



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00270/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice

**Decision &
Promulgated**

Reasons

On 8th April 2019

On 8th May 2019

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR FLORIN VOCAJ

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

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

For the Respondent: Mr P Bonavero, instructed by Kilby Jones Solicitors LLP

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of Albania born on 14th October 1983. His appeal against deportation under the Immigration (EEA) Regulations 2016 was allowed by First-tier Tribunal Judge Colvin on 27th November 2018.
2. The Secretary of State appealed on two grounds. Firstly, the judge erred in finding that the Appellant's likelihood of reoffending was low and therefore he was not a present, genuine and sufficiently serious threat to one of the fundamental interests of society and secondly, the judge failed to give adequate reasons for findings that the Appellant was socially and

culturally integrated. Permission was granted on all grounds by Upper Tribunal Judge Allen on 18 January 2018.

The Respondent's grounds of appeal

3. Ground 1: Having accepted that the Respondent had made out serious grounds on the basis of the Appellant's criminality, the judge erred in relying on a low risk of re-offending according to the National Offender Management Service. The Appellant's prospects of reoffending were found to be 14% within one year and 25% within two years. These were not negligible percentages and the judge failed to consider this and MA (Pakistan) [2014] EWCA Civ 163 in which the Court of Appeal held:
"... what may be an assessment of low risk for the purposes of criminal sentencing is not necessarily to be considered a low risk when looking at the future behaviour of this applicant. A risk of 17% reoffending over a two-year period is not, in my judgment, in the context of a deportation case a matter which can be treated as insignificant. It is a good reason for supporting a decision to deport."
4. In addition the judge took into account immaterial matters, namely the Appellant's evidence of activities undertaken whilst in prison given that imprisonment prevents integrating links from being formed. The Appellant's family had been unable to prevent the Appellant's offending behaviour. The fact that the Appellant did not pose an immediate risk due to his incarceration and subsequent licence did not mean that he did not pose a genuine, present and sufficiently serious threat because the risk need not be imminent. Given the seriousness of the offence, the decision to deport the Appellant was justified on serious grounds of public policy and security.
5. Ground 2: The judge found that the Appellant was integrated socially and culturally in the UK, having regard to a wide and supportive network provided by his wife's parents and siblings and his voluntary work in prison. It was unclear how the Appellant's involvement in a family network established that he had demonstrated a significant degree of wider cultural and societal integration such as to meet paragraph 2 of Schedule 1 of the EEA Regulations 2016, nor how life in prison amounts to integrating factors to life in the UK. There was no balancing exercise because consideration was given only to the Appellant's interests and not those of the state.

The Appellant's Rule 24 response

6. At the hearing Mr Bonavero submitted a Rule 24 response which stated:
"Ground 1:
 3. It is difficult to ascertain the nature of this alleged error, given that it is defined thus in the SSHD's subheading: 'Making a material error of law'
 4. The Secretary of State criticises the judge for assessing the Appellant as posing a 'low' risk of reoffending. It is important to

recall that she does so on the basis of a report provided by the Respondent. As for the guidance referred to by the judge, again, this was guidance provided by the Respondent in her bundle (page O3).

5. As for the passage in the grounds about the Appellant's activities in prison and family ties, they do not allege any discernible error of law. Rather they make points that are unrelated to the substance of the judge's decision.
6. The Secretary of State's mistaken approach to this appeal is revealed at the end of paragraph 6 of his grounds, where he says: 'Given the seriousness of the offence it is submitted that the decision to deport the Appellant is justified on serious grounds of public policy and public security.'
7. That passage precisely contradicts 27(5)(e) of the EEA Regulations 2016, which states that where a decision is taken on grounds of public policy or public security, 'a person's previous criminal convictions do not in themselves justify the decision'.
8. By concluding his ground 1 on a bald misstatement of the law, the Secretary of State has demonstrated the weakness of this case. There is nothing contained in this undefined ground to suggest that the judge has made an error of law.

