



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: OA/07834/2013

THE IMMIGRATION ACTS

Heard at Field House
On 11 September 2014

Determination Promulgated
On 11 September 2015

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE RINTOUL

Between

FRANK ALEGRE

Claimant

and

ENTRY CLEARANCE OFFICER, CALAIS

Respondent

Representation:

For the Appellant: Mr Loughlin, instructed by Linga & Co, Solicitors

For the Respondent: Mr C Avery, Senior Presenting Officer

DETERMINATION AND REASONS

Introduction

1. This appeal concerns a national of The Netherlands who, on 5 March 2013, was refused admission to the United Kingdom by an Immigration Officer at this country's juxtaposed immigration controls at Calais Ferry Port, pursuant to regulation of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). He appealed against that decision to the First-tier Tribunal from

out of country. First-tier Tribunal Judge Boyes dismissed the appeal in a determination promulgated on 5 December 2013.

2. On 12 February 2014, Upper Tribunal Judge O'Connor granted permission to appeal to the Upper Tribunal

Background history

3. The appellant was on 21 June 2006 convicted of having links with an organisation involved in drug trafficking. His appeals against conviction and sentencing were protracted and during the process he moved to the United Kingdom. While here, after his conviction and sentence had been confirmed by the Dutch Supreme Court, the Dutch authorities sought his extradition so that he could serve his sentence. The appellant returned to the Netherlands where he served his sentence.
4. On 5 March 2013 the appellant was stopped at Calais Ferryport by a British Immigration Officer. He was questioned about why he wished to enter the United Kingdom and about the offence detailed above. The respondent refused him admission on the basis that his exclusion was justified on public policy grounds.

The appellant's case

5. When interviewed the appellant said that he had lived and worked in London in 2010-11. He said that he had applied for a residence card as confirmation of his right of residence but that was refused; it was then that he learned that a European Arrest Warrant had been issued against him. He had gone to court and had agreed to be extradited to the Netherlands where he served a sentence from 1 March 2011 until 20 February 2013. He said he intended to return to Amsterdam after a short visit as he had a meeting with a probation officer on 18 March 2013.
6. The appellant said that his purpose in coming to London was to see his daughter whom he had not seen since she was three years old; she would be coming to London from Denmark where she lives with her mother. He was intending to stay with a friend, Mr Robert Oppong

The Respondent's case

7. The respondent's case is set out in the notice of decision of 5 March 2013 and in the explanatory notice dated 15 March 2013. The former states briefly that the appellant is to be refused admission, on the basis that his exclusion is justified on grounds of public policy for having involvement with a serious organised crime group who were involved in drug trafficking for which he had served two years' imprisonment.

Decision of the First-tier Tribunal

8. The appellant was represented by counsel, as was the respondent. Judge Boyes did not hear oral evidence but there were in the bundle of evidence adduced by the appellant two witness statements from him and a witness statement from Mr

Oppong. The respondent did not lodge a bundle of evidence, relying only on the notice of decision and the explanatory notice.

9. In his determination [22], Judge Boyes noted that there was no dispute that the appellant had been convicted in relation to the trafficking of drugs, or that he was sentenced to a term of imprisonment. After directing himself as to the relevant law as set out in article 27 of the Citizens Directive and regulations 19 and 21 of the EEA Regulations [23], he noted that the appellant could only be excluded if that were justified on grounds of public policy, public security or public health. He found [24] that the appellant was not entitled to an enhanced level of protection that would apply had he acquired a permanent right of residence or had resided here for 10 years.
10. Judge Boyes found [27] that the appellant was neither remorseful nor a reformed character [27], his failure to surrender to the Dutch authorities to serve his sentence being indicative. He found also [28]-[30] that there were significant inconsistencies between what the appellant had told the immigration officer when first questioned and what he said in his witness statements, those differences extending to how long he intended to stay here, whether he intended to return to the Netherlands, and how long he had lived here, this leading to the judge to consider unreliable [30] the appellant's evidence as to his previous residence here, character and propensity to re-offend.
11. The judge did not accept that the appellant's rehabilitation would be assisted by allowing him to enter the UK, it being more likely that he would be properly monitored, if need be in the Netherlands where he was convicted and sentenced.
12. Judge Boyes concluded [33] that the appellant presents a genuine, present and sufficiently serious threat to the fundamental interests of UK society, given his total lack of regard for the authority of the courts and law and that the respondent was justified in excluding him on grounds of public policy.

Grounds of appeal

13. The appellant sought permission to appeal on the grounds that the First-tier Tribunal had erred in its approach to regulation 21 of the EEA Regulations by:
 - (i) failing to have regard to the fact that the more firmly an individual is "anchored" in the United Kingdom, the greater the need to justify refusal of admission, this appellant having been in the UK for in excess of 8 years, and having become integrated here (4);
 - (ii) failing correctly to assess the propensity of the appellant to commit further crimes, the judge failing to take into account that he had committed only a single crime, and had been law abiding in the United Kingdom (5);
 - (iii) failing to give adequate consideration to the prospects of rehabilitation in the UK, the appellant having already served his sentence in the Netherlands (6);

- (iv) concluding that the appellant presented a genuine, present and sufficiently threat as this was not demonstrated by the evidence.

