



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

Appeal Number: DA/00069/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 16 August 2017**

**Decision &
Promulgated
On 17 August 2017**

Reasons

Before

Upper Tribunal Judge Southern

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL NORBETT DIT IMBS

Respondent

Representation:

For the Appellant: Mr S. Staunton, Senior Home Office Presenting Officer

For the Respondent: Mr R. Halim, counsel instructed by Birnberg Peirce & Ptnrs, solicitors

DECISION

1. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge Mailer who, by a determination promulgated on 26 May 2017, allowed Mr Imbs' appeal against a decision, said to have been made pursuant to the Immigration (EEA) Regulations 2006, that he should be deported. That means, of course, that it is the Secretary of State who is the appellant

before the Upper Tribunal. However, as it will be necessary to reproduce extracts from the decision of Judge Mailer, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. The judge concluded that, in determining the appeal, he should apply the Immigration (EEA) Regulations 2016 and not those of 2006. His primary finding was that the appellant was entitled to benefit from the highest level of protection, so that he could be removed only if there were imperative grounds of public security. However, he recognised that there was a dispute between the parties about the level of protection available to the appellant and so, in the alternative, considered the position of the appellant should he be entitled only to the intermediate level of protection, that requiring there to be serious grounds of public policy and public security and he concluded that the outcome would be the same. At paragraph 175 of his determination the judge set out this clear finding of fact:

“In considering the proportionality of the decision, I find on the evidence as a whole that the appellant’s personal conduct would not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.”

And on that basis, the judge allowed the appeal.

3. In granting permission to appeal, First-tier Tribunal Judge Ford said this

“It is argued the Tribunal erred in:

- a. Considering the appeal under the 2016 Immigration (EEA) regulations and not the 2006 Regulations. This is arguable
- b. Finding that the Appellant had established 10 years’ residence and consequently that imperative grounds had to be established. This is linked to the previous ground
- c. Failing to give adequate reasons for its finding that the Appellant is integrated. This is not arguable
- d. Failing to take the seriousness of the Appellant’s offending, in particular his drugs offending, into account when assessing whether the Appellant poses a genuine, present and sufficiently serious threat. This is arguable
- e. Failing to engage with the margin of appreciation. This is not a matter with which the Tribunal can or should engage and is not arguable.

...

Clear and cogent reasons were given by the Tribunal... for the finding that the Appellant had established permanent residence.

Adequate reasons were given... for accepting that the Appellant had integrated. But it is arguable that the Tribunal failed to pay due regard to the nature seriousness and extent of the Appellant's criminal offending when assessing future threat."

4. Although expressing a view on the arguability of those grounds, Judge Ford did not restrict the grant of permission and so all grounds are available to the respondent to be pursued.
5. At the beginning of the hearing this morning, there was discussion as to what in fact was in issue and of relevance in considering the respondent's challenge to the decision to allow this appeal. It was common ground and agreed between the parties, correctly, that even if the judge had fallen into error in applying the 2016 Regulations and even if he was wrong to find that the appellant was entitled to the highest level of protection of "imperative grounds of public security", those errors would not be material, in the context of this particular appeal, if he were correct in his findings upon application of the immediate level of protection and entitled to find that the appeal fell to be allowed on that basis. The respondent does not seek to challenge the finding that the appellant had established a permanent right of residence, for the reasons given by the judge at paragraphs 111-113 of his determination. Mr Staunton accepted also that, unless the challenge brought by the respondent was able to establish that the finding of the judge that the appellant did not represent a genuine, present and sufficiently serious threat then the challenge to the decision of the judge to allow the appeal would not be made out.
6. Mr Halim submitted that it was not material whether the judge was correct to apply the 2016 Regulations rather than the 2006 Regulations because, so far as is relevant to the facts of this appeal, there is no material difference between them.
7. I am entirely satisfied that the judge was wrong to find that the appellant qualified for the highest level of protection from removal on the basis that he had established ten years' continuous residence prior to the relevant decision. The continuity of residence was interrupted by his imprisonment and even if, which I find very hard to accept to be a finding open to the judge, the 19 offences committed by the appellant between March 2011 when he was just 15 years old and November 2016 could somehow be swept away in order to allow a rational finding of integration, on the judge's own findings of fact, continuity of residence was broken also by the period, which was in excess of six months, that he spent with his father in Senegal. The judge considered that it was the 2016 Regulations that applied. Regulation 3 provides, so far as is

relevant, that continuity of residence for the purpose of the regulations is not broken by periods of absence from the United Kingdom which do not exceed six months in total in any year.

8. In her grounds for seeking permission to appeal, the respondent asserts that the judge failed to strike a balance between the seriousness of the appellant's past offending and the risk of it being repeated. The judge failed to appreciate the serious nature of that offending:

“It is respectfully submitted that even a slight risk of reoffending could constitute a genuine, present and sufficiently serious threat particularly as the Appellant's offence of possession of a controlled class A drug undermines the very fabric of society. As such the FTTJ findings amount to an error in law and that the Appellant does represent a genuine present and serious threat to one of the fundamentals of society...”

