



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00869/2013

THE IMMIGRATION ACTS

Heard at Field House
On 28 July 2014

Determination Promulgated
On 5 September 2014

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

and

MR BRUNO FERREIRA MELO

Respondent

Representation:

For the Appellant: Mr Avery, Senior Home Office Presenting Officer
For the Respondent: No appearance

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of the First-tier Tribunal (First-tier Tribunal Judge Woodhouse and Miss A J F Cross de Chavannes) in which it allowed the claimant's appeal against the decision of the respondent made on 23 April 2013 to make a deportation order against him.
2. The claimant is a citizen of Portugal born on 24 April 1978. He first arrived in the United Kingdom in 2002 but returned in 2005. He last entered the United Kingdom

at some point in 2008 and on 4 October 2011 was arrested in connection with the attempted importation of a class A drug, LSD for which he was convicted on 26 June 2012 and sentenced to twenty months' imprisonment. Subsequent to that conviction, on 23 April 2013, the respondent took a decision to deport the claimant. The reasons for this are set out in the refusal letter of that date.

The respondent's case

3. In summary, the respondent considered that the claimant had not acquired the right of permanent residence in the United Kingdom and thus may be deported on the grounds of public policy or public security. The respondent noted at [17] that the NOMS assessment indicated that the claimant posed a low risk of harm to the public however she took the view that it was not reasonable to leave the public vulnerable to the effects of his reoffending that is possible importation again of class A drugs. She noted also that although the offender manager found that he posed low risk of re-offending, little assessment had been taken of the factors which led to the offending behaviour or whether those same factors continue to exist (see [22]) and that the claimant had attempted to import drugs for his own financial gain ([23]).
4. The respondent noted also that although the claimant had had problems with alcohol in the past, there was no evidence that he had attended any alcohol awareness programme or undertaken CBT despite that being said to have occurred [25]. In the absence of evidence that he had overcome drug use or issues with alcohol, he was likely to revert to using drugs or alcohol upon release [27] which would increase the risk in reoffending. On that basis, the respondent concluded that the claimant has a propensity to re-offend and represents a genuine, present and sufficiently serious threat to the public to justify his deportation [28].
5. The respondent considered that it would be reasonable to expect the claimant to be able to re-adapt to life in Portugal following his deportation and noted that he was currently without employment, without accommodation as a result of his conviction [30] and that thus, the decision to deport him was proportionate in terms of Regulation 25(5) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").
6. The respondent considered also, that having had regard to Article 8 of the European Convention of Human Rights the claimant's deportation was proportionate as although he had a daughter here, there had been no contact since 2009 and his girlfriend, Miss Marhoferova had been deported to Slovakia on 9 January 2013.

The hearing before the First-tier Tribunal

7. The claimant was not represented before the First-tier Tribunal. It heard evidence from him and took into account a bundle of material he produced. The Tribunal found that:-
 - (i) the claimant had not established permanent residence in the United Kingdom [103] or established a presence for a period of over ten years [104] and thus the

respondent was required only to show grounds of public policy, public security or public health [105];

- (ii) although the claimant has a child in the United Kingdom with whom he wishes to enjoy family life and with whom he has attempted to remain in contact since the breakdown of the relationship with a former partner, his family life here therefore continues [111];
- (iii) the claimant's offender manager concluded the risk of re-offending was low; the risk of harm to the public was low [117] despite having been homeless upon release, the claimant had continued to report daily and weekly, it had been noted that, in the opinion of the offender manager, he has an exemplary record in complying with the various licence conditions;
- (iv) the claimant has only one conviction [120] and the trial judge noted he had previously been of good character;
- (v) the claimant was remorseful; he had addressed his substance and alcohol use (see [122] to [124]); and on all the evidence before them, he is someone who does not have the propensity to reoffend and therefore does not represent a genuine present and sufficiently serious threat to the public so to justify deportation ([126]);
- (vi) weight was to be attached to letters showing he had friends in the United Kingdom [130]; those with whom he had worked with had made positive comments about him [131]; he had assimilated very well in the United Kingdom [131, 132], having an excellent command of English [133] and his links to Portugal have diminished; and, in light of his previous employment, friendships and language skills, he had integrated strongly into the United Kingdom [133]; there are reasonable prospects of rehabilitation which is a substantial and relevant factor in the proportionality balance as to whether deportation is justified [136] but that he does not constitute a present threat and is well advanced in his rehabilitation in the UK;
- (vii) the respondent had not established that the claimant represents a genuine present and sufficiently serious threat [140] and taking into account the considerations of Regulation 21(6) the decision to deport is disproportionate.

8. The grounds for permission state that:-

- (i) As the claimant had failed to demonstrate five years' continuous residence the Tribunal had erred in taking into account findings on rehabilitation into the assessment of proportionality, the claimant's criminal behaviour indicates that he is not genuinely integrated into the society of the UK and in dealing with the extent of the claimant's rehabilitation, the Tribunal had failed to note that his licence had expired on 24 February 2014;

- (ii) that the findings in respect of the claimant's good character focused solely on the lack of previous criminality, failing to have regard to his history of alcohol and drug abuse; and this is material to the present risk that he poses in failing to consider the risks that prospective employment may pose, the Tribunal failing to engage with the previous abuse.

9. On 5 June 2014 Upper Tribunal Judge Kebede granted permission, stating:-

“Whilst generally a detailed and well-reasoned determination there is arguable merit in the respondent's ground (g) since the Panel, in placing weight upon the influence of the offender manager during the claimant's licence period when assessing risk and proportionality (paragraphs 117, 134 and 136), arguably failed to note that the licence period was due shortly to expire.”

