Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04244/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC (via Microsoft Teams)	**Decision & Reasons Promulgated**
On 14 September 2021	**On 19 October 2021**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DAK
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Ryan instructed by ILC Solicitors.
For the Respondent: Ms Isherwood, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. By a decision promulgated on 19 July 2019 the Upper Tribunal set aside the decision of the First-tier Tribunal in this and a related protection appeal and gave directions for the two matters to be separated and for the EEA matter to proceed alone.

Discussion

2. The Secretary of state has refused the appellant's application for a Residence Card as the unmarried partner of a Romanian national, AS, for the reasons set out in the refusal notice of 4 July 2019.
3. The decision-maker was not satisfied on the evidence submitted with the application that the appellant had demonstrated that he is an unmarried partner (extended family member) as defined in regulation 8(5) of the 2016 EEA Regulations (as amended).
4. A considerable bundle of additional evidence has been provided for the purposes of this hearing, including a substantial number of witness statements, medical reports and other relevant documents. Although highlighting a couple of concerns arising from the documents Ms Isherwood rightly accepted that the weight of the evidence now available made it extremely difficult for her to maintain the argument that the appellant had not demonstrated that he is in a durable relationship with AS.
5. My primary finding therefore, having considered the evidence for myself and in light of the circumstances holistically, is that the appellant has established that he is an extended family member (EFM) of AS as defined in regulation 8(5) of the 2016 EEA Regulations (as amended).
6. That is, however, not the end of the matter. Regulation 18(4) of the 2016 Regulations provides:

> (4) The Secretary of State may issue a residence card to an extended family member, not falling within regulation 7 (3) who is not an EEA national on application if –
>
> (a) The application is accompanied or joined by a valid passport;
> (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
> (c) in all the circumstances, it appears to the Secretary of State appropriate to issue the residence card.

7. Regulation 18(5) requires the Secretary of State to undertake an extensive examination of the personal circumstances of the applicant and that if the application is refused, the Secretary of State must give reasons justifying the refusal, unless that is contrary to the interests of national security. There are no national security issues raised in relation to this appeal.
8. Regulation 2(8) of the 2019 amendment to the Regulations defines what is required for an extensive examination in the following terms:

> "(8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following—
>
> (a) the best interests of the applicant, particularly where the applicant is a child;
>
> (b) the character and conduct of the applicant; and

(c) whether an EEA national would be deterred from exercising their free movement rights if the application was refused.".

9. The reasons for refusing the grant of a residence card, in addition to the claim of lack of proof of being an EFM, are set out in the refusal notice in the following terms:

Consideration of Criminality

37. Even if a person is in a "durable" relationship they are only entitled to a residence card as an extended family member if it is considered appropriate to issue the card.

38. The Home Office has undertaken an extensive examination of your personal circumstances. In doing so it is reasserted that you have failed to demonstrate that you have a right to reside under the EEA Regulations, as such you **do not** qualify to have your criminal conduct considered under the protection of Public Policy (Regulations 24 & 27).

39. The European Modernised Guidance states the following:

"Conducive to the public good

Extended family members do not benefit from the protection in relation to EEA decisions taken on grounds of public policy, public security or public health until they have been issued a document under the regulations.

You must consider any criminal activity against whether the person's presence is conducive to the public good until they are issued with a document.

If a document has previously been issued, then consideration must be given to whether there are reasons to refuse a further document, or to revoke a document, on the grounds of public policy, public security or public health. For further information see: EEA decisions on grounds of public policy and public security.

You must refuse the application if refusal is justified on public policy, public security or public health grounds.

Evidence of criminality

You must consider a criminal record, either in the UK, another country or both. This may be from a Police National Computer (PNC) check or information the applicant provides on the relevant EEA application form.

You must consider any criminality in line with the Immigration Rules and not the Immigration (European Economic Area) Regulations 2016 (the 2016 regulations). This is because the regulations do not apply to a person seeking rights as an extended family member of an EEA national, until that person has been issued with a residence document. You must consider the following sections under the Immigration Rules as part of your assessment:

- paragraph 320(2) - when an applicant is seeking an EEA family permit, residence card, or registration certificate at port or after entry - if this paragraph applies, you should refuse the application, unless:

- Refusal would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees
- in exceptional circumstances, the public interest in maintaining refusal is outweighed by compelling factors
- paragraph 320(6), where the Secretary of State has personally directed that the exclusion of a person from the UK is conducive to the public good.

40 Given your criminal history and the ongoing deportation acting(sic) being taken. It would not be appropriate to issued(sic) a residence card.

41. As such, even if you had have demonstrated that you meet the conditions set forth in Regulation 8(5) of the Immigration (EEA) Regulations 2016, your application would have also been refused, with reference to 18(4) and 18(5) of the 2016 EEA Regulations (as amended.

