



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01503/2014

THE IMMIGRATION ACTS

**Heard at Field House
Oral determination given
following hearing on 7 July 2015**

**Decision & Reasons Promulgated
On 24 August 2015**

Before

**UPPER TRIBUNAL JUDGE CRAIG
PROFESSOR N M HILL QC
DEPUTY JUDGE OF THE UPPER TRIBUNAL**

Between

**KAROLIS SKEMA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Cole, Counsel instructed by Sterling & Law Associates LLP

For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Lithuania who was born on 31 March 1994. When he was 16 years old, on 15 June 2010 he came to the UK with his mother. He is an only child and his mother works as a self-employed seamstress in this country. On 9 November 2013 he committed a very serious offence of street robbery, the circumstances of which will be

described below and he was also at that time equipped with an offensive weapon. He was sentenced for these offences on 23 December to a total of 25 months' imprisonment. The sentencing remarks of the judge, His Honour Judge Zeidman QC, include the following:

"Earlier this morning I had the advantage of seeing the CCTV footage. It is extremely useful to see it. It says more than words would be able. It makes it plain this was a particularly nasty attack by two men against one victim in which his bag was stolen. It is an obvious aggravating feature but even after the bag is taken, without interruption the attack continues and the victim is gratuitously kicked by this defendant. He stamps on him when the victim is on the floor."

2. The judge then goes on to note that although the victim did not suffer "the most serious injuries or even serious injuries" nonetheless he did lose consciousness for a short while. The judge also notes that "it seems clear from the footage that the kicks were very hard and one can see on that CCTV footage what a petrifying experience this must have been for the unfortunate victim".
3. Before being sentenced for these offences a probation pre-sentence report was prepared in which the reporting officer suggested that a suspended sentence of imprisonment (which it is accepted on behalf of the appellant before us today would have been totally outside the sentencing guidelines) might be considered. Mr McMillan, the probation officer who prepared this report also concluded that this appellant presented a low risk of re-offending although he accepted that he would be at "medium risk of causing serious harm in the future should he decide to re-offend given the nature of this offence".
4. The reasons given by Mr McMillan for reaching this finding was that he considered that the appellant's behaviour on the night of the offence "does appear out of character and an aberration on his behalf" but that now he appreciates the consequences which were that he was "likely facing a lengthy immediate period in custody", Mr McMillan "gained the impression that [the appellant's] experience of the criminal justice system to date is likely to militate against further offending of this magnitude at least". He also had in mind "the statistical risk assessment tools used by the Probation Service" when assessing him as being at low risk of re-offending.
5. It should perhaps be noted that at page 3 of the pre-sentence report Mr McMillan apparently had difficulty in accepting the appellant's version of events, because he says there as follows:

"Based upon [the appellant's] version of events the offences were committed impulsively without any pre-planning or discussion between him and the other unknown man with alcohol and anger management [sic] following the breakdown in his relationship appearing to be the underlying triggers to this offending but not financial gain. The court may find some difficulty with this scenario, as I do myself, but [the appellant] was adamant

that there was no initial criminal intent in his actions although he accepts that his behaviour in assaulting [the victim] was totally inappropriate ...”.

6. In other words, Mr McMillan here was indicating not only that the appellant’s version of events was difficult to accept at face value but that he himself did not do so. Clearly the judge in sentencing did not agree with the sentencing recommendation which was made.

7. Subsequently, on 24 July 2014 the respondent made a decision to deport the appellant to Lithuania but before doing so, those acting on her behalf had in mind, as they were required to that as stated at paragraph 4 of the reasons for this decision, “any such deportation is required to be in accordance with Regulation 21 of the 2006 Regulations [this is a reference to the Immigration (EEA) Regulations 2006]”. As recognised on behalf of the respondent, pursuant to Regulation 21 an EEA national who has a right of permanent residence in the United Kingdom (which this appellant not having been present for a continuous period of five years does not have) can only be deported on serious grounds of public policy or public security and that an EEA national who has resided in this country for a continuous period of at least ten years prior to deportation decision could only be deported on imperative grounds of public security.

