



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: DA/01017/2013

THE IMMIGRATION ACTS

Heard at Glasgow
On 2 October 2013

Determination Promulgated
On 5 December 2013

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

DOUGLAS ALAN BIERER

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr V Sharma, of Matthew Cohen & Associates
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of the United States of America. He is married to a national of the Netherlands who is exercising treaty rights in United Kingdom. Having arrived in United Kingdom as her spouse, on 15 February 2012 he made an application for a residence card. In his application he noted that he had been convicted of an offence in the United States of America. Following investigations, on 10 May 2013 the Secretary of State notified the appellant of a decision to make a deportation order against him. He appealed against that decision to the First-tier Tribunal. Following a hearing on 23 July 2013, Judge Quigley and Dr C J Winstanley

(the panel) issued their determination dismissing his appeal. He now appeals, with permission, to this Tribunal.

2. Although the decision is a deportation decision, it is common ground between the parties that the relevant considerations to be applied to the appellant's circumstances and his history are those in Regs 19(1)(3)(b) and 21(1)-(6) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).
3. The most important feature of this case is undoubtedly the appellant's criminal history, and in order to understand the procedural issues which we will have to deal with, it is important that we set out that history at this point. The offence to which reference was made in the application was committed on 7 June 2003. It is described by the appellant in a letter to the Secretary of State dated 13 February 2012 as follows:

"Nine years ago, while on a business trip, I was detained pending criminal charges, after having been sexually involved with a female minor in San Francisco. Because both of us were under the influence of alcohol, and also due to the fact that she was not of legal age (18 in California), I had no alternative but to plead guilty and to serve a custodial sentence. Because the offence was categorised as non-violent, however, the actual amount of time served was cut in half."

4. In an annex to section 9.3 of the application form, the appellant gave further details:

"On a business trip to San Francisco, California, USA, on 7 June 2003, my ex-wife dropped off my daughter, who was 15 ½ years old at the time, to my hotel room. I very stupidly and wrongly acceded to my daughter's request to purchase a large amount of alcohol which we both consumed over the course of the evening. We slept together and had sexual contact. I was arrested by the police the next evening."

5. The sentence was eight years imprisonment, against which there was an allowance of about two and a half years, including credit for days spent on remand, and half the sentence had to be served: it was followed by a lengthy period of parole. The official record of parole summarises the offence as follows:

"Subject was visiting his 15 year old daughter while on a business trip from England. While at a SF Hotel, subject got victim intoxicated and proceeded to have sexual intercourse with victim despite her protest."

6. We do not need to take any notice of a driving offence, which was also declared by the appellant. There was another offence, which is, however, of some importance. It appears to have been introduced to the case by the appellant's grounds of appeal to the First-tier Tribunal, which include the following passage:

"The appellant has no criminal history except the offence in issue committed under the influence of alcohol and a misdemeanour offence committed in 1988 for which he was sentenced to do communal service for no more than 30 days, and had spent no time in prison. The misdemeanour offence committed in 1988 has been expunged and has not been considered by the Secretary of State for the appellant's deportation."

7. The content of that paragraph was slightly changed in the version of the grounds produced to support Mr Sharma's submission at the hearing of the appeal: the phrase relating to the sentence by then read "sentenced to attend jail for no more than thirty days, the time being served on weekends, and had spent no time in prison". At the hearing before the First-tier Tribunal, the appellant was cross-examined by the Presenting Officer. He was asked how many offences he had been charged with in USA, and in his reply he referred to the felony in 2005 (that was the date of the charge) and to a misdemeanour in 1990 which he described as "considered spent". He was then asked what the actual charge was, and Mr Sharma on his behalf objected on the ground that the conviction was spent and so irrelevant. The Presenting Officer was allowed to proceed and in answer to his questions the appellant said that the charge was of sexual battery, the victim was his 11-year old step-daughter. The sentence was 30 days in the County Jail, to be served at weekends. The offence was charged as a misdemeanour.
8. Having set out the facts to that extent, we can turn to the three procedural issues.
9. The first arose immediately before the hearing. The appellant had applied in writing for an anonymity order covering proceedings before the Upper Tribunal. He made submissions to support his application in person, although, so far as we are aware, his representation by Matthew Cohen and Associates continued. The written grounds for the application were as follows:

"I require an order of anonymity due to the extremely sensitive nature of the evidence included in the appeal. Should this information be made available to the public, I would be at risk of harm, and my life itself would be at risk.

