



IAC-FH-NL-V1

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

Appeal Number: DA/01567/2014

THE IMMIGRATION ACTS

Heard at Field House

**Decision and Reasons
Promulgated**

On 28 January 2016

On 01 March 2016

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR PELERIS TREIJS
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Whitwell, Home Office Presenting Officer

For the Respondent: Mr I Palmer, Counsel instructed by Duncan Lewis & Co Solicitors

DETERMINATION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. There are two sections to this determination. The first section is in respect of an oral application for permission to appeal brought by the Secretary of State against the determination of First-tier Tribunal Judge Trevaskis allowing the appeal of the appellant under the EEA Regulations.
2. The second section deals with the determination of the error of law issue.

Permission to appeal

3. Confusion arose in this case as a result of two decisions issued by FtTJ Trevaskis. The first decision was promulgated on 12 February 2015 and the second decision on 4 March 2015. Both decisions allowed the appellant's appeal against the Secretary of State's decision made on 23 July 2014 to deport him in accordance with Regulation 21 of the Immigration (European Economic Area) Regulations 2006.
4. FtTJ Parkes refused the Secretary of State permission to appeal the first decision. The Secretary of State was however granted permission by FtTJ Grant-Hutchinson on 26 March 2015 to appeal the second decision.
5. The appeal came before Upper Tribunal Judge Frances on 25 November 2015. She found that there was no application to the Upper Tribunal for permission to appeal.
6. In a memorandum and directions issued by Upper Tribunal Judge Perkins on 18 December 2015, he remarked that Judge Frances thought that the Secretary of State had somehow managed to renew her unsuccessful application, inappropriately to the First-tier Tribunal rather than to the Upper Tribunal. However it had now become apparent that although permission to appeal was refused by First-tier Tribunal Judge Parkes, the Secretary of State correctly renewed the application for permission to the Upper Tribunal. The Upper Tribunal had a print-out of an application sent by email on 24 March 2015. That application remained outstanding. Given the history of this appeal, Upper Tribunal Judge Perkins decided unusually to list the Secretary of State's permission application for an oral hearing to be followed immediately by the hearing of the appeal if permission is granted.
7. It would appear that there was some confusion by Upper Tribunal Judge Perkins in thinking that the Secretary of State had an application pending before the Upper Tribunal. This was not the case.
8. I found that the first decision by First-tier Tribunal Judge Trevaskis was void because it was incomplete. The determination which was promulgated on 4 March 2015 was the valid decision. The Secretary of State's permission application which was made on 16 March 2015 against that decision was granted by Judge Grant-Hutchinson on 26 March. Consequently, there was no permission application to the Upper Tribunal for me to decide.

Determination of Error of Law issue

9. The appellant is a citizen of Latvia born on 20 September 1977. He appealed against the decision of the respondent to make a deportation order against him by virtue of Section 5(1) of the Immigration Act 1971. The decision to make a deportation order was made on 23 July 2014 in accordance with Regulation 21 of the Immigration (European Economic

Area) Regulations 2006 on the basis that the appellant's removal is justified on the imperative grounds of public security and follows the appellant's conviction for communicating false information about a bomb hoax for which he received a sentence of 18 months' imprisonment on 30 May 2013.

10. The appellant claimed to have first arrived in the United Kingdom on 29 March 1996, before Latvia became a member of the European Economic Area. On 10 April 1996 he claimed asylum which was refused on 30 November 2000; his appeal was dismissed on 20 January 2004, and on 4 February 2004 he exhausted his appeal rights. On 12 January 2004 he was granted leave to remain as a spouse until 12 January 2006. On 11 October 2005 he applied for indefinite leave to remain, but was considered to be ineligible because he failed to return the qualifying questionnaire before the date specified without an explanation.
11. The appellant has two convictions. The first was on 7 March 2011 when he was convicted of driving a motor vehicle with excess alcohol and of failing to surrender to custody. He was fined for these offences, and disqualified from driving for twelve months.
12. The second conviction was on 30 May 2013 when he was sentenced in his absence to eighteen months' imprisonment for communicating false information about a bomb hoax. He was subsequently sentenced to a consecutive term of three months' imprisonment for failing to answer bail, making a total sentence of 21 months' imprisonment.
13. The judge recorded that the respondent accepted that the appellant has acquired a permanent right of residence in the United Kingdom and that he has resided in the United Kingdom for at least ten years. She concluded that, taking into account all the relevant factors, the appellant could only be deported on imperative grounds of public security. Although no NOMS1 assessment was available to the respondent, she concluded that the appellant's criminal record indicated a propensity to re-offend, and the nature of the index offence was such as to create feelings of fear and insecurity in communities, and to divert and waste the time and resources of the emergency services, as well as interfering with the administration of justice. The continued offending by the appellant demonstrated a lack of regard for the law, a lack of remorse for his offending behaviour, and a lack of understanding of the negative impact of his offending behaviour on others, and represented an escalation in the seriousness of offences. The respondent therefore concluded that the appellant represented a risk of serious harm, and found insufficient evidence that he had adequately addressed all the reasons for his offending behaviour.
14. At the hearing before the judge the appellant explained that in December 2010 he was arrested for drink driving; he pleaded not guilty to the charge but failed to attend the adjourned hearing, instead going to Spain for a week. On his return he went to the police station and was arrested. He

