Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/01352/2012

THE IMMIGRATION ACTS

Heard at Bradford Magistrates' Court	**Determination Promulgated**
On 11 October 2013	**On 22 October 2013**

Before

UPPER TRIBUNAL JUDGE FREEMAN
UPPER TRIBUNAL JUDGE RINTOUL

Between

MARIO MENDES MACHADO
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Draycott, Counsel, instructed by Dicksons Solicitors
For the Respondent: Mr Wardle, Presenting Officer

DETERMINATION AND REASONS

1 The appellant appeals with permission against the decision of the First-tier Tribunal (First-tier Tribunal Judge P J M Hollingworth and Mr G H Getlevog)

promulgated on 25 June 2013 dismissing his appeal against the respondent's decision made on 7 December 2012 to refuse him asylum and to make a deportation order pursuant to section 32 (5) of the UK Borders Act 2007.

2 The appellant is a citizen of Angola born on 11 December 1975. He arrived in the United Kingdom on 17 June 1996 and claimed asylum. That application was refused and his appeal against that decision was dismissed. He remained in the United Kingdom and was on 22 March 2002 convicted at Sheffield Crown Court of obtaining property by deception for which he was on 14 May 2002 sentenced to a total of two years' imprisonment and was recommended for deportation. A deportation order was signed.

3 On 22 November 2002 the appellant married Dawn Morris, a British citizen who, on 20 February 2003, became a citizen of the Irish Republic. The appellant then made an application for confirmation of his right of residence as the spouse of an EEA National, an application refused on 24 March 2003, it being concluded that his deportation would still be conducive to the public good.

4 Although an appeal against that decision was initially dismissed, his appeal was allowed by the Court of Appeal on 19 May 2005 (see Machado v SSHD [2005] EWCA Civ 597) to the extent that it was remitted to the Asylum and Immigration Tribunal (Mr C M G Ockelton, Deputy President of the AIT (as he then was) and Designated Immigration Judge Wynne) which allowed his appeal in a determination promulgated on 9 May 2006. They noted [6] that it was accepted that the appellant and his then spouse were qualified persons under the EEA Regulations. Subsequent to this decision the respondent revoked the deportation order against the appellant and issued him a residence card as confirmation of his right of residence with Dawn Morris. On 30 March 2011 he was divorced from his wife.

5 On 20 April 2010 the appellant was convicted at Sheffield Crown Court of harassment of Dawn Morris; paying for sexual services with a child aged 13-15; and failure to surrender to custody, offences for which he was sentenced to 18 months, two years and 36 days imprisonment, the first two sentences to be served consecutively. The sentence in respect of the first crime was on appeal later varied to 12 months.

6 On 16 September 2011, the respondent wrote to the appellant, explaining that he was liable to deportation and asking if he considered that any of the exceptions set out in section 33 of the UK Borders Act 2007 applied to him. He replied on 11 November, claiming that he faced persecution on return to Angola. The respondent considered that this constituted a claim for asylum.

7 On 17 November 2011 the appellant's then representatives. Irving & Co, wrote to the respondent, submitting that he fell within exception 1, that is

that his removal was contrary to articles 2, 3 6 and 8 of the Human Rights Convention. There is no indication that exception 3, relating to EU law, was invoked. Further submissions from the appellant's representatives followed, but it does not appear that they argued that the appellant's deportation from the United Kingdom was contrary to his rights under EU law.

8 On 7 December 2012 the respondent made a deportation order against the appellant pursuant to section 32 of the UK Borders Act 2007. The appellant lodged an appeal against that, accompanied by detailed grounds, averring that the decision was contrary to the United Kingdom's obligations under the Refugee Convention and the Human Rights Convention. It was not averred that the decision was contrary to the appellant's rights under EU law or not in accordance with the law.

9 The appeal against the respondent's decision was heard on 26 February 2013 and 13 June 2013 at Nottingham Magistrates' Court. The appellant was represented by Mr Barnfield of Counsel. There is no indication in the determination, or in Mr Barnfield's skeleton argument that any application was made to vary the grounds of appeal, or, that a submission was made that the appellant's deportation was contrary to his rights under EU law. While the panel noted [106] the submission by Mr Barnfield that the appellant had been issued with a residence card as the family member of an EEA national, there is no indication that this submission was developed or that it was submitted that the appellant had acquired the right of permanent residence.

10 In their determination, the First-tier Tribunal dismissed the appellant's claims that he was at risk on return to Angola of ill-treatment sufficiently severe to engage articles 2 or 3 of the Human Rights Convention or the Refugee Convention. They noted that it was accepted by his counsel that the appellant did not meet the requirements of the Immigration Rules [97] and concluded [118] that the appellant's deportation to Angola would be proportionate.

11 The appellant did not challenge the findings made in respect of the Refugee Convention or the Human Rights Convention, but only sought permission to appeal on the grounds that the First-tier Tribunal had erred:

(i) in failing to consider that the appellant had continued to enjoy a permanent right to reside in the UK under EU law, notwithstanding his divorce [3]; and,

(ii) in consequence, failing to consider whether his deportation was justified pursuant to regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

12 On 18 July 2013 First-tier Tribunal Judge Blandy granted permission to appeal on all grounds. The respondent replied to that, pursuant to Rule 24,

on 1 August 2013, submitted that the First-tier Tribunal had not erred, given that the issue of whether the appellant was entitled to a permanent right of residence had not been raised; and, in the alternative, that there was insufficient evidence to support the assertion that the appellant had acquired the right of permanent residence.