8. Furthermore, under Regulation 21 (5) of the 2006 Regulations it is provided as follows:

“Where a relevant decision [which is defined in 21(1) as meaning ‘an EEA decision taken on the grounds of public policy, public security or public health’] is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this Regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision; [and]
- (e) a person’s previous criminal convictions do not in themselves justify the decision”.

9. Pursuant to Regulation 21(6):

“Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the

person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin".

10. It is important to have the provisions of Regulation 21 in mind because these set out the factors that must be taken into account before an EEA national can be removed.
11. The appellant appealed against the respondent's decision to deport him and his appeal was heard before First-tier Tribunal Judge Nicholls sitting at Taylor House on 16 January 2015, in a hearing in which the appellant gave evidence as did his mother and various other witnesses called on his behalf. In a decision prepared on 19 January 2015 and promulgated the following day, Judge Nicholls dismissed the appellant's appeal and the appellant now appeals to the Upper Tribunal, permission having been granted by an Upper Tribunal Judge.
12. Before us, the appellant's Counsel, Mr Cole, relied on a skeleton argument which he had helpfully settled and on which he expanded in oral submissions. Essentially his argument is that on the facts of this case no judge could properly have concluded that this appellant presented a genuine and present threat of re-offending. He asked the Tribunal to note in particular that this offence was considered by the probation officer to be an "aberration" and he also submitted that Judge Nicholls had misunderstood what was said in the probation report about the appellant having denied "initially" having a criminal intention (at page 3 of the probation reports it is recorded that the appellant "was adamant that there was no initial criminal intent in his actions") because at paragraph 26 of his determination Judge Nicholls had stated that "the appellant denied a criminal intention when speaking to the probation officer". Mr Cole seemed to be suggesting that the absence of the word "initial" is a significant omission. While it is accepted on behalf of the appellant that the sentencing recommendation of the probation officer was inappropriate it is nonetheless argued that that does not mean that the conclusion of the probation officer that the appellant only represented a low risk of re-offending should also be rejected. Mr Cole asked the Tribunal to bear in mind that had the appellant been considered to have had problems with alcohol these would have been identified as would have been the case had he been considered to have anger management problems. However, neither of these were perceived to be ongoing problems which could be cured by enrolling him on any of the courses which the probation service could supply.
13. In the course of his submissions Mr Cole suggested at one point that had the appellant's offending "been more serious and he had spent a longer period in custody, these courses would have been available to him" although he did accept later in his argument that he was not attempting to minimise the seriousness of the offences which had been committed. Essentially his main argument with regard to whether or not the appellant represented a present threat was that as he had only been convicted of

one offence (or more accurately one set of offences) he could not be said to be predisposed to crime or have a criminal propensity and therefore the judge had no basis upon which to conclude that he was a continuing threat.

14. One of the reasons given by the judge for his finding which I will deal with below was that the appellant appeared to show little or no remorse for his offending and certainly showed no sympathy for the victim while giving evidence before the First-tier Tribunal, which was a matter which the judge noted during the hearing. While Mr Cole on the appellant's behalf did not seek to challenge this particular finding, he submitted that there were many other reasons why a person might be unlikely to re-offend and in this case the main reason was the deterrent effect of the sentence which he had had. He put it in these terms:

“There are a number of reasons why people may not offend in the future. Sympathy for the victim is only one of them. Deterrence is another, and this is a well-recognised purpose of imprisonment. There is no reason why it should not be effective”.

15. The core of the appellant's claim in this regard would appear to be that the judge had no proper basis upon which he could depart from the recommendation of an experienced probation officer. It was suggested in argument that the judge might have had more regard to the opinions of the experienced criminal judge who had sentenced the appellant who did not follow the recommendations made by Mr McMillan, but Mr Cole's answer to that was that it did not follow from the fact that the sentencing judge had rejected the sentencing suggestion that he had also come to the conclusion that he did not present a low risk of re-offending.
16. With regard to proportionality, although the main challenge to the judge's finding that removal was proportionate was founded on the submission that the judge should not have found that the appellant represented a present risk of re-offending, it was also submitted that the judge had failed to take any account of the appellant's case that he was not himself in regular contact with any of his family in Lithuania. While the judge noted that his mother did have a brother and sister in Lithuania who were aware of the appellant's conviction (this is noted at paragraph 31 of the determination) the judge had no regard or did not appear to have had any regard to the fact that the appellant himself was not in contact with them.
17. On behalf of the respondent Mr Avery submitted that the determination was well-balanced and that the judge had had regard to all the factors which he was obliged to have regard to. Even if one could not discount the possibility that a different judge might have reached a different conclusion, the conclusion which this judge reached was entirely sustainable and there was no error of law in the decision.

