IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004936

First-Tier Tribunal No: HU/54405/2023
LH/01975/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10th June 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
UPPER TRIBUNAL JUDGE BLUNDELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BLEDAR VRANARAJ
(aka BLEDAR VRANARI)

Respondent

Representation:
For the Appellant: Ms H Gilmour, Senior Presenting Officer
For the Respondent: Mr T Wilding, Counsel, instructed by A J Jones Solicitors

Heard at Field House on 10 May 2024

DECISION AND REASONS

Introduction

1. The parties are referred to as they were before the First-tier Tribunal: Mr Vranaraj is the 'appellant' and the Secretary of State is the 'respondent'.

2. The respondent appeals a decision of Judge of the First-tier Tribunal Mailer ('the Judge') sent to the parties on 20 October 2023. The appeal before the Upper Tribunal is directed towards the Judge's decision on a single issue that he considered to be determinative of the human rights appeal before him. The conclusion was that the appellant had made an application for an EEA residence card which had never been decided by the respondent and which "requires determining before any consideration of the human rights grounds advanced to why the deportation order should be revoked".

Relevant Facts

3. The appellant has a poor immigration history and has been sentenced to a lengthy custodial term in the United Kingdom.

4. He is an Albanian national and presently aged forty-five. He entered the United Kingdom in July 1997, when aged eighteen. He informed the United Kingdom authorities that he was a seventeen-year-old citizen of the Federal Republic of Yugoslavia who feared persecution at the hands of the Serbian authorities as a member of the Albanian ethnic minority. Being unaware that the appellant had fabricated both his identity and his account, the respondent granted him indefinite leave to enter as refugee on 24 February 1998. Such leave was valid until 24 February 2004. Following an in-time application the appellant was granted settlement on 4 April 2005. A subsequent naturalisation application was refused consequent to a criminal conviction for possessing cocaine, a Class A drug, in 2008 for which he received a fine.

5. In 1998 the appellant commenced a relationship with a French national, whom he married in June 2023. They have two children, both of whom are minors. His wife was granted indefinite leave to remain by the respondent under the EU Settlement Scheme in August 2019.

6. The appellant was a member of an organised criminal gang involved in the distribution and sale of Class A drugs in this country. He was one of six members of the gang convicted following surveillance and subsequent arrest by the authorities under Operation Answer. On 1 April 2015 he was sentenced at Ipswich Crown Court to a total of eight years imprisonment for conspiracy to supply a Class A drug and two related charges concerned with property.

7. HHJ Levett sentenced the conspirators on the basis of supplying seven kilos of cocaine. He considered that the quantities of cocaine blocks, along with purity levels and attendant packaging, meant that they were seized close in the supply line to their importation into this country. The gang were not passing the blocks onto another gang but cutting it ready to supply on the streets of London, as evidenced by a cutting agent found in a flat belonging to a gang member. Five hundred thousand Euros was seized and considered by HHJ Levett to represent the proceeds of the past selling of drugs which had been converted from Pound Sterling.

8. The appellant was sentenced on the basis that he was a person holding a significant role in the criminal gang. HHJ Levett noted that an adapted car registered to the appellant had been fitted with a secret compartment where drugs and money could be concealed as they were moved from location to location. The appellant's fingerprint was found in the compartment establishing that he accessed it.

9. The respondent served a notice of intention to cease refugee status upon the appellant, who responded by serving human rights representations. The respondent refused the representations by a decision dated 31 May 2018 and confirmed that the appellant's refugee status had ceased. Additionally, the respondent confirmed his intention to deport the appellant, who filed an appeal with the First-tier Tribunal: (HU/12211/2018).

10. In the meantime, the Kosovan authorities wrote to the respondent in September 2018 and confirmed that the appellant was not one of its citizens. In October 2018, the respondent became aware of the appellant's true identity and his date of birth.

