IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003537

First-tier Tribunal No: EA/51401/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2nd of November 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

WASEEM AKHTER
(anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 24 October 2023

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in a decision of 15 August 2023, of the decision of First-tier Tribunal Suffield-Thompson in which she allowed the appellant's appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The appellant is a citizen of Pakistan, born on 22 November 1986. He was given leave to enter the UK as a student in September 2009, valid until 30 September 2010. He overstayed his visa and was encountered on 10 August 2013 when he was arrested in relation to a fraud. On 4 November 2013 he made an asylum claim which was refused on 5 August 2014 and certified as clearly unfounded under section 94 of the

Nationality, Immigration and Asylum Act 2002. On 2 July 2014 he was convicted of conspiracy to defraud and was sentenced to 18 months' imprisonment. On 23 May 2016 he was convicted of conspiring to convert criminal property and on two counts of possessing articles for the purposes of fraud, committed whilst he was on bail. He was sentenced on 18 July 2016 to a total term of imprisonment of four years. On 10 August 2016 the respondent advised the appellant of his liability to deportation. On 9 August 2017 he became the subject of a deportation order under section 32(5) of the UK Borders Act 2007 and removal directions were set for 19 September 2017. The removal directions were, however, deferred, when he applied for asylum a second time on 19 September 2017. The appellant applied for an EEA residence card on 12 April 2018. His application was refused on 30 April 2018.

3. The appellant appealed against the deportation decision, relying upon the EEA Regulations and claiming to be the durable partner of an EEA national exercising treaty rights in the UK. He claimed to have been in a relationship with Vaida Petkeviciute, a Lithuanian national, since 2014 and that they had a daughter together, born on 3 October 2015. He claimed also that his partner had a son from a previous relationship, born on 14 October 2010, to whom he acted as a father. His appeal was heard by First-tier Tribunal Judge Foudy on 6 February 2019 and was dismissed in a decision promulgated on 23 February 2019. Judge Foudy considered the appeal under Article 8 of the ECHR. She accepted that family life was established between the appellant and his partner but considered that, in light of his criminality and the nature of the offences, his deportation was proportionate and did not breach his human rights.

4. The appellant sought permission to appeal Judge Foudy's decision to the Upper Tribunal on the grounds that she had failed to consider and apply the EEA Regulations.

5. The appellant also applied again, on 18 March 2019, for an EEA residence card as the unmarried partner of Vaida Petkeviciute. His application was refused again.

6. Permission was granted to appeal to the Upper Tribunal against Judge Foudy's decision. The appeal came before Upper Tribunal Judge Bruce on 11 October 2019. Prior to the hearing it was conceded by the Home Office Presenting Officer that Judge Foudy had erred by failing to make a finding on whether the appellant was an extended family member or family member of an EEA national and to then consider the factors under regulation 27 of the EEA Regulations. Judge Bruce was invited by both the respondent and the appellant to determine the appeal with reference to the EEA Regulations, which she then did. Judge Bruce found that there had been no successful rehabilitation of the appellant at that point and she was satisfied that he represented a genuine and present and sufficiently serious threat to law and order to justify expulsion. She rejected the suggestion that the appellant's partner and children could relocate to Pakistan and accepted that it would be difficult for the family to relocate as a whole to Lithuania. However she found that it would not be disproportionate for the family to split up and she dismissed the appeal under the EEA Regulations 2016.

7. The appellant sought permission to appeal Judge Bruce's decision to the Court of Appeal but the Court of Appeal refused permission in an order of 20 October 2020. The appellant then became appeal rights exhausted on 30 October 2020.

8. On 3 November 2020 the appellant applied once more for an EEA residence card as the unmarried partner of Vaida Petkeviciute, who by that time had been granted indefinite leave to remain in the UK.

9. The appellant's application was refused by the respondent on 19 April 2021. The respondent accepted that the EEA national sponsor was a qualified person and that the appellant's relationship with her was durable and akin to marriage. However it was noted that the appellant had never been issued with an EEA residence card on the basis of that relationship and considered that he was not, therefore, to be treated as a family member under Regulation 7(3) of the EEA Regulations. The respondent noted that ordinarily consideration would have been given to whether it was appropriate to issue the appellant with a residence card under Regulation 18(5), but since the Upper Tribunal had considered that he had public policy protection under the EEA Regulations, the respondent went on to consider his application under Regulations 24 and 27. The respondent considered that issuing the appellant with a residence card would be contrary to public policy and public security since he posed a present and sufficiently serious threat to the fundamental interests of society. The respondent considered that the refusal decision was proportionate and refused his application under Regulation 24(1) of the EEA Regulations.

10.The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Suffield-Thompson on 9 June 2022.

