Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00589/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 11 February 2020	**On 4 March 2020**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL [X]

Respondent

Representation:
For the Appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr P. Georget, instructed by Duncan Lewis & Co. (Harrow Office)

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically this is an appeal by the Secretary of State to the Upper Tribunal.

2. The appellant (Michael [X]) appealed the Secretary of State's decision dated 03 September 2018 to make a decision to remove him on public policy grounds under European law as a result of a conviction for a serious offence involving the supply of controlled class A drugs, for which he was sentenced to six years' imprisonment.

3. First-tier Tribunal Judge R. Sullivan ("the judge") considered the background [2]. She identified the relevant decision and the correct legal framework [3-8]. She went on to outline the evidence before her and summarised the case put forward by both parties [11-16]. The judge went on to make findings of fact based on the evidence before her. She made detailed findings in order to assess whether the appellant had acquired a right of permanent residence under EU law that would give rise to an enhanced level of protection. The appellant had lived here for many years and if he was able to show that he had acquired a right of permanent residence he would have qualified for the highest level of protection under regulation 27(4) of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). The judge made detailed findings and concluded that the appellant failed to produce sufficient evidence to show that he had acquired a right of permanent residence [17-26]. In light of that finding she went on to assess the case with reference to the lower level of protection contained in regulation 27(1).

4. Although an issue was raised in the rule 24 response as to whether the judge correctly assessed question of permanent residence, Mr Georget said that he was not going to pursue the issue. As such the judge's findings relating to permanent residence shall stand.

5. The judge went on to assess whether the appellant represented a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' with reference to regulation 27(5)(c). She heard from the appellant's partner. She noted that the appellant had been with Ms [J] since 1994. In the appellant's statement prepared for the criminal court he had attributed the lengthy break in his offending between 1994 to 2016 to his relationship with Ms [J]. The judge said "I heard Ms [J] give powerful oral evidence that if the appellant reoffends she would not tolerate it. I accept that she is a positive influence on him" [19]. The judge outlined the evidence from the appellant's mother regarding his background in the UK [20].

6. The judge made the following findings relating to current risk at [27-28]:

> "27. I have already indicated why I regard Ms [J] as a positive influence on the appellant. In my view her influence will deter him from reoffending. I am also able to take into account evidence which was not available to the decision maker, namely evidence of the appellant's engagement in prison with groups/courses to address the drug habit cause of his offending and the evidence from a probation services officer that the appellant has been assessed to represent a medium risk to members of the public, namely those addicted to class A drugs but that the risk was 'not thought to be current/imminent as the appellant is no longer involved with the drug culture and there is no evidence to suggest that he is likely to involve himself in similar offending behaviour in the future'. The likelihood of him reoffending within one year was calculated at 15%, rising to 26% for reoffending within two years. I also take into account that the appellant has been released from prison on licence, he will remain on licence until 14 April 2022 and is subject

to supervision, including drug testing. As at 11 October 2019 he had been co-operating fully with that supervision.

28. Against that background I return to the EEA Regulations and make the following findings:

(a) The Decision was taken on public policy and public health grounds, namely to protect the public (and individual drug users) from the harm and many problems which flow from the supply of controlled drugs.

(b) The Decision was not taken for economic reasons.

(c) The Decision is not proportionate given the length of the Appellant's residence in the United Kingdom, his close and important relationship with Ms [J], his past ability under her influence to desist from offending, the steps he has taken to address his own drug misuse and his cooperation with those now tasked to supervise him.

(d) The appellant does not currently represent a genuine and sufficiently serious threat to any of the fundamental interests of society because of the relatively low risk of reoffending but he should be under no illusions that further offending will demonstrate that he cannot be trusted when he promises not to offend in future.

(e) I find that the decision is contrary to the EEA Regulations because it is disproportionate and the appellant does not currently represent the required level of threat."

7. The Secretary of State appealed the First-tier Tribunal decision. The original grounds made general submissions and were not clearly particularised. At the hearing, Mr Lindsay accepted that this was the case and helpfully sought to crystallise three main points that could be drawn from the grounds on behalf of the Secretary of State. He accepted that the last two points relied on the success of the first.

(i) The judge erred in her assessment of whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society for the purpose of Regulation 27(5)(c).

(ii) The judge misdirected herself in relation to the proportionality assessment under EU law.

(iii) The judge erred in her relation to the assessment of proportionality under Article 8 for the same reasons.

