



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00451/2016

THE IMMIGRATION ACTS

Heard at Field House
On 20 August 2018

Decision & Reasons Promulgated
On 29 August 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOSÉ MARIA VEIGA VAS DE-PINA

Respondent

Representation:

For the appellant:

Ms A. Fijiwala, Senior Home Office Presenting Officer

For the respondent:

Mr F. Habtemariam of Anglia Immigration Law

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant is a Portuguese national who appealed the respondent's decision dated 07 September 2016 to remove him from the UK on public policy grounds with

reference to the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations 2006”).

3. First-tier Tribunal Judge Abebrese (“the judge”) allowed the appeal in a decision dated 22 January 2018. He noted that the Secretary of State accepted that the appellant had been lawfully resident in the UK since his arrival (in or around 2007) and that he was socially and culturally integrated [15]. He summarised the appellant’s convictions, which included six convictions between 2007 and 2016 for relatively minor public order and drug offences, which did not attract custodial sentences [5]. The judge had regard to the most recent offence, which was of a more serious nature. The appellant was convicted of assault occasioning actual bodily harm on 04 January 2015 and was sentenced to 16 months’ imprisonment [6].
4. Upper Tribunal Judge Jackson granted the Secretary of State permission to appeal in the following terms:

“The grounds of appeal are that that the First-tier Tribunal has materially erred in law in (i) failing to adequately explain the finding that the Appellant does not pose a risk in view of the escalation in his criminal offending shown in the sentencing remarks; (ii) failing to consider both the likelihood of reoffending and the seriousness of consequences if he does in accordance with Kamki [2017] EWCA Civ 1715; (iii) failing to give adequate reasons for finding the Appellant has shown remorse and is unlikely to reoffend, as well as why it is accepted that the Appellant is not facing prosecution in Portugal; and, (iv) failing to give adequate reasons and instead listing the facts that are accepted from the Appellant’s appeal.

It is arguable that the findings, in the main, are a restatement of the Appellant’s evidence which has been accepted and arguably contain inadequate reasons generally and specifically as to future risk of re-offending to conclude on the evidence that the risk is low, and a lack of consideration of the risk of harm. Permission is granted on all grounds.”

Decision and reasons

5. The grounds of appeal do not seek to argue that the judge erred in his application of the law. The judge made correct reference to the relevant threshold under regulation 21 of the EEA Regulations 2006. The Secretary of State accepted that the appellant had acquired a right of permanent residence and the higher threshold of ‘serious grounds of public policy’ therefore applied [7]. The judge correctly identified that the “critical issue” was whether the appellant represented risk of reoffending [9]. He noted that he would need to consider the issue of rehabilitation [10].
6. The heart of the Secretary of State’s appeal is a reasons challenge. It is argued that the judge failed to make adequate findings relating to the public interest considerations including (i) the escalation in seriousness of the appellant’s offending behaviour; (ii) the OASys assessment that the risk of serious harm was ‘medium’; (iii) the judge’s sentencing remarks; and (iv) the cumulative effect of a previous conviction in Portugal.
7. The judge considered the appellant’s offending history in full at an early stage of the decision and was clearly aware of the more serious nature of the last offence, which

prompted the Secretary of State's decision [5-6]. The Secretary of State correctly notes that the last offence was an escalation from the appellant's previous convictions in the UK. This was the appellant's first offence for which he received a custodial sentence.

8. However, it was open to the judge to assess the credibility and sincerity of the appellant as a witness and he also had the benefit of hearing from the appellant's wife. The appellant's evidence at the hearing was that he had learned from this period of imprisonment. It seems that he had time to reflect on his behaviour and the effect that it had on his wife and children. He acknowledged that his drinking was the root cause of his criminal behaviour. This was consistent with what was said in the OASys assessment. The evidence of the appellant and his wife was consistent in saying that he had now stopped drinking. Having heard from the witnesses it was open to the judge to accept the credibility and sincerity of their evidence. It was sufficient for him to say that the appellant's evidence was "consistent and credible" having assessed the appellant during the hearing.
9. It was open to the judge to consider the evidence contained in the OASys report and the appellant's antecedents contained in the PNC print out. The report acknowledged that if he did offend the risk of serious harm was 'medium', but that reflected the nature of the offence the appellant committed, which was a serious assault. However, the OASys report defines a 'medium risk of serious harm' as follows: "an offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, ... drug or alcohol misuse." The decision letter states that the offender manager assessed the appellant to pose a 39% risk of general offending within one year of community sentence/discharge. At the date of the hearing, a year and a half after his release from prison, the appellant had not reoffended.
10. The judge could have conducted a more detailed analysis of the OASys report, but I conclude that it would have made no material difference to the outcome of the appeal in circumstances where the evidence showed that the risk of reoffending was likely to be low at the date of the hearing. After having heard from the appellant that he had addressed one of the root causes of his offending, and in circumstances where the appellant had not as a matter of fact reoffended, it was open to the judge to conclude that the risk he posed was not sufficiently serious to justify his removal on grounds of public policy.
11. The sentencing judge described the offence as a "vicious and violent street offence". Undoubtedly it was; this was reflected in a custodial sentence. In so far as there was an indication of a previous conviction for common assault in Portugal, it seems that the evidence relating to that conviction was vague, albeit I am told that it was not denied by the appellant. It appears that the sentencing judge placed little weight on that conviction when he considered the most recent sentence, not only because it was historical, but also because there was little evidence of the circumstances of that offence. Ms Fijiwala was unable to point me to any other evidence relating to the conviction in Portugal. The sentencing judge took into account positive factors in

mitigation, which included the fact that the appellant was in a steady relationship with his wife.

12. Although the judge could have conducted a more detailed analysis of the evidence, what he did say was adequate and sustainable on the facts of this case. Albeit there was an escalation in the seriousness of the appellant's offending, there was little evidence to indicate that he continued to present a risk at the date of the hearing or that it was of such a serious nature to overcome the higher threshold required in cases involving EEA nationals with permanent residence. The evidence showed that the appellant had not reoffended in the period since his release and the judge was satisfied that he had given credible evidence to indicate that he had addressed the main cause of his violent behaviour, which was rooted in his use of alcohol. The judge took into account the fact that the appellant had shown remorse and was entitled to conclude that it was unlikely that he would reoffend. The judge also considered the appellant's family circumstances and the likely effect of his removal on his wife and children, which were relevant to the proportionality of the decision.
13. Even if the judge erred in failing to give sufficient reasons, it is not arguable that the factors highlighted by the respondent would have made any material difference to the outcome of the appeal given that 'serious grounds of public policy' would need to be shown to remove the appellant from the UK. Arguably, his antecedents might have justified removal on grounds of public policy, but even with the most recent conviction, his criminal history was not sufficiently serious to overcome the higher threshold. For these reasons I conclude that it was open to the judge to find that the appellant did not 'represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society' at the date of the hearing.
14. I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.
15. The appellant succeeded in his appeal on this occasion, but he should be aware that if he commits any further offences in the UK it would be open to the Secretary of State to consider whether his behaviour might justify his removal on another occasion.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

Signed  Date 20 August 2018
Upper Tribunal Judge Canavan