



**Upper Tribunal
(Immigration and Asylum Chamber)**
DA/00545/2018

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 3 March 2020

**Promulgated
On 24 September 2020**

Before

**THE HON. MRS JUSTICE MCGOWAN
UPPER TRIBUNAL JUDGE BLUNDELL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JESUALDO AFONSO QUIBELO

Respondent

Representation:

For the Appellant: Mr Tufan, Senior Presenting Officer

For the Respondent: Miss Shaw, of counsel, instructed by Kesar & Co.

DECISION AND REASONS

1. Jesualdo Quibelo is a national of the Netherlands, born on 25 February 1999. On 13 November 2019, his appeal against the Secretary of State's decision to deport him was allowed by First-tier Tribunal Judge Burnett. The Secretary of State sought and was granted permission to appeal against that decision. We will refer to the parties as they were before the First-tier Tribunal: Mr Quibelo, as the appellant and the Secretary of State as the respondent.

The Factual Background

2. The appellant arrived in the United Kingdom with his mother in August 2010, he was 11 years of age. The appellant has not been able to establish any entitlement to permanent residence in the UK.
3. The FtT was aware of number of cautions, findings of guilt and convictions:
 - a. On 27/1/12 he was cautioned for an offence of sexual assault by touching, the act occurred on 29/5/11 when he was 12,
 - b. On 18/12/13 he received a Referral Order for 6 months for handling stolen goods,
 - c. On 14/9/15 he received a Youth rehabilitation Order for 12 months for possession of cocaine and heroin with intent to supply and possession of a bladed article,
 - d. On 29/9/15 he received a Conditional Discharge for 6 months for theft by shoplifting,
 - e. On 8/3/17 he was sentenced to 21 weeks detention in a Young Offenders Institute for possession of an offensive weapon,
 - f. On 10/7/17 he was sentenced to 32 months detention in a Young Offenders Institute for possession of heroin and cocaine with intent to supply. The offences occurred in October 2016.
4. We were told that the appellant was in custody at the time of the appeal before us. The information about that was unclear at the time of the hearing. It seems that he was being held on remand awaiting trial. We now understand the position to be that the appellant has been convicted of attempted burglary and the possession of a bladed article. On 22 April 2020 he was sentenced to 8 months detention for the bladed article offence and a 2 year Community Order for the burglary offence. The sentence had been served on remand and he has been detained under immigration powers. These matters were not before the FtT and played no part in the decision. Although the FtT Judge could not have known of these matters, he was aware that the appellant had recently been arrested.

The Deportation Order

5. The initial decision of the SSHD is dated 13th August 2018. The decision was to make a deportation order in accordance with Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016. The decision was taken on the grounds of public policy and/or public security. The decision was triggered by the sentence passed on 29 November 2016 at the Crown Court sitting in Reading
6. On 18 July 2017 the respondent issued the appellant with a notice that she intended to deport him from the United Kingdom. Human rights representations were made against that course but, on 13 August 2018, a deportation order was signed against the appellant.
7. The decision to deport was based on Regulation 23(6)(b). It was said that the appellant's removal was justified on the grounds of public policy and security. The First Tier Tribunal found that he does not have a right of permanent residence and no issue is taken with that finding.

The Regulations

8. Regulation 23 provides,

23.— ...

(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if—

(a) ...

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or

(c) ...

9. Regulation 27 provides,

27.— (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

...

(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public

security it must also be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision;

(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.

...

(8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

10. Schedule 1 to Regulation 27 provides,

3. Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within

the United Kingdom if the alleged integrating links were formed at or around the same time as—

(a) the commission of a criminal offence;

...

