



IAC-FH-NL-V1

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

Appeal Number: IA/50983/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 1 June 2015**

**Determination Promulgated
On 15 June 2015**

Before

**UPPER TRIBUNAL JUDGE JORDAN
UPPER TRIBUNAL JUDGE CANAVAN**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DAVID ERWIN SCHMITZ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kandola, Home Office Presenting Officer

For the Respondent: Ms V Loveday, Counsel instructed by I.M.K. Solicitors

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State against the determination of First-tier Tribunal Judge Froom against a decision of the respondent dated 9 December 2014 to make a deportation order against Mr Schmitz who is a citizen of Germany, born on 22 September 1985, following various convictions. For the sake of continuity we shall hereafter refer to the Mr Schmitz as the appellant as he was in the First-tier Tribunal.

2. The convictions for which he was sentenced to a period of three years and two months were serious. He was convicted, according to the sentencing remarks of His Honour Judge Sheridan on 16 July 2013, to have been convicted of a knifepoint robbery at a petrol station in Milton Keynes where he chose to rob the operator of the filling station at knifepoint and succeeded in gaining between £30 and £40. The judge took as his starting point that the appellant should be sentenced to a period of four years.
3. There was another indictment in which the appellant was convicted of stealing, by way of burglary, property from the owner of a house whom he knew and indeed who had provided him with support and accommodation. Finally there was an account of the appellant mugging a victim who was an elderly woman on a bicycle. He grabbed her bag and she found herself being dragged along and suffered some minor injury as a result. The judge was minded to make this a consecutive sentence of some eighteen months' imprisonment but in the event concluded that it should properly be served concurrently. As a result of that he was sentenced to a total of 38 months' imprisonment.
4. The appellant as a citizen of the European Union came before the Tribunal on the basis of the provision contained principally within Regulation 26 of the Immigration (European Economic Area) Regulations 2006 and in particular the provisions which relate to the removal of citizens of the European Union. The judge considered the evidence that was relied upon by the respondent in support of the decision to remove him, notwithstanding his European citizenship. It considered the potential intervention of the Multi-Agency Public Protection Arrangements (MAPPA), level 1, which is designed to protect the public against future risk. He took into account the seriousness of the offences and the consequences of those involved. He looked at the appellant's attitude towards offending and the fact that he the appellant had failed to give any proper thought to the consequences of his actions and that his victims had been left traumatised.
5. The OASys Report which had been prepared found that the appellant posed a high risk of harm to the public immediate upon his release and the factors which were relevant to that assessment were his thinking and behavioural deficits, his substance misuse, his associates, the financial difficulties in which he found himself and his attitudes and beliefs in relation to his own chosen lifestyle. It was considered by the offender manager that the appellant posed a medium risk of re-offending.
6. The Secretary of State also relied upon the fact that there was a period in which the appellant descended into a spiral of disorder, first having lost his job, then having found himself without money taking upon himself to commit acquisitive offences and then misusing drugs as a result of the gains that he had made. In all of those circumstances the respondent took into account that it was a case where the applicant had failed to address his offending pattern. It was therefore on that very negative basis which was fully recorded by the judge in the determination that he set about his task in considering whether as a person who had a permanent right of residence there were, in accordance with reg. 21(3) '*serious grounds of public policy or*

public security for making the decision which itself had to accord with the principles of proportionality. In this case because the applicant had a permanent right of residence the grounds had to be what are described as *'serious grounds'*.

