Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/37767/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 11 February 2016	**On 10 March 2016**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL ARCHER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KIMBRAD KYRON SKERRIT

Respondent

Representation:

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer
For the Respondent: Ms S Naik, Counsel, instructed by the Bar Pro-Bono Unit

DECISION AND REASONS

1. This appeal is not subject to an anonymity order by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party has invited me to make an anonymity order pursuant to rule 14 of the Tribunal

Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) and I have not done so.

2. The appellant (hereafter the Secretary of State) appeals against the decision of the First-tier Tribunal (Judge Martins) allowing the respondent's appeal against a decision taken on 10 September 2014 to refuse to issue an EEA residence card as the spouse of Gilda Shaunay Janine Agostini, a citizen of Italy exercising treaty rights in the UK ("the EEA sponsor").

Introduction

3. The respondent is a citizen of Trinidad and Tobago born in 1985. He was previously granted leave to remain until 31 May 2006 but thereafter failed to obtain indefinite leave to remain. By 27 August 2008 he had accumulated 13 criminal convictions and had overstayed for two years. He was notified of a decision to make a deportation order against him and unsuccessfully appealed that decision. He was appeal rights exhausted by 25 November 2008 and the deportation order was signed and served on the respondent by 29 December 2008. There were attempts to obtain an emergency travel document in December 2008 and a request to set removal directions in March 2009. Removal was scheduled for 9 April 2009 but was then deferred. Further representations were made in relation to the deportation order on 1 April 2009 but those representations were rejected on 8 April 2009. Removal was then scheduled for 12 May 2009 but a judicial review was lodged on 14 May 2009. The respondent was released on bail on 6 July 2009.

4. The respondent applied for a certificate of approval to marry the EEA sponsor on 30 September 2009 and that was issued on 29 March 2010. However, the respondent was then arrested for firearms offences on 21 April 2010 and was subsequently sentenced to 6 years imprisonment on 9 September 2011. By then he had already served 18 months on remand. He was released in December 2013 and married the EEA sponsor in June 2014.

5. On 1 May 2013, the Secretary of State again refused to revoke the deportation order. The respondent appealed that decision and attended an oral hearing at Hatton Cross on 13 November 2014. On 14 November 2014 First-tier Tribunal Judge Adio found that the Secretary of State had failed to consider whether the decision to refuse to revoke the deportation order was taken on public policy, public security or public health in accordance with regulation 21 of the Immigration (EEA) Regulations 2006 or whether to exercise discretion under regulation 17(4). The decision was therefore not in accordance with the law.

6. The respondent applied for an EEA residence card as a spouse on 26 June 2014. The Secretary of State accepted the respondent's identity and the relationship with the EEA sponsor but concluded that the respondent's criminality demonstrated very serious behaviour showing a blatant disregard for the laws of the UK. Firearms offences were particularly

serious and the respondent's extensive criminal record showed a propensity to re-offend. That highlighted the potential danger that the respondent posed to the society of the UK. He committed the offences whilst on bail and appealing a previous deportation order. His continued presence in the UK was considered to pose a genuine, present and sufficiently serious threat to the fundamental interests of society.

The Appeal

7. The respondent appealed to the First-tier Tribunal and attended an oral hearing at Richmond on 19 March 2015. He was represented by Ms Naik. The First-tier Tribunal found that the respondent had committed serious offences between the ages of 20 and 26. In 2012 he was assessed as being of medium risk to the public. However, the last prison sentence (during which the respondent was gravely ill with a rare disease and nearly lost his life) was a trigger for a process of change. All those with whom the respondent interacted in prison, his church, his family and in society generally testified to a real change in the respondent who was now determined to be a good husband and father to his twin daughters now aged 8. He had been in the UK since the age of 14. His children were British citizens. He did not represent a genuine, present and sufficiently serious threat to the fundamental interests of society. The decision not to issue a residence card was disproportionate.

8. In relation to Article 8, the judge found that the respondent had a rare disease which was life-threatening and could flare up again. That had led to both hips being replaced. If the illness flared up again then he would need expert highly specialist care. The waiting list in Trinidad and Tobago was 2-3 years. His doctor was of the opinion that he needed to remain in the UK or a country with an equivalent health service. The children were British and could not be expected to go to live in Trinidad and Tobago. There was an independent social workers report which stated that the attachment of the twins to their father should not be disrupted. The decision was disproportionate in relation to regulation 21(6) of the 2006 Regulations.

9. The judge allowed the appeal under the 2006 Regulations and Article 8 of ECHR.

The Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the First-tier Tribunal had erred in law by failing to adequately engage with the provisions of regulation 21(5) and had failed to give adequate reasons for allowing the appeal on proportionality grounds.

