Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001786
EA/52066/2021; IA/08893/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd November 2022	**On 14th March 2023**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR SONIL ROCI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel instructed by SMA Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania seeking permission to appeal the decision of First-tier Tribunal ("FtT") Judge Ennals ("the judge") who dismissed the appellant's appeal on the basis that the decision of the respondent did not breach the appellant's rights under the EU Treaties. The decision was dated 12th April 2022.

2. A deportation order had been signed on 27th April 2015 and enforced on 21st May 2015, but the appellant re-entered the UK illegally and first came

to the attention of the authorities when he made the application which generated the decision currently under appeal.

3. The appellant applied on 30th December 2020 as an extended family member of an EEA national on the basis of Regulation 8(5) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") that he was in a durable relationship with his partner. He subsequently sought, apparently in a letter also dated 30th December 2020 from his legal representatives Good Advice UK, to change the basis of his claim to that of spouse owing to a proxy marriage on 26th January 2021, so bringing him within Regulation 7 as a family member.

The grounds of appeal for permission to appeal against the FtT decision

4. Ground 1: that the First-tier Tribunal erred in finding that the appellant could not be considered under Regulation 7 of the EEA Regulations because the marriage took place after 31st December 2020 and was restricted to its assessment under Regulation 8. The FtT failed to apply the findings of **Geci**.

5. The headnote in **Geci** is as follows:

> *"(1) The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations') were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.*
>
> *(2) Many of the provisions of the EEA Regulations are preserved (although subject to amendment) for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ('the EEA Transitional Regulations'). The preserved provisions and amendments made are set out in paragraphs 5 and 6 of Schedule 3 to the EEA Transitional Regulations.*
>
> *(3) The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.*
>
> *(4) The issue of a residence card is an administrative matter. Although the Secretary of State does have power under the EEA Regulations to refuse to issue a residence card on grounds of public policy, public security or public health, she does not have the right to do so under Directive 2004/38/EC or the EU Treaties".*

As noted in **Geci** [7],

> *"7. The Citizens' Rights (Application Deadline and Temporary Protection) Regulations regulate the position of EEA nationals who had lived in the UK but who had not, as at 31 December 2020, been given leave under Appendix EU of the Immigration Rules. There is a "grace period" until 21 June 2021 during which these people were able to apply for leave, but until that date, some of the provisions of the 2016 EEA Regulations continued to apply to that group and also apply while a valid application is pending, and while a valid appeal against such a decision is pending."*

Paragraph 3(4) of Schedule 3 of the Immigration Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions (EU Exit) Regulations 2020 ("the Exit Regulations 2020") states:

> *"3. (4) Regulation 18 of EEA Regulations 2016 (issue of residence card) continues to apply for the purposes of considering and, where appropriate, granting an application for a residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day".*

Paragraph 6 of Schedule 3 of the Exit Regulations 2020, states

> "*Decisions taken on conducive grounds*
>
> 27A.*—(1) An EEA decision may be taken on the ground that the decision is conducive to the public good.*
>
> *(2) a decision may only be taken under this Regulation in relation to a person as a result of conduct of that person that took place after IP day.*

6. The respondent was aware of the marriage before the decision was made and considered the marriage within the refusal letter on the basis, she was not satisfied that the proxy marriage was valid in El Salvador. It was submitted that following **Geci** the First-tier Tribunal erred in failing to make a finding in respect of the marriage and failing to consider the appeal on this basis which was an error of law.

7. Further, if this legal error is established then following **Geci** which save for the date of the marriage was premised on very similar facts, it was unlawful for the respondent to refuse to issue a residence card to the appellant on the grounds of public policy, public security or public health as this is contrary to primary EU law. Paragraphs 26 to 28 of **Geci** particularly [27] states the Directive does not permit a refusal to issue a residence card on public policy, public security or public health grounds (see [28]).

8. As such the Tribunal erred in law in failing to make findings on the validity of the marriage and in failing to apply these findings to the decision of the respondent in refusing to grant the appellant a residence card on the grounds of public policy, public security and public health.