7. The appellant had arrived in the United Kingdom in 2006 or 2007 when he was aged 21 and had been in the United Kingdom since then although there may have been occasions when he had left from time to time for short periods. That was the basis upon which the judge assessed the test that was before him. He considered the terms of the Regulations and the relevant case law and in paragraph 19 onwards he made the following findings of fact.
8. He considered the importance in the appeal of a brother called Patrick who was then involved in an extended training course in Germany. Patrick was involved in a haulage business. That was a business which was operating in the United Kingdom although he had been undergoing training in Germany. It was his suggestion that the appellant could be provided with employment in that business. The judge also took into account the appellant's troubled employment history. He had been employed at one stage as a cashier in a petrol station. That was a job that he held for two years and he had thereafter taken work in a warehouse and subsequently in a German-speaking customer services business. However the evidence was that the loss of that job for which he blamed his employers had caused the escalation in the problems he faced. It had resulted in his offending for which the courts had subsequently imposed sentences of imprisonment.
9. The link between the appellant's offending and his drug abuse was obvious. The question for the judge was the threat that (*'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'*) the appellant posed to society as a result of that offending. The judge looked at the OASys Report which was prepared by the appellant's offender management and he acknowledged that it deserved to be given significant weight in any assessment that the judge was required to carry out. He looked at the attitude of the appellant in as far as his offending was concerned. He concluded that the appellant took responsibility for what had occurred although he certainly sought on occasions to place the blame on others, for example on the drug dealer and the financial position in which he placed himself. The judge was concerned that, although the appellant was involved in a crime reduction initiative, he had only attended one appointment and he looked to the effect of the appellant's attending a CARATS (counselling assessment referral advice and through care) course which was designed to minimise his re-offending.
10. It is a marked feature of this case that the appellant has sought to minimise his own involvement. He denied that he posed any risk to the public and was liable to blame others for the difficulties in which he faced himself. That was seen as a feature in the report that was prepared by Dr Lilley, an independent psychologist, whose report featured largely in the determination of the First-tier Tribunal Judge. It is a report which is broadly sympathetic to the appellant and concluded that the appellant had some partial insight into his recent problems and partial insight into the way that those could be met in the future. It was the conclusion of Dr Lilley who is

undoubtedly an expert in these fields that the appellant would face a smaller risk than was assessed in the OASys Report provided that there was a robust risk of management and supervision plan put in place. It was Dr Lilley's opinion that the appellant should be encouraged to make use of the offender manager upon his release in order to avoid re-offending.

11. The First-tier Tribunal Judge did not hold back on the scepticism that he attached to some of the evidence of the appellant. For example, in paragraph 33 of the determination, he agreed that the appellant had to an extent sought to blame others to minimise his own responsibility for his actions. Indeed he said that in cross-examination the appellant was at some times '*contemptuous*' of the questions that were being put to him by the Presenting Officer. He was also sceptical of the appellant's claim that the offence which involved the use of a knife was not pre-planned and he came to the view that there was some element of pre-planning in the robbery offences. Consequently that was a matter which undoubtedly weighed against the appellant. He also took into account what Dr Lilley said about this and that the absence of any frank self-assessment of the appellant's own wrongdoing *may* have been as a result of a feeling of shame.
12. The Immigration Judge had the benefit of hearing from the appellant's mother described as Ms Shah. She used as some justification for the appellant's misconduct the fact that there had been and was a bountiful supply of drugs in Milton Keynes. However that overlooked the fact that the appellant had in fact been misusing drugs long before his arrival in the United Kingdom and this had started at about the age of 13. In addition, the judge took into account the fact that his mother was fighting for her son's right to remain in the United Kingdom and she could therefore be forgiven for a degree of exaggeration in some parts of the evidence. It was clear that she was embarrassed about some parts of the questioning that was conducted by the Presenting Officer. It is therefore not the case that the judge did not adopt a balanced view in his assessment either of the appellant and his failings or the appellant's mother and her tendency to '*gild the lily*' as far as some of the evidence was concerned about her son's behaviour.
13. He was similarly sceptical about the evidence provided by the appellant's brother as to the employment prospects of the appellant in the company which was run by his brother in the United Kingdom. There was little evidence of the profitability of the business and the judge concluded that the information which emerged at the hearing was that the offer of employment provided by the brother was speculative. Nevertheless, having heard the evidence of the appellant's mother, who was a shareholder in the business, the judge was satisfied that it was likely at some point in the future that a job would become available for him and that would provide a tangible goal. The possibility of secure employment was therefore seen as one of the means by which the cycle of offending might be broken.
14. The ultimate conclusion that was made by the judge is set out in paragraph 39 of his determination. He properly applied the test of '*serious grounds of public policy or public security*' being required to be shown for deporting this appellant. He looked at the

entirety of the appellant's offending and accepted that the serious offending was confined to a short period of time and this coincided with a period of unemployment, domestic instability and heavy drug and alcohol use. He concluded that this inevitably resulted in the appellant posing some risk of re-offending if those setbacks are once again a feature of life and that he comes to a future with a damaged pedigree but he was prepared to take a positive view that the appellant had stopped using drugs and alcohol whilst in prison notwithstanding the obvious point that this is something one would expect in the confined space of imprisonment.

