



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00487/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype.
On 23 October 2020

Decision & Reasons Promulgated
On 4 November 2020

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S I

(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer.

For the Respondent: Ms Tobin, instructed by Kalsi Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Buckwell ('the Judge') promulgated on the 5 February 2020 in which he allowed Mr [I]'s appeal against the order for his deportation from the United Kingdom to the Netherlands, pursuant to the Immigration (EEA) Regulations 2016.

Background

2. Mr [I] is a citizen of the Netherlands of Somali origin who was made the subject of an order for his deportation from the United Kingdom following his conviction on the 10 May 2019 at the Leicester Crown Court for offences of false representation and for concealing or disguising criminal property. Mr [I] was also in breach of a suspended sentence imposed by the Woolwich Crown Court for similar offences on 3 November 2017.
3. Mr [I] was born on the 16 July 1996 and entered the UK with his parents in 2003 and has remained since.
4. The Judge sets out his findings from [80] of the decision. The key findings being:
 - a. Mr [I] is entitled to the highest level of protection, that of imperative grounds [82].
 - b. Mr [I] is not a persistent offender [84].
 - c. Mr [I] is motivated to rehabilitate and not to commit further offences [86].
 - d. The burden is upon the Secretary of State to establish that imperative grounds require Mr [I] deportation and that it is proportionate to do so [88].
 - e. That the Judge did not hear any detailed reasons on behalf of the respondent that persuaded him that the imperative grounds in relation to national security had been met [89].
 - f. In light of the decision under the Regulations did not propose in detail to deal with article 8 ECHR but if you were to do so you would find the respondent's decision disproportionate [90].
5. The Secretary of State sought permission to appeal asserting
 1. The FTTJ finds that imperative grounds apply in this case but fails to properly engage with why the appellant's offences do not meet that threshold and/or whether the appellant's integrative links have been broken as a result of his offending and time spent in prison.
 2. At paragraph 84, the FTTJ finds that the appellant is not a persistent offender that relies on the fact that the appellant has the protection of imperative grounds, rather than undertaking any analysis of why the offending does not meet that threshold. Further, at paragraph 89, the FTTJ refers to "national security" rather than public security and again there is no analysis as to why this threshold cannot be met. See FTTJ should have considered the four year sentence that the appellant received alongside the actual offences concerning the fraud and making false representations which clearly affect public security. Nowhere has the FTTJ taken into the fact that although the appellant was first convicted in November 2017, receiving a suspended sentence, he went on to reoffend and was convicted in May 2019, when his previous sentence was activated in part as well as he has been sentenced to a further 3 years.
 3. Given the absence of such analysis of the circumstances, it cannot be said that the FTTJ has properly considered whether or not the appellants offending has met the high threshold. It must be noted that the appellant is still in prison and therefore out of the community and the FTTJ has failed to make any findings on whether the appellant's integrative links have been broken as a result of his offending and imprisonment.

4. Further, at paragraph 91, the FTTJ finds that the appellant is not a genuine, present and sufficiently serious threat that the FTTJ clearly states that he is looking forward to the appellants scheduled release from custody in two months time. The FTTJ could have made this finding as at the date of hearing and not looking to the future because as present he is still incarcerated and therefore still considered a threat to the public. Further, there has been no analysis regarding whether or not the appellant is rehabilitated, or focus seems to be on the fact that his parents and siblings would be able to prevent the appellant from reoffending, notwithstanding the fact that they were not able to influence him previously. Again, there should have been the consideration of the fact that the appellant was previously sentenced a suspended sentence, reoffended and sentence was activated in part because he clearly remained a threat public.
5. Overall, has been inadequate engagement with the issues and the evidence is such that the findings are wholly inadequate.
6. Permission to appeal was granted by another judge of the First-tier Tribunal who found all grounds to be arguable.

