



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01791/2020

THE IMMIGRATION ACTS

Heard at Field House
On 15 October 2021

Decision & Reasons Promulgated
On 17 November 2021

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ADRIATIK MULGECI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Presenting Officer

For the Respondent: Mr S Muquit, instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. On 9 April 2021, First-tier Tribunal Judge Mill (“the judge”) allowed Mr Mulgeci’s appeal against the Secretary of State’s refusal to grant him a residence card as the extended family member of an EEA national. This is the Secretary of State’s appeal against that decision. To avoid confusion, I will refer to the parties as they were before the FtT: Mr Mulgeci as the appellant and the Secretary of State as the respondent.

Background

2. The relevant background was set out fully by the FtT and I need not rehearse it. The appellant is an Albanian national who was born in 1990. He claimed asylum in the UK in 2007, using a different name and date of birth. He was granted exceptional leave in that identity, seemingly as a result of his claimed age at the time.
3. The appellant committed criminal offences whilst he was in the United Kingdom. There were minor offences of violence and public order in 2008 and 2011 and then, on 9 December 2011, the appellant received a total of 30 months' imprisonment for supplying Class A drugs (cocaine) and possessing those drugs with an intention to supply. The appellant was convicted and sentenced in the same false identity he had given to the respondent and it was as a result of the false date of birth that his sentence was served in a Young Offenders Institution and not an adult prison.
4. Upon completion of that sentence, the appellant was deported to Albania. That took place on 23 March 2013. The deportation order remains in force, although an application has been made to revoke it.
5. The appellant returned to the United Kingdom in breach of the deportation order at the end of 2014. He remained under the radar for the next five years. On 11 July 2019, however, he applied for a residence card as the extended family member of an EEA national who was exercising her Treaty Rights in the United Kingdom. He gave his true name and supplied his Albanian passport. He was said to have been in a durable relationship with this Italian national since 2016 and to have cohabited with her since the autumn of that year. She was said to be employed as a dental nurse at a practice in Richmond.

The Secretary of State's Decision

6. On 7 February 2020, the respondent refused the appellant's application for a residence card. It is necessary to consider the structure and reasoning of the refusal letter in a little detail. The respondent set out the salient parts of the history at [1]-[11]. At [16], she noted that extended family members ("EFM") did not have the same automatic right to live and work in the UK in the same way as EEA nationals and their direct family members. At [17], she noted that an EFM must first meet the relevant relationship criteria and that an extensive examination of their personal circumstances was then undertaken, in which the respondent considered whether it was appropriate to issue a residence card.
7. At [18]-[30], the respondent gave reasons for concluding that the appellant had submitted insufficient evidence for concluding that the appellant was the unmarried partner of an EEA national. At [31], she left open the possibility that the relationship might be one of convenience.
8. Underneath [32] of the letter there appears the following, emboldened sub-heading: 'STAGE 4 Extended Family Member Consideration - extensive examination of personal circumstances'. Underneath the following paragraph, there is a further sub-heading, also in bold type, in the following terms:

'Consideration of the Appropriateness to Issue a Residence Card'. The first paragraph in this section of the letter is as follows:

In addition to your consideration under Regulation 8(5), as an extended family member this office must also consider as to whether it is appropriate in all circumstances to issue you with a residence card as the extended family member of an EEA national under Regulation 18(4) & 5 of the 2016 EEA Regulations (as amended).

9. The relevant regulations were then set out by the Secretary of State, together with an excerpt from a policy document. At [39]-[41], the respondent gave reasons for concluding that the appellant's claimed partner would not be deterred from exercising her free movement rights in the event of the appellant's removal from the UK.
10. There is then a further sub-heading in the letter: 'Consideration of criminality'. Under that sub-heading, before a further excerpt from the European Modernised Guidance, there is the following paragraph:

The Home Office has undertaken an extensive examination of your personal circumstances. In doing so it is reasserted that you have failed to demonstrate that you have a right to reside under the EEA Regulations, as such you **do not** qualify to have your criminal conduct consider [sic] under the protection of Public Policy (Regulations 24 and 27). [emphasis in original]

11. The respondent nevertheless went on to review the level of threat posed by the appellant, drawing on the crimes for which he had been sentenced by HHJ Cameron and the remarks made during that sentencing exercise. Her conclusions in that respect were as follows:

[50] It is concluded that your offence was so serious that you represent a genuine, present and sufficiently serious threat to society to justify the Secretary of State taking the decision to refuse to issue you a document as the claimed extended family member of an EEA national as it is clearly not appropriate to do so.

