Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06110/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 December 2014	**On 12 January 2015**

Before

THE HONOURABLE MRS JUSTICE CARR
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

YLER PJETRI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel, instructed by Ozoran Turkan Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal brought by the Appellant against the determination of the First-tier Tribunal Judge, promulgated on 29 July 2014. By that determination the Judge

dismissed the Appellant's appeal against the Secretary of State's decision of 3 December 2013 refusing to issue the Appellant with residence documents as the spouse of a qualified person.

Background facts

2. The background facts can be summarised shortly so far as relevant. The Appellant is a national of Albania with a date of birth given as 8 March 1980. He says that he is lawfully married to a Lithuanian national ("the spouse") having been married on 13 August 2013 as evidenced by, amongst other things, a marriage certificate. It is said that they live together in London.

3. The Appellant has a minor child (born in 2011) from a previous relationship. He apparently remains in contact with that child.

4. The Appellant entered the United Kingdom clandestinely in 1998. His claim for asylum was refused. On 16 November 2001 he was convicted of assault occasioning actual bodily harm for which he was sentenced to a community punishment order with unpaid work and compensation order requirements attached. The Appellant was then convicted again, on 7 April 2009, for a serious offence under Section 18 of the Offence Against the Persons Act 1861. The conviction was for assault occasioning grievous bodily harm in relation to an attack committed in 2007. For this he was sentenced to four years custody. This was undoubtedly a serious offence. It was a cold and vicious attack on someone who was in no position to defend himself at the time.

5. Thus the Appellant's last offence was committed in 2007. He was on bail without incident from 2007 to April 2009. He was released on licence in 2011. A period of supervision thereafter expired on 8 March 2013. We are told that he has not offended again since 2007.

6. On 30 July 2012 the Secretary of State made a deportation order which came into effect on 21 February 2013 following the dismissal of the Appellant's appeal against that deportation order heard on 20 November 2012. Further representations of 11 March 2013 were treated as an application to revoke the deportation order. The application was refused and certified.

This application

7. In 2013 the Appellant also applied for a residence card on the basis of his marriage to an EEA national. On 3 December 2013 the Secretary of State refused that application on the grounds that, due to the Appellant's past criminal conduct, his removal would be justified on the grounds of public policy or public security in accordance with Regulations 20(1) and 21 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The Secretary of State was also not satisfied that the spouse was a qualified person, namely a worker.

8. We note that the Secretary of State accepted in terms in her reasons for refusal that the Appellant was married to the spouse. She maintained that acceptance in her later letter of 4 February 2014 albeit refusing to revoke the deportation order.

The hearing and determination below

9. On 29 January 2014 the Appellant lodged notice of appeal.

10. At the hearing below both, the Appellant, the spouse and her employer gave evidence. At paragraphs 24 to 26 of the determination the First-tier Tribunal Judge said this:

> "24. I remind myself that the onus of proof in this case rests with the Appellant to the civil standard of a balance of probabilities. It is also necessary to remind myself that the instant appeal is not against either the making of the deportation order or the refusal to revoke it. Those matters have been dealt what already and I must regard the decisions of my colleagues as my starting point.
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> 25. Having read the remarks of the learned recorder, I can only agree with him that the offence of which the Appellant was convicted was a very serious one. That view has been endorsed by my colleague at Taylor House and by Upper Tribunal Judge Reeds. On that basis alone, the refusal is correctly made under Regulation 20(1). However, in his evidence to me, the Appellant was noticeably vague about details of the offence and sought to minimise what had happened. The letter from the Probation Officer does not help as it does it does not indicate that she has ever met the Appellant. In my judgement the respondent was correct to refuse the card under Regulation 20(1).
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> 26. The evidence of as relationship between the Appellant and sponsor was not impressive. The Appellant is married to a Lithuanian, but had no knowledge of that country. The evidence of the sponsor was of lamentable quality. She differed from the Appellant as to the dates of their relationship etc. Her evidence as to her employment was incredible. She told me that she did have contracts of employment, but none were produced and Mr Dirsha told me that he did not bother with such."

11. The conclusion of the First-tier Tribunal Judge against those findings was that the Appellant had not placed before him sufficient credible evidence to show to the standard of proof required of appellants in cases such as these that he was entitled to a residence card. The appeal was accordingly dismissed.

12. The First-tier Tribunal Judge went on to consider the human rights aspect and dismissed the appeal under the Human Rights Act as well.

13. We note in passing at this stage that the First-tier Tribunal Judge appears to have proceeded throughout on the basis that no marriage certificate had been produced to him (see paragraph 20 of the determination). In fact there was a marriage certificate before him. We have seen a copy of that in the original bundle. There is no obvious explanation for the error of fact in this regard. Moreover, as we have already noted, the Secretary of State herself has acknowledged throughout the fact of marriage between the Appellant and the spouse.

Grounds of Appeal

14. On this appeal the Appellant raises three central grounds. The first ground is that the First-tier Tribunal Judge made what is described as a "fatal" error of law in failing to place the burden of proof on the Secretary of State and failing to apply the correct test under Regulations 20(1) and 21(5) of the EEA Regulations. It is pointed out that in no less than three paragraphs the First-tier Tribunal Judge stated in terms that the burden of proof throughout lay on the Appellant. It is said that this is simply wrong as a matter of law. Under Regulation 21 the burden of proof lies on the Secretary of State. Moreover it is said that the First-tier Tribunal Judge made no findings by reference to the criterion set out in Regulation 21(5) including the requirement that the personal conduct of the person concerned must represent a genuine present and sufficiently serious threat affecting one of the fundamental interests in the society. Additionally it is said that the rejection of evidence from the probation service was unreasoned and irrational and that there was no proper consideration of proportionality.

