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Heard at Field House

SS (EU Spouse - Article 8 -  
Serious Crime) Angola [2003]  
UKIAT 00159

On 11 November 2003  
Prepared 12 November 2003

## **IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

26 November 2003

**Before:**

**Mr H J E Latter (Chairman)  
Miss B Mensah  
Mr D Froome**

**Between**

**APPELLANT**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

Representation

For the appellant: Ms G Brown, Counsel instructed by Irving & Co  
For the respondent: Mr L Parker, Home Office Presenting Officer

### **DETERMINATION AND REASONS**

1. The appellant, a citizen of Angola, appeals against the determination of an Adjudicator, Mr A J Olson, who dismissed his appeal against the decision made on 5 December 2001 Giving directions for his removal following the refusal of his claim for asylum.
2. The appellant claims to have entered the United Kingdom on 16 February 1999, claiming asylum on 18 February 1999. He married on 22 September 1999 and he is the father of twins born on 17 May 2001. In March 2000 the appellant was arrested and initially released on bail. Subsequently he was remanded in custody and on 23 January 2001 he

was convicted of rape at Middlesex Crown Court and sentenced to six years imprisonment.

3. At the hearing before the Adjudicator the appellant gave oral evidence. The Adjudicator did not accept that the appellant would now be at risk of persecution on return to Angola. There is no appeal against this part of his decision. The Adjudicator went on to consider the issues which arose from the fact that the appellant was married to an EEA national. His wife had been born in Guinea-Bissau but she went to Portugal in 1985 and acquired Portuguese nationality the same year. She came to the United Kingdom and according to her statement now works part-time for Newham General Hospital.
4. The Adjudicator was not satisfied that the appellant would qualify for a residence permit. He said that no marriage certificate had been produced. His wife had made no mention of her husband as a family member in her application for indefinite leave to remain although she had referred to her two children as members of her family. It was his view that the appellant would not qualify within the provisions of the EEA Regulations 2000. He also commented that the principles in Mahmood in relation to Article 8 and in particular to the knowledge on the part of one spouse at the time of the marriage that the rights of residence of the other are precarious militates against a finding that an order excluding the other spouse would violate Article 8.
5. The lengthy grounds of appeal in substance raise two issues. The first is that the Adjudicator was wrong in his findings on the appellant's status under EU law. He had no jurisdiction to consider any appeal under EU law. An application had been made for residence but no decision had been made. In any event the Adjudicator had referred to Regulation 22 instead of Regulation 15. He referred to the application for indefinite leave to remain. This was irrelevant. There had been a proper application for residence. It was not correct that the marriage certificate had not been produced.
6. The second issue is that the Adjudicator's findings under Article 8 were incorrect. It is argued that he failed to consider in an adequate way whether there were insurmountable obstacles to the exercise of family life in Angola. In the alternative he misdirected himself as to the consequences of removal. He also failed to consider the effect of EC Treaty rights as they affected human rights issues under Article 8. He should have considered the evidence of the genuine marriage and whether removal would be proportionate when there was an EU right to remain. A residence permit did not grant a right under the European law but recognised it.
7. Ms Brown adopted these arguments in her submissions. She said that the appellant had the right to remain as the husband of an EU national exercising community rights. The Adjudicator had been wrong to find that he had no right to remain. Even if he had jurisdiction, he had

referred to the wrong Regulation and ignored the marriage certificate. When considering Article 8 the Adjudicator had failed to consider all the issues which arose. There was no reason to believe that the appellant's wife would be admitted to Angola. It was unfair to expect him to return there now that he had a family in the United Kingdom.

