



Upper Tribunal

(Immigration and Asylum Chamber)
EA/07430/2017

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House
On 12th October 2018

Decision and Reasons
Promulgated
On 5th November 2018

Before

UPPER TRIBUNAL JUDGE BLUM
UPPER TRIBUNAL JUDGE RIMINGTON

Between

Ihor Ploskodnyak
(Anonymity Direction Not Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman instructed by Sterling & Law
Associates

For the Respondent: Mr E Tufan Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was granted permission to appeal a decision of First-tier Tribunal Judge Trevaskis, promulgated on 24th January 2018, dismissing an appeal against the decision of the Secretary of State dated 18th August 2017. The respondent's decision to remove the appellant was made under regulations 26(3) and 32(2) of the Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'), with reference to regulation 23(6)(c) of the EEA Regulations 2016, on the basis that the appellant's removal was justified on the grounds of misuse of a right to reside.
2. The judge recorded that:
 - (i) the appellant appealed a decision dated 16th August 2017 revoking the right of permanent residence in the United Kingdom as the unmarried partner of a qualified EEA national under the Immigration (European Economic Area) Regulations 2006.

Application for Permission to Appeal

3. The application for permission contended the First-tier Tribunal decision
 - (i) dealt with an issue which was not under appeal. This was an appeal relating to the misuse of rights not revocation. The judge was not entitled to consider whether the respondent was entitled to revoke the residence card.
 - (ii) failed to make an accurate record of the proceedings and determine the relevant issues
 - (iii) failed to give proper reasons
4. Permission to appeal was granted by Judge McGeachy on 20th September 2018 in the following terms (inter alia)

'Although I consider the original grounds were unpersuasive I consider that the further grounds are, just, arguable'.

The Hearing

5. At the hearing before us, Ms Norman confirmed that there had been another decision by the Secretary of State dated 5th January 2018, which *had* revoked the appellant's permanent residence card, and which was under appeal, and listed as EA/00905/2018 within the First-tier Tribunal, but it was not this one. The present decision under challenge was a different decision. She submitted that the judge had not considered the correct decision or issues and that this matter should be

remitted to the First-tier Tribunal for consideration and linked to the other appeal listed, with regard to the revocation decision.

6. Mr Tufan agreed that the decision under appeal was that of removal and the judge had focussed on the wrong decision.

Conclusions

7. As agreed by the representatives, the judge concentrated on a decision to revoke the right of permanent residence (which was not before him or in the file), and not the decision which was actually under appeal, that is, to remove the appellant for misuse of EEA rights. The decision in this appeal was taken by the Secretary of State under regulations 26(3), 32(2) with reference to regulations 23(6)(a)/23(6)(c). The provisions for revocation are under regulation 24.

8. Regulation 26 of the EEA Regulations 2016 sets out as follows:

26. Misuse of a right to reside

(1) *The misuse of a right to reside occurs where a person*

—

(a) *observes the requirements of these Regulations in circumstances which do not achieve the purpose of these Regulations (as determined by reference to Council Directive 2004/38/EC(16) and the EU Treaties); and*

(b) *intends to obtain an advantage from these Regulations by engaging in conduct which artificially creates the conditions required to satisfy the criteria set out in these Regulations.*

(2) *Such misuse includes attempting to enter the United Kingdom within 12 months of being removed under regulation 23(6)(a), where the person attempting to do so is unable to provide evidence that, upon re-entry to the United Kingdom, the conditions for a right to reside, other than the initial right of residence under regulation 13, will be met.*

(3) *The Secretary of State may take an EEA decision on the grounds of misuse of rights where there are reasonable grounds to suspect the misuse of a right to reside and it is proportionate to do so.*

9. The judge referred at [1], [4] and at [57] to the appeal being in relation to revocation of permanent residence. He finally concluded that the appellant was no longer entitled to a residence permit and that

'the decision by the respondent to revoke permanent residence which had been wrongfully granted was correct'.

10. Some of the issues considered by the judge may be relevant but overall his determination is fundamentally legally flawed. The focus was misplaced on a decision to revoke permanent residence, not misuse of rights. The assessment in the decision was thus incorrectly framed. The judge misdirected himself on the law between paragraphs [5] and [11] because he targeted the wrong question, ignoring as he did the misuse of a right to reside under Regulation 26(3) and he failed to consider the second limb of regulation 26(3), namely proportionality.
11. As grounds (i) and (ii) were made out and axiomatic, we consider there is no requirement to address ground (iii).
12. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction

On remittal to the First-tier Tribunal this appeal should be linked with EA/00905/2018 for hearing/determination at the same time.

Signed Helen Rimington
19th October 2018

Date

Upper Tribunal Judge Rimington