15. He then went on to consider the prospects of this appellant. He came to the conclusion that there were support mechanisms that would offer the appellant a future which was not provided in Germany. The future was in part related to the support that will be provided by the Probation Services. It was a future that was in part provided by the support that was present in the United Kingdom through his family and it was a future which was in part provided by the evidence that the appellant had a prospect of finding work at some time in the future in the business run by his brother. All of those circumstances were taken into account by the judge in looking at whether there was a robust mechanism which was there to support the appellant. He found that, on balance, the conclusions reached by the OASys Report had been to some extent undermined by the evidence of Dr Lilley and his assessment that the risk was low to medium provided that robust supervision was in place.
16. Significantly, however, in paragraph 43 of the determination he also concluded that, even if there was a difference as he accepted there was between the OASys Report and the report of Dr Lilley, he reached an alternative conclusion that, even if the truth lay somewhere between the two, for the reasons that he had provided he was not satisfied that serious grounds of public policy or public security had been made out to justify the deportation of the appellant.
17. This was a determination which covered some fourteen pages and some 43 paragraphs and there is no suggestion made on the part of the Secretary of State that the judge overlooked any part of the material evidence that was submitted in favour of the appellant or indeed in favour of the respondent. It is therefore a true rationality challenge made by the Secretary of State that the judge was not entitled to reach the conclusion that he did. That is the burden of the grounds of appeal which were advanced by the Secretary of State in support of the appeal. The grounds assert that the OASys Report which had identified an increased risk of harm to the public and a medium risk of re-offending should have been preferred in place of the report by Dr Lilley and that the failure to do so amounted to an error of law. Whilst it is said there was a conflict between the two professional reports, this did not explain why Dr Lilley's views should be preferred simply because he advocated a robust programme of supervision. However, in our judgment, the view that was adopted by the judge was to look at the OASys Report in some detail and the reasons advanced by the Secretary of State in deciding upon the course of deportation. To take those into account on the one hand but also to take into account on the other the evidence that the appellant had provided and the evidence that came from family members and the evidence that was to be found in the material about the risk of re-

offending and to conclude that Dr Lilley's report and his rather more optimistic assessment of the future was one that he was entitled to prefer.

18. It is perfectly plain that other judges might have reached a different conclusion as far as this material was concerned and some may have concluded that although there was a system of support which was advocated on behalf of the appellant, that system of support was not adequate for the robust programme of supervision and monitoring that was required and advocated by Dr Lilley. However that is not the issue which is before us. The issue before us is whether there was a failure on the part of the First-tier Tribunal to reach a conclusion that the Secretary of State was not entitled to reach the finding that she did. In our judgment it was open to the judge to conclude, on balance, that the report of Dr Lilley added weight to the appellant's claim that he did not pose a serious risk. The Upper Tribunal in its jurisdiction cannot intervene unless it is established that that approach by the judge was an unlawful one and we do not do so. The outcome in this case is that the judge reached a sustainable conclusion on the evidence. Matters do not however rest there.
19. The appellant has been lucky perhaps in the outcome that he has found himself to have benefited from. These were very serious offences which were committed. They were offences which were related to his misuse of drugs – a misuse of drugs which has now lasted for a period of at least thirteen years or so.
20. If there is to be any further recurrence of misbehaviour on his part then it will be clear that both the First-tier Tribunal Judge and Dr Lilley were misguided in their assessment that there was a robust system of protection provided to the public. In that event, were there to be any further misbehaving on the part of the appellant, there can be no doubt whatever that a very different view would be taken as to the risk that is posed.
21. If there is to be a recurrence of drug-related offences, particularly the offences relating to violence, then these will show that the trust which has been placed in the appellant by the Tribunal and by Dr Lilley were misplaced and that the appellant does indeed present a risk to the public such as to fall within the ambit of the expression '*serious grounds of public policy or public security*'. In those circumstances his removal is almost inevitable. For this reason it is important at this stage for the appellant to know that this is not a final conclusion upon the appellant's behaviour, that it is only one stage of it. If there is to be a recurrence of the misconduct which has occurred in the past, then it will almost certainly result in a different outcome. The words which we are using at the moment are being recorded. They will be provided in writing. It will be for the appellant to make what use of them he chooses. But if he fails to make proper use of them, then it is obvious what the outcome will be.

DECISION

- (1) The appeal of the Secretary of State is dismissed.

- (2) The First-tier Tribunal Judge made no error on a point of law and the original determination of the appeal allowing the appeal of Mr Schmitz shall stand.

A handwritten signature in black ink, appearing to read 'AJ Jordan', followed by a horizontal line extending to the right.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL