



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/02550/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 13 November 2014**

**Decision & Reasons
Promulgated
On 19 November 2014**

Before

**THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE MOULDEN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**TOMASZ KAZIMIERZ MICHALIK
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss L Kenny, Home Office Presenting Officer

For the Respondent: In person, assisted by Miss Matras (McKenzie friend)

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a determination by the First-tier Tribunal (a Panel comprising First-tier Tribunal Judge Digney and Dr De Barros) ("the Panel") promulgated on 4 June 2014. The Panel allowed the appeal of the claimant, a 33 year old Polish citizen, against a decision by the Secretary of State to make a deportation order against him. To avoid confusion we shall refer to the

parties in this determination as “the Secretary of State” and “the appellant”.

2. That decision was set out in a letter dated 3 December 2013 following the appellant's conviction at St Alban's Crown Court on 21 June 2013 of the offences of abstracting electricity and production of a Class B controlled drug, namely cannabis. He was sentenced to a period of twelve months' imprisonment. Having pleaded guilty to these charges at the earliest opportunity, he obtained the maximum credit of one-third, bringing the starting point down from eighteen months to twelve months. He served only six months of that sentence in custody in the normal way. That, we should observe, is too short a period for the appellant to have undertaken any form of course whilst he was in prison that might have addressed his offending behaviour. In any event it is quite clear from the sentencing remarks of the Crown Court judge that this was not somebody who was involved in the trafficking of drugs or in consuming them himself, which is often the case with people who are convicted of drugs offences.
3. The judge explained that there was a commercial operation being run in effect from two bedrooms in the house that the appellant was renting. It had all the usual paraphernalia to grow the cannabis. There were some 117 cannabis plants found in those rooms. The appellant's account of his offending, which was not challenged by the prosecution, was that he had rented the rooms out to a man called Raj who was the person growing the cannabis. The appellant of course knew what was going on. He was doing this in order to subsidise his rent and possibly to make, as the judge put it, a “bit of profit on top”.
4. The judge assessed the role in the offending played by the appellant as somewhere between a significant and lesser role in the sentencing guidelines, and that is why it clearly passed the custody threshold. A factor that counted in his favour was that he had no previous convictions. There was also a very positive pre-sentence report by the probation service. That report assessed his risk of reoffending as extremely low. The prospect of reoffending in the first year was assessed at 3%, and 6% over two years. That should probably be understood as meaning 3% in each of those years, rather than as the Panel suggested, 3% in the first year and 6% in the second. But for present purposes that really does not matter. Whether it is 3% or 6% it is obviously a minimal risk of reoffending.
5. The grounds of appeal take issue with the adequacy of the reasoning given by the Panel for overturning the decision to deport. It is fair to say that the determination is a very short one and the reasoning is really contained in paragraph 9 in which the Panel said this:

“We do not think that a 3 to 6 percent risk of reoffending can be seen as a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society with regard to this offence. In relation to this offence it is for the respondent to satisfy us on a balance of probabilities that the Regulation is engaged, that is

Regulation 21(5)(a) of the Immigration (European Economic Area) Regulations 2006, and she has not done so. There is no argument as to how there can be the sort of needed risk when the chance of it happening is so low and the letter does not address this point. The letter deals with the harmful effects of drug offences but does not deal with the question of what risk is raised here. Bearing in mind the level of the risk, we also do not accept that the decision complied with the principle of proportionality; see Regulation 21(5)(a)."

6. Regulation 21(5)(c) requires the personal conduct of the prospective deportee to "represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". A "threat affecting one of the fundamental interests of society" simply means a threat to do something prohibited by law: **GW (Netherlands)** [2009] UKAIT 00050. Whether the threat is "sufficiently serious" depends on the assessment of how likely it is that the offender will re-offend and on the nature and seriousness of the offences he is likely to commit. The less strong the ties between the individual and the UK, the less serious the level of risk that needs to be shown. In one case, **LG and CC** [2009] UKAIT 00024, Carnwath LJ spoke of a "serial shoplifter" being properly removable if he fell within the category with the weakest ties to the UK – as this appellant does, having only entered the jurisdiction in 2010.
7. On a first reading the Panel might have seemed to be a little unfair to the Secretary of State when they said that the decision letter did not deal with the question of what risk was raised. Certainly in the decision letter it is said on a number of occasions that the offender manager had found that the appellant posed a low risk of harm to the public, in particular at paragraphs 18 and 22. However it seems to us that what the Panel was really complaining about was the fact that the decision maker never truly engaged with how that low risk impacted on the legal test in regulation 21(5)(c).
8. Paragraph 23 of the decision by the Secretary of State says this:

"It is clear that you committed your offence for monetary gain. The offence of which you have been convicted is a serious one and the sentence that you received reflects this. Whilst this is your first criminal conviction in the UK and your offender manager has calculated your risk of reconviction as low, the Home Office takes the view that the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for you to reoffend."