14. On 12 February 2014, Upper Tribunal Judge O'Connor granted permission, stating:

"Although the ground are somewhat convoluted, it is arguable (by references to paragraphs 5 and 7 of the grounds) that the First-tier Tribunal failed to give adequate reasons for its conclusion that the appellant presents a "sufficiently serious threat to the fundamental interests of society" and, in particular, failed to identify the nature of the "sufficiently serious threat" that it concluded that appellant poses to such interests.

While I see little merit in the other grounds, I do not limit the grant of permission."

15. We pause to observe that there are no challenges within the grounds to the findings of fact made by Judge Boyes.

Submissions

- 16. As the case developed during argument before us, the appellant sought to argue that the decision in question was an exclusion order, and that it was unlawful, the respondent having failed properly to comply with the relevant policies and procedures. It was submitted further that the respondent had not shown that the decision was justified under regulation 21 or was proportionate; and, that in so finding, Judge Boyes had erred.
- 17. The respondent submitted that a distinction is to be drawn between a decision to exclude on public policy grounds and an "exclusion order", the latter being of enduring effect, unlike the former. Mr Avery expressly stated that that the decision in this case was not an exclusion order, and it was submitted that the decision not to admit was justified.
- 18. In reply, the appellant submits that such a distinction is not permissible under EU law, and that such an interpretation of the law would be to permit the Secretary of State to make enduring orders without any of the relevant safeguards being in place.

Did the decision of the First-tier Tribunal involve the making of an error of law?

- 19. As a preliminary matter, we note also that it was not in dispute before the First-tier Tribunal that this was an appeal against an exclusion order; indeed, the grounds of appeal to the Upper Tribunal make express reference to exclusion, and while the judge refers to a decision not to admit (1), his decision is concerned with whether exclusion is justified (23).
- 20. The respondent has, however, now changed her case. It is now accepted that there had been no compliance with the procedures relevant to exclusion and it is said that the decision made was not an exclusion decision, just a decision not to admit. For these reasons alone, it is now evident that the First-tier Tribunal reached its decisions on fundamental mistakes as to the underlying decision, albeit mistakes of which it was not and could not have been aware.

21. Was this error material? The respondent submits that it was not. She submits that in any event there was a power not to admit, and it was properly exercised.
22. The appellant submits there is no such power and that in any event the proper procedures were not followed. The appellant also submits that the error was material, and the decision of the First-tier Tribunal was flawed. The appeal should, it is submitted, be allowed.

Discussion

23. The starting point for our consideration is the legislation governing the right of admission and the power to exclude; we will turn to the content of the procedural protections later.
24. The EEA Regulations implement European Directive 2004/38/EC (the “Citizenship Directive”). Regulation 11 of the EEA Regulations provides, so far as is relevant to this appeal:

‘11. – Right of admission to the United Kingdom

(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State

...

(8) But this regulation is subject to regulations 19(1), (1A), (1AB) and (2)’

25. Regulation 19 of the EEA regulations provided at the date of decision, so far as is relevant:

‘19. – Exclusion and removal from the United Kingdom

(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 if 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.’

26. The corresponding provisions of the Citizenship Directive provide:

‘Article 5 - Right of entry

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family

members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

Article 15 - Procedural safeguards

1. The procedures provided for by Articles 30 and 31 shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.
2. Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued with a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State.
3. The host Member State may not impose a ban on entry in the context of an expulsion decision to which paragraph 1 applies.

Article 27

1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.
2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned.

Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

3. In order to ascertain whether the person concerned represents a danger for public policy or public security, when issuing the registration certificate or, in the absence of a registration system, not later than three months from the date of arrival of the person concerned on its territory or from the date of reporting his/her presence within the territory, as provided for in Article 5(5), or when issuing the residence card, the host Member State may, should it consider this essential, request the Member State of origin and, if need be, other Member States to provide information concerning any previous police record the person concerned may have. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.'

The nature of the decision under appeal

27. It is necessary to consider first the decision made by the respondent on 5 March 2013 and the more detailed explanation dated 22 March 2013. It is headed "Refusal of Leave to Enter" and the operative part reads:

"You have sought admission to the United Kingdom under EC law in accordance with Regulation 11 of the [EEA Regulations] on the ground that you are a Dutch National. However, I am satisfied that your exclusion is justified on grounds of public policy for having involvement with a serious organised crime group who were involved in drug trafficking for which you served two years imprisonment."
28. The decision concludes:

