



IAC-AH-KEW-V1

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

Appeal Number: DA/02042/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 10 November 2015**

**Decision & Reasons Promulgated
On 20 November 2015**

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MERZAK BOUTARI

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr C Lam, of Counsel, instructed by Messrs David Tang & Company

DECISION AND DIRECTIONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Colvin who in a determination promulgated on 8 July 2015, allowed the appeal of Mr Merzak Boutari against a decision of the Secretary of State made on 16 October 2014 to make a deportation order under Regulations 24(3) and Regulation 19(3)(b) of the Immigration (EEA) Regulations 2006.

2. Although the Secretary of State is the appellant before me I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly I will refer to Mr Merzak Boutari as the appellant as he was the appellant in the First-tier.
3. At the beginning of the hearing Mr Walker produced a remand order remanding the appellant in custody prior to a trial on 24 September 2015 as he had been indicted for a further crime. Mr Walker put to me that, if convicted that would be an indication that the judge's findings that the appellant would not offend in the future were wrong. He stated it might therefore be appropriate to adjourn the appeal.
4. I considered it was appropriate however to proceed to determine the appeal before me as I was now seized of the appeal and the issue before me was whether or not the judge, on the evidence before her, had made a decision which contained a material error of law.
5. The appellant claimed to have entered Britain in 2003 and it is known from his criminal record that in 2004 he was cautioned for shoplifting. He was convicted of further theft/shoplifting offences the following year and received a conditional discharge. In 2009 he made an application for a certificate of approval for marriage which was granted. He married a Polish national and was granted a residence card valid until 1 July 2010 initially which was then extended to 10 November 2015. There was a further conviction for shoplifting in November 2009 and in September 2010 he was also convicted and fined. He was convicted of common assault in July 2012 for which he received a fine and on 19 October 2012 he was convicted to conspiring to dishonestly make false representations and sentenced to eighteen months' imprisonment. He had been released from prison on 14 November 2014. He is now again in prison pending trial in December. It was accepted that he had not acquired the right of permanent residence under the 2006 Regulations.
6. The judge heard evidence from the appellant and from his wife who is Polish and has a daughter J who is now living in Poland. The appellant's wife stated that she would find it difficult to live in Algeria. The appellant has an uncle here who has children. He asserted he had no friends in Algeria.
7. The appellant stated that he had worked since coming to Britain and had studied IT in prison. He regretted his offences.
8. The judge noted that the respondent asserted that the appellant had been involved in a sophisticated crime involving fraudulent use of bank cards and purchased items in the region of approximately £80,000 in total and she referred to the sentencing remarks in which the judge had said that he had conspired in November 2011 to obtain the proceeds of the account of a Mr Andreas Mentzer and that he had tricked Mr Mentzer's bank into believing that he was Mr Mentzer so that a debit card had been sent out to him which had been used to make purchases for the appellant who ran up debts in the region of £40,000. He made attempts to obtain another £40,000. The judge noted that it was the view of the respondent that there was insufficient

evidence that the appellant had adequately addressed all the reasons for his offending behaviour. The Secretary of State considered that it is reasonable to conclude that there remained a risk of re-offending should the appellant find himself in need of money in the future.

9. The judge noted that in a skeleton argument, Mr Lam who appeared for the appellant before her had referred to Section 72 of the Nationality, Immigration and Asylum Act 2002 which stated that a person should be presumed to have been convicted of a particularly serious crime to constitute a danger to the community if the sentence was imprisonment for at least two years. She considered that on that basis the appellant's sentence of eighteen months and the fact that the crime was not one of violence or drugs meant that it could not be considered to be a particularly serious crime. She also noted that the OASys scores showed a

'... low risk of re-offending and that the appellant had been in stable employment since his release from prison in November 2014 and had shown remorse.'