was convicted and fined for the offence. On 14 December 2010, the day when he was due to appear in the Magistrates' Court, he made a telephone call to the court, stating there was a bomb in the building. He did this because he did not wish to lose his driving licence. He had attended further interim court hearings, but on 12 December 2011 he again went to Spain, where he stayed with friends, returned to the United Kingdom on 9 November 2012. He went back to live with his parents and got a job parking cars at Gatwick Airport. On 23 October 2013 he was arrested at work and taken to court. He had been convicted in his absence of the offence relating to the hoax bomb threat, for which he was sentenced to eighteen months' imprisonment, and he received a further three months' consecutive for failing to attend court. He has served the custodial element of those sentences and was on licence until 6 July 2015.

15. The judge stated at paragraph 47 that a submission was made by the respondent's representative that he did not accept that the appellant fulfilled the criteria for protection from deportation except on imperative grounds of public security, which he found somewhat surprising, given the contents of paragraphs 9 to 16 of the deportation decision letter. The judge said the submission had not been based on any new facts which were not known to the original decision maker. The judge stated that the case of **MG (prison - Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)** was heard on 25 May 2014, two months before the respondent made her decision. The judge said that **MG** did not decide that a period of imprisonment within a period of ten years' continuous residence would be fatal to a claim of enhanced protection against deportation, although it would be a factor to be considered when assessing the extent to which the appellant had integrated successfully into the United Kingdom society. He said no evidence had been presented before him to show that the make of the original decision was wrong, and, given the detailed analysis set out in the decision letter, he was satisfied that the original decision was correct.
16. The judge relied on **LG and CC (EEA Regs; imprisonment; removal) Italy [2009] UKAIT 00024** which undertook a detailed analysis of the three levels of protection from deportation contained in the EEA Regulations.
17. The judge found at paragraph 49 that the appellant has been resident in the UK since 1996 when he was aged 19, apart from a period of one year which he spent in Spain in 2011 to 2012; the reason for that absence was to abscond from court. The appellant has spent the custodial element of sentences totalling 21 months in prison; his family connections in the United Kingdom consist of his parents. There was no evidence that he retained any links with Latvia, to which he has not returned in eighteen years. Applying the criteria identified in **Tsakouridis**, the judge found that the appellant has integrated himself into the United Kingdom society, albeit not as a wholly law-abiding member of society, and therefore qualified for the enhanced level of protection from deportation.