Furthermore, if such information were to be made public record, my wife and family would be at risk of harm.

The information included in the appeal is highly confidential and should not appear in the public record."
10. It is fair to say that the appellant's oral submissions merely repeated those points. We refused his application. The reasons are as follows. The principle is that the administration of justice is public. A good reason would have to be shown for granting anonymity to the appellant. The appellant is a person whose history is that which we have set out. His wife is the other person principally associated with his argument that despite that history he should be allowed to reside with her in the United Kingdom. No minors are involved: the children of either the appellant or his wife are now over eighteen. The hearing before the First-tier Tribunal was conducted in public. We have no reason to suppose that the appellant's history is not publicly available. Further, the appellant's application appears to contrast rather sharply with the part of his claim in which he asserts that he makes full disclosure of his history, which he is now putting behind him following his religious conversion. There is no evidence of any risk of activities against him or any member of his family. In our

judgment there is in this case no good reason why our consideration of the appellant's appeal, and of the fact that it is the appellant's appeal, should be removed from public view.

11. The second procedural point related to the admission of an item of evidence. On behalf of the Home Office, Mr Mullen sought permission to adduce the record that, following an Interim Notification Order, a Notification Order had on 13 June 2013 been made in respect of the appellant at Aberdeen Sherriff Court. It makes the appellant subject to the notification records of Part II of the Sexual Offences Act 2003. It indicates that in addition, following risk assessment, he is regarded as posing a "Medium" risk of sexual recidivism. Mr Sharma objected to the introduction of that evidence. We reminded Mr Sharma that the hearing before the First-tier Tribunal was on 23 July 2013, and asked him why he had not adduced it then, as it was in existence as a Court Order, having more than a little bearing on the submission he made, that the appellant posed no risk to the community of the United Kingdom. He told us that although he knew of the proceedings, he had not seen the order. It appears to us that that is an extremely poor excuse. Mr Sharma should, at the very least, have secured the order and drawn it to the attention of the Presenting Officer. Failure to do that runs the risk of being seen to mislead the Tribunal. In any event, we see no good reason why we should not admit it into evidence, if it should be relevant.
12. The third procedural point relates to the admission of evidence relating to the misdemeanour charge. In his submissions before us, Mr Sharma simply asserted that, although a foreign conviction, it was spent and inadmissible. He referred us to no statutory provisions, and to no authorities. As we have indicated, the First-tier Tribunal allowed questions relating to that conviction to be put to the appellant, and, as will become clear, the panel took the answers into consideration in making their decision. Although, as we have also indicated, there was an objection raised by Mr Sharma at the hearing before the First-tier Tribunal, there is again no indication to any reference to the actual content of the relevant law.
13. The position is as follows. The Rehabilitation of Offenders Act 1974 does cover convictions by courts outside Great Britain: see s 1(4) of that Act. Whether the sentence is properly to be regarded as a community sentence, or whether it was in fact some form of imprisonment, there can be no doubt that, under the terms of the Rehabilitation of Offenders Act, the conviction is "spent". The consequence is, in general, that set out in s 4: the appellant is to be treated for all purposes in law as though he had not committed the offence, and no evidence of the offence is admissible. There are, however, important exceptions to that rule, set out in s 7, of which sub-sections (2) and (3) so far as relevant read as follows (there is no difference in these provisions as applicable in England and Wales on the one hand and Scotland on the other):

“7(2) Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person’s previous convictions or to circumstances ancillary thereto –

...

(f) in any proceedings in which he is a party or a witness, provided that, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section (4)(1)

...

(3) If at any stage in any proceedings before a judicial authority in Great Britain (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below [there has been none] section (4)(1) above has no application, or proceedings to which section 8 below [defamation actions] applies) the authority is satisfied, in the light of any considerations which appear to work to be relevant (including evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person’s spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions.”