9. Developing those grounds this morning, Mr Staunton submitted that the judge had failed to consider the appellant's propensity to offend and, given that the appellant has been convicted on 9 occasions of a total of 19 offences between 2011 and 2016 the judge fell into error in finding that there was no risk of the appellant reoffending. He argued that absent from the reasoning of the judge is any indication that he weighed the significance of the offending. Mr Staunton pointed out that at paragraph 171 the judge said:

“There is no evidence produced that the appellant has a propensity to re-offend...”

But the evidence of that propensity was provided by the list of convictions accumulated by the appellant that was before the judge. It is plain from how the respondent expressed herself in the decision under challenge that heavy reliance was placed upon her analysis of the appellant's history of offending to establish a propensity to commit further offences in the future.

10. In response, Mr Halim submitted on behalf of the appellant that the judge had made no error of law. The judge had identified all the relevant facts and the material relied upon by the respondent and reached the conclusion that the appellant did not represent a genuine, present and sufficiently serious threat. This, he said was a thorough and rigorous

determination from which it was clear that the judge did not ignore the appellant's convictions but took them fully into account. The judgement, he said, must be read as a whole and when it is it is entirely clear why the judge reached the conclusions he did. In particular, Mr Halim emphasised that the judge had not said simply that there was "no evidence" that the appellant had a propensity to reoffend. The judge said also that the appellant was remorseful and had been taught a lesson by the sentence of imprisonment imposed for his last offence. The judge discussed also the strong family links and relationships that fed into the appellant's resolve.

11. Mr Halim concluded his oral submissions by pointing out that permission had been granted on the basis that the judge had failed to take the seriousness of the appellant's offending into account but it is clear from a reading of the determination that the judge did precisely that.

12. Having summarised those submissions, I next consider the determination in detail. It is clear that the judge did not overlook the fact of the appellant's criminal convictions. At paragraph 4 he recorded that the respondent was placing reliance upon those convictions in advancing her case:

"... between 24 March 2011 and 21 November 2016 he committed 19 offences resulting in nine convictions. Five of these included theft, seven related to the police, courts and prison. There were drug offences, the most serious of which was three counts of possession of Class A drugs in October and November 2016 for which he received a total sentence of 21 weeks' imprisonment."

Next, the judge had regard to the Police National Computer report of the appellant's convictions and added this:

"Between March 2011 and November 2016 he was convicted for offences including burglary and theft... His convictions in November 2016 related to possession of Class A drugs; cocaine and heroin. He was also convicted of possessing an offensive weapon in a public place, for which he was sentenced to imprisonment for five weeks."

The judge then summarised the respondent's case, as he understood it to be, as follows

"He had continued to offend without being deterred by previous convictions or sentences. He had a lack of regard for the law and a lack of remorse for his offending behaviour. He did not have an understanding of the negative impact of his offending behaviour on others.

Moreover, he was unable to abide by any conditions placed upon him by the courts. He had failed to comply with the requirements of the courts. He accordingly posed a risk to the public.

He had failed to provide evidence that he had successfully completed any programmes such as an enhanced thinking skills course or a drugs course which could possibly reduce the risk of his re-offending in the future.

Nor had he provided any evidence of employment in the UK or that he would be able to support himself financially. Accordingly it was considered that he would resort to criminal activities to support himself."

The judge recorded also the submission advanced by the respondent that the serious grounds test was met and that it would be reasonable to expect the appellant to return to France where his prospects of rehabilitation would not be compromised.

13. Having first explained why it had not been established that there were established imperative grounds of national security such as to justify the decision, the judge considered the position if instead the appellant were entitled only to the intermediate level of protection:

"In the event that my conclusion that the appellant is entitled to the highest level of protection is not correct, I go on to consider whether there are serious grounds of public policy or security justifying his removal. In accordance with the Regulations, the appellant must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

The appellant accepts (and I find) that his previous convictions are serious. The most serious were committed when he was an adult – possession of class A drugs -for which he received an associated custodial sentence of 21 weeks. However, as submitted by (counsel for the appellant), there were no convictions for intent to supply, a far more serious offence.

There is no evidence produced that the appellant has a propensity to re-offend. He claimed to be remorseful stating that the custody taught him a lesson. Even though such a claim may be self serving, I do accept that he feels ashamed of his offending behaviour and in particular how it has affected his mother.

I find that he has strong links including family links in the UK. I have had regard to statements from his 13 year old sister, Roxanne, who stated that he has helped her out so much in life. He is the only male in the family to whom she can turn for guidance. It is in Roxanne's best interests for the appellant to remain in the UK, which is a consideration to be taken into account in accordance with Schedule 1 of the 2016 Regulations."