8. Mr Parker accepted that a marriage certificate had been in front of the Adjudicator and that he had been wrong to refer to the application for indefinite leave to remain. However this did not materially affect his conclusions. He was entitled to take into account whether there was a right to remain under EU law and consider that when assessing proportionality. He confirmed that the appellant's wife had been granted a residence permit as an EEA national exercising a community right, but on 6 November 2003 the Secretary of State had issued a decision to make a deportation order under Section 5(1) of the 1971 Act on the basis that the appellant's removal would be conducive to the public good. There was a right of appeal against that decision.
9. Mr Parker argued that there was very little family life in the present case. The appellant had never seen his children. There was no evidence to support a contention that his wife could not return to Angola with him if he wished to do so, still less that the appellant would be unable to return and make an application for entry clearance in accordance with the Immigration Rules.
10. During the hearing before the Tribunal the effect of the decision to make a deportation order on 6 November 2003 was considered. It was not argued that the decision currently under appeal had been superseded or withdrawn. The appellant is entitled to pursue his appeal against that decision regardless of whether or not he exercises any further rights of appeal.
11. The first point taken by Ms Brown is that the Adjudicator had no jurisdiction to determine the appellant's status under EU law when there was a pending application before the Secretary of State which had not been decided at the date of the hearing before the Adjudicator. If this is what the Adjudicator was purporting to do, clearly he would have been wrong. However, the issue before the adjudicator and which is the subject of appeal to the Tribunal is whether removal would be in breach of the United Kingdom's obligations under Article 8. In considering this issue the Adjudicator was fully entitled, and indeed obliged, to consider and make findings on the appellant's status in the United Kingdom. If he was entitled to remain as the spouse of an EU citizen, that would undoubtedly be a relevant factor in assessing proportionality and perhaps even more to the point the interference with family life would not be in accordance with the law.
12. It is argued that in fact the Adjudicator came to the wrong conclusion when considering that issue. He was not satisfied that he would qualify for admission under the EEA Regulations. The Tribunal are satisfied

that the reasons given by the Adjudicator are wrong. He commented that no marriage certificate had been produced. It is common ground that in the bundle of documents before him there was a marriage certificate. He referred to the application for indefinite leave and drew an adverse inference from the fact that the appellant's husband was not mentioned. It is accepted that that application had no relevance to the application for EU residence and it follows that the Adjudicator's inferences were wrongly drawn.

13. It is also argued that the Adjudicator wrongly referred to regulation 22 and should have referred to Regulation 15. The reference to Regulation 22 comes from the citation of Regulation 15(2) which the Adjudicator has set out in paragraph 6.12 of his determination. Regulation 15 is expressed in mandatory terms. The Secretary of State must issue a residence permit to a family member of a qualified person provided proper evidence is produced but this is subject to Regulation 22. It is this Regulation which permits the Secretary of State to refuse to issue a residence permit if the refusal is justified on grounds of public policy, public security or public health. On the evidence before the Tribunal it is clear that the appellant is *prima facie* entitled to a residence permit subject to the Secretary of State's discretion to refuse to issue one on grounds of public policy or public security. The Adjudicator was aware of the appellant's conviction and the serious nature of that offence. That factor should have been taken into account in assessing whether or not the appellant was likely to be granted residence as the spouse of an EU national.
14. The issue before the Adjudicator was whether there would be a breach of the United Kingdom's obligations under Article 8 if the removal directions were put into effect. It is certainly arguable that there would be a breach of his rights to family life even though he has only lived with his wife for a relatively short time. He has not had contact with his children and has not yet seen them. Nonetheless, in the light of his marriage, the Tribunal is satisfied that he does have family life within the United Kingdom. In her statement his wife makes it clear that she continues to visit him in prison. She does not believe that he committed the offence he has been convicted of and is looking forward to his release so that they can live together as a family. To remove the appellant to Angola would be an interference with his right to family life.
15. It is argued that his removal would not be in accordance with the law in the light of his right to remain under EU law. That right is subject to the qualifications set out in Regulation 22. Regulation 21(3) makes it clear that even if a person is the family member of a qualified person, if the Secretary of State has decided this his removal is justified on the grounds of public policy or public security he may be removed. The Tribunal are satisfied that in the light of the appellant's conviction the Secretary of State was entitled to decide that the appellant's removal would be justified on these grounds.

16. This leaves the issue of whether removal would be proportionate to a legitimate aim. We have no doubt that it is. The appellant has been convicted of a serious criminal offence. It is not just a question of maintaining an effective immigration policy but protecting the public against those who commit such offences.
17. It was argued that the appellant's wife could not reasonably be expected to return to Angola. No evidence was put before either the Adjudicator or the Tribunal as to whether the appellant's wife and children would be permitted to enter Angola but if she is, understandably, unwilling to go to Angola, no reason is given why the appellant should not return and make a proper application for entry clearance. If such an application is unlikely to succeed because of the consequences of his conviction, that is a matter which arises because of his own actions and certainly does not make his removal disproportionate.
18. The Tribunal are satisfied that removal would be in accordance with the law and would be proportionate to a legitimate aim within Article 8(2). The Tribunal agree with the Adjudicator's conclusions but for different reasons from those on which he based his decision.
19. It follows that this appeal is dismissed.

**H J E Latter**  
**Vice President**