Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05537/2019 (P)

THE IMMIGRATION ACTS

Decision under rule 34
On 14 August 2020

Decision & Reasons Promulgated
On 20 August 2020

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

ALDRI CEPELE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Decision made under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008

DECISION AND REASONS

Introduction

This is an appeal against the decision of Judge of the First-tier Tribunal Lloyd-Lawrie ('the Judge') sent to the parties on 10 January 2020 by which the appellant's appeal against the decision of the respondent to refuse to grant him an EEA residence card as a family member of an EEA national was dismissed.

By a decision sent to the parties on 2 June 2020 the appellant was granted permission by Judge of the First-tier Tribunal Nightingale to appeal on all grounds.

The appellant's legal representatives are BMAP, London.

Rule 34

This decision is made without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the 2008 Rules').

In light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed at rule 2(1) of the 2008 Rules, and also at rule 2(2)-(4), UTJ Grubb indicated by a Note and Directions sent to the parties on 2 July 2020 his provisional view that it would be appropriate to determine the following questions without a hearing:

(i) Whether the making of the First-tier Tribunal's decision involved the making of an error of law, and if so

(ii) Whether the decision should be set aside.

The parties were requested to inform the Tribunal if, despite the directions, a face-to-face hearing was required. Neither party made submissions within the required time-limit, which has now expired. Neither party availed themselves of the opportunity to file written submissions and the time limit for filing has expired.

In the circumstances, being mindful of the importance of these proceedings to the appellant and to the overriding objective that the Tribunal deal with cases fairly and justly, and having considered the grounds of appeal, I am satisfied that it is just and appropriate to proceed under rule 34.

The appellant

The appellant is a national of Albania and aged 30. His wife is a Romanian national who is exercising EU Treaty rights in this country. He asserts that he initially entered the United Kingdom in November 2014. He was arrested for producing class B drugs and on suspicion of being an immigration offender in June 2017 and voluntarily departed this country in August 2017.

He asserts that he re-entered the United Kingdom in October 2017. He was arrested in January 2018 and convicted at Harrow Crown Court on 13 June 2018 for possession with intent to supply cannabis. He was sentenced by HHJ Barrie to 15 months' imprisonment and subsequently deported to Albania on 8 August 2018.

He sought admission as the spouse of an EEA national at UKCZ Coquelles on 2 November 2018. He was refused entry on the basis that he was the subject of a deportation order.

On 28 June 2019, the appellant applied in-country for an EEA residence card as the spouse of a qualifying national. He further applied for his deportation order

to be revoked. His passport evidenced his admission to the Republic of Ireland on 31 December 2018. He asserts that he subsequently travelled to the United Kingdom the next day by car. The respondent refused the application by way of a decision dated 1 October 2019.

Decision

The appellant relies upon five grounds of appeal, though his primary challenge is to the Judge having misdirected herself in law by applying an erroneous burden of proof. At [15] of her decision, the Judge identified the burden of proof applicable in this matter as resting upon the appellant and the civil standard of proof, namely the balance of probabilities, as applying.

By her decision dated 1 October 2019, and having taken into account the appellant's personal conduct, the respondent refused to issue an EEA residence card having concluded that the appellant poses a genuine, present and serious sufficiently serious threat to the fundamental interests of society The application was refused under regulation 24(1) of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') on the grounds of public policy/public security in accordance with regulation 27 of the 2016 Regulations.

Consequently, having made such assertions the burden of proof rests upon the respondent to the civil standard to justify her refusal on public policy grounds and so establish that the appellant represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society. It is for the respondent to establish that the decision is proportionate. That the burden of proof rests upon the respondent to so prove was confirmed by the Tribunal in *Arranz (EEA Regulations – deportation – test)* [2017] UKUT 00294 (IAC) and amplified by the Supreme Court in *Sadovska v. Secretary of State for the Home Department* [2017] UKSC 54; [2017] 1 W.L.R. 2926.

Upon considering the record of proceedings the Tribunal observes that though counsel for the appellant did not expressly refer to *Arranz* in his closing submissions before the Judge, he is clearly recorded as submitting that the burden of proof rested upon the respondent.

The failure to correctly apply the burden of proof is a material error of law having adversely infected the subsequent assessment of evidence. In the circumstances, the decision must be set aside.

Remaking the decision

Neither party has indicated their position as to the appropriate venue to undertake the remaking of the decision. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. I am satisfied that the effect

of the material error identified above has been to deprive the appellant of a fair hearing before the First-tier Tribunal and so it would be just to remit the matter to the First-tier Tribunal: paragraph 7.2(a) of the Joint Practice Statement.

Notice of decision

The decision of the First-tier Tribunal involved the making of a material error on a point of law and the Judge's decision promulgated on 10 January 2020 is set aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

The matter is remitted to the First-tier Tribunal for a fresh hearing before any judge other than Judge of the First-tier Tribunal Lloyd-Lawrie.

No findings of fact are preserved.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 14 August 2020