



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00384/2017

THE IMMIGRATION ACTS

Heard at Field House
On 29th June 2018

Decision & Reasons Promulgated
On 18th July 2018

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VICTOR EDAGHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms R Ahmad, Home Office Presenting Officer

For the Respondent: Mr B Hoshi, instructed by BiD

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Italy born on 10 July 1987. His appeal against deportation was allowed by First-tier Tribunal Judge Lever on 22 November 2017.
2. The Secretary of State appealed on the ground that the judge materially erred in law in his consideration of proportionality of the Appellant's deportation in accordance

with Regulation 27(5) of the Immigration (EEA) Regulations 2016 and the judge failed to provide adequate reasons for finding, at paragraph 34, that the Appellant's deportation would be disproportionate in accordance with Regulation 27(6).

3. Permission to appeal was granted by Upper Tribunal Judge Kebede on 9 April 2018 on the following grounds:

"There is arguable merit in the assertion in the grounds that the judge's findings in relation to the Appellant's offending were inconsistent with the fact of his conviction and that his findings on proportionality were inadequately reasoned."

The judge's decision

4. The judge made the following relevant findings:

"31. The reality seems to be that the Appellant committed no offences until the age of 25/26 years. He has no convictions for the type of offences that do cause harm to the public and cause distress to individuals such as referred to by the Respondent. As indicated above, the one offence that potentially caused upset and is a matter of concern was the common assault in March 2015 for which he was given a restraining order. However, as I have indicated, there is no indication of any breach of that order during its twelve months' duration. Much of the recent offending is essentially focused on what appears to be low level aspects of public order offences centred around the fact that the Appellant appears to have been perceived by the police as a potential problem in the area that they were policing although the Appellant either throughout or partly throughout the duration lived in that area. There is no evidence of any actual criminality on the Appellant's behalf other than the perception as such in the mind of the police other than his resistance and assault of a police constable within those circumstances. I have already commented upon the fact that the PNC discloses the Appellant's address appears to have been the very same area from which the Appellant was excluded by virtue of the CBO and the breaches including a period of imprisonment appear to be for no more than walking within that area. I do not find that on balance the Appellant's behaviour is such that he presents as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society including that referred to by the Respondent as a low level persistent offender. The Respondent's deportation letter as commented upon in the report by Mr Knight is somewhat overblown, speculative and, in parts, inaccurate. In fairness the author of that letter is unlikely to be a lawyer, appears to be working, as do I, on restrictive evidence, and may be using cut and paste standardised paragraphs. For those reasons I aim no criticism at the author of the letter.

32. I have also and separately taken account of the evidence of the Appellant's partner and Mr Steen, in terms of the Appellant's private life and character generally. Those are features that do no harm to the Appellant's case.
33. I have considered paragraph 35 of the Respondent's letter which suggests an absence of evidence that the Appellant has successfully addressed the issues that prompted him to offend. Frankly, that is a somewhat vague comment. What are the issues? It could however be said that the lack of breach of the restraining order over twelve months shows that in respect of that particular matter he had dealt with the issue. His move out of the area where he was living and from which he was excluded has clearly addressed the issue that brought about the CBO in the first instance.
34. I further consider when looking at paragraph 27(5) that removal of the Appellant would not in the circumstances of this case comply with the principle of proportionality. In terms of Regulation 27(6) I have taken account of the fact that the Appellant has been in the UK some time, has worked and continues to work in the UK, has a partner who has been with him a little time, speaks good English, and appears to have integrated into UK society. Accordingly and for all the reasons provided, I do not find in the circumstances that deportation of the Appellant is in accordance with the principles in Regulation 27(5) of the EEA Regulations 2016."

5. **The Appellant's previous convictions:**

8 February 2013	Resist or obstruct constable	Fine £110
28 February 2013	Destroy or damage property	Conditional discharge six months
25 May 2014	Common assault	Fine £150
6 October 2014	Failure to surrender to custody	No separate penalty
18 November 2015	Common assault	Restraining order, protection from harassment twelve months
13 June 2016	Battery	Fine £120
5 October 2016	Assault on a constable	Community order, 9 December 2017, unpaid work requirement

Including other offences of resisting or obstructing a constable and failing to surrender to custody at the appointed time.

14 November 2016	Failure to comply with a Section 35 direction excluding a person from an area	Fine £300
18 November 2016	Using threatening, abusive, insulting words or behaviour or disorderly behaviour to cause harassment	Community order, 9 December 2017, unpaid work requirement
30 January 2017	Breach of a criminal behaviour order [CBO]	Fined £60
6 May 2017	Breach of a criminal behaviour order	Imprisonment six weeks

Submissions

6. Ms Ahmad submitted that the judge found there was insufficient evidence of permanent residence and therefore the lowest level of protection was applicable. The judge referred to the PNC without making any findings and he failed to appreciate the evidence that the Appellant was a persistent offender. Further the judge gave weight to immaterial matters, namely that the Appellant did not started to offend until the age of 25. The judge failed to properly apply Regulation 27.
7. Evidence that the Appellant had been convicted of several offences was sufficient to show that there was a pattern to offending. He had received six weeks' imprisonment for his last offence. The judge's consideration of the Appellant's offending behaviour was speculative and the judge failed to consider whether the Appellant was a persistent offender. The judge's finding that he was not, was not open to him on the evidence. The judge's consideration of proportionality at paragraph 34 was inadequate. He failed to give reasons as to the significance of the Appellant's ties in the UK, his length of residence, his employment and other matters.
8. Mr Hoshi submitted that the challenge was a rationality challenge and lacked merit. He submitted that, at paragraphs 20, 26 and 30, it was clear that the judge's analysis of the facts was at the forefront of his mind as were the arguments made in favour of deportation. It could not be said that the judge disregarded the Appellant's offending behaviour. The judge expressly stated that he would not go behind the convictions and he accepted the pattern of offending. What the judge then did was to consider the circumstances of the offences and assess whether the Appellant was a threat to one of

