



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

Appeal Number: DA/00588/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 5 February 2018**

**Oral Decision & Reasons  
Promulgated**

**On 21 March 2018**

**Before**

**UPPER TRIBUNAL JUDGE JORDAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR ANTONIO FERNANDO RODRIGUES  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

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

For the Respondent: The Respondent in person

**DECISION AND REASONS**

1. The Secretary of State appeals against a determination of First-tier Tribunal Judge Ruth promulgated on 10 August 2017 in which he allowed the appellant's appeal against a decision made by the Secretary of State to deport him on the basis of his criminal wrongdoing. The appellant is a European citizen and accordingly the deportation decision was made in

the context of a consideration of the Immigration (European Economic Area) Regulations 2006 (2006 No 1003).

2. The particular Regulation with which I am concerned is Reg. 21. Regulation 21(5)(c) requires that a relevant decision when it is taken on grounds of public policy or public security shall apply the principle that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is only when that requirement is met that the issue of proportionality falls to be considered as an additional factor.
3. The appellant's history of offending is set out in the relevant decision letter. He entered into the United Kingdom some twenty years ago although he failed to provide any evidence of the date of his arrival or of his exercising treaty rights. However, it is known that he has been in the United Kingdom since the first of his convictions. That took place on 31 October 2001 of using threatening, abusive, insulting words or behaviour for which he received a conditional discharge of twelve months.
4. There were then offences in 2006, 2007, 2008 and 2009. I can summarise those offences by saying that they were of a relatively minor nature. They included travelling on the railway without paying a fare and assaulting a constable, another similar offence of battery against the Metropolitan Police, a failure to surrender to custody, once again assaulting a police constable and a count of shoplifting, breach of a community order and using racially threatening, abusive, insulting words and behaviour. They are all nasty antisocial or violent offences for which the appellant had no excuse. He was born on 13 June 1975 and so the offending began when he was already aged 26 and indeed it continued until he was aged 37. There was therefore an eleven year period of offending where there were a number of offences which showed a particular and simple disregard for life in the community. They were, however, made the subject of minor pieces of sentencing. For example, in 2008 he was sentenced to twelve weeks' imprisonment, which included assaulting a constable. The other offences were the subject of community orders of one sort or another.
5. It was the final offence, committed when he was aged 37, which resulted in his conviction on 20 September 2012, that prompted the decision to deport him. For that offence he was sentenced to thirteen months' imprisonment. The sentencing judge remarked upon the curious circumstances of the offence. They are dealt with in the determination in paragraph 48. The crime arose from circumstances in which the appellant's home was burgled. He confronted the thief with a knife when he should have called the police. The thief was not injured and appears not to have been frightened by the appellant despite the fact that he was carrying a knife.
6. The remarks of the sentencing judge entirely support that view taken by the First-tier Tribunal Judge:

“Whatever happened before you decided to take a knife out it certainly did not warrant you going back into your home, taking a kitchen knife and going into the street. There were people on the street, there were people in buses and traffic nearby, there were other people walking around, that is obvious from the CCTV. I am satisfied so that I am sure, in fact, that you were stolen from and that something went missing in your property that meant you left and decided to confront [the thief]. You went out there, you got nowhere, no doubt he denied it and you went back home and that is the point you should have contacted the police but what you decided to do was carry on confronting him but this time with a very offensive weapon, it was an unpleasant-looking knife, to say the least. I have read in the pre-sentence report that you said now that you never said during the trial because in the trial you completely denied ever having the knife and actually said it was Mr Costa. The reality is you now say that actually he had a knife but you managed to take it off him and run after one of them with it. I do not accept that at all – it was very strong evidence that that was you in the video.”

