Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00402/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 August 2019	**On 13 August 2019**

Before

UPPER TRIBUNAL JUDGE MARTIN
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SHAMSUL ARAFIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr N Bramble (Senior Home Office Presenting Officer)
For the Respondent: Ms G Capel (instructed by RLegal Solicitors)

DECISION AND REASONS

This is an appeal to the Upper Tribunal by the respondent with permission granted by First-tier Tribunal Judge Bristow on 30 May 2019.

It relates to a decision and reasons of Judge Rowlands in the First-tier Tribunal promulgated on 1 April 2019.

For the sake of continuity and clarity, we shall refer to Mr Arafin as the appellant and the Secretary of State as the respondent, as they were before the First-tier Tribunal, even though this is the Secretary of State's appeal.

The appellant, a citizen of Bangladesh born on 23 February 1981 had an appeal before the First-tier Tribunal against the Secretary of State's decision to deport him as a result of his conviction for assault occasioning actual bodily harm, false imprisonment and two robberies for which he was sentenced, on 18 January 2016, to 5 years imprisonment.

The appellant is the spouse of an EEA national and as a family member of an EEA national the decision to deport him was made under the EEA Regulations.

The First-tier Tribunal Judge found that as the appellant and his EEA national partner had started living together and were in a durable relationship since 2008, by 2015 he had acquired a right of permanent residence on account of five years continuous residence in accordance with the EEA Regulations.

Having so found, the judge went on to consider the deportation on the basis that the appellant could only be deported on imperative grounds of public security.

The Secretary of State, in the grounds of appeal, pointed to two major errors by the First-tier Tribunal. Firstly, the appellant had not acquired permanent residence. He had not applied for or been given a residence card as an extended family member of his now wife on the basis of a durable relationship. Not having the benefit of a residence card, he was not to be regarded, for the purposes of these proceedings, as a family member at that time. (Macastena [2018] EW CACI V1558). The couple married on 19 February 2011 and therefore he would not acquire permanent residence until 19 February 2016. By that time he had been incarcerated and therefore was not residing in accordance with the Regulations. As a matter of law therefore he had not acquired permanent residence.

The second error is that even had the judge been correct in finding the appellant had acquired permanent residence, he still erred in applying the test of imperative grounds of public security. That test only applies where someone has acquired both permanent residence and 10 years residence in the United Kingdom. The judge has not mentioned at all or considered whether the appellant had been resident for 10 years.

To their credit the appellant's representatives filed a Rule 24 response accepting that the First-tier Tribunal 's decision contained material errors of law. They did however suggest that some of the findings in the appellant's favour, particularly in relation to his relationship and risks should be preserved.

We agree that the errors identified by the Secretary of State's are material errors of law such that First-tier Tribunal's decision cannot stand. Given that the judge has completely misunderstood and misapplied the law in relation to deportation under the EEA Regulations, we find it inappropriate to preserve any findings.

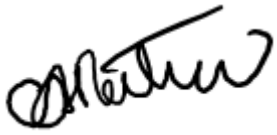
Both parties were in agreement that the appropriate step, having set aside the First-tier Tribunal's decision is to remit it for a full rehearing on all matters to the First-tier Tribunal and this we do.

We would add that in a case such as this, where the material errors of law were clearly apparent, the appropriate step to have been taken by the first-tier Judge, considering whether to grant permission to appeal, should have been to review that decision and then to set it aside under Rule 35 of the Tribunal Procedure Rules 2014. This matter should never have come before the Upper Tribunal at all.

Notice of Decision

The appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside, and the matter remitted to that tribunal for a full rehearing on all issues.

There was no anonymity direction made in the First-tier Tribunal, no application for one and we see no reason to make one.

Signed  Date 2 August 2019

Upper Tribunal Judge Martin