"Case was referred to HMI Whalley who concluded that the passenger should be refused leave to enter on the grounds of public policy due to his conviction for involvement with a serious organised crime group, and that had the sentence been served in the United Kingdom he would have been subject to a Deportation Order upon release from prison."
29. It is notable that there is nowhere in either notice any indication that regard was had to regulation 21 of the EEA Regulations.
30. The manner in which this latter decision is worded displays a degree of confusion: is it a refusal of leave to enter under the Immigration Acts, a refusal to admit under the EEA Regulations, or is it an "exclusion order" made under the EEA Regulations although the respondent now says it is not?
31. On further analysis, the decision is a little less confusing when the sequence of events which occurred in this matter is considered in the light of the relevant legislation. The Immigration Act 1971 requires (subject to minor exceptions) non-British Citizens to have leave to enter. In the case of EEA nationals, that requirement is amended by section 7 (1) of the Immigration Act 1988 which provides:

'(1) A person shall not under the principal Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'
32. A person who has been excluded from the United Kingdom, as is provided for under EU law (see Chapter VI of Directive 2004/38/EC - the "Citizenship Directive") does not have any right of entry under EU law, or under the EEA Regulations which are the relevant provision made pursuant to the 1972 Act. On that basis, a refusal of leave to enter is what would logically follow, in domestic law, from an exclusion order. That does not, however, prevent either the decision to exclude or the decision to refuse leave to enter from giving rise to a right of appeal under regulation 26 of the EEA Regulations as an EEA Decision.

33. Despite references to “leave to enter”, given the references to European Law and to “exclusion”, it is manifest that the underlying substance of the decision is one made pursuant to the EEA Regulations.
34. There is, however, a clear divergence between the wording of the decision, clearly referring to exclusion, and it being a decision not to admit. We also note, in passing, that the decision taken was due to the continuing threat posed by the appellant, something of its nature, likely to persist for a considerable time.
35. We therefore turn to the issue that developed in argument before us: can the Secretary of State refuse to admit an EEA national on public safety, security or health grounds? Can that only be done by an exclusion order? And, does a refusal to admit on public policy or security grounds constitute an exclusion order?
36. We turn next to regulation 11, set out above. It is evident that the power to refuse to admit an EEA national who produced a valid passport or national identity card, as had this appellant, is, confined to the circumstances set out in regulation 19.
37. Mr Avery’s argument is that the wording of regulation 19 (1), despite referring to “exclusion” does permit a refusal of admission which (unlike an exclusion order) does not endure. “Exclusion” is not defined, and while “exclusion order” is defined, that is in terms of an order made under regulation 19 (1B), it must mean something other than a refusal of entry and it must mean an order of a type that endures, as otherwise the framework of the Regulations and the manner in which the appeal rights and restrictions if made on them would not make sense. As noted above, the decision made in this case was based on a continuing threat the applicant is said to pose, not a one-off, or necessarily time-limited.
38. Regulation 19 (1) clearly refers to exclusion and imports also a requirement to take into account various factors as prescribed by regulation 21. That requirement is, it appears, reinforced by the relevant policy, as is a decision to deport.
39. There is no general power in the regulations not to admit someone on public policy grounds; such a person may however be excluded for a period. There are sensible reasons for this consonant with the requirement that restrictions on the right of free movement must be construed strictly (see **Orfanopoulos and Oliveri** [2004] ECR I-525). If it were open to a member state continually to refuse admission that would in effect amount to an exclusion order but without the procedural safeguards established by Articles 30 and 31 of the Citizenship Directive.
40. We are strengthened in our view by the fact that since the date of decision in this appeal, regulation 19 has been amended by new regulation 19 (1AB) to permit the refusal of admittance to those suspected of being likely to abuse rights or who have been in some circumstances been subject to removal under reg. 19 (3) (a). It thus appears that it was thought necessary to provide specifically for a power to refuse admittance where there was not already in place an exclusion order, thus indicating that there was no general power not to admit.

41. The respondent did, we accept, have the power to exclude the applicant if she considered that he met the criteria for an exclusion order to be met. If she did consider that on the facts of this case he presented a sufficient threat, then she could and should have made such an order. She could not achieve that end by a refusal to admit.
42. In the light of the above, we conclude that the questions posed at paragraph 35 above can be answered as follows:
 - (a) There is no power in the regulations in force at the date of decision permitting the Secretary of State to refuse to admit an EEA national on public policy or security grounds
 - (b) The Secretary of State can exclude a person by way of an exclusion order on public policy or security grounds
 - (c) A refusal to admit an EEA national is distinct from an exclusion order, even if it is expressed to be on public policy or security grounds.
43. In this case, if the respondent was purporting not to admit the appellant, the clear references to exclusion in the reasons given for the decision make it clear that there was no proper application of the relevant law. Given the acceptance that the proper procedures were not complied with, we consider that the decision was clearly not in accordance with the law, and thus that a fresh, proper decision must be made.
44. In the circumstances, we consider that the decision of the First-tier Tribunal did involve the making of an error of law. We set it aside, and allow the appeal on the basis that it was not in accordance with the law. It is thus for the respondent to make a fresh decision.

Summary of Conclusions

- 1 The decision of the First-tier Tribunal did involve the making of an error of law and it is set aside.
- 2 We remake the decision by allowing the appeal on the basis that it was not in accordance with the law.

Signed

Date:

Upper Tribunal Judge Rintoul