After which the judge made his determinative finding, as I have already mentioned:

“In considering the proportionality of the decision, I find on the evidence as a whole that the appellant’s personal; conduct would not represent a genuine present and sufficiently serious threat affecting one of the fundamental interests of society.”

14. It is clearly apparent that the conclusion that the appellant did not represent a genuine present and sufficiently serious risk was predicated upon the judge being satisfied that he represented no risk of reoffending. That conclusion was founded upon the view expressed by the judge that:

“There is no evidence produced that the appellant has a propensity to offend...”

That view is simply unsustainable because there plainly was evidence that the appellant had a propensity to offend, as demonstrated by his record of prolific offending between 2011 and 2016. His most recent offence of possession Class A drugs, those being cocaine and heroin, are typically characterised by the acquisitive offending committed by those who need to acquire such drugs. In her decision letter, between paragraphs 27-44 respondent had set out a lengthy, detailed and cogent account of the reasons for considering that the appellant did represent a significant risk of re-offending. In brief summary:

“Your convictions indicate an anti-social attitude towards the public and community...

You have been convicted of 3 drug offences relating to class A drugs... Individuals who form a dependency upon Class A drugs... are invariably driven to commit crime, sometimes involving violence, in order to support their addiction...

... you were convicted of assault a constable in which you received a community order...

The consequences for all those involved in, or touched by, violent crime are enormous. The nature of your offence demonstrates that you have the potential to act violently when challenged. You have demonstrated through your actions that you are capable of causing harm to others... The nature of your offence shows that you have the potential to act violently with no provocation...

You displayed reckless, risk-taking behaviour and lack of thought for the consequences your actions may have on yourself and others when you chose to drive a car without valid insurance. Driving without insurance is not only illegal but insurance companies are forced to pass on the costs associated with such claims to other drivers by increasing premiums...

You have convictions for burglary and theft from a dwelling. Burglary is a serious offence that often has long term consequences for the victim...

The fact that you have continued to offend without being deterred by previous convictions or sentences indicates that you have a lack of regard for the law, a lack of remorse for your offending behaviour, and a lack of understanding of the negative impact your offending behaviour has on others...

... Your offences relate to failing to surrender to custody at appointed time, commission of further offences during the operational period of a suspended sentence order, failure to comply with the community requirements of a suspended sentence order and you have committed a number of offences whilst on bail.

These convictions quite clearly show that you are unable to abide by any conditions placed upon you by the courts. It is considered that your history of failure to comply with the requirements of the court means you continue to pose a risk to the public.

Your convictions indicate an established pattern of repeated acquisitive offending...

There is no evidence of you have addressed (*sic*) the issues that led you to behave in this manner. In the light of the aforementioned, it is considered that you pose a significant and unacceptable risk of harm to the public in the United Kingdom...

All the available evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy.

Given the nature of the offences you committed and the threat that you pose to society, it is considered that, even if you had permanent residence as a result of five years' continuous residence in the United Kingdom.... The requirement for serious grounds of public policy would be satisfied."

15. Although, as I have mentioned above, the judge referred to the respondent's case, there is no indication that the judge engaged with this extensive reasoning on the basis of which the decision under challenge was arrived at. The judge said that he accepted that the appellant felt ashamed of his offending behaviour but, as can be seen from what the judge said at paragraph 34 of his determination, this is precisely what the appellant had said after his very first conviction in 2011 but, demonstrably, that was not something that prevented him from continuing to commit criminal offences.

16. For these reasons, I am satisfied that it was a error of law for the judge to approach his determinative assessment on the basis that there was no evidence produced that the appellant had a propensity to reoffend. As at the date of the appeal hearing before the judge, the appellant remained in immigration detention and so the absence of any further offending since that for which he had received his prison sentence in November 2016 was not a particularly telling factor in his favour. As the judge has not engaged with the lengthy and detailed reasoning offered by the respondent in support of her view that there was clear and compelling evidence of a propensity to re-offend, I cannot be confident that the outcome of the appeal would have been the same had the judge done so. Therefore, the error of law I have identified was a material one.

17. For these reasons the decision of Judge Mailer to allow the appeal cannot stand. Mr Halim made clear that if this was to be the outcome of the appeal to the Upper Tribunal, then as the appellant has now been released on immigration bail there was more to be said before the decision on his appeal could be remade. I accept, given the serious consequence to the appellant that are in play in these proceedings, he should have the opportunity to provide evidence of his current circumstances. Therefore, the appeal of the respondent to the Upper Tribunal succeeds to the extent that the decision and determination of Judge Mailer are set aside and the appeal is remitted to the First-tier Tribunal to be determined afresh.

Summary of decision:

18. First-tier Tribunal Judge Mailer made a material error of law and his decision to allow the appeal is set aside

19. The appeal to the Upper Tribunal is allowed to the extent that the appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed



Upper Tribunal Judge Southern

Date: 16 August 2017