Decision and reasons

8. In relation to the first ground, which forms the crux of this appeal, two points were put forward. The first was that it was said that the judge failed to give adequate reasons and failed to take into account relevant considerations in assessing what influence the appellant's partner might have on the risk of reoffending when, on the evidence, it seemed clear

that Ms [J]'s influence had not prevented the appellant from committing the serious index offence in 2016. The second point was that the judge had impermissibly conflated the threat as one that needed to be current or imminent and therefore did not follow regulation 27(5)(c), which did not require the threat to be imminent.

9. In relation to the first point the appellant accepts that no specific findings were made to acknowledge the point made by the Secretary of State about Ms [J]'s inability to prevent him from committing the index offence. Clearly it is not Ms [J]'s job to prevent the appellant from committing crime; it is entirely his responsibility to ensure that he does not break the law. However, insofar as Ms [J]'s influence formed part of the judge's assessment as to whether the appellant was likely to pose a genuine and present threat of committing similar crime, it was a relevant factor. I accept that the judge did not specifically acknowledge the point that is now made by the Secretary of State. It is unclear whether the point was argued by the Secretary of State at the First-tier Tribunal hearing. It was not even clearly particularised in the grounds of appeal to this Tribunal.

10. Arguably it was a relevant issue, but it seems clear from the judge's findings that she was aware of the circumstances and that this formed part of the overall body of evidence she considered. What she said at [19] made clear that she had considered the appellant's evidence attributing the lengthy break in his offending history to his relationship with Ms [J]. The appellant's antecedents showed many minor offences during his youth. There was a long break in offending from 1994 until the far more serious index offence that took place in 2016. It was reasonable to infer from this history that the appellant's relationship with Ms [J] may have had some influence on his behaviour, albeit that it was clear that they were still in a relationship when he committed the index offence. Although the judge did not tackle this point head on, I find that any omission was not likely to have made any material difference to the outcome of her assessment. It is clear the judge was appraised of all the facts and took them into account. It was open to her to conclude that Ms [J] was still likely to be a positive influence even though they were still in a relationship when he committed the index offence.

11. In any event, the first point is less relevant when one considers the professional risk assessment of the National Probation Service (NPS). It was open to the judge to place weight on the letter from Anna Cadzow dated 11 October 2019. She was the officer who was supervising the appellant while he was on licence and who was in the best position to comment on the risk of reoffending. There was no completed OASys Report before the judge, so the information and the assessment provided by Ms Cadzow was an important piece of evidence. The judge quoted some parts of that assessment, but it may be helpful to quote what Ms Cadzow said more fully:

> "Mr [X] has been assessed as a medium risk to members of the public, more specifically those who are addicted to class A drugs. Although there are no direct victims who can be specified, the potential victims are those who use

> and subsequently become addicted to illicit drug use. That said the risk is not thought to be current/imminent as Mr [X] is no longer involved with the drug culture and there is no evidence to suggest that he is likely to involve himself in similar offending behaviour in the future.
>
> Mr [X] is assessed as being a low risk to children, known adults and staff.
>
> Risk of Re-Offending:
>
> OGRS score – this is the probability of proven general re-offending. The calculated likelihood of Mr [X] re-offending is 15% within one year and 26% within two years. This is considered to be a **low risk**.
>
> OVP score – the probability of proven violent offending – The calculated likelihood of Mr [X] committing a violent offence is 3% within one year and 6% within two years. This is considered to be a **low risk**.
>
> OGP score – the probability of proven non-violent offending – The calculated likelihood of Mr [X] committing a non-violent offence. The calculated likelihood of Mr [X] committing a non-violent offence has been calculated as 7% within one year and 12% within two years. This is considered to be a **low risk**.
>
> **Currently I do not believe Mr [X] is a genuine or present risk to members of the public.**" [emphasis added]

12. It was open to the judge to take into account the fact that the appellant had been assessed as a medium risk of serious harm to members of the public and specifically to those that are addicted to class A drugs [27]. It is uncontentious that the crime that the appellant committed was a serious one and that it would pose a serious threat affecting one of the fundamental interests of society. The key question before the judge was the first part of the test contained in regulation 27(5)(c), which was whether the appellant represented a 'genuine and present threat'.

13. It was argued on behalf of the Secretary of State that in quoting the probation evidence at [27], which said that there was not thought to be a "current/imminent" risk of similar offending behaviour the judge had considered the wrong test when she found at [28(d)] that the appellant "does not currently represent a genuine and sufficiently serious threat to any of the fundamental interests of society because of the relatively low risk of reoffending." The risk did not need to be imminent. Her finding was not in accordance with regulation 27(5)(c).

