



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01169/2012

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2013

Determination Promulgated
On 6 February 2014

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Before

UPPER TRIBUNAL JUDGE O'CONNOR
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOAQUIM QUEIROS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Secretary of State: Ms K Bretherton, Counsel, instructed by the Treasury Solicitor
For the Claimant: Mr A Eaton, Counsel, instructed by Rodman Pearce

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State who appeals with permission against the determination of the First-tier Tribunal (the First-tier Tribunal Judge Cockrill and Mr M E Olszewski JP) promulgated on 1 March 2013 allowing Mr Queiros' appeal against a decision of the Secretary of State made on 3 December 2012 to make a

deportation order against him by virtue of Section 5(1) of the Immigration Act 1971. For clarity we refer to Mr Queiros as the claimant.

2. It is the claimant's case that he arrived in the United Kingdom on 1 September 1999 and has lived here continuously since then apart from short periods of a few weeks during which he had returned to Portugal.
3. The claimant first came to the attention of the authorities in the United Kingdom in January 2001 and has subsequently accumulated 17 convictions for 28 separate offences.
4. On 5 October 2011 the claimant was sentenced to a period of three years' imprisonment for being concerned in a supply of class A drugs at a street level as a user/dealer. As a result of that conviction, the Secretary of State took a decision to deport the claimant who appealed against that decision pursuant to Regulation 26 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").
5. The EEA Regulations transpose into domestic law Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 "on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States" ("the Directive"). The relevant parts of the EEA Regulations provide:

19. (1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.

(1A) a person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 of that person is subject to a deportation or exclusion order

(1B) If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom

...

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom under these Regulations may be removed if –

(a) that person does not have or ceases to have a right to reside under these Regulations; or

(b) the Secretary of State has decided that the person's removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

...

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

...

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

...

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

6. The claimant's case is that as he had resided in the United Kingdom for more than ten years prior to the conviction that resulted in the decision to deport him, he is a person to whom regulation 21 (4) (a) of the EEA Regulations applies and so can be deported only on "imperative grounds of public security".
7. The Secretary of State's case is that the claimant presents a medium risk of reoffending; that all the available evidence indicates that he had a propensity to reoffend and, that he represents a genuine present and sufficiently serious threat to the public to justify his deportation. She did not accept that the claimant had resided in this country in accordance with the EEA Regulations for a continuous period of either five or ten years and that therefore he was not a person to whom Regulation 21(3) or (4)(a) applies.
8. On appeal, the First-tier Tribunal found that the claimant had been in the United Kingdom continuously since 1999. They accepted his submission that in order to meet the requirements of regulation 21 (4) (a), he need only have resided here for 10 years, and that there was no requirement that his residence have been in accordance with the EEA regulations. They found that a sentence of three years' imprisonment did not meet the "imperative grounds of public security" test and allowed the appeal on that basis.
9. The Secretary of State sought permission to appeal on the grounds that the First-tier Tribunal had materially misdirected itself in law in concluding that the ten years residence referred to in regulation 21 (4) (a) did not have to be residence in accordance with the regulations. It was also submitted that the panel had failed to give adequate reasoning as to how the claimant had acquired ten years' total residence given the lack of documentary evidence and the acceptance that he had been out of the United Kingdom in 2006 and 2009. Permission to appeal was granted by Upper Tribunal Judge Deans on 26 March 2013.
10. The appeal then came before Upper Tribunal Judge Rintoul, sitting alone, on 3 June 2013. He found that in concluding that the claimant is a person to whom Regulation 21(4) applies, that is that he has been resident here for ten years and did not require to have shown that he was resident here in accordance with the Regulations for that period, the Tribunal relied solely on the decision in **SSHD v FV** [2012] EWCA Civ 1199 ("**FV**") and did not refer to **HR (Portugal) v SSHD** [2009] EWCA Civ 371 in which it was held that the same requirement of lawfulness governs both the five year and the ten qualifying periods, a decision approved in the Court of Appeal in **Carvalho and Omar v SSHD** [2010] EWCA Civ 1406. Judge Rintoul considered that although the panel referred to the decision in **LG (Italy) v SSHD** [2008] EWCA Civ 190 which left this question open, the panel has failed to have regard to later binding authority or distinguish it and although it is arguable that **HR** was not followed in **FV**, there is insufficient indication that the panel considered this issue. Given that it was noted in the determination [51] that Mr Eaton accepted that the claimant might have difficulty in meeting the requirement in regulations 21 (3), that is to have acquired permanent residence in the United Kingdom, and, given the claimant's history of offending the First-tier Tribunal could have come to another conclusion.

