Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00596/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 June 2017	**On 28 June 2017**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

AGRON XHEPA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P. Yong of counsel, instructed by Perry Clements Solicitors
For the Respondent: Ms Z. Ahmed, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant was born on 23 June 1976, is a national of Albania. He first entered the United Kingdom on 9 May 1999. He applied for asylum that same day but his application was refused and he then remained here without leave to do so.

2. He met his partner in September 2004 and they began to live together in October 2006. They travelled to Albania in order to marry there on 17 September 2007. On 16 October 2007 he was issued with a family permit as her partner and returned to the United Kingdom on 17 October 2007. Their daughter was born on 18 November 2008. The Appellant was then granted a five year residence card, as the partner of an EEA national, on 16 June 2009.

3. However, he travelled to The Netherlands on 13 June 2013 to take up a short-term work contract. On 18 June 2013 he was arrested and charged with wilfully transporting 5.1 kg of cocaine in Amsterdam and appeared in court on 18 December 2013. On 30 December 2013 he was convicted and sentenced to 30 months' imprisonment. He was released from prison and returned to the United Kingdom on 11 September 2014 on a family permit issued by the British Embassy in the Netherlands.

4. On 15 December 2014, he applied for a permanent residence card as the partner of an EEA national who was exercising a Treaty right in the United Kingdom. He also applied for a non-permanent residence card in the alternative.

5. His application for a permanent residence card was refused on 16 September 2015 on the basis that he could not establish five years continuous residence as the partner of an EEA national. The Respondent also refused him non-permanent residence on the grounds of public policy. On 27 November 2015 the Respondent exercised her powers under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 and decided that she was justified to deport him from the United Kingdom on grounds of public policy. The Applicant appealed on 11 December 2015 on the basis of the family and private life he had established in the United Kingdom but on 16 December 2015 the Respondent certified his claim, which meant that he had no in-country right of appeal. The Appellant brought a claim for judicial review but Upper Tribunal Judge Allen refused him permission on the papers and also refused him a stay and he was deported from the United Kingdom on 18 February 2016.

6. First-tier Tribunal Judge Hanbury heard the Appellant's appeal in his absence on 7 October 2016 and dismissed his appeal in a decision and reasons, promulgated on 31 October 2016. The Appellant appealed against this decision on 17 January 2017. First-tier Tribunal Judge Ransley granted permission to appeal on 12 May 2017 on the basis that it was arguable that First-tier Tribunal Judge Hanbury's failure to ensure that the Tribunal had the correct and complete Appellant's Bundle constituted a procedural irregularity of such a serious nature that it amounted to an arguable error of law that might have made a material difference to the outcome of the appeal. In her Rule 24 reply the Respondent submitted that First-tier Tribunal Judge Hanbury had directed himself appropriately.

ERROR OF LAW HEARING

7. I heard oral submissions from counsel for the Appellant and the Home Office Presenting Officer and I have referred to the content of these submissions, where relevant below.

DECISION

8. The Appellant is appealing on the basis that there were procedural irregularities in the manner in which the appeal was conducted by First-tier Tribunal Judge Hanbury. Counsel for the Appellant provided me with a copy of an email chain that indicated that the Appellant's amended bundle had been sent by post to the First-tier Tribunal on 30 September 2016 and that his solicitors had also attempted to check that it had been received**.** The fact that the bundle had been submitted was confirmed by First-tier Tribunal Judge Ransley, who noted that it was in the Tribunal's file when he granted permission to appeal.

9. Counsel for the Appellant also informed me that, when no confirmation of its receipt had been obtained, the Appellant's solicitors faxed a further copy to the Tribunal on 6 October 2016. This is confirmed by a number of documents and fax transmission sheets in the Tribunal file.

10. The failure by the Tribunal to place all the evidence before First-tier Tribunal Judge Hanbury amounted in itself to a material procedural irregularity. This was also augmented by the manner in which the appeal hearing was conducted.

11. The Home Office Presenting Officer provided me with a short note of the hearing but no transcript was attached to it. I asked her if she was challenging the record of proceedings provided by counsel who had represented the Appellant at the hearing and she said that she was not. I also provided both parties with the First-tier Tribunal Judge's own record of proceedings, which was not as comprehensive as counsel's. It is clear from the extracts of counsel's record at pages 243 and 245 of the Bundle provided for today's hearing, that counsel had referred to there being HMRC and tax records in the Appellant's Bundle. This should have put the First-tier Tribunal Judge on notice that he had not been provided by all the documents submitted on behalf of the Appellant, as there were no such documents in the bundle submitted for the previous hearing, which had been adjourned.