14. In my assessment this submission reads too much into the words used by the judge in the decision. It seems clear that the judge gave weight to the assessment of the probation officer who was responsible for supervising the appellant. It was open to her to do so. I accept that the wording of the first paragraph of the assessment used the phrase "current/imminent", but the judge merely quoted that part of the report. Elsewhere it is quite clear that the assessment, both by the probation officer and the judge, was focused on the likelihood of reoffending. The judge noted that there was a low risk of reoffending. Later in the assessment, the probation officer concluded that the appellant did not represent "a genuine or present risk" to members of the public, which was a similar assessment to the test the

judge was required to apply. The judge was obliged to consider whether the appellant posed a "genuine, present and sufficiently serious threat" at the date of the hearing. Nothing in her finding at [28(d)] suggests that she wrongly required the threat to be imminent. The word "current" simply denotes that the assessment was made at the date of the hearing.

15. The grounds of appeal made some other points about the NPS risk assessment scoring. The OGRS score calculated the likelihood of reoffending of 15% within one year and 26% within two years, but even on the face of the evidence from the probation service this was only considered to be a low risk of reoffending. The OGP score which was the probability of proven non-violent reoffending was even lower. The likelihood of committing a non-violent offence was 7% within one year and 12% within two years. In short, all of the risk assessments were that he was a low risk of reoffending. It was open to the judge to place weight on evidence from the probation officer, which made quite clear that he was not thought to be a genuine or present risk to members of the public. The likelihood of reoffending in the foreseeable future was low. It is not arguable that the judge's finding that the appellant posed a low risk of reoffending was outside a range of reasonable responses to the evidence.

16. I asked Mr Lindsay to point to the evidence that the Secretary of State relied to say that the appellant might a present risk given the content of the professional risk assessment undertaken by NPS. The only point that he was able to make was that the judge had failed to consider whether at the end of the licence period the appellant would be likely to reoffend. It is not clear whether this point was even made to the judge in submissions. It is speculative in the absence of any evidence to suggest that the appellant is likely to reoffend beyond the 'low' risk assessment made by NPS.

17. I conclude that it was open to the judge to consider the positive influence of his relationship with Ms [J], the evidence relating to rehabilitation, and the professional risk assessment. Albeit the nature of the offence led him to be assessed as posing a medium risk of serious harm to drug users <u>if</u> he committed a further offence, the likelihood of him committing a further offence was assessed to be 'low'. It was open to the judge to conclude that the appellant did not represent a genuine, present or sufficiently serious threat to one of the fundamental interests of society to justify his removal on public policy grounds.

18. The point made in the grounds relating to Schedule 1 of the EEA Regulations 2016 was unparticularised and was not developed in any meaningful way at the hearing. The judge referred to Schedule 1 at [8]. The public policy considerations outlined in Schedule 1 are general in nature. Clearly the judge considered that a drugs offence was a serious matter that affected one of the fundamental interests of society [27(a)]. In so far as paragraph 3 of Schedule 1 relates to risk assessment, the provision itself is general in nature and would not have precluded the judge from placing weight on the professional risk assessment of the NPS. As a matter of fact, the judge found that the appellant had produced

substantive evidence to show that he did not represent a threat for the purpose of paragraph 5 of Schedule 1. Having concluded that the appellant did not represent a present threat it was not necessary for the judge to conduct a detailed proportionality assessment taking into account the extent of the appellant's integration in the UK. In short, it is difficult to see how anything in Schedule 1 would have made any material difference to the outcome of the appeal.

19. The other two grounds relating to proportionality also fail. Following the decision in *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091 the judge erred in making an apparently off the cuff statement that the appeal also succeeded under Article 8 [29]. However, the error makes no material difference to an appeal brought on the sole ground that the decision breaches the appellant's rights under the EU Treaties when she had already undertaken a proportionality assessment under EU law. The judge's findings relating to the genuine and present threat posed by the appellant were sustainable. She considered the appellant's personal circumstances including his length of residence, his family ties and other factors that were relevant to the proportionality assessment. Those findings were open to her to make on the evidence.

20. For these reasons, I conclude the First-tier Tribunal decision did not involve the making of an error on a point of law that would have made any material difference to the outcome of the appeal.

DECISION

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

The First-tier Tribunal decision shall stand

Signed  Date 25 February 2020
Upper Tribunal Judge Canavan