Ground 2

9. The Secretary of State characterises this as a reasons challenge. In R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982. Lord Justice Brooke said this:

"14. In English Lord Phillips MR said at para 19:

'If the Appellate Process is to work satisfactorily, the judgment must enable the IAT to understand why the Adjudicator reached his decision. This does not mean that every factor which weighed with the Adjudicator in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the adjudicator's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the adjudicator to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.'

15. It will be noticed that the Master of the Rolls used the words 'vital' and 'critical' as synonyms of the word 'material' which we have used above. The whole of his judgment warrants attention, because it reveals the anxiety of an Appellate Court not to overturn a judgment at first instance unless it really cannot

understand the original judge's thought processes when he/she was making material findings."

Submissions

7. Mr Whitwell relied on the grounds of appeal and responded to the Rule 24 response. The OASys guidance at page O3 of the Respondent's bundle dealing with likelihood of reoffending and the bandings showed a scale which did not characterise the type of offending. The judge failed to appreciate the nuance of the group reconviction score and should have balanced the risk of reoffending with the seriousness of the offence. The judge relied on immaterial matters in relation to the Appellant's work in the gym in prison and the judge's reasons were insufficient.
8. Mr Bonavero submitted that if there was no merit in ground 1 then there was no need to consider ground 2. The challenge to the way the judge approached reoffending was not made out. The judge's conclusions at paragraph 38 were an exemplary treatment of how to treat the risk of reoffending and the judge gave adequate reasons for why she agreed with the OASys Report that the risk of reoffending was low.

Judge's findings

9. The judge made the following relevant findings:

"38. Whilst I am not bound by the findings of the OASys Report I am required to take it into account and in doing so I consider it important to note that the OASys assessment is not only submitted by the Respondent but is an assessment undertaken by a government agency entrusted to carry out such assessments and therefore can be relied upon in absence of any evidence to the contrary. In this case the OASys assessment is that the risk of reoffending is considered to be 'low'. And on an overall assessment of all the evidence I do not find that there is evidence in this case that suggests a different conclusion to the OASys Report. On the contrary I find that the evidence before me supports the 'low' risk assessment. In particular I do not agree with the Respondent's claim that the Appellant has an 'extensive criminal record which is escalating in seriousness' for the reasons given above and at the same time I find that the Appellant's prison record shows 'exemplary' behaviour. This, together with comments below as regards the Appellant's integration in the UK, means that I have reached the conclusion that the Appellant's current risk of reoffending is correctly assessed as 'low'."

"39. The Appellant has been in the UK for some twenty years since the age of 15. Whilst he did not continue any formal academic education in the UK he has undertaken several courses over the years as shown by the various certificates in the bundle and has

learnt to speak English well. I find that he has shown through the documents submitted that he has worked either as an employed or self-employed builder in the UK over many years paying his taxes and supporting his family financially. Whilst before this index offence he committed several driving offences and a theft offence as a younger man, there was a period of nine years when these ceased and no offences were committed. He has been in a genuine family relationship with his wife, a Czech national, for some twelve years since they married in 2006 and they have two children together. The evidence also shows that the Appellant is part of a wide and supportive network provided by his wife's parents and siblings. In these circumstances, and contrary to the Respondent's claim in the deportation letter, I find that the Appellant has shown that prior to committing this serious offence he is integrated socially and culturally in the UK and that this has continued whilst in prison through the voluntary work that he has undertaken."

...

- "42. As stated above, the burden is on the Respondent to show that serious grounds of public policy and public security justify the Appellant's deportation and that the Appellant's conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In assessing this I must have regard to the considerations contained in Schedule 1 to the 2016 EEA Regulations which relate to public policy, public security and the fundamental interests of society."
- "43. I was referred to the Home Office guidance *EEA decisions on grounds of public policy and public security* and several case decisions in the course of submissions. The Home Office guidance which makes several points including that even a low risk can constitute a present threat, especially where the consequences of any offence could be serious and that in the government's view certain types of offences weigh in favour of deportation such as drug-related offences. In LG and CC (EEA Regs: residence; imprisonment; removal) Italy [2009] UKAIT 00024 it was specifically emphasised that it is the present risk arising from conviction for the offence in question that must be established. This case also held that a clear distinction is required to be drawn between the three levels of protection against removal with each level being intended to be more stringent and narrower than the immediately lower test. These matters were confirmed in Secretary of State for the Home Department v Straszewski [2015] EWCA Civ 1245 when it was said that, save in exceptional cases, the serious threat to public policy or public security is to be determined solely by reference to the conduct of the offender and the likelihood of reoffending with considerations of deterrence and public revulsion normally having no part to play."

