



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06284/2019

THE IMMIGRATION ACTS

Heard at Field House
On 1 March 2021

Decision & Reasons Promulgated
On 7 April 2021

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NASIR KHALIL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation

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

For the Respondent: Mr Mustafa, instructed by Briton Solicitors

This has been a remote hearing to which both parties have consented. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Introduction

1. For convenience, I will refer to the parties as they were designated in the First-tier Tribunal.

2. On 16 October 2019 the appellant, who is a citizen of Pakistan born in July 1977, applied for a residence card under the Immigration (EEA) Regulations 2016 ("the 2016 Regulations") to confirm that he is an extended family member of his partner ("the sponsor"), who is a citizen of Slovakia.
3. On 9 November 2019 the application was refused. Although the respondent accepted that the appellant was in a durable relationship with the sponsor and therefore was her extended family member under regulation 8(5) of the 2016 Regulations, it was not accepted that it would be appropriate in all the circumstances to issue him with a residence card.
4. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Cole ("the judge"). In a decision promulgated on 7 February 2020 the judge allowed the appellant's appeal. The respondent is now appealing against that decision.

Background

5. The appellant entered the UK as a visitor in February 2012. He remained in the UK after his visa expired.
6. The appellant and sponsor have been in a subsisting and genuine relationship since 2014 and they have two children, born in 2014 and 2018.
7. In 2013 the appellant met the sponsor. The sponsor was 15 at the time (20 years younger than the appellant). The appellant and sponsor underwent a religious marriage ceremony just four days after her 16th birthday. She became pregnant shortly thereafter. The appellant was arrested. It was accepted by the police that although the religious marriage had been one of convenience (entered into by the appellant solely to gain immigration status), the relationship had subsequently become genuine. The appellant was nonetheless convicted of assisting unlawful immigration and sentenced to 15 months' imprisonment. Judge Mort, the sentencing judge, stated in his sentencing remarks that:

"although [the appellant] deceived [the sponsor] initially and entered into [the religious marriage] purely for [his] own purposes to get round the Immigration Rules, the relationship [] developed and that is a significant factor in this case."
8. In November 2014 and again on May 2015 the appellant applied unsuccessfully for a residence card based on his relationship with the sponsor.
9. In February 2016 he claimed asylum. The application was unsuccessful.

10. In 2017 the appellant was served with a deportation order. His ensuing appeal was unsuccessful. In a decision promulgated on 1 October 2019 dismissing his protection and human rights appeal, Judge of the First-tier Tribunal Davies found, *inter alia*, that the effect of the appellant's deportation on the sponsor and their children would not be unduly harsh and would not breach article 8 ECHR.
11. On 31 December 2019 the appellant was deported from the UK.

Relevant Law

12. Extended family members are not automatically entitled to a residence card and the respondent must exercise a discretion to decide whether or not to issue them with one. How this discretion is to be exercised by the respondent is set out in regulations 18(4) and (5), as well as regulation 8(8), of the 2016 Regulations.

Regulations 18(4) and (5)

18(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.

18(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.

Regulation 8(8)

8(8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following –

- (a) the best interests of the applicant, particularly where the applicant is a child;
- (b) the character and conduct of the applicant; and

- (c) whether an EEA national would be deterred from exercising their free movement rights if the application was refused.

Decision of the respondent dated 11 November 2019 (“the refusal letter”)

13. In the refusal letter, reliance is placed on what is described as a casework instruction called the “European modernised guidance.” As noted by the judge in paragraph 29 of the decision, the document referred to by the respondent in the refusal letter is in fact the respondent’s guidance document titled: free movement rights: extended family members of the EEA nationals, dated 27 March 2019 (“the Guidance”). The respondent quotes from page 24 of the Guidance where it states that the decision maker must consider (i) whether the EEA national will be prevented from exercising their free movement rights if the extended family member’s application is refused; and (ii) the facts and circumstances of the relationship and dependency.
14. The respondent accepted in the refusal letter that the appellant and the sponsor are in a durable and subsisting relationship, and that the sponsor is currently exercising Treaty rights in the UK.
15. The refusal letter cites paragraph 33 of the human rights decision of Judge Davies, promulgated on 1 October 2019, where it was found that the effect of the appellants’ deportation on the sponsor did not reach the threshold of undue harshness even though the appellant’s “deportation will make life very difficult for her both in a practical sense that her partner shares childcare, makes it practicable for her to work, helps with decisions about the children but in addition is one half of a genuine and subsisting and it would appear a loving relationship”. Judge Davies also stated in the paragraph cited by the respondent that it was open to the sponsor and the appellant and children to relocate to Slovakia. The respondent noted in the refusal letter that the appellant’s circumstances have not changed since the decision of Judge Davies.
16. After considering the decision of Judge Davies and stating that little weight can be given to the appellant’s relationship which was developed when he was in the UK illegally and which was entered into under false pretences (taking advantage of his partner), the respondent stated in the refusal letter that the appellant’s partner would not be deterred from exercising her free movement rights should the appellant be removed from the UK.
17. The refusal letter considered the appellant’s criminal conduct and noted that he had been convicted of assisting unlawful immigration. After quoting at length from the sentencing remarks of Judge Mort, it states that due to the circumstances of the conviction, which relates to the relationship with the appellant’s current partner, it is not considered appropriate to exercise discretion in the appellant’s favour. The refusal letter also stated that the

