



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/18765/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 25 February 2016**

**Decision & Reasons Promulgated
On 16 March 2016**

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE MANUELL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ARIAN MUCAJ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kerr. Karis Law Solicitors
For the Respondent: Mr T Wilding Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Secretary of State (to whom we shall refer as the respondent) against the determination of the First-tier Tribunal promulgated on 4 August 2015 in three appeals in which the First-tier Tribunal upheld the first appellant's appeal against a decision of the respondent to refuse him a residence card under the Immigration (EEA) Regulations 2006 (the 2006 Regulations) and the respondent's decision to seek the appellant's removal under Section 10 of the Immigration and Asylum Act 1999. A further appeal against the respondent's decision to refuse to issue him with permanent residence on the basis of marriage to an EEA national was abandoned at the outset of a hearing before the First-tier Tribunal.
2. The first appellant is an Albanian national born on 10 January 1981. He claimed to have first arrived in the United Kingdom as a minor in 1998 and applied for asylum which was refused in 2000. He was therefore removed to Albania in 2004. However no records exist in relation to that matter and the respondent does not accept that as a matter of fact.
3. However, he was granted entry clearance into the United Kingdom on 25 October 2005 on EEA family permit to join his then wife, a Swedish national. He was granted an EEA residence card as a non-EEA national in July 2006 valid until July 2011.
4. On 28 January 2008 the appellant was convicted at Inner London Crown Court of possession of cocaine with intent to supply. The sentencing judge's remarks are quoted at page 4 of the respondent's letter of 29 April 2009 setting out the reasons for a deportation order. It is clear that the sentencing judge viewed the appellant as a commercial supplier having all the trappings of a commercial drug dealer. He was found with £1,200 in his car, £685 cash at home, 50 grammes of cocaine, digital scales, plastic bags and cling film. The appellant was sentenced to three years imprisonment.
5. A deportation order was then made upon him which was intimated by letter of 29 April 2009. His appeal against that deportation was dismissed on 10 June 2009 and shortly thereafter he was deported. However he re-entered the United Kingdom sometime in that same year in breach of that order.
6. He was divorced from his Swedish wife in June 2011 but then submitted an application for EEA permanent residence on the basis of retained rights of residence. That application was refused in January 2014.
7. On 20 April 2014 the appellant married a Finnish national and submitted an EEA residence card application as her spouse. That application was refused. He appealed to the First-tier Tribunal against that decision.
8. On 14 April 2014 the appellant was served with a notice under Section 10 of the Immigration and Asylum Act 1999 as a person liable to removal as an illegal entrant since he had returned to the United Kingdom in breach of his deportation order. The appellant appealed that decision to the First-tier Tribunal also. On 8 October 2014

and 20 April 2015 the First-tier Tribunal sat to consider his appeals against these orders. As stated above, his representative did not proceed with the appeal against the decision to refuse the appellant permanent residence but insisted on his appeal against the refuse to issue him a residence card and the decision to seek his removal from the United Kingdom under Section 10 of the 1999 Act.

9. The First-tier Tribunal concluded that the Secretary of State's decision to refuse to issue the appellant with a residence card on the grounds under Regulation 20 of the 2006 Regulations on the basis of public policy or public security and the decision to seek his removal under Section 10 of the 1999 Act was not in accordance with the law and allowed those appeals. The judge concluded that the tests contained in Regulation 21(3) and (5) were not made out and, in particular, the personal conduct of the appellant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
10. The judge found that the appellant was married and in a genuine and subsisting relationship. There was no evidence that he had reoffended since his conviction of January 2008. There was no evidence that the appellant posed a threat in any way. He was found to pose a low risk of reoffending in the reports available from his trial and he had a genuine intention not to reoffend, demonstrated by his lack of convictions since 2008. The illegal entry into the United Kingdom did not, by itself, show that his behaviour poses a genuine and serious threat to the fundamental interests of society. The judge found that there was evidence of his social and cultural integration within the United Kingdom. He had worked for many years in the United Kingdom in a London club and appeared to be rehabilitated. He spoke good English.
11. In the assessment of proportionality the judge had regard to the single offence of which the Appellant had been committed, the lack of reoffending and the time that had passed since his conviction without any further offences. She found that the decision to remove him was disproportionate for someone who had a right of residence as a family member of an EEA national. Although the breach of a deportation order was serious misbehaviour clearly undermining the effectiveness of immigration laws, without more evidence of serious misconduct, she could not find that behaviour alone to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society so as to fulfil the requirements of Regulation 21(5).
12. Mr Wilding on behalf of the respondent restricted his appeal to an attack on the First-tier Tribunal's findings that the grounds set out in Regulation 21(5) had not been made out. He pointed out that in this case the appellant was entitled to the lowest level of protection as set out in Regulation 21(5) and (6). It was not a necessary criterion that the appellant had been convicted of criminality. The First-tier Tribunal had materially erred in their assessment of whether the appellant represented the serious threat envisaged by Regulation 21(5)(c). It was acknowledged by the Tribunal that he had been convicted of a serious offence. It was also accepted that

the breach of his deportation order was serious misconduct. No sufficient weight had been placed on the serious nature of the original conviction. Nor was that conviction properly weighted in the context that he had been in breach of a deportation order for five years during which time he worked illegally, deceiving his employers in respect of his illegal status. During that period he had remarried in the UK.