[51] This department will not issue you with a residence card for those reasons. As a result your application is refused under regulation 18(4) of the Immigration (European Economic Area) Regulations.

[52] You have failed to satisfy the conditions set forth in the Stage 4 Criteria of assessment [sic] an extended family member relationship under the EEA Regulations, as outlined in the European Modernised Guidance. As such, even if you had [sic] have demonstrated that you met the conditions set forth in Regulation 8(5) of the Immigration (EEA) Regulations 2016, your application would have also been refused with reference to 18(4) and 18(5) of the 2016 EEA Regulations (as amended).

The Proceedings Below

12. The appellant appealed to the FtT and his appeal was heard by the judge, sitting remotely at Hatton Cross, on 7 April 2021. The appellant was represented by counsel, Ms Akinbolu. The respondent was also represented by counsel, Mr Gazzain, who was wrongly thought by the judge to be a Presenting Officer.
13. The judge rejected an application for an adjournment by counsel for the respondent. It had been submitted that the appropriate course was to allow the respondent to consider the pending application to revoke the deportation order and that it would be premature to consider the appeal without a decision on that issue. The judge refused that application, holding that the existence of the deportation order did not of itself deny the appellant a right of residence. The judge then heard oral evidence from the appellant, his partner and her sister and submissions from counsel before reserving his decision.
14. The judge's decision is carefully structured and reasoned. I intend him no discourtesy in offering, at this stage, only an outline of his essential conclusions.
15. For reasons the judge gave at [24]-[29], he found that the appellant and the sponsor were in a durable relationship. At [30], he noted the extensive examination required by regulation 18(4)-(5) of the 2016 Regulations before such a person could be granted a residence card. At [31]-[34], the judge set out regulation 27(5) and the salient parts of schedule 1 of the 2016 Regulations. At [35]-[38], the judge turned his mind to the relevant background, including the appellant's use of a false name and other matters. At [39], he disagreed with the respondent's conclusion that the appellant's partner would not be deterred from exercising her right to free movement by the removal of the appellant.
16. The judge then turned to the appellant's criminality and to the appellant's assertion that he had reformed in the years since he had been caught supplying cocaine to undercover officers. At [49], the judge concluded that the appellant was 'no longer a genuine, present and sufficiently serious threat to the interests of society in the UK'. In reaching that conclusion, he had considered the appellant's own evidence, the absence of any evidence adduced by the respondent on the point, and a report from a Forensic Psychologist. At [50], he also found that the appellant's deportation would not be proportionate. He therefore allowed the appeal.

The Appeal to the Upper Tribunal

17. The respondent advanced two grounds of appeal. The first was that the judge had erred in refusing to adjourn the appeal on the application of counsel for the respondent. The second was that the judge had erred in law in considering regulation 27 of the 2017 Regulations.
18. In submissions before me, Mr Clarke sensibly abandoned the first of these grounds and concentrated on only the second. He did not seek to impugn the judge's consideration of the appellant's relationship but he submitted that the judge had erred from [31] onwards. With reference to Kunwar [2019] UKUT 63

(IAC), he submitted that the judge had erred in considering regulation 27 because the appellant had never been granted a residence card. It was only upon such a card being granted, submitted Mr Clarke, that an EFM such as the appellant acquired the protection from expulsion in regulation 27. Regulation 23(6) only applied to EEA nationals and their family members and it was only when the appellant fell to be treated as a family member as a result of regulation 7(3) that protection from expulsion was acquired.

19. In reliance on Macastena v SSHD [2018] EWCA Civ 1558; [2019] Imm AR 28, Mr Clarke submitted that it was not for the Tribunal to consider regulation 18(4)-(5) for itself, even where it had been considered by the SSHD in the decision under challenge. In the alternative, if it was for the judge to consider regulation 18(4)-(5), he had erred in the scope of that consideration, which should not have included the exclusion considerations in regulation 27.
20. Mr Muquit submitted that the judge had not erred. He had adopted the same structured approach as the refusal letter and had not exceeded his jurisdiction. It had clearly been necessary for the judge to consider the exercise of discretion under regulation 18(4)-(5) and it was through that prism that the exclusion considerations in regulation 27 became relevant.
21. The respondent was wrong as a matter of law, Mr Muquit submitted, to assert that the Tribunal was precluded from considering regulation 18 or regulation 27 in a case of this nature; the Tribunal was part of the procedural protection available to those in the position of the appellant. It was correct to assert that EFMs had no automatic right to reside in the UK but they did have a right to have their case considered by the Tribunal. It was clear from cases such as YB (Ivory Coast) [2008] UKAIT 62; [2009] Imm AR 18 that the exercise of discretion under regulation 18 was reviewable by the Tribunal and it would be contrary to the Treaties to hold otherwise. In sum, the judge had dealt with the matters which were legitimately 'on the table' as a result of the respondent's decision and had not erred in law in doing so.
22. In reply, Mr Clarke maintained his submission that regulation 27 had no part to play in a case such as the present. No residence card had been issued. The appellant had no right to reside in the UK and no protection from expulsion under the Directive. The right to reside only arose upon the residence card being issued, as was clear from the authorities.
23. I reserved my decision at the conclusion of the submissions.