14. We have set out section 7(2)(f) in order to exclude it, although it might at first sight appear to be engaged by the facts of the present case. The first mention of the misdemeanour appears to have been made by the appellant himself, and in those circumstances he must be regarded as having consented to the matter being in the knowledge of the Tribunal. It is clear, however, that at the hearing, which was the occasion for the determination of the issue for the requirement of the evidence, he objected to the questions about that conviction, which then proceeded by direction of the Tribunal. Accordingly, whatever the history of the raising of the matter, subsection (2)(f) can have no application to the proceedings in the present case.
15. We turn then to subsection (3), and it is of course at once apparent that the panel’s determination contains no reference at all to any consideration of the issues raised by that subsection or any decision to exercise the discretion there set out. No doubt the First-tier Tribunal, as a judicial authority, should have been aware of the terms of the Act: but it is also right to say that it was being invoked by a solicitor who did not draw the panel’s attention to any relevant provisions of the Act. Section 7(3) of the 1974 Act was the subject of the Asylum and Immigration Tribunal’s determination in AA v SSHD [2008] UKAIT 00027. The Tribunal’s consideration and conclusions in that appeal were as follows:

“[9] So far as the present appeal is concerned, it was for the Home Office to satisfy the judge that she could not do justice without admitting the

appellant's spent conviction. They did not attempt this task, or even draw her attention to the statutory provision which made it necessary. The use of 'require' as well as 'admit' suggests that it is quite open to a judge to consider the interests of justice for herself in this connection. Again she did not do so; and to rely on the spent conviction as she did, but not consider whether justice could be done without it, was in our view an error of law. Since no other substantial reason has been put forward for the appellant's not being entitled to indefinite leave to remain as a long resident, it was clearly a material error of law, unless consideration of the interests of justice would have been bound to result in evidence of the conviction being admitted.

[10] It follows that we need to consider whether justice could not be done in this case without admitting evidence of this appellant's ten-year-old conviction and sentence of 3 months' imprisonment for trying to leave this country on a false Belgian passport, on which the Home Office had taken no action at the time, nor made any attempt to secure his removal following it for 10 ½ years after. In our view it is enough to put the question in those terms, not only to see that it was by no means bound to lead to the admission of the evidence, but to answer it in this appellant's favour. Other sets of facts may well lead to different decisions in cases of this kind on the operation of s.7(3); but in this case the result is that the appeal must be allowed."

16. In the present appeal, for reasons we have already indicated, we heard no submissions on section 7(3) and its meaning, or on AA. The difference in the facts between that case and the present appeal does, however, give an opportunity to express some reservations about the conclusions expressed in such an absolute way in AA. First, it may not be right to use wording which suggests duty on one party or the other, and the word "prove" in the head note to AA would appear to be clearly inapposite. The position, as it appears to us, is simply that a judge needs to consider whether, on all the material available, including the issues that arise in appeal and the parties' positions on them, it is necessary, in order to do justice, to admit evidence of a spent conviction. That final phrase draws attention to another point: a separate decision ought to be made in relation to each spent conviction, if there is more than one. Thirdly, failure to go through the process envisaged by section 7(3) before admitting evidence for spent convictions is clearly an error of law, but where the facts are different from those in AA it may be that the error is not shown to have had any effect in the outcome of the appeal.
17. In the present case it is clear that the panel admitted evidence of the spent conviction without either observing the general rule imposed by section 4 or considering whether to exercise the discretion conferred by section 7(3). That was an error of law. The circumstances were, however, as follows. First, the existence of the misdemeanour conviction was drawn to the attention of the Tribunal by the appellant himself in grounds of appeal (not evidence) and no further details of it were given save that it ought not be taken into account. That process was sufficient to raise a suspicion which it might be difficult to dispel other than by knowing what the conviction was for. Secondly, it was a specific feature of the submissions made

on behalf of the appellant that the interval of time since the 2005 conviction, with no subsequent offences, showed that the appellant was unlikely to offend again: but the interval between the two earlier convictions was longer than the period since 2005. It was therefore impossible justly to appreciate what force the argument advanced on the appellant might have, without access to his full history. Thirdly, the full history demonstrates an escalation of offending and, again, in order to do justice to the case as a whole, it was necessary to know that.

