Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05332/2019

THE IMMIGRATION ACTS

Heard remotely via Teams	**Decision & Reasons Promulgated**
On 26 May 2021	**On 10 May 2021**

Before

UPPER TRIBUNAL JUDGE LANE

Between

RAMAZAN REXHAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Ahmed
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 17 February 2021, I found that the First-tier Tribunal's decision should be set aside. My reasons are as follows:

> "1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal. The appellant was born on 27 February 1994 and is a citizen of Albania. He applied to the Secretary of State for a residence card as an extended family member of an EEA national. His application was refused by a decision dated 18 September 2019. He appealed to the First-tier Tribunal which, in a decision promulgated on 14 January 2020, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.
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> 2. I find that the appeal should be allowed. My reasons for reaching that conclusion are as follows. First, at [31] the judge purports to allow the appeal on Article 8 ECHR grounds. This was an error of law (see *Amirteymour and others* (EEA appeals; human rights) [2015] UKUT 466 (IAC): the appellant had not served a section 120 notice and he was

not appealing against a decision to remove him). Secondly, the conclusion at [31] is wholly unclear. Whilst under the subsequent 'Notice of Decision' the judge allows the appeal under the Immigration (EEA) Regulations 2016 he qualifies this at [31] by stating, 'I therefore remit the matter to the respondent to enable her to reconsider the matter in the light of my findings and in the light of the outstanding claims by the appellant.' Those 'outstanding claims' include a trafficking claim and an application for international protection. The judge had no power to remit the matter. What he says at [31] leaves it uncertain whether he was allowing the appeal or not. His decision is, therefore, wrong in law and cannot stand.

3. The judge's job was to consider the appeal on a single basis, that is whether the respondent (who accepts that the appellant is a relationship with an EEA national) correctly refused the application for a residence card on grounds of 'appropriateness' (see regulation 18 (4) (c)). He was required to have regard to the circumstances as they existed at the date of the hearing in the First-tier Tribunal. The fact that other claims made by the appellant remained outstanding at that date was not relevant; it was not part of the judge's function to indulge in pointless speculation which was no part of the task before him. The judge was patently irritated that the appellant's other claims had not yet been determined. I agree with Mr Melvin, who appeared for the Secretary of State at the Upper Tribunal initial hearing, that the judge allowed his irritation to interfere with his analysis of the relevant evidence to an extend that the analysis has been vitiated; the decision leaves the very strong impression that the judge considered that allowing the appellant might punish the respondent for her delay or, at the very least, compel her to determine the appellant' outstanding claims. The judge's finding at [27] that the 'respondent was delaying matters' is, in any event, unwarranted; the trafficking decision lies with a body over which the Secretary of State has no control. The fact the Presenting Officer at the First-tier Tribunal hearing could not tell the judge 'when [the trafficking application] might be determined [23]' was hardly surprising.

4. At [22], the judge's unnecessary consideration of the outstanding trafficking claim led him into further error. He considered that it was possible that the appellant (who in February 2016 had been convicted of cannabis production, sentenced to 12 months' imprisonment and deported) might 'appeal against his conviction [on the defence of duress]'. The judge considered that the outcome of such an appeal (many years out of time) might be a factor in the residence card appeal. That constituted a legal error. Quite apart from the irrelevance of such speculation to the issue at hand, the judge seems unaware that, if the appellant had been trafficked to work in a cannabis factory, he must have known that at the time of his trial in 2016; it makes no sense that, in order to raise a defence of duress at the trial or on appeal, he needed a conclusive decision on his trafficking claim before he could do so.

5. I also agree with Mr Melvin that the judge erred by failing to have any proper regard at all for the fact that the appellant, having been deported, re-entered the United Kingdom the following week in breach of the deportation order. That was a circumstance which plainly should have been considered in the determining the appropriateness of

issuing a card to the appellant. However, the judge seems to have ignored it.

6. Mr Ahmed, who appeared for the appellant, agreed that the judge had erred in purporting to remit the matter to the Secretary of State and allowing the appeal on Article 8 ECHR grounds but he argued that the decision was essentially sound. Whilst I agree with Mr Ahmed that the judge's reference at [25] to the appellant having not breached the terms of his licence may refer historically to 2016/2017 and not the date of the First-tier Tribunal hearing (as the respondent argues), I find that the decision is so flawed for the reasons I give above that it must be set aside.

