



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00424/2015

THE IMMIGRATION ACTS

Heard at Field House
On 17 January 2017
Typed: 25 January 2017

Decision & Reasons Promulgated
On 1 June 2017

Before

MR CMG OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE KAMARA

Between

KP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G Ó Ceallaigh, counsel instructed by The Aire Centre
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Mayall, promulgated on 16 March 2016. Permission to appeal was granted by First-tier Tribunal Judge JM Holmes on 4 May 2016.

Anonymity

2. A direction was made previously for the benefit of the appellant's then minor child, and this is reiterated below.

Background

3. The appellant, who is a national of Bulgaria, arrived in the United Kingdom during September 2010. She first came to the attention of the respondent on 16 January 2013 when she applied for a registration certificate as confirmation of a right to reside in the United Kingdom as a self-employed person. That application was refused on 29 May 2013. The appellant next came to the respondent's attention following her conviction, on 21 March 2014, on twelve counts of theft by an employee for which she was sentenced to 43 months' imprisonment. The sentencing judge calculated the value of the items stolen as being of the order of around £30,000.
4. On 11 June 2014, the appellant was sent notice of liability to deportation, in response to which she sent representations in which she explained that her disabled husband and their son and daughter, aged 23 and 17, also resided with her in the United Kingdom. Her daughter was a carer for her father and her son worked full-time to support the family while the appellant was imprisoned.
5. The respondent signed a deportation order on 1 September 2015. An accompanying decision notice of the same date contained the respondent's reasons for doing so. The respondent did not accept that the appellant had acquired the right of permanent residence in the United Kingdom for the following reasons. The appellant had provided no evidence of exercising treaty rights in the United Kingdom; she had provided no evidence that she had permission to work nor evidence of self-employment and therefore it was not accepted that she had been lawfully resident in accordance with the Immigration (European Economic Area) Regulations 2006 for a continuous period of five years since her arrival in the United Kingdom. The respondent therefore considered that the appellant might be deported on the grounds of public policy and public security in accordance with regulation 19(3)(b) of the said Regulations. All the available evidence indicated to the respondent that the appellant had a propensity to re-offend and that she represented a genuine, present and sufficiently serious threat to the public to justify her deportation on grounds of public policy and that the decision to deport her was proportionate both under the Regulations and Article 8 ECHR.

The hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the judge heard oral evidence from the appellant, her husband and her daughter, then aged seventeen. In addition, the evidence before the judge included an OASys assessment dated 4 November 2015, an OASys assessment dated 18 July 2014, a National Probation Service Progress Report dated 11 December 2014 and a NOMS1 report dated 11 June 2014.

7. The judge disagreed with the categorisation of the appellant as being at low risk of re-conviction, considering the risk to be medium and therefore found that the appellant presented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
8. The judge considered that the decision to deport the appellant complied with the principle of the proportionality under the Regulations. Considering Article 8 ECHR outside the Regulations, the judge concluded that the public interests greatly outweighed the factors in favour of the appellant.

The grounds of appeal

9. There were four grounds in support of the application for permission to appeal.
10. The first ground was that the judge had misinterpreted and misapplied EU law to the facts of the case. Reference was made to the NOMS1 report where it was said that the appellant posed a low risk of serious harm. It was argued that this assessment was insufficient to merit a finding that she presents a genuine, present and sufficiently serious risk of harm to the public and for the judge to do so amounted to an error of law.
11. The second ground argued that the judge failed to give adequate reasons for departing from the risk assessment in the OASys reports. Reference was made to documentary evidence of the appellant's exemplary behaviour while imprisoned which it was said pointed to a reduced risk of re-offending.
12. Ground three criticised the delay between the hearing of the appeal and the promulgation of the decision and reasons, which it was said appeared to have been drafted on 16 March 2016. It was submitted that the judge's departure from the professional risk assessment was based on the credibility of the appellant and that the delay rendered his decision unsafe.
13. Finally, ground four argued that the judge incorrectly applied MA (Pakistan)[2014] EWCA Civ 163, which was referred to by the respondent's representative before the judge and in reply, counsel for the appellant had argued that this case was not an EEA case and could not be applied here. It was argued that the judge failed to adequately address this issue.
14. Permission to appeal was granted on all grounds.