offence was so serious that the appellant represents a genuine and sufficiently serious threat to society to justify refusing to issue a residence card.

Decision of the First-tier Tribunal

18. The judge directed herself at paragraph 16 of the decision that the issue to be determined was:

“[W]hether the respondent had undertaken an extensive examination of the personal circumstances of the appellant and whether the respondent’s exercise of discretion to not issue the appellant with a residence card was lawful.”

19. The judge heard evidence from the sponsor and her brother. The appellant, who had been deported on 31 December 2019, did not attend the hearing.

20. The judge noted that it was not in dispute that the appellant and sponsor are in a durable relationship.

21. The judge stated that the decision of Judge Davies concerned different legal issues: Judge Davies was considering article 8 ECHR and in particular whether the effect of deportation would be unduly harsh whereas this appeal concerned whether an extensive examination of the appellant’s personal circumstances had been undertaken as required under the 2016 Regulations.

22. The judge found that the respondent’s decision was legally flawed, for the following reasons:

a. The respondent did not refer to, or explain why she did not apply, the following “presumption” in the Guidance:

In a case where the applicant meets the definition of a durable partner, it is likely that to refuse a residence card would deter the relevant EEA national’s free movement rights. This is because it has been accepted the parties are in a long-standing and enduring relationship akin to marriage. You must however still consider all of the circumstances of the case before making a final decision on this.

b. The respondent relied on the findings of Judge Davies about “undue harshness” without recognising that undue harshness is not the test under the 2016 Regulations.

c. The respondent appears to not have recognised that the findings of Judge Davies that life will be very difficult for the sponsor in the UK without the appellant and that she could return to Slovakia are “clear indicators that the [sponsor] would be deterred from exercising her free movement rights if the appellant were refused a residence card”.

- d. When assessing the appellant's criminal conduct, the respondent did not look at all the relevant factors including that the appellant and sponsor were in a genuine relationship by the time the appellant was arrested, that they have two children, and that the application for a residence card was made at a time when the relationship was genuine and subsisting.
- e. There is no reference in the decision to the best interests of the appellant and to the best interests of his two children.

Grounds of Appeal and Submissions

23. The first argument advanced by the respondent in the grounds of appeal is that the judge conducted the hearing "on the wrong premise", as if she were dealing with a judicial review hearing. Before me, Mr Lindsay stated that he was not relying on this argument and that he accepted that the judge adopted the correct approach, which was to assess whether the respondent's exercise of discretion under regulations 18(4) and (5) had been undertaken adequately.
24. The second argument in the grounds submits that the judge failed to consider the fact that the appellant had already been deported due to his serious offence.
25. The third argument in the grounds of appeal is that the judge did not explain why the sponsor would not be able to exercise her free movement rights. The grounds make the observation that the appellant's deportation has not prevented the sponsor from working in the UK.
26. The fourth argument in the grounds submits that the judge was wrong to state that all of the personal circumstances were not fully considered in the refusal letter. It is noted that in the refusal letter consideration was given to the relationship between the sponsor and appellant, the fact that they have two children, and the details of the offence committed by the appellant.
27. The fifth argument in the grounds is that the judge misunderstood regulation 8(8) as it does not require consideration to be given to the best interests of the appellant's children. It is stated that, in any event, the children were considered in the broader extensive examination including the previous findings of the First-tier Tribunal, where it was found that the effect of deportation would not be unduly harsh for them.
28. At the hearing, Mr Lindsay argued that the judge's assessment of the respondent's exercise of discretion was flawed because the issue for the respondent to consider, when exercising discretion, was whether the sponsor would be deterred from exercising her right to free movement, and it was

