



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04000/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 31 October 2013

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

CLAUDE TCHATCHOUA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Williams, Andrew Williams Solicitors
For the Respondent: Mrs Brewer, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Claude Tchatchoua, was born on 17 July 1964 and is a male citizen of Cameroon. By a decision dated 20 December 2012, the appellant was refused a residence card as confirmation of a right of residence under European Community

law as the family member of an EEA national exercising treaty rights in the United Kingdom. The appellant appealed against that decision to the First-tier Tribunal (Judge Upson) which, in a determination promulgated on 4 June 2013, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission, Judge Wellesley-Cole wrote:

It appears the judge overlooked the fact that the appellant raised Article 8 in his grounds of appeal and for that reason alone, I give leave. Whilst I do not find other grounds have merit, I do not rule them out.

3. As at the date of the hearing before the First-tier Tribunal, the appellant was living with his adult son. It was by reference to that residence and relationship that the appellant sought to confirm his right to reside in the United Kingdom as the family member of an EEA national. The respondent did not dispute the fact that the appellant met the requirements of Regulation 7 of the 2006 Regulations. The appellant accepted that he had entered the United Kingdom illegally but it was not clear when he had done so. The appellant had committed a number of criminal offences while in the United Kingdom. In respect of those offences, the judge found as follows:

- (i) Whilst the judge was aware that the appellant had been “very sorry” for his numerous driving offences (including driving with excess alcohol on two occasions and driving whilst disqualified) he did not accept that these could be explained away, as the appellant had sought to do, on the basis that the appellant had driven in order to assist a friend who was ill.
- (ii) The judge did not accept that the appellant had attempted to regularise his stay in the United Kingdom until the time of the present application. He did not accept the appellant had forgotten to do so.
- (iii) The judge noted that the appellant had entered on the sex offenders’ register for seven years in November 2006. He had been imprisoned for six months for a sexual assault on a female child under the age of 13 years in Snaresbrook Crown Court in October 2008. The judge found that the appellant was still subject to the sex offenders’ notification requirements at the time that he completed his application form for a residence card.

4. The judge noted the requirements of Regulation 20 and 21(5) of the 2006 Regulations:

20.—(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.

(2) The Secretary of State may revoke a registration certificate or a residence card or refuse to

renew a residence card if the holder of the certificate or card has ceased to have a right to reside

under these Regulations.

(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card or refuse to renew a permanent residence card if the holder of the

certificate or card has ceased to have a right of permanent residence under regulation 15.

(4) An immigration officer may, at the time of a person's arrival in the United Kingdom –

(a) revoke that person's residence card if he is not at that time the family member of a qualified person or of an EEA national who has a right of permanent residence under regulation 15, a family member who has retained the right of residence or a person with a

right of permanent residence under regulation 15;

(b) revoke that person's permanent residence card if he is not at that time a person with a

right of permanent residence under regulation 15.

(5) An immigration officer may, at the time of a person's arrival in the United Kingdom, revoke

that person's EEA family permit if –

(a) the revocation is justified on grounds of public policy, public security or public health; or

(b) the person is not at that time the family member of an EEA national with the right to

reside in the United Kingdom under these Regulations or is not accompanying that

national or joining him in the United Kingdom.

(6) Any action taken under this regulation on grounds of public policy, public security or public

health shall be in accordance with regulation 21.

....

21 (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;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society;

(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.

5. At [29], the judge wrote this:

It is clear that the appellant has a number of offences committed over a lengthy period and with a certain amount of regularity. The decision to refuse the appellant's application has, however, to be based on his personal conduct and the convictions are not capable, in themselves, of justifying the refusal. The appellant entered the UK illegally on his own admission. I find it is not possible to determine when that was. I find that the appellant is not a credible witness and therefore what he has to say about when he might have entered the UK is of no assistance. Indeed, even in these proceedings he has given different years for that entry. The convictions of the defendant show that he regularly drives whilst disqualified. What is more, he has been convicted on two occasions of driving with excess alcohol and on four occasions whilst uninsured. There is no evidence that he has ever passed a driving test or obtained insurance. I find that he clearly poses an on-going risk to other road users be they drivers or pedestrians. His latest conviction for driving whilst disqualified was on 28 February 2012 when he was sentenced to sixteen weeks' imprisonment. I find that the defendant does pose a present and sufficiently serious threat affecting a fundamental interest of society.