The hearing

15. Mr Ó Ceallaigh acknowledged from the outset that the judge's decision was thorough. Addressing the grounds in order, he argued that there had been two assessments by probation while the appellant was in prison and the authors of those reports were in a better to position to assess the risk. The judge identified no sufficiently strong reason to go behind the risk assessments. For instance, the judge had said that the appellant did not accept responsibility for her offending, whereas Mr Ó Ceallaigh said that such an attitude occurred frequently. The starting point of the reports was the appellant's offending.
16. In relation to the second ground, he highlighted the appellant's excellent behaviour during her imprisonment; that she had no previous convictions (it being assumed there were no convictions in Bulgaria), however the appellant had not repaid any of the approximately £30,000 worth of items and money she stole.
17. Mr Ó Ceallaigh stated, regarding the third ground, that the benchmark was 3 months and that a delay of this order gave the impression to an appellant that the judge may have forgotten the facts. In this case the issue was that of risk, albeit Mr Ó Ceallaigh did not expand upon what the oral evidence was as to risk. At this point, we referred to an entry on the appellant's IAC case file showing that the judge's decision and reasons was sent for typing on 4 January 2016 and was duly typed the following day. Mr Ó Ceallaigh said that the question was more of perception than a matter of pointing to a specific error.
18. Finally, with the fourth ground, Mr Ó Ceallaigh argued that with regard to MA (Pakistan), the error of the judge was in saying that low risk in criminal context does not mean that this is the case in an immigration context. He concluded by saying that the judge was not entitled to disregard the probation assessment in this instance.
19. In reply, Mr Wilding stated that all but the third ground were intertwined. He argued that the judge forensically considered the material and that if the arguments on behalf of the appellant were accepted this would mean that the assessed low risk would be determinative of the appeal. The judge assessed the professional reports against the appellant's oral evidence that it was not her who stole from her clients. The criticism on the appellant's behalf was mere disagreement. The judge did not fail to consider any evidence or misunderstand anything.
20. Mr Wilding relied on Vasconcelos (risk-rehabilitation) [2013] UKUT 00378 (IAC), where the proposition that an OAsys assessment was determinative was rejected. He argued that the appellant's oral evidence regarding the offence was relevant as was the fact that she pleaded guilty and that the wrong number of offences had been considered in one of the reports. With regard to MA (Pakistan), it was unfair to criticise the judge given his self-direction on the point. As far as delay was concerned, Mr Wilding was of the view that this did not have any impact upon the judge's assessment of credibility or the evidence. With regard to the evidence, there had been very little in terms of dispute.

21. Mr Ó Ceallaigh added little in response.
22. At the end of the hearing, we reserved our decision which we now give with our reasons.

Decision on error of law

23. The first ground argued that because the appellant was found by professionals to pose no risk of serious harm, it was not open to the judge to find that she represented a genuine, present and sufficiently serious threat to the public.
24. In considering the risk of serious harm, the judge had regard to all the evidence before him including the remarks of the sentencing judge, who said that *“These matters seem to me to be extremely serious. It is a plain breach of trust, and a breach of trust of the highest degree, taking place not only in the home but for people who trusted you with their possessions.”* The remarks continue; *“The Indictment makes it clear that it is multiple thefts over a long period of time, and with multiple victims.”* With reference to reference to the Sentencing Guidelines Council’s overarching principles of seriousness, the sentencing judge considered that the fact that there were multiple victims to be *“a factor indicating a more than usually serious degree of harm.”*
25. At [68] the judge, with explicit reference to the remarks of the sentencing judge, considered that the effect of the offences on the victims was *“great,”* that *“real harm”* was inflicted on the victims of this type of crime and were the appellant to re-offend in the same manner, the harm could well be *“serious.”*
26. The first OASys report was somewhat dismissive of impact on the victims. At 2.5, the following was said;

“As the victims of the offence are sufficiently buoyant to employ a cleaner to clean their accommodation, the loss of the article could be more of a sentimental value rather than a major loss, also that the fact that there is a reliance on the trust of the people you employ, this could be seriously denied.”
27. The actual impact on the appellant’s twelve victims was addressed by the sentencing judge at considerable length in his remarks. While many of the victims lost expensive items and those of sentimental value, there are also references to one victim needing a cleaner owing to suffering from multiple sclerosis and the appellant taking advantage of his disability. There are also references to the ruses employed by the appellant to carry out her offences in the presence of the victims (counts 5, 10 and 12).
28. In view of the evidence before him, we find that the judge made no error in considering the appellant to represent a genuine, present and sufficiently serious threat.
29. In view of the guidance given in Vasconcelos, the first ground is completely lacking in merit.

