-makers. However, it is of course not binding on the Tribunal.

9. Having seen that guidance I am concerned that it is itself in part wrong in law. In particular at page 26 of the guidance the caseworkers are instructed to consider criminality under the Immigration Rules and not the regulations. It is said:-"This is because the regulations do not apply to a person seeking rights as an extended family member of an EEA national, until that person has been issued with a residence document." That is wrong. In a case such as the current one where it is accepted by the Secretary of State that the Appellant is in a durable relationship with an EEA national it is accepted that the appellant is in fact an extended family member. He therefore has to be dealt with in accordance with the EEA regulations and not the Immigration Rules. Whether or not he has a residence card or any other kind of document issued in relation to that relationship with the EEA national is irrelevant. It is his status as an extended family member that brings him within the regulations.

10. Regulation 8 (5) confirms the Appellant to be an extended family member.

11. Regulation 17 (4) provides that the Secretary of State may issue a residence card to an extended family member if-

> ‘(a) the relevant EEA national in relation to the extended family members is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
>
> (b) in all the circumstances appears to the Secretary of State appropriate to issue the residence card.’

12. That provision confirms that there is a discretion to be exercised by the Secretary of State and the issue of a residence card is not automatic for extended family members as it is for family members.

13. Regulation 17 (5) provides that where the Secretary of State receives an application for a residence card from an extended family member he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

14. Regulation 20 covers matters to be taken into account when exercising discretion to refuse, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal of revocation is justified on grounds of public policy, public security or public health. That would appear to confirm therefore that it is only on the grounds of public policy, public security or public health that justify the Secretary of State refusing to issue a residence card to an extended family member.

15. Regulation 21 (1) defines a “relevant decision” as a decision taken on grounds of public policy, public security or public health and then provides, so far as is relevant in this case that:-

> ‘(2) A relevant decision may not be taken to serve economic ends.

...

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles-

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.'

16. It is important to note that the sole issue before the First-tier Tribunal Judge was whether the Secretary of State had properly considered the exercise of discretion and whether it should have been exercised differently.

17. The Judge correctly set out in paragraph 9 that he had to consider whether the respondent had correctly applied Regulation 17 to the Appellant and secondly whether there was sufficient evidence to warrant an exercise of discretion in favour of the Appellant. The Judge then indicated that he had to consider whether Article 8 was engaged despite the absence of an application in that regard. I will deal later with the Article 8 question.

18. The Judge set out the personal circumstances of the Appellant from paragraph 12. They are as follows.

19. The Appellant entered the UK using a false French passport in a name other than his own on 31st March 2007. He was interviewed on 2nd April 2007 and removed to Italy because he claimed to have been working illegally there for three years.

20. Undeterred, the Appellant entered the UK again in May 2007. He was arrested in Slough in July 2007 attempting to open a bank account using a

different false French passport in a different name. He was convicted of dishonestly making false representations for gain and possession of a false ID document in August 2007 and sentenced to 15 months detention. That conviction was in an alias name, date of birth and nationality. That was his third identity and he claimed to be a citizen of Lebanon born in 1988. As a result of his giving a false date of birth he was detained in a Young offenders Institution rather than a prison

21. In December 2007 the Appellant was served with a notice of liability to deport and he then made an asylum application which he then withdrew six months later. He was served with a deportation order in June 2008 and released from detention with reporting and tagging restrictions. He failed to comply with those restrictions and removed his tagging device. He was thus listed as an absconder on 25th November 2010 and the deportation order remains extant.

22. The Appellant was and remains detained since September 2014 when he eventually revealed his true identity as the name he currently uses with a date of birth of 24th January 1984 with Algerian nationality. He said that he has both parents, two sisters and a brother living in Algeria.

23. His French partner came to the UK in September 2012 and has worked since. The couple initially met over the Internet, meeting face-to-face in November 2012. They commenced a relationship in February 2013 and lived together since May 2013. She has visited the Appellant a number of times in detention

24. The Appellant’s partner has always been aware of his immigration status, convictions and the deportation order and has also been aware that he has been an absconder. She did not encourage the Appellant to regularise his status.

25. The Judge at paragraph 25 of the Decision and Reasons did not accept the submissions made on the Appellant's behalf that his previous conviction was of historical significance only but rather considered the nature of the conviction to be of a kind which did represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, namely, in the honest production and maintenance of accurate and true public documents confirming identity and status. The Judge also did not consider the convictions could be viewed in isolation as they formed part of an ongoing pattern of behaviour on the part of this Appellant from his initial illegal entry into the United Kingdom with false documents until the point he was detained in September 2014 when he eventually revealed his true identity. The Judge also took cognizance of the fact that the Appellant was detained in a Young Offenders Institution rather than a prison purely on the basis of his having given a false identification and age. He also noted the Appellant had failed to take any steps to regularise his status despite having formed a serious relationship with his partner who was herself fully aware of his status. He noted that neither the Appellant nor his partner had shown respect for United

Kingdom immigration law. The judges expressed himself satisfied therefore on the basis of the principles referred to in regulation 21 (5) that the Secretary of State's refusal was justified.

26. On the facts of this case that conclusion is inescapable. While the Judge did not set out in terms the Appellant's ties to Algeria, he did refer to the number of family members there. There was no evidence whatsoever of any health issues and the Appellant can hardly claim to be integrated in the UK when he has committed offences and shown a total disregard for immigration law. He has been here a relatively short time and all of it unlawfully.

27. The Judge then moved on to considering whether there was sufficient evidence to warrant an exercise of discretion in his favour. What the judge did not consider specifically in that regard was the effect that the decision would have on his partner's ability to exercise Treaty rights. However, that could have made no material difference to the outcome because it cannot be said that his lack of a residence card affected in any way her ability to live and work in United Kingdom. The fact that he has been detained for a considerable period of time has not affected her ability to exercise Treaty rights.

28. So far as taking irrelevant considerations into account, such as his poor immigration status and his EEA national's culpability in his failing to comply with UK immigration law I find that they are relevant considerations because they go to proportionality which is one of the considerations that must be taken into account.

29. At paragraph 27 of the Decision and Reasons the Judge found Article 8 not to be engaged, there having been no independent application in relation to it. The Judge was right not consider Article 8 but perhaps not for the right reasons. We now have the Upper Tribunal case of Amirteymour (EEA appeals; human rights) [2015] UKUT 00466 (IAC) subsequently confirmed to be correct by the Court of Appeal in TY (Sri Lanka) [2015] EWCA Civ 1233 which makes clear that in EEA appeals, unless there is a removal decision there is to be no consideration of Article 8. In this case there is an extant deportation order. However, as the extended family member of an EEA national this Appellant cannot be deported pursuant to that deportation order and any deportation decision will now need to be taken under the EEA regulations. Thus there will be no question of the Appellant is being removed consequent upon his losing this appeal and Article 8 is thus not engaged. In those circumstances it is perhaps surprising hat the Appellant is detained.

30. For the above reasons I find that the First-tier Tribunal Judge made no material error of law in his decision which stands.

31. There has been no application of anonymity in this case and I see no justification for making an anonymity direction.

Notice of Decision

The appeal to the Upper Tribunal is dismissed

No anonymity direction is made.

Signed Date 21st January 2016

Upper Tribunal Judge Martin