Legal Framework

24. It is necessary to make reference to a number of provisions of the Immigration (EEA) Regulations 2016. The appellant contends, as we have seen, that he is the sponsor's extended family member under regulation 8(5), which requires him to be in a durable relationship with an EEA national.
25. Such a person does not have an automatic right to reside in the UK. A decision maker considering an application for a residence card from such a person must also consider regulation 18(4)-(5), which are as follows:

(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

- (a) the application is accompanied or joined by a valid passport;
- (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
- (c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security.

26. The corresponding provisions in the Immigration (EEA) Regulations 2006) were to be found at regulation 17(4)-5).

27. Regulation 23 concerns exclusion and removal from the United Kingdom. I need not reproduce it here, as no such decision has ever been made. Regulation 24 concerns the refusal to issue and renew and revocation of residence documentation. Only regulation 24(1) and 24(7) are relevant to cases such as the present and provide as follows:

(1) 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, or on grounds of misuse of rights in accordance with regulation 26(3).

(...)

(7) Any action taken under this regulation on grounds of public policy, public security or public health must be in accordance with regulation 27.

28. The corresponding provision in the 2006 Regulations was regulation 20.

29. Regulation 27 of the 2016 Regulations makes provision for decisions taken on grounds of public policy, public security and public health. For present purposes, the material parts of the regulation are as follows:

(1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) ...

(3) ...

(4) ...

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these 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 following principles –

- (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 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;
- (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 into the United Kingdom and the extent of P's links with P's country of origin.

(7) ...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

30. The corresponding provision in the 2006 Regulations was regulation 21. As the authorities cited below all make reference to the 2006 Regulations, the following table of equivalent provisions may assist the reader:

<u>Regulation sub-heading</u>	<u>EEA Regs 2006</u>	<u>EEA Regs 2016</u>
Issue of Residence Card	17	18
Exclusion and removal from the UK	19	23
Refusal to issue ... residence documents	20	24
Decisions on public policy (etc) grounds	21	27

Analysis

31. Despite my initial disposition towards the respondent’s arguments, I am persuaded by the submissions of Mr Muquit that the judge did not fall into error in proceeding as he did.

32. Mr Clarke’s characteristically able submissions distil, in substance, to the following points. Whilst he accepts that the judge was perfectly entitled to find

that the relationship between the appellant and the sponsor was a durable one, he submits that his enquiry should have finished at that point. The judge should not, Mr Clarke submits, have considered regulation 18(4)-(5) or regulation 27. The former was a discretionary consideration for the respondent, not for the Tribunal. The latter could not come into play unless and until the appellant had been granted a residence card as it was only at that point that he acquired protection against expulsion. I will address these points in turn.

33. It is quite clear that the Tribunal may evaluate for itself the considerations in regulations 18(4)-(5) in a case in which the respondent has done so in the decision under challenge. Regulation 18(4)-(5) is materially identical to regulation 17(4)-(5) of the Immigration (EA) Regulations 2006. Considering those provisions of the 2006 Regulations in FD (Algeria) [2007] UKAIT 49, a senior constitution of the Asylum and Immigration Tribunal concluded that:

The Tribunal has jurisdiction to review the exercise of the Secretary of State's discretion under the EEA Regulations applying to "extended family members". In such cases the Tribunal is not, therefore, confined to considering whether the decision was a lawful one.