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(b) maintaining public order;

(c) preventing social harm;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(j) protecting the public;

The Appeal to Judge Burnett in the First-tier Tribunal

11. The appeal came before Judge Burnett on 23 August 2019. The appellant was represented by Mr Smyth, the respondent by Ms Javed, a Presenting Officer. Both parties had filed and served comparatively large bundles of documents. The judge heard oral evidence from the appellant and his witnesses: his sister and O.S. from the St Giles Trust. The judge received submissions from both representatives, after which he reserved his decision.
12. The judge's reserved decision is lengthy and logically structured. He set out the relevant immigration and offending history. In summary he found that the appellant had not established a right of permanent residence in the UK, he found that the appellant had not been demonstrated to be a genuine, present and sufficiently serious threat to the fundamental interest of society to mean that his deportation to the Netherlands was a proportionate response.
13. In paragraphs 13-15 of his judgment he set out the test to be applied, namely whether the respondent had established, on the balance of probabilities that the appellant is a genuine, present and sufficiently serious threat to the fundamental interests of society. No complaint is made about these self-directions, which

are in accordance with the authorities, including *SSHD v Straszewski* [2015] EWCA Civ 1245; [2016] 2 CMLR 3.

14. The judge set out the relevant parts of the regulations, including schedule 1, at [17]. Having concluded that the appellant was only entitled to the basic level of protection against deportation, he turned his focus to the threat posed by the appellant to the fundamental interests of society. At [26], he reminded himself again of the burden of proof in this respect, and of the relevant parts of the Regulations. The judge reviewed the appellant's offending behaviour from [27] onwards. He noted that the appellant's Probation Officer believed that he was engaging with the relevant services and would be assisted by them. He noted that she believed that there was a high chance of positive change by the appellant. He noted that she believed that the assistance provided would "hopefully" deter him from further offending.
15. The Judge heard evidence from the appellant's sister who also stated that the appellant had a more positive attitude towards change, although she did not know his friends or the people he mixed with on a regular basis.
16. He also heard from O.S., who works for the St Giles Trust and had worked with the appellant for about a month prior to the hearing. He found O.S. to be a 'very impressive witness'. He recognised that the contact between the appellant and O.S. had only lasted for a relatively short period of time but work was being done through a number of agencies towards rehabilitation and employment. The Judge found O.S. to be confident in the prospects for rehabilitation.
17. He observed that the respondent had not provided any evidence of an assessment of risk posed by the appellant in an OASys or any other report. Although the appellant had not provided any report either, he had submitted evidence from his Probation Officer and called O.S., both of whom "expressed the hope" for the commitment and engagement of the appellant.
18. The Judge noted that although no charges were being pursued the appellant had recently been arrested with others in a car, a knife had been found in the car. That had occurred in July 2019. Worryingly the appellant was still mixing with people who drove a car which contained a knife.
19. The Judge paid careful attention to the sentencing remarks of HHJ Duran QC who sentenced the appellant to 32 months in July 2017. She had observed that the appellant had come under pressure to offend, which fell short of duress. He had been using drugs and was under pressure to offend to finance his own use.

He had re-offended despite earlier court appearances. She had observed that the appellant was young and that there was the prospect of change with maturity.

20. The findings crucial to this appeal are set out at paragraphs 36 - 38 of the FtT judgment.

“36. The appellant’s criminal record points to a continuation of his offending behaviour and a pattern of behaviour. The appellant has been convicted twice of possession of a bladed article. He has been convicted twice of dishonesty offences. He has been convicted twice of the possession with intent to supply drugs. The appellant was also recently arrested, and he states that a knife was found in the car, but this had nothing to do with him. However, the arrest shows the appellant still associates with individuals who carry knives. The appellant has been persuaded in the past to resume his offending behaviour and the appellant is described as vulnerable due to his difficult childhood. The appellant has clearly not changed his peer group. Balanced against this evidence, which points to a risk of further offending, is the evidence from the Probation Officer and Mr O.S. regarding the appellant’s positive behaviour and commitment. The judge also expressed a hope that the appellant would gain some maturity after his incarceration, and the judge noted the appellant’s young age.

37. In my judgment there is some risk the appellant will offend again. If there was no such risk the multi-agency would not be working with the appellant. The question is whether there is a real risk and the likelihood of such reoffending. The probation officer is hopeful for the appellant. Mr OS is confident and positive regarding the appellant’s future and his chances of moving away from his offending behaviour. I found Mr OS to be an impressive witness and accept his assessment. These are professionals, whose employment and role is to assist people move away from offending behaviour. If the confidence in the appellant is borne out there is only a small risk, he will offend again in the future.