Notwithstanding the fact that the prospect of re-offending was so low, the decision-maker had concluded that it was outweighed by the nature of the offending and the serious harm that was perceived to result in consequence of any similar instances of offending; but it is difficult to see how that conclusion could have been reached if the decision maker had

properly applied his mind to the test. What he was considering was whether a 3% chance of the appellant sub-letting his premises to a cannabis grower in future was a sufficiently serious threat to commit a criminal offence to justify his being removed from the UK.

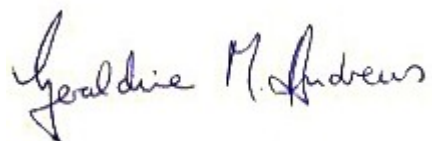
9. On behalf of the Secretary of State, Miss Kenny submitted that paragraph 9 of the determination nowhere addresses a number of the points adverse to the appellant that were made in the determination letter. In particular she pointed to the deterrent effect that deportation of the appellant would have on others who might be tempted to come over to this country from another EEA state, and allow their residences to be used for growing cannabis. She also pointed out that all drugs offences are very serious, as was stated in the decision letter. Drug addiction affects not only the drug users themselves, but their families. It can have a knock-on effect in terms of encouraging addicts to commit other types of crimes of an acquisitive nature in order to finance their habit. It can have a very serious impact on society as a whole. But the appellant is not a drug addict, and he is not himself a drug distributor. His offence was one of facilitation of the production by others of Class B drugs.
10. Miss Kenny said that in paragraph 9 the only factor of relevance which appears to have been addressed at all by the Panel is the one of risk. There is nothing on the face of the determination to show that the other relevant factors have been taken into consideration or weighed in the balance, or to explain why the Panel thought that the decision should be overturned.
11. It is clear that in making a determination of this nature it is not incumbent upon a Tribunal to set out every single argument that it has heard or every single factor that it has taken into account. All the Tribunal must do is to set out sufficient reasons to explain why it has reached the decision that it has. In our judgment the reasons given in this determination are sufficient. The Secretary of State's appeal on this ground in reality amounts to little more than disagreement with them; and whilst the grounds of appeal also contend that the Panel fell into error in treating this case as subject to the elevated test applicable to those EEA nationals who have acquired rights of permanent residence, that is plainly not the case, and the point was rightly not pursued in oral argument by Miss Kenny.
12. Paragraph 9 is really focusing upon the one factor which countervails all the other factors referred to in the reasons for deportation letter - which the Panel plainly had in mind because they refer to that letter specifically in paragraph 8. Clearly they were considering what was said in it when they looked at the risks in paragraph 9. Indeed there is specific reference to the fact that the decision letter deals with the harmful effects of drug offences and it does so in terms which make it very clear that it was a serious offence, and that drugs offences can have the harmful consequences and knock-on effect to which we have already referred.

13. However, notwithstanding that it was an offence which may have been committed for financial gain and notwithstanding that any reoffending of a similar nature could (indirectly) have harmful effects on others, one comes back, as the Panel did, to the fact that the risk of any such reoffending is extremely low. So the financial motivation which prompted the commission of these offences was unlikely to do so again. That evaluation of the risk of repetition was accepted.
14. In the light of that, the Panel was faced with the position of a man of previous good character who has committed one serious offence, who pleaded guilty to it at the earliest opportunity, who did not maintain a central role in the offending, who was not himself a drug user and who had a wife and family who were well established within the jurisdiction. Those considerations and the considerations under Section 55 also came into play in the underlying decision letter, although the decision maker came to the conclusion that any impact on the appellant's son of his deportation would be "minimal". Given his very low risk of re-offending, could it really be said that he posed a "sufficiently serious" risk to justify his deportation? The Panel concluded that when the risk was properly evaluated the answer was plainly no, but the decision maker had not properly evaluated the risk.
15. The real question for this Tribunal is whether or not there is a material error of law in the determination. The sole issue is whether or not the reasoning in this case falls short of what was required in order to inform the Secretary of State why it was that the decision that had been made by her officer was overturned. In our judgment paragraph 9 of the determination satisfies these requirements. It makes it very clear that it was felt by the Panel that there had been an inadequate consideration and weighing of the low risk in the balancing exercise and that when that risk was properly taken into account the threshold of a genuine, present and sufficiently serious threat to the fundamental interests of society had not been crossed.
16. In those circumstances the requirements of the Regulation were not met, and therefore there was no need, as the Panel said, for it to go on and consider any of the other points that could be raised on behalf of the appellant.
17. For those reasons we take the view that this appeal should be dismissed. There was no material error of law in the determination by the Panel.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

A handwritten signature in cursive script that reads "Geraldine M. Andrews". The ink is dark and the handwriting is fluid and legible.

Signed

Date 18 November 2014

Mrs Justice Andrews