10. The appeal has been determined on the basis of the law as it stood at the date of the hearing.
11. In Rahman [2012] CJEU Case-83/11 the CJEU held that Article 3 does not automatically entitle an EFM, who meets the defining criteria, to join and reside with a Union citizen in a host Member State. That right is reserved for ordinary family members, as defined by Article 2 and transposed into UK law by Regulation 7. All that Article 3 requires of a Member State is that it should make it possible for an EFM to obtain a decision upon his application that is founded upon an extensive examination of his personal circumstances and, in the event of refusal, to justify the decision with reasons. It follows that the host country has a wide discretion with regard to the selection of factors that are taken into account. However, the host Member State must ensure that its legislation contains criteria for the exercise of that discretion which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness. Examples of appropriate considerations would be the extent of economic and physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.
12. Under the Government's settled status scheme following Brexit, an extended family members must have been issued with a document under the current EEA Regulations in order to meet the definition of 'family member'. This is not a 'settlement scheme' appeal and no submissions were made by the parties to suggest it was. There is no evidence any application has been made by the appellant for settlement under that scheme. The appellant has not been issued with any document under the pre-Brexit EEA Regulations.
13. Two cases are relied upon by Mr O'Ryan, one being MO (reg 17(4) EEA Regs) Iraq [2008] UKAIT 00061 in which the Tribunal held that (i) the decision by the Tribunal in FD (Algeria) [2007] UKAIT 00049 that it has power to review the exercise of discretion exercised within the EEA Regulations remains correct, despite the reversal of that determination on other grounds by the Court of Appeal; and (ii) when exercising discretion under reg 17(4) it will be necessary

for the decision maker to show that all relevant circumstances were taken into account in relation to that decision.

14. In Khan v SSHD [2017] EWCA Civ 1755 (approved by the Supreme Court in SM (Algeria) v ECO [2018] UKSC 9) the Court of Appeal held that Sala (EFMs: Right of Appeal) [2016] UKUT 411 (IAC) was wrongly decided and that the decision whether to grant an extended family member a residence card was a decision which concerned an entitlement as it was a decision whether to grant such an entitlement and hence an "EEA decision" for the purpose of the 2006 regulations. Extended family members do therefore, under the 2006 regulations have a right of appeal to the tribunal from an adverse decision.

15. However, for EEA decisions taken on or after 6 April 2015 the only permitted ground of appeal is that the decision breaches the appellant's rights under the EEA Treaties (reg 36 and Schedule 2 EEA regulations).

16. It was not disputed such provision continue to apply. Schedule 3(4) to The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 reads:

> (4) 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.

17. A case involving an appellant who was the subject to a deportation order is R (on the application of Decker) v SSHD [2017] EWCA Civ 1752 in which the Court of Appeal was considering the refusal of a residence card to the appellant, a third-country national, who was the brother and dependent of a British citizen. The appellant and his sister had gone to Ireland to escape the operation of a deportation order made against the appellant and whilst in Ireland the appellant obtained an EEA residence card as the extended family member of his sister. The appellant and his sister returned to the UK and the appellant applied for a residence card. The Court of Appeal considered that if the decision to refuse to issue a residence card to an extended family member was taken on public policy, public security or public health grounds then that decision had to be taken in accordance with the provisions of regulation 21 (of the 2006 regulations). The judge had not applied regulation 21 and so the appeal was allowed as the judge had found that the appellant had posed a low risk of offending, his offence had been committed in 2003 when he was still a youth and there had been no offending since then. The court held there was "considerable room for argument" as to whether the threat presented by the appellant was "genuine", "present" and "sufficiently serious".

18. I allow the appeal to the limited extent the application is not in accordance with the Directive because the Home Office got the facts wrong in relation to the existence of a durable relationship, the failure to consider whether, in light of the appellant's criminality, the passage of time, and all the facts of this appeal, the appellant still poses a "genuine", "present" and "sufficiently serious" threat to a fundamental interest of society, and whether an EEA national would be

deterred from exercising her free movement rights if the application was refused.

19. On the criminality point Mr O'Ryan submitted there was no evidence of a present risk which was countered by Ms Isherwood by reference to the nature and extent of the criminality and the lack of remorse in the appellant's latest witness statement which refers only to the convictions being spent. That dispute will have to be resolved by the decision maker

20. The decision maker is required to undertake the full and complete holistic assessment required by regulation 18 of the 2016 Regulations. If the application is refused the Secretary of State is required to provide adequate reasons justifying the refusal by reference to the facts as found.

Decision

21. I allow the appeal on the basis set out above.

Anonymity.

22. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 20 September 2021