11.The respondent was not represented at the hearing, but produced a 'Respondent's Review'. In the Respondent's Review it was stated that the Upper Tribunal, in the appellant's previous appeal, had incorrectly applied the EEA Regulations 2016 since the appellant was not a family member of an EEA national, having never been issued with a residence card under regulation 18(4) on the basis of his durable relationship with his EEA national partner, and thus not being entitled to an protection from the Directive or the EEA Regulations. The respondent confirmed, in the Respondent's Review, that an extensive examination of the appellant's circumstances had now been undertaken in accordance with regulation 18(5) and it had been decided that the appellant should not be issued with a residence card as the extended family member of an EEA national for numerous reasons which were set out in detail. The respondent considered that the refusal to issue the appellant a residence card under Regulation 18(4) was therefore justified.

12.The appellant and his EEA national sponsor appeared at the hearing and gave oral evidence before the judge. The appellant was legally represented. He relied upon a skeleton argument in which it was asserted that the respondent's conclusion was disproportionate under Regulation 27 and was contrary to the best interests of the children.

13.Judge Suffield-Thompson considered that the previous Tribunals had failed to take account of the appellant's remorse which she found to be genuine and that the respondent had failed sufficiently to consider the best interests of the two children. She found it disproportionate for the appellant to have to leave his family alone in the UK or for the sponsor and the children to go and live in Pakistan or Lithuania and she concluded that the appellant was entitled to a residence card. She allowed the appeal under the EEA Regulations in a decision promulgated on 10 June 2022.

14.The Secretary of State sought permission to appeal against that decision on the grounds that the judge had failed to apply the correct legal approach. It was asserted that the judge was not entitled to consider Regulation 27(5) since the appellant was not a family member for the purposes of the EEA Regulations and was not entitled to protection under the EEA Regulations. It was also asserted that the previous decision

of the Upper Tribunal was wrong in its approach for the same reasons, as set out in the Respondent's Review, which the judge had failed to address.

15. Following a grant of permission to the respondent to appeal to the Upper Tribunal, the matter came before myself on 15 August 2023. Mr Tan appeared for the Secretary of State but there was no appearance by or behalf of the appellant. Having made appropriate enquiries and decided that the appeal could properly and fairly proceed in the absence of the appellant, I heard from Mr Tan and came to the conclusion that Judge Suffield-Thompson's decision contained material errors of law and had to be set aside, for the following reasons set out in my decision of 15 August 2023:

> "20. It is clearly the case that Judge Suffield-Thompson followed an erroneous approach in considering the appellant's appeal. Although she correctly identified the nature of the respondent's decision at [2], she went on erroneously to approach the case as an appeal against removal, as is apparent from [21] and [26] to [34], treating the appellant as being a person with an entitlement to protection under the EEA Regulations 2016 and considering proportionality under Regulation 27(5).
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> 21. It is correct, as accepted by the respondent in the Respondent's Review, that matters were complicated by the fact that the appellant had been treated by the Upper Tribunal, in his earlier deportation appeal, as being a person who was entitled to protection under the EEA Regulations, when he was not so entitled, having never been issued with a residence card under the EEA Regulations as a durable partner and thus not being a family member under Regulation 7(3). However that was a matter clarified in the Respondent's Review, where the respondent confirmed that discretion had never been exercised to issue a residence card to the appellant, and where the respondent then went on to conduct the extensive exercise required under Regulation 18(5) and exercised discretion against the appellant. As the grounds of appeal make clear, relying upon the case of Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558, the role of the judge was to consider that exercise of discretion. That involved an assessment which took account of the fact that the appellant was a person who had a valid deportation order issued against him and who had unsuccessfully appealed the decision to deport him. The judge did not do that. She did not engage with the Respondent's Review at all, but went on essentially to consider the issue of removal and proportionality afresh, departing from the decision previously made by the Upper Tribunal.
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> 22. Even if the judge had approached the appeal in the terms set out in the respondent's refusal decision as an appeal against a decision made under Regulation 24(1), it is still the case that she went astray by effectively re-making the decision of the Upper Tribunal rather than treating that decision as a starting point in accordance with the principles in Devaseelan. The extent of that error is to be seen, by way of example, where the judge, at [24], found that the previous Tribunals had failed to take into account the appellant's remorse which she herself found to be genuine, and simply ignored the Upper Tribunal's finding at [25] in that regard and gave no weight to the Tribunal's findings.
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> 23. For all these reasons I find the Secretary of State's grounds to be made out and conclude that the judge's decision cannot stand and must be set aside."

16. With regard to the disposal of the appeal, I considered that the appropriate course was for the matter to be considered afresh, following the correct approach to the decision made by the respondent, as clarified by the Respondent's Review, and taking the findings of Upper Tribunal Judge Bruce as a starting point. I considered that the most appropriate course would be for the matter to be retained in the Upper Tribunal and to be re-made at a resumed hearing, and I made directions for further evidence and skeleton arguments to be filed and served, so giving the appellant an opportunity to attend and participate in the re-making hearing.