11. By her decision dated 21 November 2019, Judge of the First-tier Tribunal Meacher dismissed the appellant's human rights appeal. She noted the respondent's concession that the appellant was in a genuine relationship with his partner but concluded that he could not meet the threshold of "unduly harsh" established by section 117C(5) of the Nationality, Immigration and Asylum Act 2002. Permission to appeal the decision of Judge Meacher was refused initially by Judge of the First-tier Tribunal Povey and then by Upper Tribunal Judge Stephen Smith by a decision dated 12 February 2020.

12. On 31 March 2020, the appellant applied for an EEA residence card as the extended family member of an EEA national. The respondent rejected the application by a letter dated 3 August 2020 on the ground that though credit/ debit card details were provided, the issuing bank rejected payment. Questions as to the validity of the application and service of the decision arise in the appeal before this Tribunal. The

respondent contends that the rejection letter was sent by recorded delivery to the appellant's then legal representatives, Karis Solicitors. The appellant's position is that Kilby Jones Solicitors had placed themselves on record with the respondent as his legal representatives, and that neither they nor Karis Solicitors received the letter.

13. On 25 May 2021 the appellant was detained pending removal from this country. He served an application to revoke the extant deportation order on 4 June 2021, with reliance upon article 8 ECHR. He commenced judicial review proceedings challenging his proposed removal in which he relied upon both his recent human rights representations and his earlier EEA residence card application: (JR/826/2021). The respondent cancelled removal directions and permission was subsequently refused by Upper Tribunal Judge Kamara who reasoned in her Order of 29 December 2021, *inter alia:*

> '2. The applicant's removal was deferred on 9 June 2021. The EEA application was decided on 3 August 2020 and served on the applicant's then solicitors. The further submissions are under consideration and the respondent has undertaken to provide a response within a month of the AoS being produced.
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> 3. The relief sought by the applicant included relief against removal and an order for the respondent to make decisions on the EEA application and human rights submissions. The first two items have been achieved and the third is matter is under consideration. This application is, therefore, entirely academic and there are no exceptional circumstances which would justify permitting this matter to proceed.'

14. The respondent refused to revoke the deportation order by a decision dated 13 March 2023. He considered the appellant's deportation to be conducive to the public good and concluded that very compelling circumstances did not arise in the appellant's matter. In response to the appellant's submission that his EEA residence card application had not been resolved, the respondent reasoned as follows:

> 'With reference to your EEA Residence Card, as concluded by the Upper Tribunal Judge Kamara on 12 October 2021 [sic], your application for an EEA Residence Card was decided by the Home Office in its decision of 31 March 2020. On this date your application was refused due to non-payment of a fee, and no further applications were made for an EEA Residence Card. UK EEA Residence Cards are no longer valid and permission to stay must be obtained under the EU Settlement Scheme. There is no evidence of an EUSS application having been submitted by yourself. The deadline to apply to the EU Settlement Scheme was 30 June 2021.'

First-tier Tribunal Decision

15. A case management hearing was held in the First-tier Tribunal on 26 September 2023 via CVP. The appellant requested a preliminary ruling on whether his EEA application of 21 March 2020 was still outstanding. The case record confirms Judge of the First-tier Tribunal Louveaux's observations in respect of the request:

> 'I find that the appellant is seeking to re-litigate a matter that has already been decided by UTJ Kamara on 12 October 2021. From paragraph 3 of UTJ Kamara's order it is clear that the appellant was specifically seeking an order for the respondent to make a decision on the EEA application. UTJ Kamara found, at paragraph 2, that the EEA application had been decided on 3 August 2020. That was one of the reasons UTJ Kamara concluded that the appellant's application for judicial review was academic. Regardless of the merits of that decision, it is not for this Tribunal to go behind the clear findings of a higher Tribunal. If the appellant believed UTJ Kamara's findings to be wrong, he should have sought permission to appeal the order to the Court of Appeal.
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> However, rather than issue a formal decision on the preliminary issue, I have left it to the judge deciding the deportation appeal to do so as it would make sense for all the issues in the appeal to be appealed together rather than have any separate application to challenge my preliminary ruling.'

