



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

Appeal Number: PA/06643/2019

THE IMMIGRATION ACTS

**Heard at Field House Remotely
On 16 December 2020**

**Decision & Reasons Promulgated
On 24 February 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

GULAL [S]

(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel instructed by Mondair Solicitors

For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan. He was born in 1996 and has lived in the United Kingdom since he arrived aged 16 in January 2013. He appealed against a decision of the respondent on 27 June 2019 refusing him asylum and leave to remain on human rights grounds after he was made the subject of a deportation order as a consequence of his criminal behaviour and against the refusal of his claim for a residence card under the Immigration (EEA) Regulations 2016. The First-tier Tribunal allowed the appeal under the EEA Regulations and on human rights grounds with particular reference to Article 8 of the European Convention on Human Rights. The First-tier Tribunal Judge

dismissed the appeal on asylum, humanitarian protection and “Article 2 and 3 grounds”.

2. The appellant did not appeal the decisions to dismiss his appeal. He is not a refugee, he is not entitled to humanitarian protection and refusing him leave will not contravene his rights under Articles 2 or 3 of the European Convention on Human Rights.
3. The Secretary of State appealed the decision to allow the appeal under the EEA regulations and on “article 8 grounds” and it was set aside following a hearing in the Upper Tribunal before The Honourable Lord Uist and Upper Tribunal Judge Kopieczek in the decision dated 5 March 2020. The Upper Tribunal gave directions for future conduct of the appeal including directions that the appeal be redetermined in the Upper Tribunal. Subsequently further directions were given as a result of the well-known national lockdown and the appeal came before me to be determined.
4. In its decision finding an error of law the Upper Tribunal set out Regulation 27 of the EEA Regulations and particularly Regulation 27(5)(c) which provides that where a decision is taken on the grounds of public policy or security (as it was in this case) it must also take account of certain principles including:

“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;”.

5. The Upper Tribunal then said beginning at paragraph 41:

“41. We note, in particular, reg 24(7); thus, “Any action” under reg 24 on grounds of public policy, public security or public health must be in accordance with reg 27. We note that at para [41] of the refusal of residence card decision it states as follows:

‘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 you a document as the claimed extended family member of an EEA national as it is clearly not appropriate to do so’.

42. The respondent expressly stated, therefore, that the decision was taken on the grounds of public policy etc. (as in Reg 24(7)) in relation to the appellant’s convictions. Whilst we note what is said in the decision and extracts from the Home Office guidance, and what was said in submissions on behalf of the respondent in terms of the guidance, insofar as the guidance expressly rules out any consideration of Reg 27 in the refusal of a residence card for an extended family member, the guidance is not wholly consistent with the EEA Regulations. The contention on behalf of the respondent that the decision to refuse a residence card was made on the basis that it was conducive to the public good (because of the appellant’s convictions) is plainly inconsistent with the terms of the decision itself at para [41].

43 Accordingly, notwithstanding the inconsistent position taken on behalf of the appellant as between the Reply and in submissions, we are not satisfied that [the First-tier Tribunal Judge] erred in law in *deciding to apply* Reg 27.-

44 However, although neither party made reference to it, we cannot simply ignore the fact that the judge's decision under Reg 27 makes no reference to, or reveals any recognition of, the need to consider the multitude of factors required to be taken into account in Schedule 1 of the EEA Regulations. As a matter of law he was required to consider Schedule 1. To repeat, Reg 27(8) provides that:

"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.)."

45 Some of the Schedule 1 matters are, to summarise, the need to prevent social harm (para 7(c)) and tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences relating to the misuse of drugs) (para 7(g)). It is to remember that the appellant received a sentence of thirteen months' imprisonment for possession with intent to supply drugs. (The First-tier Tribunal Judge) referred to the appellant's submissions on the public interest etc. and incorporated them by reference at [18]. He made some findings that could be said to touch on the Schedule 1 considerations but he did not address those matters head on. In failing to do so we are satisfied that he erred in law.

46 The errors of law which we have identified are such as require his decision allowing the appeal on Article 8 grounds and under the EEA Regulations to be set aside. As we have already indicated, there was no appeal to the Upper Tribunal in relation to his dismissal of the protection/Article 3 ground of appeal."