9. In addition, the respondent's reliance on the appellant's presence being conducive to the public good fell within the remit of paragraph 6 of Schedule 3 of the EU Exit Regulations 2020. The conduct of the appellant did not occur after IP completion day.

10. Ground 2 – alternatively in relation to consideration of the being a durable partner, there required extensive examination of personal circumstances. **Geci** supports the proposition there is no power to refuse to grant a residence card on public policy grounds within the EU Treaties. The appeal was not against a removal decision. Alternatively, the First-tier Tribunal erred in law in finding that in an undertaking of extensive examination of personal circumstances, the respondent's decision was justified on public policy, public health or public security grounds. **Geci** supports the submission there cannot be a restriction on the grant of a residence card for a family member of an EEA national on these grounds within the EU Treaties and it is submitted that the same parameters ought to be extended to extended family members.

11. Alternatively it was submitted, if it is found that the respondent could consider public policy, public security and public health grounds within the decision to refuse a residence card as part of the extensive examination of personal circumstances, there are further significant errors of law.

12. At [8] of the decision the Tribunal cites that the appellant holds the burden of proof. The issue determined by the First-tier Tribunal was whether the refusal to grant a residence card was justified on public policy, public security or public health grounds and there the respondent held the burden of proof not the appellant.

13. At [24] of the decision the Tribunal found as follows:

> *"24. I have considered the provisions of reg 27 which set out the factors to consider in a decision on the grounds of public policy or public security, and the aspects of the fundamental interests of society in para 7 Sch 1. I consider that the appellant has shown a persistent disregard for the laws of the UK. This decision is based entirely on his own personal conduct, and I cannot see that issuing a residence card to someone who has an unexpired part of a prison sentence outstanding, and re-entered and remains in the UK in breach of a current deportation order, is consistent with the fundamental interests of society set out in para 7 Sch 1. It would undermine respect for the rule of law, and of the ability of the authorities to maintain an effective*

> *immigration control system, and to enforce criminal and immigration laws".*

The Tribunal failed to undertake an assessment of the current public policy/security risk posed by the appellant, having accepted that the appellant has not committed an offence since 2015 and that he has been found to be of low risk of reoffending. Instead, the Tribunal focused heavily on the fact that the appellant has been in the UK unlawfully and considered the existence of the previous deportation order. This deportation order was made under a different statutory regime only applicable to the appellant prior to the existence of his relationship with his EEA partner for which the appellant had sought revocation.

14. The First-tier Tribunal failed clearly to assess whether the respondent's decision was justified on public policy, public security or public health grounds and failed to undertake a full proportionality assessment including the appellant's partners ties to the UK and other relevant considerations. To simply find the appellant could return to Albania and apply to join his partner in accordance with the Immigration Rules was an irrelevant consideration.

The Hearing

15. At the hearing Mr Gajjar submitted that the first challenge was to the outright refusal to consider the marriage. The judge did not address the issue which was the evidence provided that El Salvador did not allow for proxy marriages. The position the judge took in dismissing the appeal was that in essence at [14] of the decision such that the appellant could not succeed on their marriage because it took place after December 2020. He acknowledged that the marriage in **Geci** took place before the IP day, but the grounds clearly relied on the Transitional Provisions which extended the period of application. It was not a revised ground. The application for a residence card was made on 30th December 2020 and the appellant and sponsor were married in January 2021. The key point is that on 22nd January the appellant's solicitors notified the Secretary of State that the marriage had taken place and the Secretary of State did not take the stance that Regulation 7 was incapable of applying. At no point in the reasons for refusal letter because the marriage took place after implementation period it was incapable of being considered.

16. The only point recognised was whether it was legal or not. At no point was it raised that the date of marriage was a valid concern.

17. At [16] of the reasons for refusal letter it was noted that the application fell to be considered under paragraph 8(5) but there was no requirement to consider that at all and that was pragmatic because Regulation 7 was the centre of the appeal. This was not a case presented on revised grounds.