plain that the respondent had done this adequately in the refusal letter. He highlighted that regulation 8(8)(c) refers to “deterrence” and maintained that the judge had improperly equated deterrence with merely making life more difficult. The finding of Judge Davies, which the respondent was entitled to rely on, was that life will be more difficult as a result of the deportation, not that the sponsor would be deterred from residing in the UK or otherwise from exercising her Treaty rights. Mr Lindsay also submitted that the judge was wrong to state that the relevant issues were not considered in the refusal letter.

29. Mr Mustafa, in summary, argued that the refusal letter did not contain an adequate examination of the appellant’s personal circumstances, as required under the 2016 Regulations, for the reasons given by the judge.

Analysis

30. Mr Lindsay and Mr Mustafa were in agreement that the judge approached the appeal correctly, by considering whether the respondent had adequately undertaken an extensive examination of the appellant’s personal circumstances that included examination of the factors set out in regulation 8(8). Those factors are (a) the best interests of the appellant; (b) the character and conduct of the appellant; and (c) whether the sponsor would be deterred from exercising her free movement rights.
31. In my view, the respondent’s assessment of all three of the factors in regulation 8(8) was inadequate.
32. First, even though Regulation 8(8)(a) requires consideration to be given to the best interests of an applicant, the refusal letter does not contain any assessment of the appellant’s best interests. The judge was therefore entitled to find that the respondent did not comply with her duty under regulation 8(8)(a). Mr Lindsay argued that there was no duty on the respondent under regulation 8(8)(a) to consider the best interests of the appellant’s children. That is correct, but the point does not undermine the judge’s finding at paragraph 40 that the respondent does not appear to have considered the best interests of the appellant.
33. Second, Regulation 8(8)(b) requires consideration to be given to the conduct and character of an applicant. However, the only aspect of the appellant’s conduct and character considered in the refusal letter is the fact that he committed a crime which relates to his partner. This crime is, of course, highly relevant to the appellant’s conduct and character, but it is not the only relevant consideration. The judge was, in my view, entitled to reach the conclusion that the assessment under regulation 8(8)(b) was inadequate both because the particular circumstances of the offence were not considered in the refusal letter (as set out by the judge in paragraph 38 of the decision) and

because other aspects of the appellant's personal circumstances, such as his relationship with his children, were also not considered.

34. Third, Regulation 8(8)(c) requires an assessment of whether an EEA national would be deterred from exercising their free movement rights if the application was refused. The respondent's assessment of this, in paragraphs 25 - 30 of the refusal letter, is plainly inadequate, for several reasons. First, reliance is placed on the conclusion of Judge Davies that the effect of the appellant's deportation would not be unduly harsh on his children without acknowledging that "unduly harsh" is not coterminous with deterrence from exercising free movement rights. Plainly, an individual might be deterred from exercising Treaty rights as a consequence of her partner being deported even though the effect of that deportation is not unduly harsh. Second, despite quoting in the refusal letter a paragraph of Judge Davies' decision where it was said that the appellant's deportation will make "life very difficult" for the sponsor in the UK, the refusal letter does not address whether the "very difficult" circumstances will deter the sponsor from exercising Treaty rights. Third, at paragraph 29 of the refusal letter the respondent states that little weight can be given to the relationship as it was entered into under false pretences and when the appellant did not have leave to be in the UK. This is given as a reason the sponsor will not be deterred from exercising her free movement rights. However, the appellant's status when the relationship commenced (and his conduct at that time) is of little, if any, relevance to whether the sponsor will be deterred from exercising treaty rights. Far more relevant to this question is the current state of the relationship including in particular the appellant's relationship with their children. However, the refusal letter does not consider this.
35. Accordingly, I am satisfied that the judge, for the reasons she gave, was entitled to find that the respondent did not undertake an adequate extensive examination of the appellant's circumstances. It therefore remains for the respondent to make a lawful decision in respect of the appellant's application for a residence card.

Notice of decision

36. The Secretary of State's appeal is dismissed.
37. The decision of the First-tier Tribunal did not involve the making of an error of law. The decision stands.

Signed

Dated: 1 April 2021

D. Sheridan

Upper Tribunal Judge Sheridan