Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07357/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 November 2018	**On 09 January 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR FETHI OUAHIB
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins instructed by EMAP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 26 May 2016 refusing to issue him with a residence card as the spouse of an EEA citizen exercising treaty rights in the United Kingdom.

2. The judge found in favour of the appellant and allowed the appeal. Subsequently at a hearing before Judge McWilliam on 27 April 2018 she set aside the judge's decision as being vitiated by an error of law. The matter was adjourned to be reheard in the Upper Tribunal. We sat as a

panel on 1 August 2018 and the matter had to be adjourned because of a point that had arisen in connection with the relationship between the deportation order of which the appellant is the subject and the EEA Regulations. We subsequently received helpful written submissions from Mr Collins and Mr Melvin prior to the hearing today.

3. The appellant entered the United Kingdom clandestinely in February 2010. On 9 April 2010 he was sentenced to six months' imprisonment when convicted of making false representations/possessing false identity documents. He was recommended for deportation. In August 2010 deportation was enforced and he was removed from the United Kingdom. He re-entered the United Kingdom in October 2010 in breach of the deportation order and has remained here since.

4. The appellant met Ms Lagssaibi, a French national, in 2013 and they subsequently entered into a relationship and began living together in May 2014. On 4 October 2014 the appellant came to the attention of the immigration authorities when he was attempting to marry his partner and he was detained in immigration detention. He made an application for a residence card on 8 October 2014, that application being refused on 8 December 2014. On 23 December 2014, whilst in immigration detention, he was allowed to marry his wife.

5. He made an application for a residence card on the basis of his marriage to an EEA national exercising treaty rights in the United Kingdom on 13 January 2015. He was released on bail by First-tier Tribunal Judge on 14 April 2015 and, having been released from immigration detention, was given permission to work in the United Kingdom and has worked thereafter. On 21 September 2015 he and his wife attended a marriage interview in Liverpool as a result of which they were found to be in a genuine relationship.

6. The judge in 2017 accepted without reasons that the appellant was the spouse of an EEA national exercising treaty rights, and found that he did not currently pose a serious threat to the United Kingdom. It was concluded that the terms of Regulation 21(5)(c) of the Immigration (European Economic Area) Regulations 2006 (hereafter "the Regulations"), were not met.

7. As noted above, this decision was set aside by Judge McWilliam noting that the First-tier Judge had not considered the issue in the context of there being an extant deportation order against the appellant, and also identifying a lack of reasoning as to the finding that the sponsor was exercising treaty rights, which constituted an error of law.

8. The written submissions before us and the oral submissions today concentrated on the issue we raised at the hearing in August 2018 concerning the interplay between and implications of the existence of the deportation order and the exercise of EEA rights by the appellant.

9. Mr Collins noted that it was no longer argued on behalf of the appellant that the existence of an extant deportation order acted as a "override" in this case. It appeared from his submissions that an application was made to revoke the deportation order in October 2014, though in his written submissions Mr Melvin disavowed on behalf of the Home Office any awareness of such an application ever having been made. Mr Collins argued the evidence indicated the appellant was not a genuine and present risk of any sort. There was no attempt to deport the appellant despite the Home Office being aware of his existence in the United Kingdom in defiance of the deportation order, since 2014. The appellant led a blameless life subsequent to his return to the United Kingdom and there were job references on file which had been referred to at the earlier hearing. The issue of proportionality would only become relevant, as held by the Upper Tribunal in MC [2015] UKUT 00520 (IAC) if the personal conduct of the person concerned was found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society under Regulation 21(5)(c). That was not the case here and accordingly issues of proportionality did not arise. On the facts of the case it would be wholly disproportionate to refuse a residence card.

10. In his submissions Mr Melvin maintained that the appellant posed a genuine and sufficiently serious threat given his complete disregard for United Kingdom law and his illegal entrance to the United Kingdom. He had previously been removed at public expense and had ignored the deportation order and returned. No doubt this had been done on the basis of false documents. He had made no attempt to regularise his status which had only come to light on his attempt to marry in 2014. The respondent did not further use public money in removing him given the likelihood that he would return illegally in the future. His representatives had always known the EEA Regulations included a revocation point and this required the person to leave the United Kingdom and so any effort to seek revocation while he was still in the country could not have been successful. The Immigration Rules were a fundamental element of UK society. It was unclear whether the reference to the decision in Decker which had been made at the previous hearing could assist him as there the appellant was applying on the basis of being an extended family member under Regulation 8 unlike the circumstances in this case. The Tribunal was invited to make a proportionality assessment considering all the facts and drawing conclusions from them.