38. The question I need to answer is whether the personal conduct of the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In all the circumstances, I consider that the threshold set out in [sic] regulations has not been demonstrated by the respondent and I conclude that the appellant does not represent a genuine, present and sufficiently serious threat at this present time. This is sufficient to dispose of this appeal.”

21. The Judge went on, in the alternative, to consider the proportionality of the appellant’s deportation. The appellant had come to this country as a child and had a difficult childhood, including going into the care of the local authority for some time.

His mother and sister live in the UK. His father may still live in the Netherlands but there has been very limited contact, the last being in 2015.

22. Having considered the nature and quality of the appellant's claimed family life the Judge found that there was help available to him to find employment and avoid re-offending. He has the support of his mother and sister in the UK.
23. The Judge found that his considerations under the Regulations were wider than would be required for an Article 8 ECHR consideration. Therefore, it was not necessary for him to consider the Article 8 argument further, having found for the appellant under the Regulations.
24. The finding that the appellant does not represent a genuine, present and sufficiently serious threat to society is at the core of this appeal.

The Appeal to the Upper Tribunal

25. The respondent sought permission to appeal on the ground that there had been a material misdirection in law. She submitted that the FtT had failed to give adequate reasons for the finding that the appellant did not pose a genuine, present and sufficient threat to the fundamental interests of society. Further that the evidence before the tribunal did not support the finding because it was expressed in terms of hope for the future and that the witness who expressed a confident view had only known the appellant for too short a period of time and was not aware of a recent arrest. The respondent argues that because the finding as to future risk was flawed, the subsequent reasoning on proportionality was "infected" by those earlier findings.
26. Permission to appeal was granted on the following grounds by a judge of the First-tier Tribunal;
 - a. That the Judge failed to give adequate reasons for his finding that the appellant was not a risk because it was based on the evidence of the Probation Officer that it was hoped that he would not re-offend,
 - b. That the Judge was wrong to place reliance on the evidence of O.S. because he had not known of the appellant's recent arrest,
 - c. That the judge had failed to take account of the appellant's continued association with others involved in crime.

27. The skeleton argument of the SSHD argues that the FtT had not given sufficient reasons for making the finding that the appellant did not pose a genuine, present and sufficiently serious threat. It is submitted that the Probations Officer's view was expressed as a hope that he would not re-offend, rather than a "firm conclusion" that he would not. Further it is argued that the FtT should not have accepted the evidence of O.S. and the Probation Officer because they were not aware of the recent arrest and were therefore not fully appraised of the facts of the appellant's recent conduct. Also, that the appellant's continued association with persons who drove a car in which a knife was found showed that there was a continuing risk of further offending. It is argued that the FtT failed adequately to consider the full extent of the offending history as past conduct carries weight as to future behaviour.
28. We were invited by Ms Shaw to adjourn the appeal to await the Court of Appeal's decision in a case (or cases) in which further guidance was to be given on the deportation of EEA nationals. She was unable to provide us with any further details of the case, or with the date on which a decision might be expected. In the circumstances, we declined to adjourn and proceeded to consider the parties' submissions.
29. In addition to relying on the skeleton argument submitted on behalf of the SSHD, Mr Tufan sought to argue that the FtT had not engaged sufficiently with Schedule 1, which requires separate consideration of all the relevant factors. He accepted that there was no application to vary the grounds but he submitted that the point was raised 'tangentially' in the grounds. In amplification of the grounds, he submitted that the judge had erred in attaching weight to the evidence he had heard regarding rehabilitation, since that evidence was merely speculative and based on nothing more than hope. The appellant's conduct post-hearing shed light on the risk of re-offending and there was a tension between the judge's assessment at [38] and [46]-[47].
30. Miss Shaw submits that the Judge was entitled to place reliance on the evidence of O.S. as an expert witness in the assessment of risk. That his confident view could be used to balance the fact of repeated offending over the appellant's adolescence. The Probation Officer had known the appellant for a longer time and was supportive of the view that the risk was not sufficiently great.
31. She submits that the Judge heard the evidence, applied the regulations, and reached a conclusion open to him on the facts. She argued that he had properly considered all the applicable factors in reaching his decision on the proportionality of

deportation. She relied on the Rule 24 Response in addition to her oral arguments.