18. The definition under the Regulation was the moment he married an EU spouse who became a family member so Regulation 8 no longer applied. It was not possible to deprive him all rights.

19. Schedule 3(4) provided a route to vary the application and that is how the grounds are framed. **Geci** should not be treated as limiting the appellant's grounds. Thus the deportation order could not be taken into account.

20. In terms of ground 2 there was a need to consider current circumstances. There was no further offending regarding the drug conviction and a change in circumstances and the appellant was now in a relationship which was accepted at the time of the appeal and the veracity of the relationship was no longer in doubt.

21. It was necessary to look at the appellant's age at the time of the offence and all factors pointed to him to being no risk to public policy. The judge focused at [24] in her determination on the appellant's immigration history in that he returned in breach, none of which was contradicted by **Geci**. The appellant in that instance also entered in breach of a deportation order. The Tribunal should be uncomfortable with the extent of [27] because the judge failed to consider properly relevant factors and impact on the sponsor and proportionality.

22. There was no Rule 24 response. Mr Gajjar submitted that it was a grey issue with regards to the ambit of the third headnote.

23. Mr Clarke in response in relation to ground 1 referred to the headnote (3) of **Geci** and [14] of that judgment. Commencement day was the day of the repeal of the Regulations and that was clear from the Transitional Regulations and that date was 31st December 2020. Schedule 3(6) referred to things done on or after but before commencement day. That was the relevant date. It was difficult to see how the appellant could crowbar in a marriage which took place after the repeal of the 2016 Regulations, and I was referred to Schedule 3(3).

24. Under Regulation 18 of the EEA Regulations the issue of the residence card was therefore at the Secretary of State's discretion.

25. Paragraph 3(4) referred to an application validly made before the commencement date. How could one construe a valid application under Regulation 7 if those circumstances did not exist? Read with Schedule 3(6) the only things that could be considered were those done before commencement day. I was again referred to headnote (3) of **Geci** which reflected [14] of **Geci**. The commencement day was the date of the repeal of the Regulations. In this instance Schedule 3(6) defined things which were done after exit day but before commencement day. It was difficult to see how the appellant could enlist a marriage which took place after the repeal of the 2016 Regulations.

26. In relation to Regulation 18 the issue of a residence card was still discretionary in terms of a durable partner. Although the application was validly made before the commencement date it was not possible to construe a valid application under Regulation 7 if those circumstances did not exist and read with Schedule 3(6) it was only possible to consider things done before the commencement day.

27. It was always the case from the Secretary of State when looking at exclusion that the decision of the Secretary of State would be based on personal conduct, not historic conduct. The refusal letter considered the appellant's position in the context of a continuing act because the appellant was in the UK in breach of a deportation order and [33] identified the fundamental interests as including preventing unlawful immigration which was an ongoing and present threat.

28. The judge stated at [23] that the appellant was remaining in breach of the Immigration Rules and that was an ongoing threat to fundamental interests, and at [24] the judge set out the interests. He was clearly satisfied that the threat was ongoing following the implementation period completion date and that point was misconceived in the light of the judge's reasoning.

29. In relation to ground 2 **Geci** did not relate to extended family members. It was accepted by the parties that Regulation 7 applied in **Geci** and Judge Rintoul accepted that the appellant had a free movement right and considered whether the residence card could be refused on the basis of public policy.

30. The situation here was wholly different in that the appellant was not a family member and there was no *right* under the treaties until the Secretary of State undertook an examination under the Directive 2004/38/EC. Under Article 3(2) it was defined that "the host member state shall undertake an extensive examination of the personal circumstances". That required a consideration of Regulation 24 which was retained by the Transitional Provisions and at 24(7) made reference to Regulation 27.

31. If the right of appeal were under the EU Treaties, it was possible to look at the matter of public policy, but the grounds suggest that the Tribunal was precluded from that which was in error.

32. **Geci** is not authority to circumvent the extensive examination and given the Saving Provisions it would appear that the Secretary of State must conduct an examination.

