Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02220/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 November 2021	**On 25 January 2022**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

JETMIR MUJA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Mr Ahmed, Counsel instructed by Evolent Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, who is a citizen of Albania, applied in 2019 for a residence card under the Immigration (EEA) Regulations 2016 ("the 2016 Regulations") to confirm that he was an extended family member of his EEA national partner ("the sponsor").

2. The respondent accepted that the appellant was in a durable relationship with the sponsor and that the sponsor was a qualified person. The application was refused, however, under regulations

18(4)(c) and 18(5) of the 2016 Regulations, because it was not accepted that it was appropriate in all of the circumstances to issue the appellant with a residence card.

3. The respondent, in accordance with regulation 18(5), carried out an "extensive examination of the personal circumstances" of the appellant. The personal circumstances that led the respondent to conclude that it was not appropriate to issue a residence card were, in particular, that the appellant in 2013 committed a serious offence for which he was sentenced to 20 months imprisonment and then – on two separate occasions – entered the UK in breach of deportation order. With respect to the appellant's family circumstances, the respondent stated that his relationship was entered into, and family started, in the knowledge that he did not have a right to reside in the UK.

4. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Mathews ("the judge"). In a decision promulgated on 29 June 2021, the judge dismissed the appeal.

5. The judge was clearly sympathetic to the appellant. He found that the crime in 2013 was out of character and that the appellant had fully rehabilitated. He also accepted that the appellant breached the deportation order in order to support his family. The judge nonetheless found that it was appropriate, in all of the circumstances, for the respondent to refuse to issue a residence card given the significance of the appellant ignoring on more than one occasion a deportation order. The judge found that the public interest in maintaining a fair system of immigration control would be "significantly undermined" by allowing the appellant to succeed.

6. The grounds of appeal make a single argument, which is that the judge erred by failing to take into account "the clear advantage" principle elaborated in *Khan v Secretary of State for the Home Department & Anor* [2017] EWCA Civ 1755. The grounds quote paragraphs 34 – 35 of *Khan,* which state:

> 34. A better argument for the Appellant arises from the overall provisions in the Directive, and finds an echo in Regulations 17 and 20. An EFM is characterised under Article 3 as a "beneficiary" of the Directive, and under Article 3.2, "the host member shall, in accordance with its national legislation, facilitate entry and residence for" EFMs. Article 3 goes on to specify that there must be "an extensive examination of the personal circumstances" and the host member state must "justify any denial of entry or residence" to an EFM. Those are not neutral formulations. They are clearly intended to confer on the EFM an advantage in terms of entry and residence over those without such connection with an EEA national. Hence the discretion of the Secretary of State is not unfettered.

> 35. Mr de Mello appeared to argue that the Secretary of State had no discretion under Regulation 17(A), once the person established that he or she was an EFM. I reject that. However, Mr Kennelly did accept that the discretion had to be exercised within the constraints laid down in the legislation, and with the provisions of the Directive in mind. In my view this is reinforced by Article 8 ECHR, and by Article 7 of the Fundamental Charter which is in substance identical. In short, the Directive confers a clear advantage upon an EFM of an EEA national, as against others. EU law favours family integrity, and the exercise of discretion must be exercised in the prescribed way with that advantage, and with Article 7 and the EU principle of proportionality, in mind.

7. Before me, Mr Ahmed argued that the judge had not referred to the principle of "clear advantage" in the decision, and had not applied it in substance. He submitted that the concept of "clear advantage", as set out in paragraphs 34 – 35 of *Khan*, would be rendered meaningless if it did not make a material difference. He argued that it was indicative of the judge not applying a "clear advantage" that in paragraph 30 he stated that he was "bound to conclude" the public interest in the maintenance of effective immigration control must apply.

8. Mr Melvin's response was that the judge considered all of the circumstances and was entitled to attach significant weight to the breach of a deportation order on two occasions.

9. The respondent had a discretion as to whether or not to issue a residence card to the appellant. As explained in *Khan*, that discretion had to be exercised in a way that recognised that EU law favours family integrity. It also had to recognise that an extended family member should be in a more advantageous position than others.

10. The judge did not cite *Khan*. Nor did he set out the principles that are summarised in paragraphs 34 – 35 of *Khan*. However, I am satisfied that the judge approached this appeal consistently with those principles. Even with the appellant being given a "clear advantage", it was nonetheless plainly open to the judge to find that the respondent properly exercised her discretion in refusing to issue a residence card given the significance of the appellant breaching a deportation order on two occasions. Breaching a deportation order undermines the UK system of immigration control; breaching it twice does so profoundly. It is unfortunate that the judge used the phrase "bound to conclude" as this wording suggests a lack of discretion. However, reading this phrase in context, and as part of the decision as a whole, it is clear that the judge did not find that breaching the deportation order twice was determinative or that it removed the discretion; rather, the judge found that it weighed very heavily against the appellant. The judge was entitled to so find.

11. The grounds do not identify a basis upon which it can be said that the discretion in regulations 18(4) and (5) was not exercised lawfully. The appeal is therefore dismissed.

Notice of decision

12. The appeal is dismissed and the decision of the First-tier Tribunal stands.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 13 January 2022