16. The appeal came before the Judge sitting at Hatton Cross on 3 October 2023. Mr Wilding again raised the issue concerning the EEA residence card application submitting that the respondent's letter upon the application had not been properly served and therefore a decision remained outstanding. Any consideration of the application under regulations 8 and 17(4) of the Immigration (European Economic Area) Regulations 2016 would inevitably have considered the applicant's criminal conduct, but a decision to refuse based upon such conduct would have to have been taken with reference to regulation 27 of the same Regulations. Mr Wilding contended that the outstanding application had to be considered before a decision to revoke the deportation order could be undertaken, because a refusal on public policy grounds would have to comply with regulation 27(5) and (6) and there was no evidence that the appellant presented an ongoing threat.

17. The Judge concluded that the appellant had, through his legal representatives, chased the respondent for a decision on his EEA residence card application. As he had not received a substantive decision, it was outstanding and required determination before there could be proper consideration of the human rights grounds advanced as to why the extant deportation order should be revoked. He then proceeded to allow the appellant's article 8 appeal, concluding at [88]: '[t]he decision is accordingly unlawful and is disproportionate'.

Grounds of Appeal

18. By means of his notice of appeal the respondent advances three grounds of appeal, summarised by Ms Gilmour before us as:

i. The appellant was relitigating a factual issue previously decided by Judges Kamara and Louveaux ('service');

ii. The residence card application was not valid and would have been refused regardless ('validity'); and

iii. The residence card application was made in relation to the appellant's claim of being a documented extended family member (durable partner), who possessed no rights under EU law prior to documentation. The application is not a barrier to removal and the same applies to the maintenance of an existing deportation order ('materiality').

19. Permission to appeal was granted by Judge of the First-tier Tribunal Aziz in general terms by a decision dated 16 November 2023.

Application to amend grounds of appeal

20. This matter came before Upper Tribunal Judge O'Callaghan on 12 January 2024. Upon a request by Ms Gilmour the hearing was adjourned to permit the respondent to file amended grounds of appeal. The issue of permission was left to the panel at the next hearing.

21. The respondent's application for permission to amend grounds was filed and served on 16 February 2024.

22. Before us Ms Gilmour explained that the respondent was not seeking permission to advance a fourth ground. Rather, the intention was to clarify ground 3 as follows:

- If the reasoning of the Judge is accepted in respect of the residence card application, and the relevant decision was not served and remained outstanding, it cannot aid the appellant as it could not result in any entitlement under the saved Regulations, with the exception under section 33(4) of the UK Borders Act 2007 having been repealed before the revoke deportation order decision was issued in March 2023.

- The Judge erred by effectively concluding at [82]–[88] of his decision that section 33(4) was engaged, the decision to refuse to revoke the deportation order was unlawful and so there was disproportionate interference to the appellant's article 8 rights. This conclusion was materially erroneous in law because at the date of decision the appellant could only have engaged an exception under section 33 of the 2007 Act if he was a 'relevant person' as defined under section 33 (6B) and (6C) of the Act, and he was not.

23. Mr Wilding opposed the amendment on behalf of the appellant, submitting that the amended grounds constituted a new, and late, challenge to the Judge's decision.

24. After a short retirement to consider the application, we confirmed at the hearing that we granted the respondent permission to amend grounds so far as it was necessary under our case management powers established by rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008. We confirmed that we would provide our reasons in writing and do so now. We consider the amended grounds to address the same materiality point advanced by ground 3 but from a different angle. It was not necessary for the respondent to amend the grounds as he simply seeks now to identify the statutory underpinning of his case, thereby enabling the appellant and the Upper Tribunal to understand the ground in the round. The appellant suffers no prejudice as a result of the clarification and has had more than adequate time to consider the amended grounds.

Discussion

25. At the outset we thank Ms Gilmour and Mr Wilding for their detailed and helpful submissions.

26. We consider it helpful for the discussion below to note at this juncture that during these proceedings the appellant had three legal representatives at various times: Karis Solicitors, Kilby Jones Solicitors, and his present representatives, A Jones Solicitors.