6. I have the benefit of a skeleton argument from the respondent signed by Mr C Howells, Senior Presenting Officer dated 19 May 2020 and a skeleton argument from the appellant signed by Mr Muquit dated 15 May 2020. I have considered both of these written submissions.
7. There have been changes since the hearing before the First-tier Tribunal. The appellant and his girlfriend married on 6 January 2020 and their daughter was born on 6 June 2020. Mr Avery helpfully and realistically conceded that the appellant is now married with an EEA partner and a child and the case had to be approached on the basis that he was the family member of an EEA national. I had to determine the appeal under the Regulations. In all the circumstances the parties agreed that Article 8 did not add anything but rather all the points that could be made in this case were subsumed into the appeal under the Regulations.
8. The appellant gave evidence. He adopted a witness statement signed 6 October 2020.
9. I have considered all of that statement but I am particularly interested in his attitude to his offending. Concerning his offences he said, "I truly and sincerely regret". He explained that he had listened to bad people who persuaded him he could earn money quickly and he had done wrong and resolved not to

repeat his error. He had served his sentence and said that he had turned his life around. He said he wanted to be able to support his family. He now has a job working as a delivery driver for Pizza Hut.

10. Concerning his relationship with "Wicki" he said they became partners in August 2014 and married under Islamic law in December 2016 and in January 2020 they married in accordance with United Kingdom law. He said it was important to them that their daughter was born in a legal marriage.
11. I have considered the sentencing remarks. The appellant had been in trouble for driving a motor vehicle that he should not have driven on an earlier occasion but the matters that took him to the Crown Court by way of committal for sentence and led to his imprisonment were committed on 22 April and then on 11 July 2017. Essentially on both occasions he was caught with a stash of cannabis. It is not necessary to say much more. It is plainly an aggravating feature that he committed the second offence so soon after the first offence and after he had been arrested and when he knew that he was under investigation. This led to consecutive sentences totalling thirteen months. The sentencing judge commented that had there only been one offence he may well have been able to suspend the sentence but the two made it more serious.
12. Having interposed the sentencing remarks because they are relevant to the evidence about his relationship and how that might impact on his behaviour I return to consider his statement. He said that he had not committed any offence since coming out of prison and that his probation officer had supported him and helped him with his rehabilitation.
13. There are several references in the statement to his affection for his wife and daughter and his desire to do right by them.
14. He was cross-examined and pressed by Mr Avery to explain what led him into crime and he said that he was not allowed to work and had to get some money from somewhere. It would be wrong to consider this answer as some sort of self-justification. Rather it was, I find, a frank response to a question about why he had given in to the temptation to deal in drugs. He said that he now had a family, his wife was working, he was working, he wanted to get a better job, not go back to criminal behaviour and he regretted every day of his life the things that he had done. He said that he hated drug-taking because of the hurt it does to people.
15. In answer to questions from me he said he had done courses in prison about the use of drugs and that had been informative.
16. I then heard evidence from his wife, Wiktoria Wanda Furmanska. She too had made a statement in her case signed on 5 October 2020 and she adopted it as her evidence.
17. She described herself as a Polish national who had been given indefinite leave to remain in the United Kingdom.

18. She confirmed that her relationship with her husband began in August 2014 and that she moved out of her parents' home in February 2016 but she was under the care of the local Social Services until she was 18.
19. She said she had been working full-time since she was aged 16. She was not working presently because she was still on maternity leave but intended to return to work.
20. They lived in privately rented accommodation and she was clearly happy with her personal circumstances. She said how her parents were very supportive. She knew that the appellant had done bad things and made mistakes but was satisfied that he was "a changed man now".
21. She said that when he was in trouble before she was only aged 17 years and not able to influence his behaviour. She clearly implied that she believed that she had far more influence now and she said that the appellant was more mature too. He was devoted to his daughter and would not put at risk seeing her. She went as far as to say that she could "guarantee he will not reoffend". Prison had affected him badly.
22. She repeated this view when she was cross-examined. She said that he did not use drugs now; indeed even cigarettes were banned in the house for the sake of the child and he was taking medication to help him give up cigarettes.
23. She responded to question about the family income with confidence and clarity. The family income is made up with the appellant's wages and her maternity pay and her statutory benefits. She gave every impression of a couple who were living responsibly within their means.
24. She also said how her mother had become reconciled to her marrying a Muslim. Her mother loved being a grandmother and was supportive.
25. I have considered the evidence in the appellant's bundle.
26. There are letters confirming his and his wife's employment.
27. I note that the appellant's employment as a delivery driver although part-time is expressed to be "on a permanent basis". There is also a letter from the shift manager. It is written in manuscript in plain paper and so there is nothing on the face of the documents that confirms that it is in fact from his employers but the matters that relate to the job are proved in other ways. The appellant is described as "a very responsible young man who has always worked very hard since he started working ...". The employment started in July 2019, so the appellant has now worked for roughly eighteen months. I do not know how much the shift manager knows about the appellant's criminal record but he illustrated the appellant's responsibility by saying that he had never been late for work, which clearly mattered to him.
28. There is a short note from the appellant's probation officer dated 29 January 2019. It referred to a report where his reoffending rate was assessed as low with a score of 49% and the chances of serious harm in all areas were

described as low. He had attended each of the eleven appointments offered and was motivated and punctual and engaged in all aspects of his supervision.