18. The judge stated at paragraph 50 that neither party had provided the relevant sentencing remarks nor made any submissions thereon, and accordingly, he had not considered those remarks in making this decision.
19. The judge held at paragraph 51 that the index offence of perpetrating a bomb hoax contrary to Section 51(2) of the Criminal Law Act 1977 is one which, on conviction on indictment, carries a maximum sentence of seven years' imprisonment. The appellant committed the offence on 14 December 2010, when he was already on bail from the Magistrates' Court, pleaded not guilty and was convicted after a trial in his absence. He received a sentence of eighteen months' imprisonment for the offence and the sentencing judge would have been aware that he was convicted on 7 March 2011 of driving a motor vehicle with excess alcohol and of failing to surrender to custody. He will therefore receive no credit for a plea of guilty, and the seriousness of the offence would have been aggravated by its commission whilst on court bail and the failure of the appellant to attend his trial. Given these factors, and based upon his own experience of presiding over trials in a Crown Court, the judge took judicial notice of the fact that the sentence passed on the appellant was a relatively short sentence; the offence involved a single telephone call.
20. The judge noted that the appellant has not engaged in any form of rehabilitation in the United Kingdom, nor was there any evidence that he intends to do so. He was satisfied however that this was not an overriding consideration in this case.
21. With regard to the assessment of risk of re-offending, there was no NOMS Report but the OASys Report assessed all the risk factors as low. The judge said he had seen no evidence which would lead him to disagree with that assessment. The commission of the index offence clearly displayed bizarre thought processes and a complete lack of perspective, but he could not accept the submission that it represented clearer evidence of a degree of escalation in the seriousness of offending by the appellant which meant that any future offence committed by him would be so much more serious as to make his deportation imperative in order to preserve the safety and security of persons resident in the United Kingdom.
22. In considering the assessment of the threat posed by the appellant, the judge considered the principles set out in Regulation 21(5) of the EEA Regulations. Whilst the judge was satisfied that the personal conduct of the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, namely protection against crime, he was not satisfied that the degree of threat which the appellant's conduct represented was one which was sufficiently high to amount to an imperative ground of public security. The offence, whilst causing disruption and alarm, was not one of the most serious class of offences, and the appellant did not receive the maximum available sentence for the offence, despite pleading not guilty and absconding from his trial. The judge said that it would be straining the definition of

“imperative public security” beyond reason to apply it to the index offence in this case.

23. The Secretary of State was granted to permission to challenge the judge’s decision on the basis that it is arguable that the judge (a) misdirected himself by taking judicial notice of the aggravating factors relevant to the index offence and the sentencing judge’s view of it based on his own experience presiding over trials in the Crown Court and (b) by failing to consider that the appellant has not lived in the UK for 10 when he lived in Spain between 2001 and 202 and as such misdirected himself in relying on the case of MG (prison-Article 28(3) of Citizens Directive) Portugal [2014] UKUT 392 (IAC).
24. Mr. Whitwell relied on paragraphs 9 and 10 of the Court of Appeal’s decision in **Warsame [2016] EWCA Civ 16**, wherein Longmore LJ accepted the submission made by Mr Greatorex, Counsel for the Secretary of State, that “any sentence of imprisonment in the ten years before the deportation order must in principle prevent an applicant from accruing 10 years’ residence... There is a “maybe” category of cases under **MG (Portugal)** where a person has resided in the host state during the ten years prior to imprisonment, depending on an overall assessment of whether integrating links have been broken, and that in such cases it might be relevant to determine, by way of overall assessment, the degree of integration in the host member state or the extent to which links with the original Member State have been broken.”
25. Mr Whitwell, referring to paragraph 49 of the judge’s decision, submitted that the appellant was in Spain from 2011 to 2012. He was then in prison for 21 months. These are two significant breaks. The question therefore is whether the appellant’s integration has been broken by these two significant breaks. He submitted that the judge’s approach was applying a forward facing test when he found that the appellant has integrated himself into the United Kingdom society, albeit not as a wholly abiding member of society. The judge did not consider whether or not the appellant’s significant breaks broke the level of protection afforded him by the EEA Regulations.
26. Mr Whitwell further argued that the judge erred in law in relying on his own experience to hold that the appellant’s sentence for the offence of perpetrating a bomb hoax was a relatively short sentence. He submitted a document entitled “Communicating a Bomb Hoax” issued by the Crown Prosecution Service on 24 August 2007. It stated that the sentencing range from 12 months to two years’ imprisonment on indictment have generally been approved by the Court of Appeal. Mr Whitwell submitted that the judge erred in law by suggesting that eighteen months’ sentence given to the appellant was not at the far end. He also submitted that the judge should have taken the entirety of the sentencing into account.
27. Mr Whitwell took issue with the judge’s findings at paragraph 47. He submitted that the appellant’s visit to Spain was not before the Secretary

of State when she made her original decision. It first appeared at pages 11 to 12 of the appellant's witness statement. That would explain the contrary view that was taken by the Home Office Presenting Officer below.

