



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02914/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8th March 2019

Decision & Reasons Promulgated
On 10th April 2019

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

HAMDINOU ELBORAEI ELMOURSII ELSHERBINI ELSRAFI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Kamal, ISL Legals Ltd

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Egypt born on 13 January 1983. He appeals against the decision of First-tier Tribunal Judge Cockrill dismissing his appeal against the refusal of a residence card as confirmation of a right of residence as a spouse. The Appellant was refused a residence card under Regulation 24(1) of the 2016 Regulations.

Immigration history

2. The Appellant entered the UK illegally and claimed asylum on 13 October 2008 in the identity of Abdul Ibrahim Jamal a Palestinian national. He was served with a removal notice as an illegal entrant. His asylum claim was refused on 7 November 2008. On 20 October 2011 he submitted an EEA residence card application in his own identity as a family member of an EEA national which was refused on 11 January 2012. He submitted an application for leave to remain on Article 8 grounds and was granted leave until 1 May 2016. On 22 April 2016 he submitted a further application for a residence card which was rejected on 13 June 2016. On 22 November 2016 he was notified of his liability to deportation and served with a deportation order. The application for a residence card made on 24 June 2016 was refused under Regulation 24(1) on grounds of public policy and public security.
3. The Appellant applied for permission to appeal. The judge accepted at paragraph 34 that the offences were relatively minor and, although he was a persistent offender, he was not a serious offender. The Appellant was not a threat to the public in any way and had not committed any further offences. The judge failed to consider the Appellant was legally married to an EEA national for the last five years and was entitled to permanent residence. The judge accepted that the Appellant was still married and they were trying to reconcile their marriage.
4. Permission was granted by Deputy Upper Tribunal Judge McCarthy for the following reasons: "At the end of [34], the judge states that he accepted the proposition that the Appellant has not been a serious offender but does not explain why, if that is the case, the respondent can be said to have discharged the burden in relation to Regulation 27(5)(c) as required in Arranz (EEA Regulations - deportation - test) [2017] UKUT 294. This ground was arguable." The other grounds relating to the 2016 Regulations were arguable because they related to this fundamental issue. The Article 8 grounds were not arguable and permission was not granted on that basis.

Submissions

5. Mr Kamal submitted that the Appellant was legally married and was a family member but had been refused a residence card on grounds of criminality. It was not in dispute that his wife was a qualified person. Having found that he was not a serious offender the judge had erred in finding that he was a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The Appellant was not a threat. He had been rehabilitated and completed his community service in respect of the offences of which he had been convicted. The Respondent had failed to discharge the burden because the Appellant was not a current threat. The judge's comments in relation to the Appellant's alleged deception in employing another identity were wrong.

6. Mr Melvin submitted that the Appellant's submissions in the grounds of appeal and made orally amounted to an argument with the judge's decision but disclosed no material error of law. The judge found that the Appellant was an unsatisfactory witness and had been deceitful. Given the Appellant's fifteen previous convictions and the finding that his oral evidence was unreliable, it was open to the judge to conclude that the Appellant was currently a risk in the UK. It was clear from the judge's findings at paragraphs 38 to 40 that the burden was on the Respondent and there was sufficient evidence before the judge to discharge that burden. The Appellant did not have permanent residence so it was not necessary to show serious grounds of public policy and security. The judge's findings were sufficient and sustainable in law.
7. In response, Mr Kamal submitted that the Appellant was not a serious offender. He was not a genuine, present and sufficiently serious threat and had not committed any further offences. On the balance of probabilities, there had been no further criminal activity and therefore the Respondent had not discharged the burden because the Appellant was not currently a threat.

Relevant regulations

8. Regulation 24 (1) states: The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health, or on grounds of misuse of rights in accordance with regulation 26(3). Regulation 24 (7) states: Any action taken under this regulation on grounds of public policy, public security or public health must be in accordance with regulation 27.
9. Regulation 27 (1) states: In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health. Regulation 27 (5) provides: The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;
 - (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

- (e) a person's previous criminal convictions do not in themselves justify the decision;
- (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

Discussion and conclusions

10. The judge found that the Appellant was an unsatisfactory witness and had been untruthful in a number of respects. He was not a person upon whom the judge could place reliance. He found that the Appellant had used his brother's details. His brother was also culpable because he had falsely used the Appellant's address. The Appellant had been subject to a restraining order, which he disclosed in his oral evidence. There was no reference to this in his witness statement where he stated that he was still living with his wife. The judge found that the reality of the situation was that the Appellant was separated and had been for an appreciable time. His wife was living with an aunt and the Appellant had been living on his own.
11. This is not a case where deportation was followed. However, the judge noted that the Appellant's spouse did not attend to give evidence and there was no witness statement from her. The judge was clear that the Appellant had been someone who had been far from consistent and reliable in the way he gave his account and had tried at various points to blame his twin brother. The Appellant had misrepresented the situation by using his brother's details and he had fifteen previous convictions. The judge took into account the positive report from the Appellant's probation officer and that the Appellant has completed a certain number of hours of unpaid work, but concluded that, looking at his overall conduct, the Appellant had been deceptive and he was not currently living with his EEA national wife.
12. In summary, the judge made the following relevant findings. The Appellant has fifteen previous convictions. Each offence was relatively minor in the scale of criminal behaviour but looked at overall it amounted to a situation where the Appellant had shown a clear propensity to reoffend. The Appellant was a persistent offender, although not a serious offender. The Appellant did not have permanent residence and was not entitled to enhanced protection.
13. The reference to Arranz in the grant of permission was relied on by Mr Kamal to support the submission that the burden was on the Secretary of State and there was insufficient evidence on the balance of probabilities to discharge that burden. The case of Arranz is a deportation case unlike the current one and other than establishing the burden and standard of proof does not really assist the Appellant. The Appellant did not have permanent residence and was not entitled to enhanced protection. The Appellant's fifteen previous convictions show that he was a persistent offender. The Appellant had employed deception in the past and had failed to disclose, prior to the appeal hearing, that he was no longer living with his wife. The judge was entitled to find, on the evidence before him, that the Appellant's

conduct was such that he was a genuine, present and sufficiently serious threat and, therefore, it would not be appropriate to grant him a residence card.

14. The judge considered whether the Appellant's conduct justified the Respondent's decision. He found that the Respondent had shown that the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge accepted that although the Appellant was technically married to an EEA national, relying on the Appellant's overall conduct, the Respondent was entitled to exercise discretion in refusing to issue a residence card. The judge's finding was open to him on the evidence before him and there was no material error of law in the decision to dismiss the Appellant's appeal.
15. I find that there was no error of law in the judge's decision dated 24 September 2018 and I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed

Date: 8 April 2019

Upper Tribunal Judge Frances

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed

Date: 8 April 2019

Upper Tribunal Judge Frances