33. Further, it was clear that the judge had appropriately considered public policy and undertaken a balancing exercise. In terms of the burden of proof when looking at substance over form at [21] the judge expressly looked at the case set out by the respondent. The judge did in effect consider proportionality when considering the decision.

34. Mr Gajjar submitted that at [24] the judge could not be read as assessing a current risk and the reference was to historic events. The appellant was only aged 21 when the offences were committed. The sentencing judge referred to the limited role undertaken by the appellant and that he had no previous convictions. The sentencing judge did not recommend deportation. It could not be said the judge had undertaken a proportionality exercise.

Analysis

35. The appellant made an application on 31st December 2020 for a residence card to confirm that he was an extended family member of an EEA national.

36. It was noted that the appellant subsequently submitted further evidence on 2nd March 2021 together with a covering letter requesting that his application be instead considered on the basis that he was a spouse. The marriage took place after the specified date of 31st December 2020. I have already noted that the representatives' letter was curiously dated 30th December 2020 when the marriage in fact post dated that date as it was said to have taken place in 2021.

37. The Secretary of State's decision refused the application under Regulation 7 and refused the application under Regulation 8 of the EEA Regulations 2016. It was submitted that the Secretary of State was not satisfied that the marriage contracted on 23rd January 2021 satisfied the requirements of a marriage recognised in the United Kingdom because the appellant had undertaken a marriage by proxy in El Salvador.

38. The appellant continues to have an appeal by virtue of the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

39. Schedule 3 paragraph 1 states:

> *"1. In this Schedule 'EEA Regulations 2016' means the Immigration (European Economic Area) Regulations 2016 and, unless provided otherwise, refers to those Regulations as they had effect immediately before they were revoked".*

40. Schedule 3 paragraph 3 (4) states that

> *Regulation 18 of the EEA Regulations 2016 (issue of residence card), continues to apply for the purposes of considering and, where appropriate, granting an application for a residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day.*

Schedule 3 paragraph 5 sets out existing appeal rights and appeals, in so far as material, state

"1. (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—

...

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day".

41. The decision refusing the appellant's application was taken on 29th June 2021 and any existing appeal right is therefore preserved by Schedule 3(5)(1)(d) of the Transitional Provisions.

42. Paragraph 6 set out the specified provisions of the EEA Regulations 2016

43. Paragraph 6(1)(cc) identifies the continuing provisions of Schedule 2 (appeals to the First-tier Tribunal) as follows:

(cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—

(aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)".

44. The question therefore is the jurisdiction of the Tribunal notwithstanding the Secretary of State's decision in relation to Regulation 7, to consider the appeal in relation to the appellant being a family member as a spouse by virtue of his marriage post-31st December 2020.

45. Unlike **Geci** whereby the appellant was married prior to 31st December 2020 and filed an appeal in 2019, although there is a right of appeal by virtue of the durable partnership application the sole ground of appeal is in

relation to his status as a durable partner. Under **Geci** at [20] it was stated that

> *"The effect of the amendments as set out above is that the sole ground of appeal is, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020".*

The appellant, however, does not fall within paragraph 5(1)(b) of Schedule 3 as in **Geci** but under 5(1)(d) of Schedule 3.

46. Included 'specified provisions' of paragraph 6 is regulation 36 (appeal rights) and Schedule 2 of the of the EEA Regulations entitled (appeals to the First-tier Tribunal)

47. Regulation 36 sets out

> ***1.*** *The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—*
>
> > *section 84 (grounds of appeal)(**1**),* ***as though the sole permitted grounds of appeal were*** *that the decision breaches the appellant's rights* ***under the EU Treaties*** *in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");...*

48. Paragraph 6(1) of the Exit Regulations 2020 also sets out as follows:

> *6.— Specified provisions of the EEA Regulations 2016*
>
> *(1) The specified provisions of the EEA Regulations 2016 are—*
>
> > *(a) regulation 2 (general interpretation) with the following modifications—*
> >
> > > *(i) as if all instances of the words "or any other right conferred by the EU Treaties"—*
> > >
> > > > *(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to a right conferred by the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;*
> > > >
> > > > *(bb) in so far as they relate to things done on or after commencement day, were omitted;*

49. Thus the appellant cannot secure the benefit of his marriage which was post the commencement day whatever was contemplated by the Secretary of State's decision. The judge had no jurisdiction to consider it. The Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020 do not apply according to the appellant because he made his application under the EEA Regulations.