11. By way of reply Mr Collins argued that Mr Melvin had made no reference to any present threat. He had come back to the United Kingdom unlawfully and no sensible reason had been given why the Secretary of State had not sought to deport him albeit aware of his residence in breach of the order since 2014. The original deportation order was not an EEA deportation order. The point from Decker fell away as there was no longer any reliance on the override point on behalf of the Secretary of State as this had now been conceded. It was relevant to note also that the Secretary of

State had conceded that the appellant's wife was exercising treaty rights and that he had a blameless history subsequent to his return to the United Kingdom. Although there was no documentation, this Tribunal was assured by the appellant's representative who would provide a statement if required that the revocation application had been made when claimed in October 2014. An application was likely to be made for wasted costs of today's hearing but that was a matter that could be dealt with subsequently.

12. We reserved our determination.

13. We have set out above the appellant's immigration history. This is a case that is governed by the 2006 version of the EEA Regulations. It is clear from Regulation 20(1) that:

> "The Secretary of State may refuse to issue, revoke or refuse to renew … a residence card … if the refusal or revocation is justified on grounds of public policy, public security or public health or on grounds of abuse of rights in accordance with Regulation 21B(2)."

14. It is also relevant to note Regulation 21 which states at 21(1)

> "In this Regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> …
>
> (5) 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 –
>
> (a) the decision must comply with the principle of proportionality
>
> …".

15. Also relevant is Regulation 25 which, where material, states as follows:

> "…
>
> (4) A person who enters the United Kingdom in breach of a deportation or exclusion order … shall be removable as an illegal entrant under Schedule 2 to the 1971 Act or the provisions of that Schedule shall apply accordingly.
>
> (5) Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the date of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that removal continues to be justified on the grounds of public policy, public security or public health."

16. The decision in this case was based on Regulation 20(1), noting the conviction of the appellant in April 2010 to which we have referred above and noting also that his conviction resulted in his deportation from the United Kingdom, and also on the basis that his wife was not exercising community rights. That latter point has fallen away.

17. On the former point the first issue we have to consider is whether the refusal is justified on grounds of public policy bearing in mind that the decision must comply with the principle of proportionality. It is also important to bear in mind Regulation 21(5)(c) that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Under (d) matters isolated from the particulars of the case or which relate to consideration of general prevention do not justify the decision; and under (e) a person's previous criminal convictions do not in themselves justify the decision.

18. The central issue in this regard is the weight to be attached to the deportation order against the appellant and the fact that he re-entered the United Kingdom in breach of that order and remained in the United Kingdom thereafter. In the particular circumstances of this case it seems to us that a decision to refuse on grounds of public policy bearing in mind the ongoing purpose of the deportation order is capable of amounting to a decision taken on grounds of public policy. The ability of a State to deport foreign nationals who have acted in breach of its laws is a fundamental interest of society which clearly merits protection and deserves considerable respect. The appellant chose to return to the United Kingdom in defiance of the deportation order and though it seems efforts were made to revoke the order in 2014, those were not with a response from the respondent and were not followed up subsequently by the appellant.

19. As was said in MC, it is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests to society that the issue of proportionality becomes relevant. In our view the speedy return to the United Kingdom by the appellant in defiance of the deportation order and the resumption of his life in the United Kingdom without making any effort, subject to the abortive effort in 2014 to have it set aside, does amount to a genuine, present and sufficiently serious threat affecting a fundamental interest of society, that being an ongoing threat to a fundamental interest in society in the importance of and significance of deportation decisions being respected.

20. However there is the remaining issue of proportionality. In this context we must consider as clearly material the failure on the part of the respondent, having been aware since 2014 of the appellant's illegal status in the United Kingdom, and allowing him to marry, to work in particular to do anything to remove him from the United Kingdom. No effort for example

appears to have been taken to put into effect the provisions of Regulation 24(5). Nor does it appear there is any ongoing action on the part of the respondent in respect of the deportation order. That in our view weighs heavily in the proportionality evaluation in this case. In the particular circumstances as here where though a person represents a genuine, present and sufficiently serious threat affecting a fundamental interest of society, nevertheless we conclude that the decision in the case is not proportionate bearing in mind the weakening of the public interest side of this equation by the respondent's inertia in the teeth of clear awareness of the appellant's unlawful presence in the United Kingdom for several years, to take any action. As a consequence we conclude that the decision to refuse the residence card is disproportionate, and the appellant's appeal is allowed.

Notice of Decision

The appeal is allowed.

No anonymity direction is made.

Signed Date: 04 January 2019

Upper Tribunal Judge Allen