29. Cynicism comes easily to anyone who has experience in the criminal courts but I am persuaded on the evidence that the appellant is unlikely to reoffend. What he did was committed, as he said frankly, to satisfy greed because he thought he could get some easy money. I do not know if he obtained any easy money but he was caught and he has been to prison. His previous offending showed irresponsibility but, although criminal, was not really serious crime. Repeating the drugs offence a short while after being arrested was wholly discreditable but there has been no offending since his release from prison. He now has a job, and there is evidence that he is doing that job responsibly, and a wife and a child and a home. These are the sort of things that do tend to cause people to reorder their lives and whilst there is no guarantee that the appellant will continue to behave properly I think I can say it is a matter of general knowledge that a lot of hitherto offenders change their behaviour when they have these benefits.
30. I reflected on his wife's evidence about her inability to influence his behaviour when he got into trouble. She in some ways is a very impressive young woman. Clearly there is a history of unhappiness there which has not been explained to me, nor needed to be, because there is a history of Social Service involvement but she is on good terms with her family now. I can well understand her mother's concern as a Polish Catholic seeing her daughter at a very young age becoming intimately involved with a Muslim of uncertain status in the United Kingdom and, as it turned out, a criminal. The fact remains that the appellant's wife has now organised things so she is in regular work, married to a man in regular work with a home suited to their needs. Her understanding of the income that they received was particularly sharp and suggests to me somebody who is indeed a very keen wife and mother. As far as I can tell, on limited evidence, she will exercise considerable influence over him *if* he were tempted to return to criminal ways but I do not think there will be any strong temptation. He has too much to lose now and I think that his criminal behaviour is behind him.
31. Given the reasons for finding an error of law by the First-tier Tribunal I have reread Schedule 1 of the 2016 Regulations. I have taken it into account. I have particularly considered Regulation 27(6), which guides me that when taking a decision on the grounds of public policy and public security regard must be given to the age, state of health, family and economic situation of the applicant, length of residence in the United Kingdom, social and cultural integration into the United Kingdom and links with the country of origin.
32. Taking these things into account points towards allowing the appeal. The appellant appears to have a secure job and settled family circumstances. He is married to a person with indefinite leave to remain in the United Kingdom and is the father of a child who is almost certainly entitled to British citizenship even if she has not already been given it. The appellant appears to be in reasonably good health although there are mental health problems which would impact on his removal. He is now living industriously in the United

Kingdom. He is contributing through his work and no doubt the taxes which he pays.

33. Considering his cultural integration is less straightforward. I note that he wanted a religious marriage ceremony in a Mosque but many British people have some degree of commitment to Islam. It is certainly not “un-British” to follow Islam. Rather he showed a wish to engage in the wider community. There is no evidence that the appellant is a man who relies solely on links with the “Afghani community in the United Kingdom” if I can per permitted such a vague phrase. The appellant’s Polish wife has indefinite leave to remain and the appellant has work where he is clearly respected by his supervisor. He is not living in a “foreign bubble” but is establishing himself in the United Kingdom.
34. I accept that the length of his sentence and repeat offending make it easier to show that his continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting the fundamental interests of society. I have no hesitation in saying this appellant’s conduct was a threat to the fundamental interests of society. Drug-taking is the cause of much social harm and much crime. It matters. However, this is a man whose serious offending was over a very short period of time and has not been repeated since he has been to prison.
35. I have reflected on the case and on the importance given to showing society’s disapproval of drug offenders. I have considered Mr Avery’s submissions, which were measured and thoughtful, but I am satisfied that the witnesses before me were essentially truthful. I am satisfied that there is a genuine resolution to keep out of trouble. I am satisfied too that the appellant has motives and incentives now that he has not had before in the form of a supportive wife and family and memories of the disagreeable consequences of prison. I am satisfied that his responsible attitude towards his probation officer is something to rely on in support. I am wholly unpersuaded that he now presents any threat even if it is not an immediate one. I also find that his removal would be disproportionate under the Regulations. It follows that I reach the same conclusion as the First-tier Tribunal on the important points, namely that this appeal should be allowed under the EEA Regulations but I hope I have explained it better.

Decision

36. This appeal is allowed under the EEA regulations.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 11 February 2021