50. The appellant does not fall within Article 9 of the Withdrawal Agreement because the definition is given as follows:

> *"For the purposes of this Part, and without prejudice to Title III, the following definitions shall apply:*
>
> *(a) 'family members' means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:*
>
> *(i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;*
>
> *(ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part".*

51. As such the appellant has no appeal on the basis that he is a spouse under the relevant Regulations. That is consistent with the fact that the EEA Regulations 2016 were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 and it would wholly inconsistent with the revocation to attempt to *found* as opposed to evidence gan EU right based on an act following that revocation.

52. The date of the marriage was crucial and thus the judge did not err in failing to make a finding on the validity of marriage.

53. Albeit that the appellant may have had an appeal right and a ground of appeal as a durable partner, his appeal was assessed without material error from [22] onwards which took into account relevant factors and made a balanced and proportionate assessment.

54. It was specifically recorded in the decision at [15] that the Secretary had conceded that the appellant was the extended family member of his EU national partner but had declined to grant a residence card. As the judge noted the granting of a residence card in this situation was at the discretion of the respondent following an extensive examination of the personal circumstances of the appellant.

55. **Geci** at [22] sets out Articles 9 and 10 of the Directive and both of those refer to "family members" not "extended family members" which are specifically excluded by the withdrawal agreement. There are no grounds to extend Geci as an authority to extended family members.

56. It was thus open to the judge to take the legal approach that he did in relation to the durable relationship of the appellant and that in undertaking an extensive examination of the personal circumstances the respondent's decision was justified on public policy, public health or public security grounds. The appellant was not a family member for the purposes of **Geci** and the contention that the same parameters ought to be applied to extended family members is rejected.

57. I agree with Mr Clarke that it is the question of substance over form as to whether the appellant was fixed with the burden of proof in the appeal. There was no express direction that the burden was on the Secretary of State but the judge looked at how the case had been advanced and how the appellant was proving he should not be refused. The complaint was immaterial when looking at substance over form. The judge identified Regulation 27 and clearly set out the facts and did undertake an assessment of the current public policy and public security risk posed by the appellant. As the judge pointed out the appellant has an unexpired part of a prison sentence outstanding which was inimical '*to the fundamental interests of society set out in para 7 Sch 1'*. It was pointed out at [21] that he could have been recalled to prison at any time as he had re-entered illegally twice the second time in breach of a deportation order. The appelalnt's conduct was clearly found to be an ongoing and contrary to the fundamental interests and thus the risk was current. The appellant had minimised his time in prison by agreeing to return to Albania. It is clear that the appellant *continued* to be unlawfully in the UK and albeit that it is stated that the deportation order was made under a different statutory regime the definition of a deportation order under the amended Regulation 2 (as amended by the Exit Regulations 2020) references "deportation" meaning "an order made under Regulation 32(3) or under Section 5(1) of the Immigration Act 1971". It was entirely open to the judge to consider the extant deportation order against this appellant as it is now framed under the modified Transitional Provisions.

58. At [24] of the decision, the judge was alive to the argument on proportionality as could be seen from [23] and alive to the provisions of the Regulation 27 and specifically states so. He was aware of the age of the appellant and relevant facts including his family and economic situation and length of residence in the UK. At [19] the judge had set out the case made on behalf of the appellant that he was young when he offended (he was sentenced to 12 months imprisonment) and was now older and in a relationship. The judge noted the appellant withdrew his asylum claim in relation to risk in Albania. There is a requirement for the judge to invoke the principles of proportionality and from [25] onwards was undertaking a proportionality assessment with reference to the previous findings. There was no material error of law.

59. The decision of the FtT shall stand and the appeal remains dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 5th January 2023

Upper Tribunal Judge Rimington