Discussion

18. In our judgment the judge in the course of a careful and detailed determination had full regard to the matters to which he should have had regard and his findings are entirely unimpeachable. It is common ground that as set out at Regulation 21(5)(c) the principal test is whether “the personal conduct of the person concerned [represents] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. Even on the basis of the pre-sentence report, if there could be said to be a real risk that this appellant would re-offend, that would be a serious threat affecting one of the fundamental interests of society because as Mr McMillan notes at section 4 of his report dealing with “risk of serious harm and likelihood of reconviction” he would have to “assess him as being at medium risk of causing serious harm in the future should he decide to re-offend given the nature of this offence”. In our judgment, given the nature of the offence which this appellant has shown he has been prepared to commit, if he represents a genuine and present threat then that threat is sufficiently serious to affect one of the fundamental interests of society which is that ordinary citizens should be able to go about free from the risk of being attacked in the street and gratuitously kicked even after an offence has been committed.
19. Accordingly the major factor which the judge had to consider was whether, on the basis of the evidence before him, this appellant could be said to represent a genuine and present threat of re-offending. The judge had in mind not only that the appellant did not appear to have much sympathy for the victim of this offence but also that the reason that he gave for committing it was that he had had too much to drink on the night in question and had just broken up with his partner. There are undoubtedly many members of society who have broken up with their partners and who may also have had something to drink but who do not go out and commit offences as serious as this appellant has done. This is not the sort of behaviour which one would expect normal law-abiding people to indulge in whatever the reasons now being put forward.
20. What the judge then noted was that this appellant had not appeared to address either of the factors said by him to have been behind the offence. It was said on his behalf that the probation officer had not considered he had a drink problem. It was also said that it was not considered he had any problem with anger management. This would seem to beg the question of why if that was the case he committed this offence at all. In our judgment the judge was entirely justified in saying that absent any strategy of dealing with what must clearly be a problem (because his case had been put on the basis simply that he does not have a problem of this kind), he cannot be said not to present a real risk of re-offending.
21. The judge was not obliged to accept everything within the pre-sentence report and in our judgment it is understating the seriousness of the offence to describe it as Mr McMillan does as “out of character and an aberration on his behalf”. There also appears to be a lack of development from Mr McMillan’s statement at page 3 of the report that “the court may find some difficulty with this scenario [that is the appellant’s explanation

of how the offences came to be committed] as I do myself". In these circumstances it was open to the judge to form the view that while not able to say whether or not the appellant would actually commit further offences there was nonetheless a real risk that he would offend again such that he could properly be said to represent a "genuine" and "present" threat of doing so. In these circumstances as already noted above, it cannot in our judgment be said that such a threat is not sufficiently serious as to affect one of the fundamental interests of society.

22. In our judgment having considered that this appellant did represent a genuine threat to one of the primary interests in the UK "which is the prevention of crime" (as the judge notes at paragraph 33 of his determination) the judge then considered all the other aspects regarding this case including what ties he had with relatives in Lithuania (which is noted at paragraph 31) and it was open to him to conclude, having weighed up the various factors, that the removal of this appellant now was entirely proportionate. The factors which the judge needed to take into account were properly taken into account and these are set out within the determination. Although it is said on the appellant's behalf that the judge did not take account of evidence such as that given by his godmother, that he had little contact with anybody in Lithuania and that he was "responsible and diligent" and so on, it is quite clear that the judge did have all this evidence in mind because it is set out in detail within the determination itself.
23. It follows that we are both entirely satisfied that Judge Nicholls' decision is properly reasoned and entirely sustainable and that this decision contains no error of law. This appeal must accordingly be dismissed.

Decision

There being no arguable error of law in the decision of the First-tier Tribunal Judge, this appeal is dismissed.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', written over a light blue rectangular stamp or background.

Upper Tribunal Judge Craig

Date: 17 August 2015