28. In response Mr Palmer questioned whether there was any material error of law in the judge's decision. He submitted that whether the level of protection was on imperative grounds or serious grounds, the test was the same. At paragraph 54 the judge said that the risk factors had been assessed as low.
29. With regard to the submission made by the Home Office Presenting Officer below, Mr Palmer submitted that there was no evidence to support the Home Office Presenting Officer's approach. If the Home Office Presenting Officer thought that the original decision was taken in error, he should have withdrawn it and the decision re-made on facts that had become known to the Secretary of State. Consequently the judge did not err in reaching his conclusion at paragraph 47.
30. Mr Palmer submitted that the grounds at paragraph 15 were misleading because the ten year residence is not the test. **Warsame** reiterates the principle that one has to look back ten years from the date of expulsion. It also reiterates the principle that one has to look at everything in the round, including the breaks in the residence and the integration into the UK society. The appellant was in the UK for sixteen years before he committed the index offence. The judge said that his integration was not broken by his offending behaviour nor the breaks in his residence. Mr Palmer submitted that permission was granted on grounds that were arguably misleading and which did not disclose why the error was material.

Findings

31. I was persuaded by the submissions made by Mr. Palmer and reached the conclusion that the judge's decision disclosed no error of law. The expulsion decision was made on 23 July 2014. At paragraph 15 of the respondent's Reasons for Refusal Letter, the respondent accepted on the basis of the evidence set out at paragraphs 9 to 14 that the appellant has obtained a permanent right to reside by virtue of a 5 year period of continuous residence in accordance with the EEA Regulations between 2002 and 2013. Although it was also accepted that he had resided in the United Kingdom for at least 10 years, the respondent took the view that the appellant did not automatically qualify for the protection of imperative grounds of public security. The respondent applied the "integration test" set out at recitals 23 and 24 of the Directive and in the CJEU case of **Tsakouridis** and found that the appellant met the "integration criteria". As a result it was necessary to establish that his deportation was warranted on imperative grounds of public security.
32. In light of the above, I find that the judge did not err at paragraph 47 in expressing surprise at the submission made by the HOPO below. I accept

Mr. Palmer's submission that Mr. Whitwell was speculating that the HOPO's submission was a result of evidence that the appellant had been in Spain for a year, which had come to light after the original decision was made.

33. The judge found the appellant has been resident in the United Kingdom since 1996 when aged 19, apart from a period of one year which he spent in Spain from 2011-2012. He also said that the appellant spent the custodial element of sentences totally 21 months in prison. The judge stated that the case of **MG (prison-Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 00392 (IAC)** which was heard on 25 May 2014, 2 months before the respondent's decision of 23 July 2014 in this case, did not decide that a period of imprisonment within a period of 10 continuous residence would be fatal to a claim of enhance protection against deportation, although it would be a factor to be considered when assessing the extent to which the appellant had integrated successfully into the United Kingdom.
34. I find that the judge's decision satisfactorily answers the points raised by Mr. Whitwell. The judge noted that within the 10 years preceding the respondent's decision, the appellant was in Spain for a year and had spent the custodial element of the sentences in prison. I therefore disagree with the argument that the judge was applying a forward facing test when he found that the appellant had integrated himself into the United Kingdom. Indeed the respondent herself accepted following application and assessment of the factors in **Tsakouridis** that the appellant met the integration criteria.
35. I also reject Mr. Whitwell's argument that the judge did not consider whether the two significant breaks in the appellant's residence preceding the expulsion decision broke the level of protection afforded him by the EEA Regulations. The judge considered this at paragraph 49 and found for the reasons given that the appellant qualified for the enhanced level of protection from deportation. I do not find that the judge's decision falls foul of **Warsame**.
36. With regard to the judge taking judicial notice of the sentence passed on the appellant as a result of his own experience of presiding over trials in the Crown Court, I have looked at Annex L which Mr Whitwell said was the sentencing judge's remarks. I find that it does not contain the reasons relied on by the judge for passing the eighteen months sentence on the appellant. The document from the CPS does say that the statutory sentence is a maximum of seven years; so if this was the sentence the judge was looking at then the appellant's sentence of 18 months was relatively short; but if the judge was looking at the statutory range, then eighteen months was at the higher end of that sentence range. Nevertheless, I find this does not materially undermine the judge's decision because of his finding at paragraph 55 that whilst the bomb hoax caused disruption and alarm, it was not one of the most serious class of offences, and that it would be straining the definition of "imperative public security" beyond reason to apply it to the index offence in this case. I find

that this was a finding open to the judge in the light of his professional experience.

37. I find that the judge's decision discloses no error of law.

Notice of Decision

36. The judge's decision allowing Mr. Treijs' appeal shall stand.

Signed

Date

Upper Tribunal Judge Eshun