10. Having set out the terms of Regulations 19(3)(b) and Regulation 21 the judge set out her findings of fact and her conclusions in paragraphs 17 onwards of the determination. In paragraph 18 she stated that there was no doubt that the index offences represented a serious fraud as described in the sentencing remarks and that they were committed following a conviction history involving a series of dishonest offences of theft and shoplifting. She noted that it was accepted that the appellant was not offered a sentence plan or rehabilitation course in relation to the offences but had asserted that he had taken several other courses. She referred to and shown the certificate in his bundle.
11. She went on to say that the only expert report before her was that of the OASys Report which had assessed that the appellant's financial issues were linked to his offending behaviour and said there was no evidence that it is linked to a risk of harm. She stated that his predictors course for general re-offending were 32% in year one, 49% in year two and that this was assessed as low.
12. Having found that the appellant had a genuine relationship with his wife she noted that his wife had said it would be extremely hard for her to live in Algeria and she would have to give up her job as a dental nurse which she had had for ten years.
13. The judge then referred to the terms of Regulation 21 stating that the principal matter was whether on the evidence before her the appellant represented a genuine, present and sufficiently serious threat. She went on to say:-

"It is submitted on his behalf that the fact that he was sentenced to a period of imprisonment of less than two years means that he does not, for example, come within the definition of constituting a danger to the community as stated in Section 72 of the 2002 Act. It is also submitted that the appellant's offence is not one referred to in Appendix B of the UKBA criminal case work directive which lists those crimes which are defined as serious and which might constitute serious grounds of public policy or public security. Further the expert report submitted - the OASys - clearly refers to the

risk of re-offending as being low. It also refers to the fact that his behaviour and attitudes when taking the index offences into account does not amount to a risk of serious harm.”

14. She went on to state that she had to consider the issue of proportionality and then placed weight on the appellant’s relationship with his wife stating that there was no doubt in her view that his wife would find it unduly harsh to relocate to Algeria. She added that in terms of rehabilitation the appellant’s cooperating with the Probation Service continued until November 2015 and he had gained employment as soon as he was released from prison and had not re-offended.

15. The judge concluded in paragraph 24 by stating:-

“Taking all these matters into account I have reached the view that on balance the appellant cannot be said to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Although he has a history of criminal offences most of them are of a minor nature and for the only serious offences committed he was sentenced to eighteen months imprisonment which is less than that considered to constituting a danger to the community. None of his offences have involved violence or drugs. He has shown that he is in the process of successfully being rehabilitated and the risk of re-offending is low – although if he does commit any further offences the situation would clearly be different. Further, I consider that it would be disproportionate to deport him when also taking account of the hardship that would be caused to his wife if she were required to relocate in Algeria in order to continue her family life with the appellant.”

Accordingly the judge allowed the appeal.

16. The respondent appealed arguing that the judge had misdirected herself in law stating that the judge concluded that the index offence was serious but had then stated that in accordance with Section 72 of the Nationality, Immigration and Asylum Act he did not constitute a danger to the community and was not therefore a sufficiently serious threat. It was submitted that that was wrong as Section 72 applied for the purpose of the constructed application of Article 33(2) of the Refugee Convention.

17. It was also stated that the judge had conflated the assessment under Regulation 21 with what was required under paragraph 399 of the Immigration Rules – Section 117C of part 5A of the Nationality, Immigration and Asylum Act 2002 when she had considered whether it would be unduly harsh for the appellant’s partner to return to Algeria. It was stated that that was not a relevant threshold with a proportionality assessment under the Regulations.

18. It was argued that she had erred in interpreting the term “genuine, present and sufficiently serious threat affecting the fundamental interests of society” as being an offence which involved with violence or drugs when there was no such requirement under the Regulations.

19. It was also argued that the judge had erred in seeking to undermine the findings of the sentencing judge and diminishing the seriousness of the appellant’s offence and

had failed to “lawfully engage” the risk of re-offending case which must contribute to the notion of a genuine, present and sufficiently serious threat. The fact that the appellant had been recorded as having a 49% likelihood of reconviction within two years. While that was stated to be a low risk it seemed to be the more significant and of any such risk and must therefore be balanced accordingly.