18. For these reasons we regard it as wholly inconceivable that, if the panel had been aware of the provisions of the 1974 Act, they would not have admitted evidence of the misdemeanour offence, whatever might have been said to them by or on behalf of the parties. To put it another way, the evidence was bound to be admitted. Further, for the avoidance of doubt, we should say that if we were to have to remake the decision we would certainly admit evidence of that conviction, for the reasons we have given. The error of law made by the panel in not working through the process under the 1974 Act made no real difference to the way in which they dealt with the appeal.
19. We must now turn to the substance of the case. After setting out the principles upon which the appeal had to be decided, the panel turned to the evidence. They noted that the appellant's letter accompanying his application form had, after the paragraph referring to sexual contact with a minor, to which we have set out above, listed various factors, including his work experience, which in his view made his application worthy of approval. The panel's comment is "the tenor of the letter is largely self-aggrandising". They went on to comment that the description of the 2003 offence in that letter appears to downplay the severity of the crime, although the actual details are set out in the comment on the application form from which we have also quoted above. At [31] the panel recorded their reactions to this. First, the letter to UKBA accompanying the application form "omitted certain extremely important matters". Secondly, the more detailed statement of the offence shows that the appellant's 15 ½ year old daughter had been dropped off at the appellant's hotel room by her mother and "clearly, the appellant was in a position of trust". Thirdly, the appellant's statement of the offence includes an implied blame of his daughter for the purchase of the alcohol which they then both went on to consume. The panel described that as "outrageous":

"It is absolutely clear from the above paragraph, which is of course the appellant's own account of what happened, that the appellant took terrible advantage of his own daughter in a manner which is very difficult for us to imagine the consequences for her in her future life. Unfortunately there are no medical or psychological reports before us in this respect"

20. The determination continues as follows:

"[32] Turning back now to the context of the appellant's letter to the UK Border Agency of 13 February 2012, in the final paragraph, the appellant seeks to

highlight his remorse and good character. The paragraph is quoted below as follows:

‘It is worth mentioning that my wife remained married to me and supported me both financially and emotionally throughout this ordeal. I am deeply remorseful for this incident. It was a result of a terrible mistake which I have worked hard to redress through professional and pastoral counselling. In the years following this incident I have increasingly turned to religion as a source of comfort and guidance. I have made a personal and religious commitment to uphold high ethical and moral standards, and have taken the step of becoming a Jehovah’s Witness.’

[33] Again the tenor of this paragraph seems to us, once again, to be self-aggrandising. There is a total absence of any reference to his daughter and any feelings of remorse towards her, only a reference to his turning to religion as a source of comfort and guidance for him. There is reference to upholding high ethical and moral standards and absolutely no reference to the enormous depravity of his crime. We find that this letter shows a complete lack of self-awareness on the part of this appellant. We also find that this same lack of self-awareness permeated his oral evidence before us.”

21. The panel then deals with the 1990 offence, and concludes that “there is clearly a definite pattern of offending”. There is then reference to one of the trigger points for his offending being viewing pornography, and the panel’s conclusion, after considering the evidence before it, that the appellant has not undertaken any focused rehabilitation course, but has instead decided that, so far as he is concerned, the cure is his religion. In paragraph [39] the panel raised (very properly in our view) a concern about safeguarding practices in the church to which the appellant belongs, where there are a number of young teenagers. The panel comment as follows:

“We accept that there are various letters in the documentary evidence testifying to the appellant’s kindness, assistance, involvement in his local community and church. However, it seems to us that the appellant is a clever and manipulative person who will seek to put forward the best presentation of himself on every occasion.”

22. Given the pattern of the appellant’s offending, and the fact that he had not undertaken any appropriate courses, the panel reached the conclusion that there was a real risk that he would commit further offences of the same nature.
23. So far as the evidence of the appellant’s wife is concerned, the panel concluded that she had no real appreciation of his offending or the level of it: indeed it appeared that she knew little or nothing of the 1990 offence. The panel looked at the evidence of the family life relating to the appellant, his wife and her son (now aged about thirty) and appeared to have concluded that the ties between them were not so strong as to prohibit the appellant’s removal. The appellant and his wife had, after all, lived apart – thousands of miles apart – when he was in prison and subsequently when the terms of his parole prevented him leaving the United States of America. The panel

concluded that “We have no hesitation in finding that the personal conduct of this appellant does represent a genuine presence and sufficiently serious threat affecting one of the fundamental interests of society” and concluded further that the appellant’s removal was not disproportionate in all the circumstances of the case. The panel accordingly dismissed the appellant’s appeal.