Submissions

13 Mr Draycott relied on his extensive skeleton argument, submitting that the First-tier Tribunal, having acknowledged that the appellant had been issued a residence card of five years' duration, had been put on notice that EU law was engaged, and, following the principle of effectiveness, should have enquired into the matter. He submitted also that the First-tier Tribunal should have concluded that the appellant had acquired permanent residence, his imprisonment notwithstanding. He also drew our attention to the difficulties the appellant faced in the circumstances of a marital breakdown in establishing that his ex-wife had been exercising Treaty rights.

14 Mr Wardle submitted that the FTT did not err in law, given that it had not been put to them that the appellant had acquired the permanent right of residence and that although it appears from the notes of the presenting officer who had appeared below that the issue had been raised with him by the appellant's counsel, it had not been raised in the hearing.

15 Mr Wardle submitted also that even had the FTT erred in law in considering this issue, this was not material as there was insufficient material before the court on which they could have made a finding that the appellant had acquired permanent residence, asking us to note also that in July 2007, the appellant had been sentenced to a term of imprisonment. As the law presently stands (see Ogunyemi (imprisonment breaks continuity of residence) [2011] UKUT (IAC) 164), that is the effect of this, notwithstanding the reference to the Court of Justice of the EU made in Onuekwere (imprisonment – residence) [2012] UKUT (IAC) 269, which has as yet not proceeded beyond the publishing of the opinion of the Advocate-General.

Discussion

16 It is established law that a tribunal or judge does not err in law in failing to make a finding in respect of a matter not put to him. In this case, despite Mr Draycott's submissions, he was unable to demonstrate that the assertion that the appellant had acquired the permanent right of residence under EU law was raised before the First-tier Tribunal. We find that it was not, and in doing so we note that this issue was not raised with the respondent in the numerous submissions made following the notification on 16 September 2011 to the appellant that he faced deportation, nor was it raised in the grounds of appeal despite the appellant's earlier success in appealing against a deportation order on the basis of EU law. The issue is

not raised in the skeleton argument served on the First-tier Tribunal, nor was any relevant case law adduced in the appellant's bundle.

17 As regards the principle of effectiveness, it is clear from the Court's case-law that it is concerned with the question whether a national procedural provision renders the exercise of rights conferred by the EU law on individuals impossible or excessively difficult. Its application is fact-sensitive, and we do not accept that it is applicable here where the appellant had not yet asserted that he is entitled to benefit from a right, in this case, the acquisition of permanent residence. Further, we do not accept that the case law of the ECJ establishes that in a context such as this, where a legally represented party has not raised an issue, that a Tribunal is required to raise it of its own motion.

18 We accept that the appellant is not currently precluded from raising this issue in a fresh application, but as he did not raise it previously in a notice pursuant to section 120 of the 2002 Act or otherwise, Mr Draycott's submission that we should entertain the issue given the one-stop appeal process, is not a matter with which we are concerned. Still less does that submission indicate that the First-tier Tribunal's determination involved the making of an error of law.

19 We do not consider that it was incumbent on the First-tier Tribunal to raise or consider the issue of acquisition of permanent residence. Even assuming that they should have done so, it is not arguable that any failure to do so constituted a material error of law for several reasons.

20 First, in the light of McCarthy v UK [2010] EUECJ C-434-09, it is now unclear that this appellant's ex-wife had been exercising Treaty rights in the United Kingdom, given the absence of any finding of her having exercised her right of free movement,

21 Second, were that hurdle overcome, it would have been necessary for the appellant to show that his ex-wife had, in any relevant five year period, been exercising Treaty rights. Had that period begun as early as October 2002 when they married, we consider that, as Mr Wardle submitted, there was insufficient evidence before the First-tier Tribunal on which they could have concluded that she had been a qualified person during the whole five year period.

22 While the AIT found in 2006 that the ex-wife was still a qualified person it does not follow that she continued to be such a person after that date, and the later the qualifying period starts, the longer the period for which there is insufficient evidence of qualification. It was for the appellant to adduce evidence to that effect and he did not do so, nor did he assert before the First-tier Tribunal that he was unable to do so.

23 Finally, the effect of Ogunyemi, unless and until Onuekwere changes it, is that the appellant could not have acquired the right of permanent

residence on which the application for and the grant of permission were based.

24 In summary, the First-tier Tribunal did not err by not considering whether the appellant had acquired the right of permanent residence, as that issue was not raised with them, nor was it submitted that regulation 21 of the EEA Regulations applied to the appellant. They were not under a duty to consider or raise these issues.

25 The First-tier Tribunal directed themselves properly as to the law and reached conclusions open to them and for which they gave adequate reasons. Accordingly, we find that the determination of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Conclusions

1 The determination of the First-Tier Tribunal did not involve the making of an error of law, and we uphold it.

Signed Date: 22 October 2013

Upper Tribunal Judge Rintoul