...

“45. In making my assessment I acknowledge that there is no doubt that the serious nature of the offence committed by the Appellant justifies on a prima facie basis deportation on serious grounds of public security. However, when making a wider assessment of all the evidence, I do not find on a balance of probabilities that the Respondent has shown – despite the serious nature of the offence – that the Appellant currently poses a genuine, present and sufficiently serious threat so as to discharge the burden to justify the Appellant’s deportation on serious grounds of public policy and public security under the EEA Regulations. This is for the reasons set out above in relation to the finding that the Appellant’s present risk of reoffending is ‘low’ as assessed by the government agency entrusted to do so with this assessment being supported by the other evidence particularly in relation to the Appellant’s conduct in prison which I consider is most likely to be playing a significant part in the Appellant’s stated rehabilitation.”

“46. Even if I am wrong in reaching that conclusion there is still the burden on the Respondent to show that the decision to deport is proportionate. I have set out the factors above relating to this issue in this case. I consider that the most important factors are the length of time of nearly twenty years that the Appellant has been in the UK, his integration over this time and his established family life over the past twelve years. In terms of the latter, it is significant that his two children aged 4 and 2 have the status of permanent residence and British citizenship respectively. Whilst there is no doubt that these children can continue living with their mother in the UK with the support from her family, the removal of the Appellant would effectively prevent either child from developing a proper relationship with their father. Whilst the Appellant has links with Albania in that his mother and other relatives continue to be there, he has only ever returned to holiday in the country in the past twenty years. When taking account of all these factors I have reached the conclusion that the deportation of the Appellant would be disproportionate particularly in light of the additional factor that he poses a low risk of reoffending.”

Discussion and Conclusions

10. I am not persuaded that the judge’s approach to the risk of reoffending amounts to an error of law. It is clear from the bandings at page O3 of the Respondent’s bundle that the percentage of 0 – 29% in relation to violent offending is still considered to be a low risk. The Appellant was assessed at posing a 14% risk of general offending within one year of discharge, rising to 25% within the two years of discharge. This was currently within the low band of reoffending, even taking into account the seriousness of the

offence. In any event, it is apparent from paragraph 38 that the judge not only looked at the OASys Report and the guidance, but made an overall assessment of all the evidence, and concluded that it did not suggest a different conclusion from a low risk of reoffending.

11. In that respect, the judge took into account all relevant factors. The Appellant's conduct in prison was also a factor relevant to the risk of reoffending in that the Appellant was seeking to rehabilitate himself. Although the Appellant had been convicted of supplying cocaine and sentenced to eight years' imprisonment, it is apparent from paragraph 45 that the judge considered the seriousness of the offence in concluding that the Respondent had failed to show a genuine, present and sufficiently serious threat on serious grounds of public security. In any event, the Appellant's previous conviction in itself was not sufficient to justify a decision to deport and the factors taken into account at paragraph 46 were relevant to the assessment of proportionality, which the judge had to consider according to Regulation 27(5). Given the Appellant's lengthy residence in the UK, the judge was entitled to conclude that the Respondent had not justified deportation under Regulation 27(5).
12. The Respondent needed to show serious grounds of public policy and that the Appellant's conduct represented a genuine, present and sufficiently serious threat. The judge was entitled to take into account low risk of reoffending, rehabilitation and proportionality. The judge's conclusion that the Respondent has failed to show that the Appellant's deportation was justified was open to the judge on the evidence before her and accordingly, I dismiss the Respondent's appeal.

Notice of Decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 3 May 2019