30. Moving on to the second ground, it is argued that the judge failed to give sufficient reasons for deciding that there was a medium risk of re-conviction.
31. We start by examining the professional reports which dealt, *inter alia*, with the appellant's risk of serious harm and likelihood of re-conviction. The earliest report, dated 11 June 2014, was prepared for the Criminal Casework Directorate. This somewhat brief report indicated that it was "*not known*" whether the appellant had previous convictions in other countries; assessed the risk of serious harm as low and stated that there was also a low likelihood of re-conviction. It is worth mentioning that the author of the report appeared to have little information about the appellant. As can be seen from page 6 of the report, the author could not say with certainty that the appellant had no previous convictions in the United Kingdom; there was no up to date information on the accommodation likely to be available; the appellant's education, training or employability; whether drug or alcohol misuse was an issue and was not assisted by the fact that an OASys report had not been completed. There was also no pre-sentence report completed prior to sentencing. The author's clinical assessment was that if the appellant should seek employment in households in the future she presented a "*raised risk of re-offending*."
32. The first OASys report dated 18 July 2014, based on an interview with the appellant, concluded that her risk of re-conviction was low. It is notable that the appellant denied having carried out the series of thefts, stated that she was appealing both conviction and sentence and any remorse related only to the fact that she had not declared her earnings.
33. At the same time, the author of this report commented at 2.14 that while there was no serious risk of harm to the public, "*as the offences were committed over a period of time and in different locations the possibilities of a continuation of offending is more likely than not*."
34. The National Probation Service Progress Report of 11 December 2014 does not address the issue of risk but was based on an interview with the appellant's daughter in relation to her own circumstances including her caring responsibilities.
35. The most up to date evidence of risk before the judge was the OASys assessment dated 4 November 2015. In that report, it is said that the appellant continued to deny responsibility for the thefts, blame an individual to whom she had given her identity card and explain that she only pleaded guilty on the advice of her solicitor. The words attributed to the appellant in the report at 2.8, 2.11, 7.5 and 12.8 show that her position was now that she was apologetic for the poor judgment she showed in lending her identification and was accepting of her punishment despite not being responsible for the thefts. The assessment of risk of serious harm and re-conviction was also assessed as being low.

36. The judge gave a number of reasons for departing from the conclusions of the professionals. Firstly, at [67], the judge expresses his concern that the appellant does not accept her guilt. Secondly, he found her to be manipulative and willing to put forward differing positions to suit her purposes. At this juncture, it is useful to look at what the judge said at [62] when assessing the appellant's oral evidence. Here he notes that the appellant's original defence had been to blame another for the series of thefts, but that this "*had been abandoned after the police had carried out further identification procedures.*" Furthermore, he refers to the fact that the sentencing judge considered the evidence against the appellant to be "*overwhelming.*" Thirdly, the judge notes that the offending continued over a long period of time. Indeed, the first OASys reports refers to the offending spanning eighteen months. Fourthly, the judge took into consideration the temptation for the appellant to resume offending if things went badly financially.
37. In view of the fact that the OASys reports mention the difficulty the appellant will face in finding employment in view of her convictions, as well as her poor level of spoken English, there was no evidence before the judge to suggest that there had been any improvement in the appellant's financial circumstances since the offences were committed. We consider the reasons given by the judge were more than sufficient to explain his departure from the professional opinions expressed in the reports before him.
38. Mr Ó Ceallaigh's submissions in relation to the delay in promulgation failed to indicate any link between that and the judge's findings. As we indicated during the hearing, the decision and reasons appeared to have been sent for typing on 4 January 2016, which is a period of approximately two months after the hearing, well within the three-month rule of thumb referred to in Sambasivam. It was not contended that there were any errors of fact in relation to the judge's findings. We find there to be no substance to this ground.
39. Ground four took issue with the judge's reference to MA (Pakistan). It was said that the judge failed to address the submission made on the appellant's behalf, to the effect that this case was not relevant to an EEA case. This argument does not take into consideration what the judge said at [70];
- "I accept, of course, that this was not in the context of an EEA case. It was not considering the effects of the Regulations. Nonetheless (Elias J) was expressly considering what is a low risk when looking at the future behaviour of the offender. That is, of course, the task that I must undertake in this case."*
40. There is nothing objectionable in the judge's self-direction in relation to MA (Pakistan). This ground of appeal is misconceived.
41. We find that the First-tier Tribunal Judge Mayall made no errors of law and, accordingly, uphold his decision.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 19 July 2017

Upper Tribunal Judge Kamara