24. The grounds of appeal are lengthy and rather unfocused. The first ground is that the appellant’s wife has been exercising treaty rights in the United Kingdom for the last fifteen years and should not be expected to leave the country. There is no suggestion, however, in the First-tier Tribunal’s decision that the appellant’s wife should leave the United Kingdom: on the contrary, the decision proceeds on the basis that if the appellant is deported they will not be living together.
25. The second ground is that the First-tier Tribunal was not entitled to hold that the appellant’s description of himself was “self-aggrandising and remorseless”. In our judgment the panel were more than entitled to make the comments they did. The ground continues by pointing out that the details of the appellant’s offence were contained in the comments in his application form. That, however, is precisely what the panel said. They took into account what he had said about himself, but also noted that when undertaking the task of “introducing” himself to the Secretary of State in a covering letter, he downplayed the offence. That is absolutely accurate. The same ground goes on to indicate that “pleading guilty in itself indicates that the appellant is remorseful”. That, however, is not what the appellant said: he said he had no choice but to plead guilty. We reject ground 2.
26. Ground 3 sets out the facts of the relationship between the appellant and his wife, beginning in 1997 and interrupted from 2003 until the end of his parole. The ground objects to the Tribunal’s conclusion that “their relationship was mere (sic) of a carer and a vulnerable person”. The phrase in the determination at [45] is “the relationship between the appellant and his wife is more akin to that of a carer and a vulnerable person”. That view was drawn from the evidence as a whole, including the appellant’s response to what cannot have been an unexpected question about what would be lost from the relationship if the appellant and his wife lived apart. As the ground says, “the element of care does form a formidable part in a genuine relationship”, but the appellant did not appear to give very much indication of anything else that was in their relationship. We reject ground 3.
27. Ground 4 is apparently an assertion that the appellant should be regarded as a person who has undertaken relevant rehabilitation courses. None were specified by the appellant in answer to questions at the hearing. The ground relies entirely on supposition. There is nothing in it which gives any reason to say that the panel were not entitled to reach the conclusions they did about rehabilitation courses. The point which the panel make, which the ground appears not to appreciate, is that the appellant has shown no sign of accepting that he may need to be directed by others, rather than himself choosing what he considers would be appropriate for his rehabilitation. We reject ground 4.

28. Ground 5 relates to the Rehabilitation of Offenders Act 1974, and we have already dealt with it.
29. Ground 6 asserts that the appellant is fully rehabilitated, and that he would not have been released from parole if that had not been the case. The truth is that the appellant's parole was maintained for the whole of the applicable period. There is no reason to suppose that it was possible to maintain parole beyond the date on which it was maintained: it is certainly clear that deliberate decisions were taken during the appellant's parole that it was not appropriate to release him before the end date fixed for it.
30. Ground 7 invokes the decision of the Upper Tribunal in Essa v SSHD [2013] UKUT 00316 (IAC). That ground appears to be inconsistent with the previous ground, which is that the appellant is fully rehabilitated. There is, in any event, no basis for saying either that the appellant's rehabilitation is continuing, or that whatever activities the appellant is currently undertaking with his church, he cannot continue them in any other part of the world. Ground 7 also contains a restatement of assertions made at the various stages in the appellant's appeal. It does not appear to contain any new material. We reject Ground 7.
31. The position is that the First-tier Tribunal considered the evidence in full. It recognised that it was dealing with an appellant who had a very serious history, and who showed no signs of recognising either the harm he was doing to others or the need to make the sort of changes in his life which he might not otherwise choose. He has a long term marriage to a Dutch national, but the evidence did not demonstrate that it would be disproportionate to require them to live apart, if that was the consequence of the appellant's deportation. The comments made by the panel are, we think, all comments that we would endorse. The conclusion that he continues to represent a threat to the public by the commission of further offences is endorsed by the notification order, which Mr Sharma was at such pains to attempt to prevent us from taking into account. Strictly speaking, it does not fall to be taken into account, because, apart from the error in dealing with the spent conviction, which we have found made no difference, the panel made no error in its assessment of the appellant's appeal.
32. For the foregoing reason, this appeal is dismissed.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 4 December 2013