



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

Appeal Number: IA/45687/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 22 October 2015**

**Decision and Reasons
Promulgated
On 3 November 2015**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KB

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms E Savage, Senior Home Office Presenting Officer

For the Respondent: Ms P Solanki, instructed by Lawrence Lupin Solicitors

DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing KB's appeal against the decision to deport him from the United Kingdom pursuant to Regulation 19(3) (b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and KB as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Portugal, born in Luanda, Angola on 9 January 1979, who lived in Portugal from the age of 17 years until he came to the United Kingdom in November 2003. He first came to the attention of the authorities in the United Kingdom in July 2005 when he was cautioned for travelling on the railway without paying a fare. Between October 2005 and January 2010 he was convicted 19 times for 37 offences, including possessing an offensive weapon in a public place, failing to surrender to custody, attempting to travel without paying rail fare, breach of community order, battery, using threatening abusive insulting words or behaviour with intent to cause fear or provoke violence, destroying or damaging property, breach of suspended sentence, drunk and disorderly and making false representations.

4. On 12 November 2009 he was convicted at Ipswich Crown Court of false imprisonment, rape of a male aged 16 years or over, wounding with intent to do grievous bodily harm and robbery. On 12 January 2010 he was sentenced to a hospital order under section 41 of the Mental Health Act 1983 without limit of time, having been diagnosed as suffering from schizoaffective disorder.

5. On 13 August 2014 the appellant was served with a notice of liability to deportation. He responded on 1 September 2014. On 14 November 2014 he was served with a notice of decision to make a deportation order under the EEA Regulations.

6. The respondent, in making that decision, considered that the appellant had not exercised Treaty Rights in the United Kingdom for a continuous period of five years or more and had therefore not acquired the right of permanent residence. As such he could be deported on grounds of public policy or public security. Having considered the circumstances of the index offence and the sentencing judge's remarks, and having taken account of his mental health and diagnosis as suffering from schizoaffective disorder, as well as his established pattern of repeated offending, the respondent concluded that the appellant had a propensity to re-offend and that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy. The respondent went on to consider proportionality as required under Regulation 21(5)(a) and considered the various factors under Regulation 21(6), taking account of his relationship with his father who lived in the United Kingdom, his single status, his health, his length of residence in the United Kingdom and his rehabilitation prospects in the United Kingdom and Portugal, and concluded that the decision to remove him was justified and proportionate. It was considered that the appellant's deportation would not be in breach of the United Kingdom's obligations under the EEA Regulations and neither would it breach the appellant's human rights either under Article 3 or Article 8 of the ECHR.

7. The appellant's appeal against that decision was heard in the First-tier Tribunal on 14 May 2015 by First-tier Tribunal Judge Wellesley-Cole and was allowed under the EEA Regulations and on Article 8 grounds. In allowing the appeal the judge concluded that the appellant did not now pose any level of risk to the public since his hospital confinement under the Mental Health Act appeared to have had a positive effect on his rehabilitation.

8. The respondent sought permission to appeal to the Upper Tribunal on four grounds: that the judge had applied the wrong public policy test under Regulation 21 and that her proportionality assessment was thus unsound; that the judge had erred by conflating the appellant's risk of reoffending with his mental health condition; that the judge had erred in her consideration of the appellant's rehabilitation; and that the judge had erred in her assessment of Article 8 by concluding that section 117 of the Nationality, Immigration and Asylum Act 2002 did not apply in EEA cases.

9. Permission to appeal was granted on 7 July 2015, with specific reference to the first ground of appeal.

10. The appeal came before me on 22 October 2015. I heard submissions on the error of law and have concluded that the judge's decision is materially flawed and cannot stand, for the following reasons.

Conclusions on the Error of Law

11. I find myself in agreement with the respondent's assertion that the judge appears to have applied the wrong public policy test in the appellant's case, or at the very least that it is difficult to ascertain which test she applied.

12. Whilst it is the case, as Ms Solanki submitted, that paragraphs 6 and 13 of the judge's decision refer to the correct test, that being the test applicable to persons not having acquired a permanent right of residence, it is clear that those paragraphs are simply a record of the submissions made by the representatives. At paragraph 16, however, the judge stated that the starting point in the appeal was the "serious test". Ms Solanki submitted that that referred simply to the "serious threat" within the correct public policy test at Regulation 21(5) and was not an indication of any higher test being applied by the judge. However that does not appear to be the case when considered in the light of the judge's comments at paragraph 18, that "the serious test is the residence of five years". It is also relevant to note that the judge referred, at paragraph 16, to a tension between the respondent's decision that the appellant did not have a permanent right of residence and the case that he posed a serious threat, also suggesting that the judge proceeded on a misunderstanding of the correct test. I do not agree with Ms Solanki that the fact that the test is set out in full at the end of paragraph 18 indicates that the judge had the correct test in mind, since those provisions apply also to the higher test, as indicated by the judge's statement that "I have *also* weighed in the balance the principles set out in Regulation 21(5)".

13. On that basis alone I find that the judge's decision cannot stand. As the judge recognised at paragraph 16, the starting point for her assessment was the correct test under Regulation 21. Clearly, all other findings flow from that assessment and if those findings were founded upon the wrong test, they simply cannot be sustained.

14. In any event I find merit in the respondent's other grounds. Whilst the judge, in her Article 8 assessment, refers to the appellant not representing a genuine, present and sufficiently serious threat to society, there is no clear finding in that regard within her assessment under the EEA Regulations.

15. The judge put significant weight upon the positive rehabilitative effect of the appellant's hospital treatment and the lack of comparable treatment in Portugal in concluding that his removal would be disproportionate. However, in so doing, she concentrated solely on the index offence and failed to take account of, or make considered findings on, other relevant factors in assessing risk, in particular the fact that his history of criminal offending appeared to pre-date his mental health problems. Although she referred to the appellant's previous criminal convictions, in so far as she recognised that Regulation 21(5) (e) provided that they did not in themselves justify the decision to remove, she did not appear to have given his offending history any weight in the assessment of risk of re-offending and thus in her consideration of whether he posed a current risk. Furthermore, the significant weight that she attached to his rehabilitation, in the face of a lack of comparable facilities in Portugal, is inconsistent with the approach taken in SSHD v Dumliauskas [2015] EWCA Civ 145 and also reinforces the suggestion that she approached the appellant's case on the basis that the relevant public policy test was the higher one applicable to those with permanent residence.

16. Finally, as regards her Article 8 assessment, the judge plainly erred by considering that section 117 of the 2002 Act did not apply in the appellant's case, when it did. Aside from a failure to consider the public interest considerations in section 117, the judge's proportionality findings under Article 8 were clearly marred by the same failings referred to above in relation to her decision under the EEA Regulations and accordingly her Article 8 assessment must also be set aside.

17. For all of those reasons the judge's decision cannot stand and must be set aside and re-made. Both parties agreed that in the event an error of law was found in respect to the first ground the most appropriate course would be for the case to be remitted to the First-tier Tribunal for a complete rehearing and a fresh decision on all grounds. I therefore set aside the judge's decision and remit the case to the First-tier Tribunal.

DECISION

18. The Secretary of State's appeal is allowed.

19. The making of the decision of the First-tier Tribunal, with respect both to the EEA Regulations and Article 8, involved the making of an error on a point of law. The decision is set aside in its entirety. The appeal is remitted to the First-tier Tribunal, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2, to be dealt with afresh, before any judge aside from Judge Wellesley-Cole.

Anonymity

The First-tier Tribunal made an anonymity order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal)(immigration and Asylum Chamber) Rules 2014. I continue that order, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed
Upper Tribunal Judge Kebede