Service

27. The respondent's first challenge is directed towards the Judge's conclusion that there had been no proper service of the rejection of the appellant's EEA residence card application. It is said that the matter of service had been considered in favour of the respondent by both UTJ Kamara and JFtT Louveaux.

28. Ms Gilmour did not pursue this ground with vigour before us. We consider that she was correct to adopt this approach. The focus of the appellant's judicial review proceedings before the Upper Tribunal in 2021 was to secure a stay of removal. Consequent to the respondent deferring removal on 9 June 2021 he secured what he wanted from the proceedings. UTJ Kamara noted the observation by the respondent in his acknowledgment of service that the decision in respect of the EEA residence card application had been posted, but she was not aware of the applicant's position that it had not been received. She was not asked to, and did not, make a finding of fact upon an issue that she was unaware to be contentious between the parties. JFtT Louveaux therefore proceeded on a misunderstanding in his consideration of UTJ Kamara's reasoning. Further, we consider that JFtT Louveaux made no more than observations in respect of service, as is clear by his confirming that "rather than issue a formal decision on the preliminary issue" it was a matter to be left to the judge hearing the substantive appeal.

29. We are satisfied that neither UTJ Kamara nor JFtT Louveaux made a final decision as to service that would result in the doctrine of *res judicata* being applicable in these proceedings.

30. This ground is properly to be dismissed.

31. The respondent raised no alternative challenge to the Judge's conclusion at [78] that the rejection letter had not been served upon the appellant or his previous legal representatives, Karis Solicitors.

32. We do not go behind that finding of fact by the Judge but consider it appropriate to observe that there was evidence before him, favourable to both parties, that was unfortunately overlooked in what was a relatively brief consideration of service.

33. The appellant was represented by Karis Solicitors at the date of application on 31 March 2020. The application was rejected on 3 August 2020. The respondent's GCID case record sheet confirms that the rejection letter was sent to Karis Solicitors by recorded delivery accompanied by the appellant's birth certificate. We were not taken to any GCID entry confirming that the rejection letter was returned to the respondent by Royal Mail as undeliverable. We take notice that it is the usual practice of the respondent's officials to update GCID to that effect. It is not clear to us as to whether the Judge's attention was drawn to the letter being sent by recorded delivery. He makes no reference to this fact in his decision.

34. In the meantime, Kilby Jones Solicitors wrote to the respondent on or around 1 July 2020 seeking a change of address on the respondent's

records and detailing they now represented the appellant. An entry on GCID records the change of address not being accepted on 16 July 2020 as no identity documents from the appellant were provided. The respondent's 'change of address' team (COAT) did not verify the new representatives. A subsequent entry on GCID, dated 20 August 2020, confirms that a change of address request was received from the appellant's representatives on 16 July 2020, with a copy of a driving licence provided as an identity document. Ms Gilmour was unable to throw further light on this entry as there is no copy of the driving licence on the system, and COAT does not work on GCID. We observe that sufficient information appears to have been provided by correspondence on 16 July 2020 to satisfy the respondent that Kilby Jones Solicitors were representing the applicant, though the system was not updated to recognise the change until after the rejection letter was sent to Karis Solicitors. When the respondent sent his notice of rejection to Karis Solicitors on 3 August 2020, therefore, that did not represent service of a decision to the appellant's nominated representative.

Validity

35. The respondent's second challenge is, in simple terms, the Judge materially erred by not recognising the invalidity of the EEA residence card application.

36. The Judge noted Mr Wilding's submission that the rejection of an application as invalid for non-payment of the fee required more than a bare assertion. He concluded at [75]-[78] of his decision:

> 75. I am satisfied on the evidence adduced that the respondent has failed to properly notify the appellant regarding the validity issue. There has been no challenge to the chronology presented by Mr Wilding that payment had been attempted as confirmed by the receipt received on 16 April 2020, and furthermore, that the respondent did not attempt to notify the appellant of this for another four months, without giving any explanation.
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> 76. Nor has the respondent given any details in the rejection letter as to when payment was attempted nor whether there had been more than one attempt. The receipt stapled to the previous solicitor's letter sent back by the respondent did not have the full card number nor any reason why the authorisation was not successful. Nor has there been any explanation as to why it took some four and a half months to reject the application.
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> 77. There has been no contention by the respondent in the current appeal that the EEA application was rejected on the basis that

> the application itself was incomplete. The basis of rejection was that the fee was not able to be taken.
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> 78. In summary, I find on the evidence provided that neither the appellant nor his solicitors received the rejection letter relating to the inability to pay funds. Nor has the respondent indicated how or what attempts were made to take funds.'