12. As a consequence, the description of events at the hearing in paragraph 10 of the decision and reasons indicates that the First-tier Tribunal Judge had not given sufficient attention to what documents were before him. He said that the Appellant "mentioned at the start of the case that she wished to take instructions on certain wage slips and related documents. I assumed that this was a reference to documents which had been disclosed but it transpired at the end of the hearing that this reference was in fact two documents contained in a new bundle which Ms Tobin had in her possession". It is hard to see how he could accurately assume these documents were before the Tribunal and also that she was trying to rely on material he had not been provided with.

13. In the light of the history now provided about the service of the amended bundle, the First-tier Tribunal Judge was mistaken in paragraph 43 of his decision and reasons when he said that the documents at pages 99 to 197 of the amended bundle were not produced until the conclusion of the hearing or that in order to comply with the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 he had to exclude them.

14. In addition, given the content of these documents, it is difficult to see how he could conclude in paragraph 46 of his decision and reasons that this evidence may have only been peripherally relevant to the hearing.

15. The Home Office Presenting Officer submitted that it was failings on the part of the Appellant's solicitors which had led to evidence not being before the Tribunal. For the reasons given above I cannot accept that submission. There may have been no direct proof of service but the emails and fax transmission sheets strongly suggest that service took place.

16. The Home Office Presenting Officer relied on the second part of the head note in *MM (unfairness; E & R) Sudan* [2014] UKUT 105 (IAC). But the first part of the head note states that "where there is a defect or impropriety of a procedural nature in the proceedings at first instance this may amount to a material error of law requiring the decision of the First-tier Tribunal (the "FtT") to be set aside".

17. The second part of the head note was not applicable to the current appeal as, unlike *E & R v Secretary of State for the Home Department* [2004] EWCA Civ 49, it was not being submitted that the First-tier Tribunal Judge's decision was based on ignorance or mistake as to the facts.

18. As a consequence, I find that there were procedural irregularities that undermined the legality of the decision reached by the First-tier Tribunal Judge.

19. In relation to the substance of the appeal, regulation 19(3) of the Immigration (European Economic Area) Regulations 2006 states that a family member of an EEA national may be removed if (b) the Secretary of State had decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21.

20. In Regulation 21 a "relevant decision" is an EEA decision taken on the grounds of public policy, public security or public health.

21. Regulation 21(3) states that "a relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

22. In addition, whether or not the Appellant could establish that he had become entitled to permanent residence on the basis that he had entered the United Kingdom, as the partner of an EEA national exercising a Treaty right as a worker on 17 November 2007 and remained here until he travelled to The Netherlands on 13 June 2013, regulation 21(5) of the EEA Regulations applied.

23. This states that:

"Where a relevant decision is taken on grounds of public policy or public security it shall…be taken in accordance with the following principles-

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the person conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(e) a person's previous criminal convictions do not in themselves justify the decision.

24. The First-tier Tribunal Judge did not adopt a structured approach to his analysis of whether these principles applied. But, in so far as he may have been considering whether the Appellant's deportation was proportionate in paragraphs 52 to 55 of his decision and reasons, the First-tier Tribunal Judge relied in paragraph 52 on a finding that the Appellant had made a significant financial gain from his offence when there was no evidence that this was the case. He also failed to take into account the strength of his family life with his wife and daughter but simply asserted that the fact that he had offended meant that he was not in a happy family relationship.

25. There was also no evidence to show that the Appellant had used false identities and made a number of bogus asylum claims, as asserted in paragraph 53 of the decision and reasons. Although the fact that he had previously claimed asylum in another identity could reasonably be taken into account when considering proportionality.

26. The First-tier Tribunal Judge did consider regulation 21(5)(c) and whether the Appellant represented a genuine and present threat to one of the fundamental interests of society in paragraph 55 of his decision and reasons. However, he failed to take into account the fact that the Appellant had committed one offence and had not committed any other offences since his release. He also failed to take into account the fact that he returned to the family home as soon as he was released and obtained employment to support his family. The evidence from the witnesses at the hearing also indicated that he would be able to obtain employment here if he was permitted to return.

27. In paragraph 32 of *Essa (EEA Rehabilitation/integration*) [2013] UKUT 00316 (IAC) the Upper Tribunal found that:

> "…for any deportation of an EEA national or family member of such a national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable".

28. Therefore, the finding in paragraph 54 that "the seriousness of the offence, the circumstances in which it was committed and the sentence of the Amsterdam Court fully justified the decision to deport" is not sustainable in the light of regulation 21(5)(e) of the EEA regulations or the case of *Essa.*

29. In addition, in paragraph 55 the First-tier Tribunal Judge noted that the public interest here in deportation outweighs all other considerations. This is the test which applies to foreign national offenders. The test to be applied as a result of regulation 21(5) is more nuanced.

DECISION

(1) The Appellant's appeal is allowed.

(2) The decision by First-tier Tribunal Judge Hanbury is set aside in its entirety.

(3) The appeal is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Hanbury.

Nadine Finch

Signed Date 22 June 2017

Upper Tribunal Judge Finch