11. Permission to appeal was granted by First-tier Tribunal Judge White on 28 October 2015 on the basis that it was arguable that the judge erred in law by allowing the appeal under Article 8, considering Amirteymour and

others (EEA appeals, human rights) [2015] UKUT 466. No arguable error of law arose in relation to the 2006 Regulations.

12. Thus, the appeal came before me

Discussion

13. Ms Brocklesby-Weller submitted that the permission to appeal was not expressly limited and therefore all grounds were arguable. Ms Naik submitted that there was only one ground in the grounds of appeal and the Article 8 appeal was technically not before the First-tier Tribunal. The error was not material and no permission to appeal was granted under the 2006 Regulations. I have considered Ferrer (limited appeal grounds, *Alvi*) [2012] UKUT 00304 (IAC). I am satisfied that the grant of permission does not make it abundantly clear that permission was granted only in respect of Article 8 and no notice was sent out informing the Secretary of State of her right to make a further application to the Upper Tribunal on grounds that had been refused by the First-tier Tribunal. This was not a limited grant of permission and all grounds were arguable.

14. Ms Brocklesby-Weller then agreed that the judge had no jurisdiction to consider Article 8. The judge had referred to the recent prison sentence but there was no consideration of the fact that the stabilising factors had historically been present but had not prevented re-offending in the past. The respondent was someone who has had disregard for the laws of the UK. The judge did not give adequate reasons for finding that family members would prevent further offending. The OASYS report refers to a medium risk of re-offending and it was unclear how recent activities would be a preventative factor. The proportionality assessment was parasitic on the fact finding. There was nothing new in the fact finding in relation to proportionality.

15. Ms Naik relied upon her skeleton arguments and submitted that the Secretary of State had glazed over the fact finding. The facts were set out at paragraphs 21-96 of the decision. The last prison sentence was the trigger for change. There was a near death experience in prison and the respondent is now a changed man. The decision was based upon sound evidence and the appeal ground cannot be made out. The proportionality findings were relevant to regulation 21(5). The decision should stand.

16. I find that the judge has provided a comprehensive account of the facts and submissions which are fully set out at paragraphs 25-96 of the decision. The reasons for the decision under the 2006 Regulations are clearly set out at paragraphs 100-114 of the decision. They are summarised at paragraphs 7-8 above. I find that the reasons are adequate. The judge resolved all relevant matters in the evidence and it is clear from the decision why the Secretary of State lost the appeal. The Secretary of State has not identified any legal ground as to why the

findings and decision were not properly open to the judge. The fact that other judges might have reached a different conclusion is not sufficient. I find that the ground in relation to the 2006 Regulations lacks merit and is no more than a disagreement with the key findings of the judge.

17. I have also considered SSHD v Jacek Straszewski [2015] EWCA Civ 1245 and I am satisfied that the judge followed the approach set out by the Court of Appeal in that case in relation to consideration of regulation 21. The general proposition is that great importance is to be attached to the right of free movement which can be interfered with only in cases where the offender represents a serious threat to some aspect of public policy or public security. Save in exceptional cases, that is to be determined solely by reference to the conduct of the offender. General considerations of deterrence and public revulsion normally have no part to play in the matter. In those respects, the principles governing the deportation of foreign criminals in general differ significantly from those governing EEA nationals. There is nothing in the authorities to suggest that the judge's approach to the 2006 Regulations was wrong in law.

18. The respondent has had the benefit of the strong support of his family and witnesses, many of whom also attended the hearing in the Upper Tribunal. The respondent will be aware that any further offending will wholly change the factual matrix of this case and is likely to make the continued presence of the respondent in the UK completely untenable.

19. Both parties accepted that the judge erred in law by additionally allowing the appeal under Article 8 ECHR. The facts of this appeal are different from most residence card appeals because there is an extant deportation order against the respondent. However, deportation was not before the judge and First-tier Judge Adio had already found that the refusal to revoke the deportation order was not in accordance with the law. Amirteymour was cited with approval by the Court of Appeal in TY (Sri Lanka) v SSHD [2015] EWCA Civ 1233. I therefore agree that the judge erred at paragraphs 116-117 of the decision by considering Article 8 on a standalone basis.

20. Thus, the First-tier Tribunal's decision to allow the respondent's appeal under Article 8 ECHR involved the making of an error of law and that decision cannot stand.

Decision

21. Consequently, I set aside the decision of the First-tier Tribunal in relation to Article 8 ECHR. The decision to allow the appeal under the 2006 Regulations stands. The appeal of the Secretary of State in relation to the 2006 Regulations is dismissed.

22. The Secretary of State will now make a further decision in relation to revocation of the deportation order.

Signed  Date 1 March 2016

Judge Archer

Deputy Judge of the Upper Tribunal