



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

Appeal Number: IA/00830/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 19 October 2018**

**Decision & Reasons Promulgated
On 23 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

**MR SAID AITJILAL
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Akinbolu, Counsel

For the Respondent: Ms Z Kiss, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Ross dismissing his appeal against the respondent's decision to revoke his permanent residence card.
2. The appellant is a citizen of Morocco, born on 16 January 1967. He claims to have entered the UK in March 2001 with a visit visa. On 17 November 2003 the appellant married a French national and was issued with a residence card which expired on 14 April 2009.

3. He first came to the adverse attention of the authorities on 22 November 2004 for criminal offences for which he was subsequently convicted. In March 2009, the appellant and his wife separated and started divorce proceedings. On 6 April 2009, the appellant submitted an application for a permanent residence card which was refused on 18 September 2009. The appellant successfully appealed and was issued with a permanent residence card on 29 June 2010 valid until 29 June 2020.
4. On 3 November 2011, the appellant was convicted at Portsmouth Crown Court of six counts of handling stolen goods, ten counts of possessing etc false identity documents and two counts of attempting to remove criminal property from the UK. He was sentenced to a period of three years and six months' imprisonment.
5. On 29 March 2013, the appellant's custodial sentence ended. He was then detained in immigration detention and served with a notice of decision to make a deportation order. His appeal against the decision to deport him was dismissed by the FtT on 16 August 2013. On 25 January 2016 the respondent decided to revoke the appellant's permanent residence card. His appeal was allowed in a decision promulgated on 21 April 2017. Following the respondent's appeal to the Upper Tribunal, the appeal was remitted for a hearing de novo.
6. The respondent relied on two reasons for deciding to revoke the appellant's residence card. The first was that the appellant's marriage to his French national wife, as a result of which he was granted a residence card on 14 April 2009, and then a permanent residence card on 29 June 2010, was a marriage of convenience entered into for the purpose of obtaining residence in the UK. The facts relied on by the respondent in that that are that;
 - (1) the appellant married his EEA national spouse on 17 September 2003;
 - (2) the appellant has four children whose mother is also a Moroccan national and who was in a relationship with an EEA national around the same time as when the appellant was in his relationship with his French wife;
 - (3) two of the appellant's children were born whilst the appellant was still married to his EEA national wife;
 - (4) the appellant's third and fourth children were born after he was divorced from his EEA national wife.
7. The judge upheld the respondent's decision. He found the evidence of the appellant and his current partner in relation to how their relationship developed was confused, inconsistent and unreliable. He was satisfied from the evidence before him that Secretary of State had proved that the appellant's marriage to his EEA former spouse was a marriage of

convenience. He was also satisfied that the Secretary of State had reasonable grounds for suspecting an abuse of a right to reside and that it is proportionate to revoke the appellant's residence card for that reason. The revocation of the residence card does not of itself, require the appellant to leave the United Kingdom.

8. Onward appeals by the appellant to the First-tier Tribunal and to the Upper Tribunal against this decision by Judge Ross were refused.
9. The respondent's second reason for deciding to revoke the appellant's permanent residence card was that due to the appellant's criminal convictions, the decision to revoke his residence card is justified on the grounds of public policy and security. The judge upheld the respondent's decision. upholding the Secretary of State's decision.
10. The judge stated at paragraph 30 that in relation to the appellant's criminal offending, his starting point is the decision of the FtT promulgated on 16 August 2013. That appeal which was against the decision to deport the appellant proceeded on the accepted basis that the appellant had achieved a permanent right of residence in the UK. Accordingly, the FtT in 2013 carefully considered whether there were "serious grounds of public policy, public security or public health" under Regulation 21(5) of the EEA Regulations 2006 which justified the appellant's deportation.
11. The judge made the following findings:

"31. I note, as set out in paragraph 36 of the FtT determination (quoting from the NOMISS probation report, that the appellant "had committed 36 offences on seven different occasions, including twelve fraud, thirteen theft, two relating to the administration of justice and ten miscellaneous offences. He demonstrated an anti-social attitude towards the public and the community with a clear escalation of the seriousness of offences and although he claimed remorse in a letter he showed no remorse at the time. He had not really admitted his involvement. He had committed the offences to make money and had said in his letter that he had debts and financial trouble. The respondent considered that there may be an increased risk of reoffending from this quarter. Besides this there was an established pattern of repeated acquisitive offences. He had not previously been deterred".