37. As we observed to Mr Wilding in argument, it is far from clear that the Judge actually considered the question of validity, as distinct from the question of service. A failure to consider that question is an error of law. That question arose even if the respondent had failed to effect valid service of the rejection because an application which is not validly made can have no substantive effect: *R (Mirza & Others) v. Secretary of State for the Home Department* [2016] UKSC 63; [2017] 1 WLR 85, at [33]. Insofar as Mr Wilding submitted that the application was deemed to be valid until the respondent served notice of invalidity, we do not agree.

38. As to authorities concerned with non-payment of fees the Judge was directed to *Basnet (Validity of Application – Respondent) Nepal* [2012] UKUT 00113, [2012] Imm AR 673 and the modification of the *Basnet* guidance in *Mitchell (Basnet revisited)* [2015] UKUT 00562. When considering validity, his attention was not drawn to the defining authority of *R (Kousar) v. Secretary of State for the Home Department* [2018] EWCA Civ 2462, [2019] Imm AR 479 and the identified test, at [49], *per* Irwin LJ:

> '49. In my view, the approach of the Upper Tribunal in Mitchell (Basnet Revisited) was entirely correct. It is only when an Appellant can demonstrate that he or she has taken the **necessary steps to authorise and effect payment** that it falls to the Secretary of State to show, by further evidence, that the application was nevertheless invalid on the ground that the application fee was not "paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes", as Rule 34A stipulates.'
>
> [Emphasis added]

39. The words 'necessary', 'steps', 'authorise', 'effect' and 'payment' enjoy their ordinary meanings. The question is whether the appellant authorised the fee to be paid from the bank account identified on the mandate accompanying the application form and whether he had taken the necessary steps to effect payment which can only mean that he ensured that the necessary sum was available in the account. The necessary sum in this case was £65: line 10.5.1 of Table 10 in

paragraph 2 of Schedule 3 of the Immigration and Nationality (Fees) Regulations 2018.

40. We consider that the Judge's reasoning at [75]-[78] does not engage with the relevant test, and such failure is a material error of law. Before the burden of proof is transferred onto the respondent, it is for the appellant to establish that he had taken necessary steps to authorise and effect payment. The Judge was required to consider the appellant's evidence going to the core of this issue: he did not complete the mandate requesting the respondent to take the funds from his bank account, he simply paid his previous legal representatives in cash and thought they would proceed to pay the fee by a cheque.

41. We observe that in *Basnet*, at [8] and *Kousar*, at [10], it was acknowledged that the appellants had sufficient funds in their accounts at the time the payment was sought. The focus of the panel in *Mitchell* was directed to the signing, or otherwise, of the mandate, and did not proceed to considering whether sufficient funds were available. In all three matters, the mandate was for the application fee to be taken from the applicant's account. In this case it is said to be Karis Solicitors who completed the mandate, not the appellant, and so took steps to authorise and effect payment.

42. In this matter, the application fee was to be taken from an account of Karis Solicitors. On the appellant's account it was Karis Solicitors who were required to undertake the necessary steps to authorise and effect payment as it was to be taken from the firm's bank account. The appellant could not personally authorise the respondent to take the fee as it was not being taken from his account. Whilst Karis Solicitors apparently provided account details which enabled the respondent to attempt to take the fee, there is nothing from the firm to confirm that the account was in funds when the payment was attempted. Mr Wilding was not able to explain why no such enquiry was made of that well-known firm during the course of these proceedings.

43. The appellant has been aware that the application fee was not paid for some years. Mr Wilding acknowledged that a Post-it note dated 26 May 2021, placed on a copy of the covering letter accompanying the residence card application, stapled to which is the receipt confirming that payment on 16 April 2020 was not authorised, confirmed the date when these documents were received by Kilby Jones Solicitors from Karis Solicitors. No steps were taken to ascertain why the fee was not paid. No confirmatory evidence has been secured from Karis Solicitors explaining why payment was refused.

44. Considering everything in the round, we are satisfied that there is insufficient evidence as to the appellant having taken the necessary steps to authorise and effect payment requiring the burden of proof to be reversed in this matter.

45. On its face, the application was invalid as the application fee was not paid. An invalid application cannot be an outstanding application awaiting a decision. It is an application that will properly be rejected.

46. The respondent's appeal is allowed on this ground, which is determinative of the appeal before us.

Materiality

47. As we have concluded that the Judge materially erred in law in treating the EEA residence card application as valid, there is no requirement that we consider the respondent's third ground. Indeed, the respondent advances it in the alternative; if unsuccessful on his validity challenge. We do so because we are satisfied that it identifies an additional material error of law.

48. If the Judge had correctly treated the application as valid, and we have found it was not, the appellant did not enjoy the benefit of section 33(4) of the UK Borders Act 2007 at the date of the respondent's decision not to revoke the deportation order in March 2023, as it was omitted on 31 December 2020 by regulation 17(2) of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020. The appellant therefore could not rely upon as an exception his removal in pursuance of a deportation order being in breach of his rights under the Union treaties.

49. The Judge observed at [81] of his decision that section 33(4) had been omitted from the 2007 Act. Confusingly, he then references a Court of Appeal judgment and an Upper Tribunal decision addressing section 33(4) before against observing that the section was omitted. He proceeded to conclude, at [86]:

> '86. ... However, if the deportation would be unlawful under the EEA Regulations, it would be ipso facto disproportionate under Article 8(2) ECHR, and the Tribunal would be obliged to allow the appeal on human rights grounds provided that Article 8(1) was engaged. Mr Wilding also referred me to Charles (Human Rights Appeal: Scope) Grenada [2018] UKUT 89.'

50. Mr Wilding accepted that he could not seek support from *Charles (Human Rights Appeal: Scope)* [2018] UKUT 89 (IAC); [2018] Imm AR

911, as the appellant in that matter was exempt from deportation under section 7 of the Immigration Act 1971.

51. The exercise of an appeal right against the refusal of an EEA residence card under regulation 36 of the 2016 Regulations does not impose a stay of removal whilst an appeal is outstanding by application of the principle established in *R (Ahmed) v. Secretary of State for the Home Department* [2016] EWCA Civ 303; [2016] Imm AR 869. The Secretary of State is not prevented from removing (or deporting) a person who has a pending EEA application. Insofar as the Judge treated the supposedly pending EEA application as determinative of the human rights appeal, therefore, he erred in law. Even if that application was pending, it was incapable in itself of rendering the respondent's decision unlawful or disproportionate.

52. We consider that the possibility of future removal was not defining in human rights terms if the appellant could lawfully be removed prior to the determination of an appeal.

53. At its highest, an outstanding EEA residence card application can be a material factor in the proportionality assessment, but it cannot be a determinative factor. The Judge erroneously considered that it was determinative; it was the only factor considered.

54. Further, we consider that though the Judge's final word in his decision was 'disproportionate', it is clear that he entirely failed to weigh the public interest against the rights of the appellant and so only undertook half of the proportionality assessment.

55. In the circumstances, the respondent is successful in his alternative case advanced by ground 3.

Remittal

56. As the Judge allowed the appellant's appeal on the single basis we have considered above, the appropriate course is to remit the matter back to the First-tier Tribunal so that there can be substantive consideration of the appellant's appeal.

Decision

57. The decision of the First-tier Tribunal sent to the parties on 20 October 2023 is subject to material error of law and is set aside in its entirety.

58. The appeal is remitted to the First-tier Tribunal sitting at Hatton Cross to be heard by any Judge other than Judge of the First-tier Tribunal Mailer.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 May 2024