32. We reserved our decision.

Discussion

33. The appellant is a young man with an unenviable record of offending. That full record was before the FtT and the history and nature of those offences was adequately summarised in the judgment. The Judge read evidence from his Probation Officer, who had known him and worked with him for some time. He also heard from O.S. who had worked directly with the appellant but only for a short time. The judge was entitled to draw, from that combination of expert opinion, the conclusion that whilst the risk of further offending could not be eliminated there was an evidential basis upon which he could conclude that there were grounds for confidence. O.S. was confident and the Probation Officer was hopeful, neither could provide certainty and the Judge reached his findings on the basis that there was a continuing risk.

34. The FtT noted that the appellant had been found by the Judge who sentenced him at Reading Crown Court to be immature, acting under pressure from others and to some extent driven by the need to finance his own drug use. She expressed the view that increasing maturity was an important factor in reducing the risk of future offending.

35. The judgment of the FtT does adequately set out the reasoning by which the Judge concluded that the SSHD had not discharged the burden on her of proving that the appellant was a genuine, present and sufficiently serious threat to the interests of this society. It was open to him to place weight on the evidence of O.S. who expressed confidence in the appellant's future conduct, even if he had not been told of an arrest which had not led to a prosecution.

36. The separate points made in the grounds of appeal amount, in truth, to nothing more than a disagreement with the findings reached by the judge. He was demonstrably aware of the full extent of the appellant's offending; the extent of the witnesses' familiarity with the appellant; and his more recent offence. There can be no doubt that he took all of those matters into account. Nor can there be any doubt that the weight which he attached to the evidence, and in particular the evidence of OS, was a matter for him. It is trite that an appellate Tribunal should be slow to interfere with factual decisions such as this, based as they are on the 'sea of evidence' before the Tribunal of fact. We

see no proper basis to interfere with the judge's well-reasoned conclusion that the appellant does not present a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom. As the judge himself noted, that conclusion was determinative of the appeal before him, and our conclusion that it is free from legal error is determinative of the appeal before us: MC (Portugal) [2015] UKUT 520 (IAC); [2016] Imm AR 114.

37. There is no conflict between the judge's conclusions at [36]-[38] and those he expressed subsequently. The findings made at [36]-[38] stand alone, and represent clear conclusions about the level of risk presented by the appellant. And there is no failure in the reasoning to the conclusion on the level of future risk that can be said to "infect" the conclusion reached on the proportionality of the SSHD's decision. If the appellant has not been demonstrated to present a sufficient threat to the interests of society than the decision to deport is disproportionate.
38. Insofar as Mr Tufan sought to vary the grounds of appeal so as to include a submission that the judge failed to have regard to, or to apply, schedule 1 to the 2016 Regulations, we refuse permission for that variation. We do not accept that the point was raised 'tangentially' in the grounds; there is no reference to schedule 1, nor to the principles within it. No application to vary the grounds was made in writing, whether in the respondent's skeleton argument or otherwise. No notice was given to the Upper Tribunal, the appellant or his representatives of the attempt to raise a wholly new argument. As was explained in Das [2019] UKUT 354 (IAC), representatives who attempt to raise new points at the very last moment in this way can generally expect the Upper Tribunal to adopt a robust approach, and to insist on proper standards of appellate advocacy. That was said in the context of a late application by an appellant's representative but it must apply *a fortiori* to the respondent, given the resources at her disposal (see, for example, SSHD v SS(Congo) & Ors [2015] EWCA Civ 387; [2016] 1 All ER 706).
39. We must, we think, add one concluding observation to ensure that the appellant understands the consequences of our decision. The judge's decision was reached on the basis of the facts presented to him. The circumstances which obtain at today's date are evidently different, for the reasons we have set out at [4] above. It is no doubt open to the respondent to initiate further deportation proceedings as a result of those subsequent convictions, and the appellant would be mistaken to think that he is somehow immune from deportation as a result of our decision.

Notice of Decision

The respondent's appeal is dismissed. The decision of the FtT stands.

Mrs Justice McGowan

23 September 2020