the fundamental interests of society. The Appellant's previous convictions alone were not enough to show this and it was not enough for the Appellant to be considered a persistent offender. The judge properly assessed whether the Appellant was a genuine, present and sufficiently serious threat at paragraph 31. The Respondent submitted the judge was speculating in circumstances where there was no evidence beyond the PNC record. It was ironic that the Respondent made speculative assertions in the grounds, namely that there is an escalating pattern of serious offences and the Appellant presents a high risk to the public. The judge accepted the expert evidence that the mere fact of a CBO did not mean the Appellant was a serious risk. There was no evidence of the surrounding circumstances in the Appellant's case and the standard of the imposition of a CBO was low.

9. The Nexus witness statements adduced at a renewal of bail hearing were not adduced as evidence in the appeal before the First-tier Tribunal and should be disregarded. In this case the judge accepted the Appellant's evidence of surrounding circumstances and that the problems had now stopped because the Appellant had left the area from which he was excluded. The Appellant's explanation was consistent with the limited evidence and there was a lack of evidence on the part of the Respondent. There was nothing other than the Appellant's mere presence in the area which gave rise to the convictions. The judge accepted the Appellant's account of returning to collect his belongings as plausible. So, although there was breach of an exclusion order, it was not harmful and no crime was committed in the exclusion zone. The judge's decision was well reasoned in relation to whether the Appellant was a genuine, present and sufficiently serious threat.
10. Mr Hoshi submitted that the judge considered the Appellant's antagonistic relationship with the police and the fact that the Respondent's letter was speculative. The judge was also entitled to conclude that the issues referred to in that letter had been dealt with because there had been no further offences since the Appellant had left the area from which he was excluded. In that respect there was no error of law (ground 1).
11. The finding that the Appellant was not a genuine, present and sufficiently serious threat meant that there was no public interest in deportation which was highly relevant to the assessment of proportionality. If deportation was not justified it was not incumbent on the judge to give lengthy reasons as to why the decision was disproportionate. Since the judge found there was no public interest, he stated his reasons on proportionality very briefly. There was evidence referred to in the decision to support the judge's findings. There was not much in favour of the Appellant but, given that there was no weight to be attached to the public interest, then the judge's finding on proportionality was open to him. If I found that there was an error of law and I set aside the decision the matter should be remitted to the First-tier Tribunal because I was setting aside a positive credibility finding. Ms Ahmad made no submissions in response.

Discussion and Conclusions

13. The Respondent's case was that there was a clear public interest in removing foreign criminals. The Appellant is a persistent offender and the imposition of a Section 35 and CBO demonstrate a degree of seriousness to his offending. The inference to be drawn is that he poses a continuing risk of harm to the public. It was further said that there was an escalation in the offences committed.
13. The judge found that the Appellant did not have permanent residence in the UK and therefore the appropriate test was whether he was a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The judge applied the appropriate test to the evidence and there was no challenge in that respect. The judge also found that the Appellant was a credible witness and accepted his account of the circumstances of the offences he had committed. Again, there was no challenge in the grounds of appeal to that finding.
14. In assessing whether the Appellant was a genuine, present and sufficiently serious threat his previous convictions alone were not sufficient. I am not persuaded by Ms Ahmad's submission that the judge failed to appreciate evidence that the Appellant was a persistent offender because the judge acknowledged each of the Appellant's convictions and considered those convictions in some detail. The judge found, at paragraph 31, that at best the Respondent considered the Appellant to be a lower level persistent offender, but concluded that assessment was overblown and speculative. The fact that the Appellant has several previous convictions or that he may be a persistent offender was not in itself enough to justify deportation.
15. The judge was entitled to look at the circumstances of the offences. There was no evidence other than the PNC from the Respondent to show the circumstances of each offence. The judge only had the evidence of the Appellant which he found to be credible. It was open to the judge to rely on that evidence in assessing whether the Appellant was a genuine, present and sufficiently serious threat to one of the fundamental interests of society. The judge recognised the pattern of offending at paragraph 23 and did not seek to go behind the convictions. He concluded that the Appellant had been convicted of several low level public order offences. He acknowledged that his most serious offence was for assault and noted that he had complied with the restraining order imposed upon him and had not breached it.
16. The judge accepted the Appellant's explanation for his later offences in which he received a CBO, and for which he was sentenced to six weeks' imprisonment for breach of that order. The judge accepted the Appellant's evidence that he lived in the area from which the police sought to exclude him and that he did not commit any offences whilst in that area. The Appellant had returned to the area to collect his belongings in order to leave. Since the Appellant had left that area he had not committed any further offences. The judge was entitled to rely on the fact that the Appellant's address in the PNC was within the excluded area. The judge therefore took into account all relevant factors in assessing whether the Appellant represented

a genuine, present and sufficiently serious threat and his conclusion that he did not do so was open to him on the evidence before him. The Appellant had a legitimate reason to be in the excluded area and had not committed any offences since he had left that area. Therefore, applying Regulation 27(5), his deportation was not justified.

17. Given that finding there was no public interest to which the judge could attach weight and, although the Appellant's circumstances did not weigh heavily in his favour, they did not harm him and, therefore, on balance the decision to deport was not proportionate. The judge's reasons were brief but adequate given his finding that the Appellant did not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
18. Accordingly, I find that there was no error of law in the judge's decision to allow the Appellant's appeal under the Immigration (EEA) Regulations 2016 and I dismiss the Respondent's appeal.

J Frances

Signed

Date: 16 July 2018

Upper Tribunal Judge Frances