32. At paragraph 37 of its determination, the FtT recorded,

"The appellant claims going to prison was a shock to his system and he missed his family and his present intention is to turn a new leaf. Supported by the learned Crown Court judge, the probation officer and the NOMISSI offender manager we do not consider the appellant can be taken at his word. The offender manager described the appellant as manipulative, particularly with regard to immigration and identity. He was married in a different name and had been discovered with a number of aliases, including his present

name with a different date of birth. The appellant is an intelligent criminal who has been educated to a high standard. He told the offender manager that he had gained a degree in agriculture and that he fluently speaks French, English, Arabic and can converse in Spanish and Italian. Should he have wished to undertake lawful employment we consider that he could easily have managed to do so; although claiming to have been a baker and building worker there is no documentary evidence in support of it. We have formed the view that he is a professional criminal."

33. At paragraph 42 of its determination, FtT stated,
- "Nevertheless, considering the question of whether this man should be tolerated in the UK for the sake of his children, we regret to find that he should not. The children would be better off not brought up in constant contact with such a grossly dishonest individual who plainly has no morals or scruples and who is ready to exploit false identities, false passports, false bank cards, trading in Morocco for cash to sell doubtless illicit goods at huge profit in the UK. We acknowledge that emotional ties with young children will be partially broken but we consider that this is required for the good of society and to a lesser extent for the good of the children themselves. If he keeps in touch by Skype and other electronic means the children will to a degree be insulated against his exploitive dishonesty. We consider that if the appellant put his mind to (if it be true that he has a degree in agriculture and speaks many European languages) he would be able to get a job and would be able to have the family to Morocco to visit him".*
34. *I have had regard to the authorities of SSHD v Straszewski [2015] EWCA Civ 1245 and MC (Essa principles recast) Portugal [2011] UKUT 520 (IAC). I am reminded in the judgement of Straszewski, that it would be wrong to equate the position of an EEA national to that of any other foreign criminal whose removal is required under section 32 of the UK Borders Act 2007. Because of the nature of this appeal, I have to treat the appellant as a person with the benefit of the protection of the 2006 EEA Regulations, notwithstanding that his residency was obtained by abuse of rights.*
35. *In paragraph 12 of the judgement, I am also reminded that in a case where the removal of an EEA national would prima facie interfere with the exercise of his Treaty rights, it is for the member state to justify its action. At paragraph 14 of the judgement it is stated, "On the face of it, therefore deterrence, in the sense of measures designed to deter others from committing similar offences, has of itself no part to play in a decision to remove the individual offender. Similarly, it is difficult to see how a desire to reflect public revulsion at the particular offence can properly have any part to play, save, perhaps in exceptionally serious cases. As far as deterrence is concerned, the CJEU has held as much in Bonsignore v Oberstadtdirektor der Stadt Koln.*

36. *In paragraph 24 of the judgement, "it would therefore be unwise, in my view. To attempt to lay down guidelines. In the end, The Secretary of State must give effect to the Regulations, which themselves must be interpreted against the background of the right of free movement and the need to ensure that derogations from it are construed strictly. In that context, it is worth noting that even in a case where it is considered that removal is prima facie justified on imperative grounds of public security, the decision maker must consider, among other things, whether the offender has a propensity to re-offend in a similar way".*
37. *There is no doubt that the appellant has amassed an appalling criminal record. I have to be satisfied that the appellant's conduct represents a genuine, present and sufficiently serious threat to the public. The appellant's criminal offending began in 2004, continuing up to 2011 when he was sentenced to a total of 3 years 6 months imprisonment. The appellant's appeal against the deportation decision was dismissed in 2013. It is true that the appellant has not re-offended since his release in 2013. It is true that the appellant has not re-offended since his release in 2013, however the appellant also had a similar gap in offending between 2006 and 2010. Further, it is not surprising that the appellant has stayed out of trouble given that he was on license until 2014 and also because he knows that the Secretary of State wishes to deport him.*
38. *I have carefully considered the Psychological and Social work reports in the appellant's bundle. The opinions of the Psychologist and Social Worker rely largely on whether the appellant has been truthful with them and presented an honest account of his current attitudes. I am unable to give any significant weight to the Psychologists opinion that the appellant has rehabilitated himself, given the conflicting probation assessments of him being a low to medium risk of reoffending and given the fundamental dishonesty and manipulative behaviour demonstrated by him. I find that if allowed to remain in the UK, the appellant will revert to criminal offending as a means of making easy money as he has persistently done in the past.*
39. *In all of the circumstances, I am satisfied that the appellant's offending is sufficiently serious, such that he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.*
40. *The decision to revoke the appellant's residence card is also, in my judgement proportionate. The immigration status of the appellant's current Moroccan national partner and their children will no doubt have to be investigated, given the reasons for the revocation of the appellant's residence card. All of the appellant's children were born in the United Kingdom. Whilst they are said to be British Citizens, even if their citizenship status is in doubt, three of the children have lived here for more than seven years. I also find, as did Judge Glossop, that the children's best interests are to be looked after by their mother. I find that the children's best interests do not require their father to remain*

in the United Kingdom. Furthermore, I have not been provided with any evidence as to why the appellant's wife and children could not relocate to Morocco to be with the appellant, given the close ties which the family have maintained there".

12. The appellant was granted permission to appeal on grounds 1 and 2. The first ground argued that there was an error in approach to the judge's analysis of the risk of re-offending. It was submitted that at the date of the hearing before the judge it had been six years and nine months since the appellant's arrest on 26 June 2011 and since then and since his release from prison in 2013, the appellant had not re-offended in any way. In support of his contention that he did not constitute a present risk of re-offending, the appellant adduced evidence inter alia in the form of a psychological report from Susan Pagella, a Consultant Psychologist. It was argued that the judge's approach to Miss Pagella's report amounted to an error of law. The judge had stated that he was unable to attach any significant weight to Miss Pagella's conclusion that the appellant is of low risk of reoffending as he has rehabilitated. The judge gave three reasons for this; firstly, because the report relied largely on whether the appellant had been truthful, secondly, because there are conflicting probation assessments that is either of low or medium risk of re-offending and thirdly that he had demonstrated dishonest behaviour in the past. The grounds argued that the judge failed to consider Pagella's professional assessment of the appellant's non-verbal communication, her application of an established psychological model to his case and the evidence (such as engagement whilst in prison) that came from sources rather than the appellant.
13. Ground 2 argued that the judge erred in approach to his analysis of proportionality at paragraph 40. It was argued that the judge failed to take into account the findings of Pagella and Jones (social worker's report) which states that the appellant enjoys a loving, positive and mutually beneficial relationship with his children. To dismiss Jones' evidence as simply based on what she has been told by the appellant is a clear error of law.
14. Ms Akinbolu relied on the two grounds of appeal. She said that the decision to revoke the appellant's residence card under Regulation 25 must meet with the principles of proportionality; the judge must be satisfied that it is proportionate in all the circumstances to revoke it. She said that was the nub of the two grounds.
15. She said the challenge in respect of the first ground is that the judge refused to attach any weight to Pagella's conclusions because he said it was reliant on the truth of what the appellant said. Ms Akinbolu said that the expert carefully set out the appellant's criminal offending, her own assessment of his demeanour, his behaviour in prison and since his release and various other factors and expressly concluded for herself the truthfulness of the evidence as to how it suits with the history of the appellant. She submitted that it was unlawful to dismiss Pagella's

conclusions. Ms Akinbolu said the judge relied on the history of the offences which was wrong because he had to look at what the present position is.

16. As regards ground 2, Ms Akinbolu submitted that Miss Jones is an independent social worker. The judge was dismissive of her report again because he said it was based exclusively on evidence provided by the appellant. She said this is not properly sustainable because the social worker pointed to observations following her visits and interview with the appellant, his partner, the children's schools and other factors.
17. Ms Akinbolu submitted that both errors were material because they weighed into the proportionality assessment. The impact of dismissal is that the appellant will be removed. If the decision is proportionate it is to be assessed on current risk and the adverse impact it would have on the family. The judge failed to properly consider the accounts of the expert report.
18. Ms Akinbolu asked that the decision by the judge be set aside and remitted for fresh consideration because the findings of fact as to his relationship with his family need to be remade.
19. Ms Kiss submitted that Upper Tribunal Judge Freeman who granted permission on the two grounds found that the finding that the marriage was a marriage of convenience, was sustainable. There is no arguable error on this point. She said that the Reasons for Refusal Letter took a belt and braces approach to revocation as did the judge. As the marriage was always a marriage of convenience, the appellant is no longer an EEA national. This is because he is no longer the spouse of an EEA national under Regulation 2 and Regulation 23 of the EEA Regulations. If this was a marriage of convenience, it means that the appellant has never been an EEA person. Therefore Regulation 21 is irrelevant but the judge considered it anyway. (I agree).
20. She submitted that the appellant's current partner is now a British national and so are the children. Before Judge Ross she had permanent residence because of the marriage to an EEA national. She was successful in her appeal against revocation so the permanent residence card was maintained. So in respect of proportionality, the appellant has never been a genuine spouse of an EEA family member. This needs to be taken into account in terms of proportionality.
21. Ms Kiss submitted that Judge Ross took account of the findings made by FtT Glossop, building up the case in the light of **Devaseelan**. That is the background of his criminal behaviour. When Judge Ross looked at it, he considered the update given by Miss Pagella. Miss Pagella said she had seen the appellant for two hours in 2013, two hours at home and one hour on the phone. During the four assessments over a two-year period, Miss Pagella said the appellant presented as highly remorseful, empathic and

psychologically minded. Miss Pagella listed post sentencing indicators which she said bode well for his rehabilitation and reintegration into society, continuing to take full responsibility for his partner and their four children. Ms Kiss submitted that at paragraph 37 Judge Ross said the appellant may not have reoffended, but on the other hand the appellant had a similar gap in offending between 2006 and 2010. Further, it is not surprising that the appellant had stayed out of trouble, given that he was under licence until 2014 and also because he knows that the Secretary of State wishes to deport him.

22. Ms Kiss submitted that Judge Ross's decision does not disclose an error of law because he took into account all the circumstances of the appellant's case.
23. In reply, Ms Akinbolu submitted that in this case the deportation order was made in 2012. It was upheld in 2013. He has not committed any further offences since 2013 and yet reliance has been placed on the 2013 decision as opposed to the reports of two experts saying that the appellant has reformed and he is at low risk of reoffending and is a vital part of his children's lives. Judge Ross did not believe him because he found the appellant to be untruthful and said that the experts had been manipulated in some way. Therefore, we cannot place much weight on the judge's decision.

Findings

24. With regard to the decision to revoke the appellant's residence card, I accept Ms Kiss' submission that as the appellant has been found to have engaged in the marriage of convenience, this meant that his marriage was always a sham. This meant that he was no longer an EEA national. I conclude that on this evidence, the decision to revoke the appellant's residence card was one that the Secretary of State was entitled to make. The appellant was not a spouse of an EEA national in accordance with Regulation 2 of the EEA Regulations. His partner is a British citizen and so are the children.
25. I shall deal with ground 1. This challenges the judge's finding at paragraph 38. It is said that Miss Pagella concludes in her report that the appellant is of low risk of re-offending. Miss Pagella sets out her reasoning at length in the body of her report. In her assessment of the genuineness of the appellant's remorse Miss Pagella set out her methodology and made it clear that she did not take the appellant's expressions of remorse at face value. She carefully observed and considered the appellant's body language, facial expression, eye contact and tone of voice in addition to the language that he appeared to use spontaneously.
26. Whilst I have considered the methodology used by Miss Pagella, I do find that this does not mean that judge erred in law in concluding that the psychological report from Miss Pagella relied largely on whether the

appellant had been truthful with her and presented an honest account of his current attitudes. I preferred Ms Kiss' submission which is recorded at paragraph 20 above. I find that the judge considered the reports provided by Ms Pagella including her update. I find that the judge took into account all the circumstances of the appellant's case in reaching his findings at paragraph 38. I find that the judge's conclusion that if allowed to remain in the UK, the appellant will revert to criminal offending as a means of making easy money as he has persistently done in the past was open to the judge on the evidence.

27. The judge was in no doubt that the appellant has amassed an appalling criminal record. The judge considered and accepted that the appellant has not reoffended since his release in 2013. However, the judge noted that the appellant also had a similar gap in offending between 2006 and 2010. It was open to the judge to find that it was not surprising that the appellant has stayed out of trouble given that he was on licence until 2014 and also because he knows that the Secretary of State wishes to deport him.
28. On all the evidence that was before him, I find that the judge did not err in concluding that the appellant's offending was sufficiently serious such that he represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
29. I find that Miss Jones' report dated 14 December 2017 mainly deals with the appellant's relationship with his partner and four children. She said she has visited the home on numerous occasions and has witnessed the love and care the appellant has for each of his children. She said were the appellant to be permanently separated from the family, it would have a devastating effect on both his partner and the children. The children had a secure attachment to their father and for him to be removed from their lives would have implications for their ongoing emotional development.
30. I ascertain from Miss Jones' report that the appellant has a loving and caring relationship with his partner and his children. I accept that his partner and children are now British nationals. Nevertheless, the judge said he had not been provided with any evidence as to why the appellant's partner and children could not relocate to Morocco to be with the appellant, given the close ties which the family have maintained there. The judge found that the best interests of the children are to be looked after by their mother. I also note that there was evidence before FtT Judge Glossop that the children or at least the older children, spoke Arabic. I find that the judge's conclusion that the respondent's decision to revoke the appellant's residence card was also proportionate was sustainable on the evidence.
31. I find that the judge's decision does not disclose an error of law.
32. The judge's decision dismissing the appeal shall stand.

No anonymity direction is made.

Signed

Date: 16 November 2018

Deputy Upper Tribunal Judge Eshun