11. The matter was then listed before us to remake the decision. Since that hearing on 31 October 2013, the Court of Justice of the European Union (“CJEU”) has handed down decisions in two relevant cases – MG v SSHD [2014] CJEU C-400/12 and Onuekwere v SSHD [2014] CJEU C-378/12. In consequence we gave directions to both parties permitting them to make submissions on these cases. In his response, Mr Eaton states [4];

...for the purpose of the current appeal, it firstly must be conceded that [the claimant’s] periods of imprisonment preclude him from the specific level of protection from deportation, set out at Article 28(3) (a) of Directive 2004/38/EC and Regulation 21 (4) (a) of the 2006 EEA Regulations

12. In the light of this concession, we consider that in remaking the decision, we need only concern ourselves with the lower of the three levels of protection as described in Batista v SSHD [2010] EWCA Civ 896 (per Carnwath LJ as he then was) at [9] –[10]:

9. It is sufficient to recall that the Regulations (particularly regulation 21) provide for a hierarchy of levels of protection in relation to decisions to remove EEA citizens on grounds of public policy or public security. As I explained in *LG(Italy)* in the Court of Appeal (at para 14-15):

"... the 2006 Regulations have introduced a new hierarchy of levels of protection, based on criteria of increasing stringency:

- 1) A general criterion that removal may be justified 'on the grounds of public policy, public security or public health';
- 2) A more specific criterion, applicable to those with permanent rights of residence, that they may not be removed 'except on serious grounds of public policy or public security';
- 3) The most stringent criterion, applicable to a person 'who has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision', who may not be removed except on 'imperative grounds of public security'.

....

The Court of Appeal has long accepted that removal on 'public policy' grounds may be a justified response to sufficiently serious criminal conduct, if combined with evidence of a propensity to reoffend, and in particularly serious cases even without it..."

13. It is also important to note that, under all three levels of protection, certain general criteria must be met including at regulation 21 (5) (c) that “the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. It flows from that requirement, that even in the case of the lowest level of protection, there is a minimum level of threat that must be met before the consideration of proportionality envisaged in regulations 21 (6).
14. As it is accepted that the claimant is not entitled to the benefit of regulation 21 (4) we proceed consider whether regulations 21(5) has been made out. Our starting point is whether the appellant represents a genuine, present, and sufficiently serious threat affecting one of the fundamental interests of society, that is, in this context whether he has a propensity to re-offend. We note from Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) at [32]-[35]

32. We observe that for any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending. In such a case, if there is acceptable evidence of rehabilitation, the prospects of future rehabilitation do not enter the balance, save possibly as future protective factors to ensure that the rehabilitation remains durable.

33. It is only where rehabilitation is incomplete or uncertain that future prospects may play a role in the overall assessment. Here we must take our guidance from the Court of Justice in *Tskouridis* and the Court of Appeal in the present case remitting the matter to this Tribunal. It is in the interests of the citizen, the host state and the Union itself for an offender to cease to offend. This is most likely to be the case with young offenders who commit a disproportionate number of offences, but many of whom will stop offending as they mature and comparatively few of whom go on to become hardened criminals and persistent recidivist offenders. We can exclude consideration of offenders beneath the age of 18 as EEA law will prevent their deportation save in the unusual event that it is in their own interest (Article 28 (3) (b) of the Citizens Directive).

34. If the very factors that contribute to his integration that assist in rehabilitation of such offenders (family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like) will assist in the completion of a process of rehabilitation, then that can be a substantial factor in the balance. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.

35. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, we cannot see how the prospects of rehabilitation could constitute a significant factor in the balance. Thus recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with impulses to commit sexual or violent offences and the like may well fall into this category.

15. There was little material before the First-tier Tribunal which relates to the claimant's life in the United Kingdom although it is listed in their determination at [33] - [34]. The panel heard evidence from the claimant, but we did not as, although he was offered the opportunity, Mr Eaton elected not to call him.
16. The First-tier Tribunal did not make any findings of fact in relation to the claimant's account of how he had spent his life here. No submissions have been made that he was not telling the truth, and we have no reason to doubt his account. We accept, that:

- (i) the claimant worked as a plumber in Portugal, but became involved with drugs, although was able to be drug free from 1993 to 2000; that he became involved with drugs again in the United Kingdom, finding it hard to beat his addiction;
 - (ii) the claimant arrived in the United Kingdom in 1999 to work, initially in a factory in Spalding, but lost his job and then started to claim benefits;
 - (iii) the claimant met his wife in 1999; that they were married in 2001 and that she give birth to twin daughters in March 2001; that the relationship broke down;
 - (iv) there had been regular contact between the claimant and his daughters who continue to live in the United Kingdom, but that since he has been in prison, although contact was maintained by telephone, that has ceased and his former wife is unwilling for contact to continue;
 - (v) the claimant has undergone a number of courses in prison, including on the CARAT programmes, and is a regular churchgoer.
17. In terms of his offending behaviour, we note that he has accumulated 17 convictions for 28 offences between 2001 and August 2011 when he was convicted of the index offence of supplying Class A drugs for which he was sentenced to three years imprisonment. His offending includes convictions for shoplifting, simple possession of drugs, failure to surrender, and breach of community order.
18. We note from the sentencing remarks of HH Judge Madge that the claimant had been a street dealer, with entrenched drug addiction, and had been sentenced on the basis that his offending was to feed his habit. Having had regard to the presentence report, the judge was not satisfied that the claimant has the necessary motivation for a drug rehabilitation order to be successful.
19. The First-tier Tribunal did not make a finding on the risk posed by the claimant. They found that the highest level was not met in this case, but went on to state [60] "in any event this conclusion [that the test was not met] is underscored by the most recent assessment that the [claimant] represents a low risk. He has integrated into the UK by residing here for many years".
20. That last sentence is, we find, not a finding of fact by the First-tier Tribunal, nor did Mr Eaton expressly submit that it was; it is nothing more than a gloss on the principal finding which meant that it was unnecessary for them to reach any further conclusions, the finding with respect to the claimant meeting the high level test being determinative. Further, such a finding is in isolation of any consideration of proportionality, or any of the other considerations set out in regulations 21 (5) and (6).
21. There are two reports produced by the Probation Service assessing the claimant's propensity to re-offend. There is a NOMS report, and a subsequent OASys report which is more detailed, and breaks down the risk into three categories: OGRS3, OGP and OVP. Of these scores, OGRS3 alone indicates a medium risk, and Mr Eaton