34. That case was decided in 2007 and a great deal has changed since then, not least the jurisdiction of the FtT and the IAC under Part 5 of the Nationality, Immigration and Asylum Act 2002. Mr Clarke did not attempt to suggest, however, that any of those legislative changes had any effect on the ongoing application of FD (Algeria).
35. Mr Clarke did submit, rather tentatively, that Macastena v SSHD was to contrary effect but he was unable to press that submission when he considered what had actually been said by the Court of Appeal. At [25], under the sub-heading 'Can the Tribunal exercise a discretion when the Secretary of State has not?', Longmore LJ (with whom King and Coulson LJ agreed), reached the same conclusion as the Tribunal has in its reported decisions. The Court of Appeal's decision in that respect was that the Secretary of State must consider the exercise of discretion under regulation 17(4) first, and it is only when she has done so that the Tribunal can undertake that exercise for itself.
36. Macastena v SSHD did not establish, therefore, that the exercise of discretion under regulation 17(4) is unreviewable by the Tribunal; the relevant holding was simply that the Tribunal could only consider that issue in cases where the respondent had herself done so. There can be no doubt that the respondent considered that issue for herself in the decision under challenge. As Mr Muquit put it, what the Tribunal did thereafter was simply to consider what the respondent had put 'on the table'.
37. It was for that reason that Mr Clarke's primary focus was on the second of his submissions, that the Tribunal's consideration of regulation 18(4)-(5) was corrupted by consideration of regulation 27. This submission has a superficial attraction to it in light of authorities such as Kunwar and SSHD v Aibangbee [2019] EWCA Civ 339; [2019] Imm AR 979, in which it was held that an EFM may only accrue residence which counts towards the acquisition of permanent residence once they have been granted a residence card. In reliance on that

settled line of authority, Mr Clarke submitted that an EFM cannot rely on the Directive's protection against expulsion until they have been granted a residence card in recognition of their right to reside.

38. In my judgment, however, Mr Muquit has a complete answer to that submission. As he noted, there has been no decision to expel the appellant from the United Kingdom under regulation 23. The decision under challenge does make reference to regulation 24, however, as a basis for refusing to issue the appellant with the residence card he sought. The respondent does not seek to expel the appellant under regulation 23; she only seeks to refuse him the residence card which he applied for in the first place.
39. The situation is therefore directly comparable with the authority cited by the judge at [47] of his decision: R (Decker) v SSHD [2017] EWCA Civ 1752; [2018] Imm AR 420. A deportation order had been made against the appellant in that case and he had subsequently applied for a residence card as confirmation of his right to reside in the United Kingdom as the EFM of his sister. He had been granted just such a card, on the same basis, by the Irish authorities. The Court of Appeal considered the validity of the deportation order, which was made when the appellant was out of the UK. I need not consider what was said in that respect. The Court also considered the proper approach to a discretionary decision under regulation 17(4), however. The Secretary of State and the FtT had not considered whether the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK, and had confined their enquiry to regulation 17(4).
40. Hamblen LJ, as he then was, concluded that the FtT had erred in failing to consider whether the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. He noted at [49]-[50] that the respondent had not referred to regulation 21 (of the 2006 Regulations) but that she had made reference to the appellant's conviction in considering whether to exercise her discretion in his favour under regulation 17(4). It was, he said at [55], 'reasonably apparent' that neither the respondent nor the FtT had considered regulation 21 in their decisions. It was accepted by the respondent that the FtT had fallen into error in excluding regulation 21 from its consideration: [56].
41. At [58], Hamblen LJ held that the Deputy Judge of the High Court who had considered the application for judicial review had fallen into error in her approach to the decisions of the SSHD and the FtT. He said this:

The main difficulty with this approach is that failing to consider and apply the correct test is itself an error of law. In considering the impact of the Appellant's conviction the Respondent was required to have regard to Regulation 21 and whether the Appellant represented "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". She did not do so. On appeal the FTT judge was similarly required to have regard to those matters. He did not do so.
42. Lewison and Jackson LJJ agreed with Hamblen LJ.

43. Nothing subsequent to Decker v SSHD has cast any doubt on the correctness of these conclusions. The law is clear, therefore, that the respondent and the Tribunal on appeal may consider the discretion under (what is now) regulation 18(4)-(5) and that it must, in considering the significance of any convictions within that necessarily holistic assessment, adopt the approach required by (what is now) regulation 27. The Secretary of State and the Tribunal are therefore bound to consider in a case such as Decker v SSHD or the instant appeal, whether the appellant represents a genuine, present and sufficiently serious threat and whether the decision complies with the principle of proportionality. This is precisely what the respondent did. It is precisely what the FtT did, and there was no error in its approach.
44. It is accepted by the respondent that the judge reached sustainable conclusions in relation to the durability of the appellant's relationship. I have concluded that the judge did not fall into error in considering for himself the exercise of discretion under regulation 18(4)-(5) and that he was correct to consider, as part of that assessment, the requirements of regulation 27. I do not accept the respondent's submission that these were matters which fell outside the proper scope of the FtT's enquiry, and I consider Decker v SSHD to establish the contrary. In the circumstances, the FtT's decision to allow the appeal will stand.

Notice of Decision

The Secretary of State's appeal to the Upper Tribunal is dismissed. The decision of the FtT to allow the appellant's appeal shall stand.

No anonymity direction is made.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 November 2021