15. The second and third grounds relate to the question of whether or not the spouse was a qualified person for the purpose of the EEA Regulations : firstly whether or not there was a genuine marriage and secondly, whether or not the spouse was a worker. What is said for the Appellant is that the First-tier Tribunal Judge's reasoning as to the absence of genuine marriage was flawed and unreasoned. Additionally, in dealing with the question of working, he failed to heed witness statements that were available and other material evidence.

16. The Secretary of State formally opposes the appeal having lodged a Rule 24 response. However, no particular points are taken other than the First-tier Tribunal Judge was entitled to reach the conclusion on the facts that he did.

Decision

17. We remind ourselves that an appeal to this Tribunal only lies on the basis of an error of law (see Section 11 of the Tribunals, Courts and Enforcement Act 2007 and **R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982**).

18. The EEA Regulations so far as material provide as follows:

> "Regulation 17(1)
>
> The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under Regulation 15 on application and production of
>
> (a) a valid passport, and
> (b) proof that the applicant is such a family member"

19. By Regulation 7 a family member includes a spouse but (by Regulation 2) not a party to a marriage of convenience. By Regulation 6 a qualified person is someone who is an EEA national and a worker.

20. Regulation 20(1) provides :

> "The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health."

21. Regulation 21(1) provides :

> "In this Regulation a relevant decision means an EEA decision taken on the grounds of public policy, public security or public health."

22. Regulation 21(2) provides

> "A relevant decision may not be taken to serve economic ends."

23. Regulation 21(5) provides:

> "Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this Regulation be taken in accordance with the following principles:
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> (a) the decision must comply with the principle of proportionality
> (b) the decision must be based exclusively on the personal conduct of the person concerned
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one the fundamental interests of society
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision

(e) a person's previous criminal convictions do not in themselves justify the decision."

24. Regulation 21(6) provides :

> "Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

25. We turn then to the first ground of appeal. We are persuaded that the First-tier Tribunal Judge made a material error of law. Whilst the issue is not necessarily one to be framed in terms of burden of proof, there can be no doubt that it is for the Secretary of State to justify the correctness of her decision by reference to the factors identified in Regulation 21(5) and (6) of the EEA Regulations. The error in this regard cannot be said to be immaterial, not least since the First-tier Tribunal Judge referred to the burden of proof lying on the Appellant on all issues no less than three times.

26. Additionally, and perhaps more fundamentally, the First-tier Tribunal Judge made no proper assessment of the appeal by reference to the factors identified in Regulation 21(5) and (6) of the EEA Regulations. We note that he did conclude that the risk of re-offending was not as low as the probation officer thought, but that was a passing comment made only in the context of the separate human rights consideration.

27. In our judgment therefore the judge made a material error of law in his approach to the issues arising in the appeal.

28. That of course without more will not avail this Appellant given the findings in relation to the spouse. We turn therefore to grounds 2 and 3.

29. Grounds 2 and 3 challenging the First-tier Tribunal Judge's findings of fact are potentially more difficult. But we are persuaded that the findings are inadequately reasoned and unacceptably vague. The evidence is dealt with in a single paragraph as quoted above at paragraph 10. As for the finding in relation to marriage, as we have noted the Secretary of State herself had accepted there had been a marriage. Material evidence on the issue was ignored, fundamentally and most obviously perhaps the marriage certificate which, contrary to the First-tier Tribunal Judge's findings, was in evidence. Additionally, there was evidence of a wedding reservation, witness statements confirming the existence of a genuine relationship, a tenancy agreement and letters of support.

30. Although the judge stated at paragraph 21 of his judgment that he bore these documents in mind, we do not anywhere find any reasoned rejection for their genuineness or accuracy.

31. That then leaves the question of the finding as to whether or not the spouse was a worker. It is not entirely clear what the First-tier Tribunal Judge's finding on this point was. But we are persuaded, looking at the evidence available as a whole, and the brevity of the reasoning available, that insofar as he found that the spouse was not a worker, such finding was the product of inadequate reasoning such as to amount to a material error of law.

32. We share some of the Secretary of State's concerns in relation to the spouse's working status, as reflected in her refusal letter of 3rd December 2013. There are inconsistencies in some of the documentation available. On the other hand, the First-tier Tribunal Judge heard evidence from the spouse's employer and heard evidence from the spouse about her job as a cleaner in a bar and a waitress in a café. None of that is addressed in any detail in terms of being rejected as unacceptable or inadequate.

33. In all these circumstances, having found material errors of law, we set aside the decision below.

34. We then move to consider the correct way forward. In our judgment both sides, that is to say the Secretary of State and the Appellant, are entitled to a fresh and full hearing. Justice requires that such a hearing in our judgment should take place in front of the First-tier Tribunal. We accordingly remit this matter for that exercise now to be carried out.

Notice of Decision

The appeal is allowed. The matter is remitted for re-hearing before the First-tier Tribunal.

No anonymity direction is made.

Signed Date

The Honourable Mrs Justice Carr

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal, we have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

Signed Date

The Honourable Mrs Justice Carr