20. Reference was made to the judgment of the Court of Appeal in **Dumliauskas [2015] EWCA Civ 145** in which the court held the greater the risk of re-offending the greater the risk to deport: the more serious the risk of re-offending and the offences that might be committed the greater the right to interfere with the right of residence.
21. It was also argued, referring again to the judgment in **Dumliauskas**, that the judge had erred in placing weight on the appellant’s rehabilitative efforts when the prospect of rehabilitation was irrelevant unless the offender had a permanent right of residence. Substantial weight should not be given to rehabilitation.
22. Mr Walker relied on the grounds of appeal emphasising the appellant was only entitled to a basic level of protection. He referred to the fact that the Secretary of State was entitled to consider that the index offence was serious and that the judge had erred in importing into consideration a consideration of the terms of Section 72 of the Nationality, Immigration and Asylum Act 2002. Moreover it was argued that she had erred in the way in which she engaged with the risk of re-offending and that the proportionality assessment of the judge was wrong.
23. Mr Lam stated that there was no error of law in the determination of the Tribunal. He stated the judge had properly considered all relevant factors with regard to the Regulations and that her conclusions were fully open to her.
24. He accepted that an attempt to obtain £40,000 was a serious matter but stated that the judge had been more nuanced in her consideration of the relevant issues. She had been entitled to look at the report and to repeat the terms of the report. Although the Secretary of State, in ground 2, asserted that she was incorrect to say that the risk of re-offending was low that was what was in the report. He pointed out that the factual matrix in the judgment in **Dumliauskas** was totally different from offences such as that committed by the appellant. This was not a case where there had been violence and the judge was entitled to take into account the likelihood of rehabilitation. Moreover the judge had properly considered the issue of proportionality as was incumbent upon her taking into account the terms of Regulation 21(5)(a).

Discussion

25. I consider that certain of the grounds of appeal are disingenuous. It is not the case for example that the judge considered that the relevant test of whether or not the appellant had committed a particularly serious crime was that set out in Section 72 of the Nationality, Immigration and Asylum Act 2002 – where the judge referred to that section in paragraph 21 of the determination she is merely referring to an example of a danger to the community as stated in that section. Moreover she does also in that

paragraph refer to Appendix B of the UKBA criminal casework directive which lists crimes which were defined as serious and took into account the terms of the OASys Report. It is not, as alleged, the fact that she considered that the risk of re-offending was low – that was a conclusion which she had taken from the OASys Report. She properly set out the terms of the report including the percentages of the risks of re-offending. Indeed what she said was a direct quote from the report. Moreover it is not the case that she imported into Regulation 21 the provisions of Section 117C of the Nationality, Immigration and Asylum Act. What she was doing when she referred to the term of unduly harshness was assessing the proportionality factors relating to the appellant’s deportation and she was entitled to consider that such a factor was the impact on the deportation on the appellant’s wife. That was not a perverse consideration to take into account.

26. Moreover with regard to the proportionality of the decision and the risk of offending it is not the case that the judge sought to undermine the findings of the sentencing judge – indeed she refers to them specifically. She weighed up the factors before her and reached a conclusion which was open to her. Although the grounds of appeal refer to the judgment in the case of Dumliauskas the reality is that the facts in that case are very different.
27. What the judge found was that it was not appropriate to deport the appellant in the particular circumstances of his case and I consider that her conclusions were open to her and were not in any way perverse.
28. I therefore find that there was no material error of law in the determination of the judge.
29. The reality is, of course, that, should the appellant be convicted of a further offence then the arguments put forward by the judge that the appellant had been rehabilitated would clearly be considered to be wrong. It would therefore, of course, at that stage be open to the respondent to make a further decision to deport.

Notice of Decision

The Secretary of State’s appeal is dismissed.

Signed

Date

Upper Tribunal Judge McGeachy