accepted in oral submissions that there was a medium risk of re-offending, notwithstanding the low risk in relation to some scores.

22. The probation reports must be considered with the indication that the claimant has undertaken CARAT courses and the negative drug test results. These count in his favour, but we bear in mind also his history of long term drug use.
23. There is little or no evidence before us regarding what support would be in place for the claimant on release. There is no evidence as to where he would be accommodated, what income he would have, whether he is likely to be employed or what support is available to assist him to avoid drug misuse. There is, in fact, a dearth of evidence of any stabilising factors being present on release, and we consider that there is as a result, and given the claimants long history of drug abuse and crime to feed his habit, that it is likely that he will continue, on release, to deal in drugs as he has done in the past.
24. There is little or no evidence other than what the claimant says that he has changed and would no longer seek to commit crimes. It is relatively easy to make such statements, but without evidence that such a change has in fact become embedded in his person, shown by proper insight into his past behaviour or other actions he has taken, it is difficult to accept them at face value, given his history. Accordingly, we are satisfied that the claimant does have a propensity to re-offend and is likely to turn again to dealing in drugs and other crimes. There is thus a medium risk of his re-offending.
25. We consider that, in the circumstances, given the pernicious effect of the dealing in Class A drugs has on society, that this claimant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
26. In assessing whether it would be proportionate to remove the claimant, we note that there is little evidence before us of his life in the United Kingdom other than his chaotic history of drug-abuse and crime. There is little evidence of support from friends or family; no one appeared before us to support him. He does, we accept, have a family life with his two daughters, but his relationship with them is, and has been for a long time, limited. There is insufficient evidence before us to reach conclusions about what is in the children's best interests nor have we heard detailed submissions on that issue. Given that there is now no longer any telephone contact with them, the content of the family life is minimal; there is no indication that deportation would make any substantial difference to the nature of the tenuous family life that exists.
27. The claimant has now lived in the United Kingdom for over 13 years, but beyond that, given his limited work record, and continued criminality, his ties to this country are very limited. That said, we are mindful of the length of the claimant's residence here, and bearing in mind what was said in **MG** at [36] and [37], it is a factor which we take into account in his favour and one to which we attach weight, although we balance this against the risks he poses.

28. We bear in mind, in weighing these factors, that the claimant has rights under European Law to enter the United Kingdom, establish himself here and work here. Any interference with his rights must be proportionate. We find that in this case the serious threat posed by the claimant cannot be addressed by any measures other than his removal from the United Kingdom and that the interference with his rights is, given his limited integration into and life in this country, proportionate.
29. Accordingly, the decision made in this case was in accordance with Regulation 21 of the EEA Regulations, and we dismiss the appeal on that basis.
30. Turning to Article 8 of the Human Rights Convention, it is not submitted that the claimant meets the requirements of paragraphs 399 and 399A of the immigration. We do not consider that there are exceptional circumstances in this case. The claimant has at best a very limited family life with his daughters. In assessing proportionality, we bear in mind that the claimant has rights under EU law, and that significant weight must be attached to that, but equally for reasons set out above, we have found that under EU law his removal is proportionate. We bear in mind our finding that the claimant has a family life here; he has spent a substantial part of his time here in custody, and that his private life is limited for the reasons set out above. We consider that the interference with that limited private life is proportionate to the legitimate aim as set out in the EEA Regulations, given the serious threat posed by the claimant's continued residence here and his continued offending.
31. Accordingly, we find that the claimant's deportation would not be in breach of this country's obligations under Article 8 of the Human Rights Convention and we dismiss his appeal on that basis also,
32. We find that the claimant has failed to satisfy us that the decision made in this case was wrong on the basis of any of the grounds set out in section 84 of the 2002 Act or the EEA Regulations, and we dismiss his appeal in its entirety.

Signed

Date

Upper Tribunal Judge Rintoul