7. We do not have the pre-sentence report but there was very little evidence of remorse and the writer took the view that the appellant was not particularly remorseful. The judge said that the offence was so serious that it could not be suspended but he imposed a sentence of thirteen months' imprisonment. He took a very merciful view and reduced it to that sentence imposed because of the circumstances. On any view this was a very unusual offence.
8. The principal point in favour of the appellant is that, whilst there was a period between the age of 26 and 37 when he was involved in a series of nasty disorderly offences, since 2012 he has not committed further offences. That still appears to apply now. Whilst, when the decision was made in 2015 that steps be taken to remove him, there were still no additional offences when the judge came to deal with it on 31 July 2017. Nor are there, as I understand it, today, which is now some five years after the offence. It is submitted that the fact that he has not reoffended is not determinative. I entirely agree with that. That is particularly the case where somebody who has committed a criminal offence knows that this is likely to result in his being removed and therefore his behaving properly is as easily attributable to the fact that he knows that he is under threat of deportation as it is that he has seen the error of his ways.
9. However, in this case it is noticeable that the decision letter itself was made in October 2015. It appears to have been prompted some three years later by the conviction which took place on 20 September 2012, so there was evidence before the judge that he had not offended in the intervening period during which time he was not under obvious threat. It is submitted also on the part of the Secretary of State that the offending was, in part, related to the abuse of alcohol. That was a matter which was mentioned by the judge but clearly he did not come to the view that this materially altered the risk the appellant posed to the members of the public. Indeed, since there has been no further offending since 2012, it was the case that there had been an opportunity to see whether the appellant might reoffend under the influence of alcohol, but no such

incident has in fact taken place. It was on that basis therefore that the judge did not attribute weight to the fact that the appellant had not apparently demonstrated that he had addressed his alcohol abuse. The judge concluded that this, too, was not a matter which established the risk that the Rules require to be established.

10. Finally, it was said that there was escalating behaviour. That is certainly true. As a matter of simple fact, the offence which he committed in 2012 was a more serious offence than the other pieces of offending but committed in very unusual circumstances. Whilst a material factor, it does not alter the fact that when one looks at the projectory from which this appellant started, there has been a cessation of criminal activity for the last five years. That is a significant factor when it comes to consider whether the conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. For these reasons I consider that the judge reached a decision that was open to him.
11. At an earlier hearing I was troubled by the fact that there was the clearest finding of fact that that the Secretary of State was approaching this case on the basis of the EEA Regulations and, in particular, that he was an individual who is protected from removal by those Regulations, albeit the lowest level of protection set out in Regulation 21, namely, the decision had to be taken on grounds of public policy, public security or public health and not the more formidable protection which is provided where an individual has a permanent right of residence on the basis that there must then be *serious* grounds of public policy or public security to permit his removal. The Secretary of State was on notice of my preliminary view. (There is no evidence to suggest that the appellant satisfies the third 'imperative' ground, based on his having resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision.)
12. In fact, during the course of the hearing it appears that the judge considered his working history and took the view that he was not exercising Treaty rights and, indeed had not done so for many years. His evidence was that he had arrived in the United Kingdom in 1996. He only worked cash in hand in a Pound Shop as a cleaner between 1997 and 1999 and had never worked since. No protection is provided to a person who is not a qualified person. Reg. 19(3)(a) permits *removal*, (not deportation), irrespective of wrongdoing, if a person 'does not have or ceases to have a right to reside under these Regulations'.
13. In those circumstances it seems to me he could certainly neither claim to have a permanent right of residence nor to be able to claim the particular protection which is provided on the basis of ten years' residence. Further, I do not see the basis upon which he had *any* rights to remain on the basis of exercising Treaty rights as a qualified person. The effect of such a finding would be that it could not be said to be a disproportionate breach to remove somebody who has not worked since 1999. However, the Secretary of State has decided not to use this route. Instead, she took the view that the correct approach was to treat this as a deportation appeal.

In doing so, she committed herself to make out the requirements of Reg.21. I make it clear that I do not find the First-tier Tribunal Judge made a material error of law in reaching the conclusion that the Secretary of State had not satisfied him that the appellant represented a present and sufficiently serious risk to require his removal.

14. In those circumstances I dismiss the appeal of the Secretary of State and uphold the decision of the First-tier Tribunal Judge.

DECISION

- (i) I dismiss the appeal of the Secretary of State;
- (ii) The decision of the First-tier Tribunal allowing the appeal of Mr Rodrigues under Reg. 21 of the Immigration (European Economic Area) Regulations 2006 shall stand.

ANDREW JORDAN  
JUDGE OF THE UPPER TRIBUNAL