



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

Appeal Number: UI-2022-003941  
DA/00134/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 November 2022**

**Decision & Reasons Promulgated  
On 5 January 2023**

**Before**

**THE HONOURABLE MRS JUSTICE THORNTON DBE  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**ERGES KOLA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Clarke, Senior Home Office Presenting Officer

For the Respondent: Mr Lee of Counsel, instructed by Briton Solicitors

**DECISION AND REASONS**

1. The Secretary of State for the Home Department appeals against the decision of the First-tier Tribunal Judge (Davey). On 9 May 2022 the Tribunal allowed the appeal of Mr Kola, a national of Albania, against the decision by the Secretary of State, dated 10 February 2019, as a deportation order against him, pursuant to Section 5 of the Immigration (European Economic Area) Regulations 2016 SI (2016/1052), referred to for the remainder of this judgment as the EEA Regulations.

2. For ease of reference the parties are identified in this judgment as they were in the First-tier Tribunal i.e., references to the appellant are to Mr Kola and references to the respondent refer to the Secretary of State.

### **Background**

3. The appellant, Mr Kola, says he came to the UK in September 2012, although this is not accepted by the Secretary of State. On 8 June 2015 he married a Latvian national. He made an application in June 2015 to the Secretary of State as the spouse of an EEA national. He was issued with a residence card on 16 August 2016, valid until 16 August 2021. In 2016 and 2017 he engaged in conduct which led to criminal convictions, a point I will return to, which, in turn, led to the decision of the Secretary of State on 19 February 2019 to make a deportation order under the EEA Regulations.

### **The Legal Framework**

4. Pursuant to Regulation 23 of the EEA Regulations 2016, an EEA national who is in the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27;

Regulation 27: Decisions taken on grounds of public policy, public security and public health:

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by the Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the principles that are set out including—

- (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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the person and that the threat does not need to be imminent;
- (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; and
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration in the United Kingdom and the extent of P's links with P's country of origin.

### **The decision of the First Tier Tribunal**

- 5. The First-Tier Tribunal identified three issues relevant for determination:
  - 1) Could the appellant show that at the material time he was the spouse of an EEA national exercising treaty rights? If so;
  - 2) Had the respondent established that he represented a genuine, present and sufficiently serious threat so as to justify his removal from the United Kingdom pursuant to Regulation 27 of the EEA Regulations; and if so
  - 3) Was the proposed removal and exclusion proportionate under Regulation 27(5) of the EEA Regulations and Article 8 of the ECHR?
- 6. The judge addressed the criminal conduct of the appellant which form the basis of the deportation order as follows:
  - "4. The sentence imposed of 22 months' imprisonment by His Honour Judge Reeds QC reflected the slight complexities of the sentencing provisions and the judge concluded that there were aggravating features of significance and took into account such matters in order to reduce the length of custodial sentence.
  - 5. It is common ground that since his conviction for a motoring offence there have been no further offences pursued against the Appellant and he contends that he has not involved himself in any further criminality. The Appellant's explanation of these matters is that he essentially got into the company of the wrong people and that he has, aside from this period of criminality, been in the United Kingdom working lawfully and that he has seen the error of his ways and has not and will not reoffend. The Appellant clearly said that he came to the United Kingdom on economic grounds because of the family finances and outgoings and that he has since been in the United Kingdom, in employment. The Appellant's criminal history is set out in detail

in the Respondent's bundle which I have fully taken into account but do not find necessary to repeat within this decision."

7. The judge heard evidence from the appellant and his current partner, Ms Today, and her mother. The judge found that all three were reliable witnesses of fact and genuine in their intention that this should be a subsisting relationship made certain by marriage. Having considered the evidence the judge found that the appellant has formed a new settled relationship with his new partner who has attained British nationality and that she and her mother have been settled in the United Kingdom for a number of years. She is in full-time employment in the United Kingdom, supports the appellant and believes in the continuance of their relationship. The judge found clear evidence they wish to have children and because of difficulties are being given access to IVF treatment in the United Kingdom. The appellant's partner is a dental nurse and there was clear evidence of employment.
8. The judge concluded that the absence of further offending since November 2018, together with the evidence of the appellant working, his compliance with licence conditions and the evidence of his probation officer showed that the appellant is motivated and determined to change his past offending behaviour. He had, the judge said, had a material change in his personal circumstances since the time of the offending, which is represented by a new relationship. In conclusion, the judge decided that the respondent Secretary of State had not established that there was a genuine, present and sufficiently serious threat.
9. Turning then to the question of proportionality of any removal, the judge attached weight to; the length of time, notwithstanding his criminality, that he had been in the United Kingdom; his work and integration into life within the UK; the passage of time since his past offences, namely four years; his family life with his fiancée and their intention, not only to settle in the United Kingdom, but to raise a family here; the nationality of his partner and her being settled in the United Kingdom; the progress he has made since release and the prospects of his rehabilitation and the presence of the appellant's parents and future parents-in-law in the United Kingdom. The judge concluded it would be disproportionate to remove the appellant and were it necessary to do so, he would also conclude on the same basis that the appellant's claim would engage Article 8(1) of the ECHR and his removal would be disproportionate in relation to the objectives of Article 8(2).