13. The failure to look at these matters cumulatively, the failure to recognise his continuing criminal behaviour in remaining illegally in the United Kingdom and deceiving his employers were material errors in law. The decision was an irrational and perverse one, notwithstanding the evidential position accepted by the First-tier Judge.
14. Mr Kerr for the appellant submitted that we should dismiss this appeal. There was no error of law. The judge had taken into account all relevant factors. The passage of time since the appellant's conviction and his integration into society thereafter by obtaining a long term job demonstrated that he was not a genuine, present and serious threat in terms of the Regulations. In any event, the Tribunal was entitled to come to that view.
15. We consider that the First-tier Tribunal materially erred in law in this case by failing to have proper regard to the cumulative effect of the conviction in 2008, the continuous nature of the criminal behaviour in breaching the deportation order and remaining in this country since 2009 on an illegal basis and his willingness to deceive his employers as to his illegal status. It appears to us that in paragraphs 35 to 37 the First-tier Tribunal Judge has artificially compartmentalised these factors and has failed, in the proportionality exercise, to recognise their cumulative weight.
16. It is stated in paragraph 35 that by itself the breach of a deportation order does not pose a necessary threat. In paragraph 36 she finds that the appellant is socially and culturally integrated within the United Kingdom because he is married and has worked here for many years. In paragraph 37 she considers that the "serious misbehaviour" of the breach of the deportation order cannot alone represent the necessary serious threat without more evidence of serious misconduct.
17. We have concluded that this fragmentative approach is materially erroneous and for these reasons allow the Secretary of State's appeal.
18. We announced our view at the end of submissions and invited Mr Kerr to make any further submissions on this matter after an appropriate adjournment. In taking advantage of that opportunity Mr Kerr submitted that we should find that the grounds contained in Regulation 21(5) were not made out. The two adverse features, namely the conviction and the breach of the deportation order did not, even taken together, amount to a sufficiently serious threat to a fundamental interest of society. The appellant had pled guilty to the offence, he had not committed any further offences and had been found to have fulfilled the intention not to reoffend. His

behaviour since had been positive in that he had been entrusted with a responsible job, as was attested to by the letter from his employers in the appellant's bundle.

19. The conviction was over eight years ago and he had entered the United Kingdom illegally six years ago. It could not be said that there was any genuine and presently serious threat in those circumstances.

Discussion and Decision

20. We have to consider whether the appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This must be based exclusively on the personal conduct of the appellant, and bearing in mind that his convictions alone do not justify his decision to remove him. We have had regard to his age, state of health, family and economic situation and his length of residence in the United Kingdom together with his social and cultural integration. No issue arose in respect of any severance of his links with Albania. We have to consider whether his removal, in all the circumstances, would be proportionate.
21. The relevant circumstances appear to us to be as follows. This is a 35 year old man who came to the United Kingdom in 2005 as the husband of an EEA national. He had no previous criminal history. He was convicted of a serious offence in respect of the supply of Class A drugs on the basis that he did so on a commercial basis. Having served a substantial period of imprisonment he was lawfully deported from this country. In blatant breach of that order he returned to this country and purported to establish a life here. Although not entitled to do so, he obtained employment once again, married for the second time and claimed residence rights as a result thereof.
22. He only obtained that employment by deceiving his employers as to his immigration status. Furthermore, at paragraph 34 of the determination it is plain that the First-tier Tribunal Judge found him to be wholly incredible when he asserted that his employer knew that the appellant had entered the United Kingdom illegally when he was re-employed.
23. Accordingly, there exists in this case not only the existence of a very serious criminal offence which strikes at the heart of ordered society but thereafter there is evidence of a determined breach on the appellant's part of an order deporting him by re-entering this country. In addition, there is evidence of a continuing breach of that order by remaining in this country and deliberate deception of his employers on a continuing basis in the failure to point out that his employers were continuing to employ him on an illegal basis and thus exposing them to sanctions. There is also the circumstance that he was found to be incredible in relation to his assertion that he had made his employers aware of his illegal status.

24. We have regard to his stable marital status but since he was married in London at a time when he ought not to have been there, the weight of this factor is diminished. We also note that he has remained in employment since January 2013. However, that employment was achieved by deception and again during a period where he ought not to have been in this country.
25. Accordingly, the life he has established in marriage and employment since his illegal return to the United Kingdom has been achieved in breach of immigration laws and in the course of committing a continuous criminal offence. In all the circumstances we are satisfied that the personal conduct of the appellant does represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. His criminal conviction coupled with his ability to disregard the deportation order and to deceive his employers in that respect seems to us plainly to establish the level of threat to society envisaged in the Regulations. The weight to be attached to his years of employment in this country is significantly undermined by the circumstances by which it was achieved.
26. Having regard to the cumulative nature of these circumstances we find it proportionate for the appellant to be removed in spite of the right of residence acquired as a family member of an EEA national.

Notice of Decision

27. Accordingly we will allow the appeal of the Secretary of State to the Upper Tribunal. The linked decisions of the First-tier Tribunal are set aside because of material error of law.

The original decisions of the First-tier Tribunal are remade as follows:

The decision to remove the appellant under Section 10 of the Immigration and Asylum Act 1999 is, we find, in accordance with the law.

His appeals under the Immigration (European Economic Area) Regulations 2006 and against his removal from the United Kingdom are accordingly dismissed.

No anonymity direction is made.

Signed

Date

Lord Burns
Sitting as a Judge of the Upper Tribunal