17.Mr Tan filed a skeleton argument but nothing further was heard from the appellant. The Notice of Hearing sent to the appellant was returned undelivered. Having made enquiries again of the appellant's former representatives, Mamoon Solicitors Ltd, the Tribunal administration managed to obtain a new address for the appellant and the Notice of Hearing was re-served on him, together with a copy of my decision of 15 August 2023.

18.On 23 October 2023 the Tribunal received an email from R&A Solicitors stating as follows:

> "We write with reference to the above subject matter. Our above-named client has an upcoming appeal hearing on 24 October 2023 at Upper Tribunal Manchester.
> We write to confirm that we do not hold the authority to deal with this appeal.
> We thank you for your cooperation in this matter."

19.The matter then came before me for a resumed hearing on 24 October 2023. The appellant appeared with his partner, but without a legal representative. He advised me that he had signed an authority to act for R&A Solicitors but had not been able to pay their fee for representation, and neither had he been able to find any other legal representative who could assist him. Indeed I noted from the Tribunal's case records that on 6 April 2023 an email had been received from R&A Solicitors enclosing a letter of authority to act for the appellant, but that they had not then gone on to register themselves as the appellant's representative and had not filed a change of representative, as required.

20.I advised the appellant that the issue before me was a narrow one, namely whether there had been a lawful exercise of discretion by the Secretary of State when deciding not to issue him with an EEA residence card. I observed that this was an issue which would have been better argued by a legal advocate, but the fact was that the appellant did not have a legal representative. I asked him whether he could present any case to show that the Secretary of State's decision to refuse to issue him with a residence card was unlawful, based on the evidence before her at the time she made the decision. He was unable to offer anything other than to state that his daughter had since become a British citizen, a matter which I advised him was not really relevant to the matter before me. Mr McVeety kindly provided the appellant with details of organisations he may be able to approach for advice on further options open to him, but for the purposes of the appeal before me I told Mr Akhter that I would make a decision on the information and evidence I had before me.

Discussion

21.As I advised the appellant, the issues before me are narrow. In that respect, Mr McVeety relied upon the skeleton argument prepared by Mr Tan, which was set out in similar terms to the respondent's review that had been before Judge Suffield-Thompson but with which she had failed to engage. The first issue to be determined was whether the appellant was to be treated as a family member of his partner, Ms Petkeviciute, which as I said in my earlier decision of 15 August 2023 at [21] she was not, having never been issued with a family permit or residence card under the EEA Regulations on the basis of their durable partnership. The second issue was whether the appellant should be issued a residence card as per Regulation 18(4). In that regard, and as discussed in my decision of 15 August 2023, the Court of Appeal held in Macastena that it was for the Secretary of State to decide, following an extensive examination of the personal circumstances of the appellant, whether or not to issue

him with a residence card as a durable partner, pursuant to Regulation 18(4) and (5), and it was not open to the Tribunal to carry out that exercise of discretion.

22.Having undertaken that extensive examination in the respondent's review, and as set out in Mr Tan's skeleton argument, the respondent concluded that the appellant should not be issued with a residence card. That being so, the Court in Macastena made it clear at [25] of its judgment that the only role the Tribunal had was to determine if there had been an error of law in the respondent's exercise of discretion and, if there had, to then "remit for a decision to be taken on the legally correct basis."

23.There is no evidence before me to suggest that the respondent's exercise of discretion was undertaken erroneously or unlawfully. The reasons given by the respondent for refusing to issue the appellant with a residence card are set out at [10] of Mr Tan's skeleton argument and are, it seems to me, sound reasons. Essentially, the appellant is a person who has remained in the UK without any leave since September 2010, who has committed a range of criminal offences and has several criminal convictions, who is the subject of a deportation order issued in 2017 and the subject of a decision to deport him from the UK and whose removal to Pakistan has been found to be proportionate by an Upper Tribunal Judge.

24.As for any change in circumstances or developments since Judge Bruce made her decision, there are none of significance. The evidence which was before Judge Suffield-Thompson was essentially the same as that before Judge Bruce – there was certainly little by way of additional documentary evidence before Judge Suffield-Thompson. In so far as Judge Suffield-Thompson decided to depart from the conclusions of Upper Tribunal Judge Bruce, she clearly did so without regard to the principles in Devaseelan and simply substituted her own views on the basis of essentially the same evidence. She was evidently persuaded by the oral evidence of the appellant and his partner, but the factors upon which they relied, in particular their family life, the best interests of their children and their inability to relocate together as a family to Pakistan or Lithuania, were all fully considered by Upper Tribunal Judge Bruce.

25.Accordingly, having conducted the relevant extensive examination of the appellant's circumstances in line with the requirements of the EEA Regulations in Regulation 18(5) and having also, in the refusal decision, considered public policy grounds and proportionality, the respondent was fully and properly entitled to exercise discretion against the appellant on the basis that she did. For all these reasons, the decision to refuse the appellant a residence card followed a lawful exercise of discretion and was fully justified.

Notice of Decision

26.The decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 October 2023