10. There is no response the claimant pursuant to rule 24.

The hearing before us on 28 July 2014

- 11. When the matter came before us, the claimant did not appear. We are satisfied that due notice of the time, place and venue of the hearing had been sent to the address given by him and accordingly, absent any explanation for his failure to attend, that it was appropriate for us to proceed to determine the appeal in his absence. We heard submissions from Mr Avery.
- 12. Mr Avery submitted that, in assessing the claimant's risk of re-offending as low, the Tribunal did not refer to any actual score. He submitted also that the Tribunal had failed to make any mention of the fact that the claimant had no permanent accommodation and no employment this being of particular importance as homelessness indicated he is in poor financial straits which had in the past contributed to reoffending. He submitted also that the Tribunal had not properly grappled with what is meant by a low risk.
- 13. In addition, Mr Avery submitted that the Tribunal had erred at [136] in finding that the claimant had resided lawfully in the United Kingdom for upwards of nine years. He accepted however that that is not a matter which had been pleaded in the grounds of appeal.

Discussion

- 14. It is for the Secretary of State to justify the deportation of an EEA national; that is established law. The EEA Regulations at 21(5) and 21(6) set out the factors that must be considered.
- 15. We note from Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 at [32] to [35]:
 - 32. We observe that for any deportation of an EEA national or family member of such 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.

33. It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment. Here we must take our guidance from the Court of Justice in Tskouridis and the Court of Appeal in the present case remitting the matter to this Tribunal. It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend. This is most likely to be the case with young offenders who commit a disproportionate number of offences, but many of whom will stop offending as they mature and comparatively few of whom go on to become hardened criminals and persistent recidivist offenders. We can exclude consideration of offenders beneath the age of 18 as EEA law will prevent their deportation save in the unusual event that it is in their own interest (Article 28 (3) (b) of the Citizens Directive).
34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.
35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category.
16. The first issue to be considered is whether the individual represents a genuine, present and sufficiently serious threat to the public; were that not established, it is difficult to see how a decision to deport an individual could be proportionate in EU law terms (see **GW EEA reg 21: 'fundamental interests' Netherlands** [2009] UKAIT 00050) nor is that the respondent's case. We therefore consider if the finding that the claimant does not pose such a threat was one rationally open to it.
17. We note, as did the Tribunal, that the applicant's offender manager had considered him to be at low risk of re-offending. His reasons for so finding are set out at length in his report and are reproduced in the determination [117]. There is no direct challenge in the grounds of appeal to the Tribunal's finding that the applicant does not represent a genuine present and sufficiently serious threat to the public.
18. The submission that it did not engage with what "low" meant is not based on the grounds of appeal as pleaded. In any event, the categories of risk are specified in the

Offender Manager's report, and represent a score of 0-40 out of a total of 168. No exact figure was given as no OASys report was, according to the report, prepared.

19. That said, there is a challenge in the grounds [(h)] to the "Panel's findings on the claimant's good character". The first observation is that the reference to good character is clearly a quotation from the sentencing judge's comments [120]. Further, it is evident that the Tribunal considered in some detail the claimant's past drug and alcohol abuse at [121] to [124]. They considered and took into account the evidence of the professionals involved with the claimant as he dealt with this abuse noting in particular the report that the claimant had made good progress within therapy. They noted also that he had pursued sessions in alcohol awareness, a five session relapse prevention course [122] and that drug testing had proved negative [124]. They were rationally entitled and gave adequate reasons for finding that he had improved and had responded well while in prison.
20. The submission in the grounds [(h)] that the Tribunal had failed to consider the risks that may rise in future employment is without merit; there is no evidence that such a submission was made to the Tribunal that being employed as a DJ or in clubbing would increase the claimant's risk of becoming involved again with drink or drugs. Submissions have to be based on the evidence. Accordingly, we are satisfied given the comprehensive way in which the Tribunal assessed the issue of propensity to reoffend that their finding is sustainable.
21. The Tribunal reached that conclusion before going on to consider the issue of proportionality, and it was at that stage that it considered rehabilitation. We note as a preliminary observation that it is difficult to conceive what factors could have permitted the Tribunal, having found that the claimant did not have a propensity to re-offend, and not represent a threat, to conclude that nonetheless, his deportation was proportionate.
22. The grounds challenging the Tribunal's approach to rehabilitation are somewhat confused. As was noted in Essa, the issue of rehabilitation only properly arises where someone continues to present a threat of re-offending or a propensity to do so. If, as here, the Tribunal found that there was no such threat, then it cannot be said that a person has failed to rehabilitate and so failed to comply with societal norms. The findings with regard to rehabilitation were in fact unnecessary but do not indicate that the Tribunal fell into error. Their observations with regard to future rehabilitation are, in reality, a consideration of what was referred to in Essa as future protective factors to ensure that the rehabilitation (which has occurred) remains durable.
23. Further, contrary to what is asserted, the Tribunal set out at considerable length sustainable reasons for concluding that the claimant was integrated into the United Kingdom. That was a conclusion open to them on the evidence and for which they gave rational and adequate reasons; the challenge to that finding is nothing more than a disagreement that does not identify error of law.

24. The Secretary of State has not shown that the determination of the First-tier Tribunal involved the making of an error of law and we therefore uphold it.

Summary of Conclusions

- (1) The Secretary of State's appeal is dismissed.
- (2) We uphold the decision of the First-tier Tribunal.

Signed

Date: 5 September 2014

Upper Tribunal Judge Rintoul