7. The facts in this appeal are uncontroversial. The decision can be remade in the Upper Tribunal.

Notice of Decision

The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand. The decision shall be remade in the Upper Tribunal following a resumed hearing (Upper Tribunal Judge Lane, if available. If not, any Upper Tribunal Judge or Deputy Upper Tribunal Judge; no interpreter; remote hearing on first available date; the parties may rely on new evidence provided that such evidence (including witness statements) are served and filed no less than 10 days prior to the resumed hearing.) "

2. I did not hear any oral evidence at the resumed hearing. The appellant had filed a supplementary bundle of documents which included a new witness statement by his partner. Mr McVeety did not seek to cross examine her.

3. Having heard the submissions of the representatives, I reserved my decision.

4. As I noted in my error of law decision, the facts are essentially agreed. Since the promulgation of the First-tier Tribunal decision, the appellant has, on 5 March 2021, been recognised by the Single Competent Authority (SCA) as a victim of trafficking between 2006 and 2011 in Albania and the United Kingdom. In addition, the appellant has completed courses designed to rehabilitate him following his criminal offending. Mr Ahmed, who appeared for the appellant at the Upper Tribunal initial hearing, submitted that the appellant had shown remorse for his offending and did not constitute a threat to the United Kingdom as regards further criminal offending. He referred to the medical evidence of Dr Hussain which indicated that the appellant is suffering from an anxiety and depressive disorder. He submitted that it was possible that the appellant had been 'unable to rationalise' his decision-making at the time in 2016 when, having been deported to Albania, he illegally re-entered the United Kingdom. Mr Ahmed also submitted that it was possible that the appellant had been scared of returning to Albania and encountering those who have trafficked him and that his fear explained his decision to return so promptly. Mr Ahmed noted the absence of any record of the sentencing remarks of the Crown Court judge. As a consequence, it was impossible to know whether the fact that the appellant had been trafficked had been

taken into account by the judge in determining the duration of the sentence (12 months).

5. Mr Ahmed's submissions were skilfully advanced but I do not accept that the Secretary of State has exercised her discretion in any way improperly when she refused to issue a residence card to the appellant.

6. Immigration (EEA) Regulations 2016, paragraph 18(4) provides:

> (4) The Secretary of State ***may*** issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—
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> (a) the application is accompanied or joined by a valid passport;
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> (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
>
> *(c****) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.***
>
> [my emphasis]

Sub-paragraph (c) ('*in all the circumstances*') plainly entitles the Secretary of State to take a comprehensive view of all relevant facts in each case. In the instant appeal, those facts included not only the appellant's criminal offending but also the extraordinary speed (less than one week) with which he chose to disregard the laws of the United Kingdom by returning and thereafter working illegally (with all the damage to the efficient operation of the economy and the potential risks to the appellant himself and the public which such work inevitably creates) for the next two years. Set against those facts, the matters raised in Mr Ahmed's submissions are speculative at best. Notwithstanding the trafficking decision, there is no evidence that the appellant came back to the United Kingdom because he was scared of criminals in Albania. Likewise, a diagnosis of anxiety and depression does not in itself support the claim that the appellant had been unable to act rationally when he returned to the United Kingdom; on the contrary, his actions have every appearance of a rational calculation (correctly as it transpired) that he would not be apprehended either on arrival or whilst subsequently working illegally. Moreover, as Mr Ahmed acknowledged, that the appellant has, long after the decision under challenge, undertaken rehabilitation courses and may not intend to re-offend is irrelevant to the test of 'appropriateness' which the Secretary of State was obliged to apply. In my opinion, the Secretary of State's exercise of the discretion provided by paragraph 18 cannot be described as perverse, irrational or improper either for the reasons put forward by the appellant or at all. Discretion was exercised by reference to relevant and undisputed facts, in particular concerning the appellant's appalling immigration history. Accordingly, I dismiss the appeal.

Notice of Decision

I have remade the decision. The appeal is dismissed.

Signed Date 26 May 2021
Upper Tribunal Judge Lane