6. There are two grounds of appeal. The first ground is headed "Perverse Findings". The grounds assert that the judge had placed "so much weight" on the fact that the appellant had entered the United Kingdom illegally yet could not remember the date

when he had entered. The grounds repeatedly refer to “minor” driving offences and to the fact that the appellant was “only sentenced to six weeks’ imprisonment for his last driving offence”. The grounds assert that “the IJ has failed to show the appellant’s previous offending means that he is a serious risk to the public”.

7. I find the ground has no merit. The judge has directed himself appropriately to the effect that convictions “in themselves” cannot justify the refusal of the appellant’s application. He has correctly noted that the convictions provide evidence of the appellant’s serious disregard for the road traffic laws of the United Kingdom and, perhaps more importantly, that a pattern of behaviour which he has established (and the judge found is likely to continue) poses a serious threat to other road users. Given that it is not disputed that the appellant has driven vehicles having consumed excess alcohol and appears never to have taken the trouble of passing a driving test or obtaining insurance, I have concluded that that finding was open to the judge on the evidence. The judge has not simply dismissed the appeal on the basis that the appellant has previous convictions; he has sought to identify the characteristics of the appellant and his patterns of behaviour and has used evidence of his convictions, together with other evidence, to conduct that analysis. It was an approach which was not flawed by legal error. The grounds are, in effect, a disagreement with findings which were open to the judge. I would record also that it is clearly not appropriate to refer to motoring offences such as driving with excess alcohol as “minor”.
8. Further, the judge was clearly concerned that the appellant had failed to disclose that he had been convicted of a serious sex offence on a minor. The appellant was still subject to the sex offenders’ notification requirements (which he chose to ignore) when he made his application to the respondent. The judge was entitled to consider that conduct as adding to the threat which he poses to society.
9. The second ground is more straightforward. The appellant had appealed to the First-tier Tribunal on Article 8 ECHR grounds. The judge has failed to deal with the appeal on that ground. However, Mrs Brewer, for the respondent, submitted that, on the basis of the evidence before the judge, the outcome of the Article 8 ECHR appeal was not in doubt. At the time of the hearing, the appellant was living with his adult son and no evidence had been produced that there were any particular ties of dependency between these two men which would justify allowing the appeal on Article 8 ECHR grounds (see *Kugathas* [2003] EWCA Civ 31). At the Upper Tribunal hearing, the appellant claimed for the first time that he is in a relationship with a woman who has a child. There was no evidence of the nationality of the partner or the child. That relationship has only started since the date of the First-tier Tribunal determination. Mrs Brewer submitted that the First-tier Tribunal Judge should not be criticised for failing to have regard to facts which were not even in existence at the date of his determination.
10. I agree with Mrs Brewer’s submissions. Although Article 8 is referred to in the grounds of appeal to the First-tier Tribunal, it is clear that that ground was not argued in oral submissions before the Tribunal. Indeed, the appellant’s

representative's skeleton argument made no reference to Article 8 ECHR. There was before the Tribunal no documentary or oral evidence concerning the appellant's family life or private life in the United Kingdom. Further, although he is no doubt referring to the 2006 Regulations, the judge wrote at [31]:

Having due regard to all of the information before me, I am unable to say the decision of the respondent was disproportionate. I can find no reason to interfere with that decision.

11. Had the judge gone on to consider the appeal on Article 8 ECHR grounds, I am left in no doubt at all that the judge would have dismissed the appeal on Article 8 ECHR grounds. There were no submissions on Article 8 and no evidence of private/family life other than the fact that the appellant was living as a non-dependant in the home of an adult son. I agree with Mrs Brewer that it is inevitable, in the light of those facts, that the judge would have dismissed any Article 8 ECHR appeal. Therefore, whilst I find the judge erred in law by failing to deal with Article 8, I find that the error is not such that the determination of the First-tier Tribunal falls to be set aside. If the appellant considers that any new family life he has with any new partner will suffer interference if he is removed from the United Kingdom, then he should make the appropriate application referring to those new circumstances to the Secretary of State. So far as these proceedings are concerned, this appeal is dismissed.

DECISION

12. This appeal is dismissed.

Signed

Date 21 November 2013

Upper Tribunal Judge Clive Lane