### **Grounds of Appeal**

10. Three grounds of appeal are advanced by the Secretary of State:
  - Ground 1 is that the First-tier Tribunal made a material misdirection of law in mistaking the index offence for a motoring offence rather than a drugs related burglary committed during the operational period of

the suspended sentence. Before us Mr Clarke has also referred to the persistence of the offending;

- Ground 2 is that the judge failed to give adequate reasons for finding that the appellant does not pose a genuine, present and sufficiently serious threat and in considering his deportation would be disproportionate; and
- Ground 3 is that the First-tier Tribunal materially misdirected itself in law by allowing the appeal on Article 8 grounds when Article 8 has no application in an appeal under the Regulations.

## **Discussion**

11. We are not persuaded of any material error of law in the First-tier Tribunal's decision. Beginning with ground 1; we accept that the decision does not refer, in terms, to the index offending and it could have been clearer in this respect. Nonetheless the judge refers to the sentencing remarks of the Crown Court judge which set out clearly the relevant offending, including the activation of the suspended sentence for prior offending and to the appellant being subject to a community order at the time. The sentencing remarks also refer to the appellant being lightly convicted previously, before commenting that the index offending was serious. It is apparent from the analysis of the Crown Court sentencing remarks at paragraph 4 of the FTT decision, which include a reference to aggravating features of significance that the sentencing remarks were considered carefully by the judge. Further, at paragraph 5 of the FTT decision it is said that "the Appellant's criminal history is set out in detail in the respondent's bundle which I have fully taken into account but do not find it necessary to repeat within this decision".
12. Whilst we accept that on first reading, the reference in paragraph 5 to the motoring offence could give rise to confusion, it is apparent from the consideration of the chronology that the drug related burglary that the appellant was sentenced for in October 2018 was in fact committed in November 2017 and that the vehicle related offence post-dated the offending conduct. We have satisfied ourselves that this is the correct sequence of events having been taken through the relevant documents by Counsel for the appellant. There was, therefore, no error in the judge's reference in paragraph 5 to it being common ground that there had been no further offences since the appellant's conviction for a motoring offence.
13. On Ground 2, we are not persuaded that the judge failed to give adequate reasons. The decision explains and analyses the relationship with Ms Todaj subsequent to his offending, which the judge identifies as a material change of circumstances. Mr Clarke also submitted that the reference to a material change of circumstances amounted to an error in the FTT judge's chronology on the basis the relationship had been established before the offending conduct. However, the judge refers to there being a material change of circumstances since the offending as represented by the new

relationship with Ms Today. His comments are not therefore to be taken as literally as Mr Clarke submitted. The judge goes on to consider the progress made since the offending behaviour, including the evidence of the Probation Officer and he makes findings of credibility after hearing evidence from the appellant, Ms Today and her mother. We are not persuaded that the judge failed to engage with the index offending and the persistence of the offending in this regard. The judge had come to a view on that offending, which we have explained in our reasons on ground 1, namely that the offending had come to an end with the motoring offence and he therefore turned to consider subsequent developments, as befits the application of a legal test of a genuine, present and sufficiently serious threat.

14. In our view, Mr Clarke's submission on this ground amounted, in essence, to an attempt to reargue the merits, as did his submissions on proportionality, which were in any event acknowledged to be a subsidiary aspect of the argument. In this respect, the grounds of appeal isolate one strand of the judge's reasoning and seek to identify an error in it, which is to seek to reasons for reasons.
15. Ground 3: it was accepted on behalf of the Secretary of State that Ground 3 was parasitic on Grounds 1 and 2 and therefore we do not need to address it in detail given our decision on Grounds 1 and 2. Suffice to say, whilst we accept that the reference to Article 8 at the end of the judge's decision is unhelpful, we are not persuaded of any material error of law in this regard. In the Upper Tribunal decision of **Badewa**, relied on by the Secretary of State, the First-tier Tribunal referred to Section 117 of the 2002 Act in the context of an assessment under the EEA Regulations, which is not the case here. In any event, the Upper Tribunal in **Badewa** emphasised that the EEA Regulations are a self-contained set of legal rules, which is how the judge in the present case has treated them.

### **Decision**

16. Accordingly, for these reasons, the Secretary of State's appeal is dismissed.

No anonymity direction is made.

Signed: MRS JUSTICE THORNTON DBE  
2022

Date: 24 November

Mrs Justice Thornton DBE  
Sitting as a Judge of the Upper Tribunal