Error of law

7. In relation to the Judge's finding the appellant was entitled to the higher level of protection, it is settled law that the 'ten years residence' is calculated counting backward from date of decision to deport, and it must be continuous: *SSHD v MG* [2014] EUECJ C-400/12, *B v Land Baden Württemberg* (Case C-316/16) [2019] QB 126. The Judge was aware of the chronology including the date of the decision to deport, the 1 August 2019, at which point the appellant had been in the United Kingdom continuously for a period of 16 years.
8. It is accepted that even if 10 years has passed, whether a person is entitled to the higher level of protection requires an assessment of whether during the relevant period they have maintained sufficient integrative links to the United Kingdom and that periods in prison, in principle, may weaken such integrative links. What is required is a holistic assessment: *Onuekwere* (Judgment of the Court) [2014] EUECJ C-378/12 (16 January 2014); [2014] 1 WLR 242.
9. The Judge had available to him written and oral evidence setting out the appellant's case. The appellant was educated in the United Kingdom studying for O and A-levels at school and having studied for a BTEC qualification in business. The Judge records the appellant's evidence that he wishes to go to university to study business. It was noted the appellant has both parents and brothers in the United Kingdom who had visited him in prison. The family support the appellant financially in the United Kingdom. The appellant lives within the family home. The evidence before the Judge was that the appellant could return to the family home upon his release from prison or detention. The appellant entered the United Kingdom when he was six years of age.
10. The respondent submitted before the Judge that the appellant's links have been broken because he had been persistent in his offending. In relation to this matter the Judge writes at [84]:

“84. Ms Darkwah, understandably, sought to emphasise that the Appellant had been persistent in his offending. In that respect the Appellant has had two substantive appearances before two Crown Courts. Not only, from the sentencing in Leicester in May 2019, did the Appellant receive a term of imprisonment amounting to three years, but additionally a period of a previously suspended prison sentence, 12 months, was added on a consecutive basis. That is a total four year period. In light of those convictions and sentences Ms Darkwah sought to persuade the Tribunal that the Appellant should be considered to be a persistent offender. It is certainly true that in the two Crown Court appearances the Appellant was sentenced for 13 offences. However, considering all the evidence in the round I do not find that Appellant should be seen as a persistent offender, having been subject to sentencing on two occasions. The Appellant also had the benefit of the imperative grounds of public security threshold. Specifically that consideration does not include public policy.”

11. Contrary to the assertion in the grounds seeking permission to appeal to Judge does not find the appellant is not a persistent offender because he is entitled to the higher level of protection. The specifically finding is that the appellant should not be seen as a persistent offender in light of the fact he has only been sentenced on two occasions, albeit for 13 offences.
12. A “Persistent Offender” is defined as a person who “keeps on breaking the law”: Chege (“is a persistent offender”) Kenya [2016] UKUT 187 (IAC) (12 April 2016) as approved in SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929 (26 April 2018) and Binbuga v SSHD [2019] EWCA Civ 551. It is a question of fact in each case. The Judge considered the appellant’s criminal history but clearly found that the two periods of offending for which the appellant had been sentence did not satisfy this definition. Whilst the respondent may disagree it has not been shown the Judges finding on this point is outside the range of those reasonably available to him on the evidence.
13. As it was found the appellant is not a persistent offender and that the evidence had not established a breakdown in his links to the United Kingdom, and that he satisfied the 10 year continuous residence criteria, the finding the appellant was entitled to the higher level of protection has not been shown to be a finding outside the range of those available to the Judge on the evidence.
14. The relevant date at which the Judge was required to assess these matters is the date of the appeal. The burden of proof rested on the Secretary of State to make out her case that the appellants deportation from the United Kingdom is lawful and justified on the balance of probabilities: Arranz (EEA Regulations – deportation – test) [2017] UKUT 00294 (IAC). The Judge’s finding is that the respondent had not discharged the necessary burden. At [89] the Judge writes

“89. No doubt the conviction of the Appellant for being in possession of items for use in committing fraudulent offences were directly related to the other matters to which the Appellant pleaded guilty. I did not hear any detailed reasons on behalf of the Respondent which persuaded me that the threshold in relation to imperative grounds of national security had been met. Whilst it might well have been the position that my

overall findings would have been different if the Appellant did not have the entitlement to the highest degree of protection under the EEA Regulations, it is on that basis that I must make my decision.”

15. Whilst the Judge does refer to ‘national security’ the correct phrase of ‘public security’ is recorded at [84], [88] and [91], indicating the Judge was fully aware of and applied the correct test. I find the reference to ‘national security’ to be no more than a typing error.
16. In *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09 it was found that ‘public security’ is concerned with state internal and external security, including threats to institutions, public services, military interest and the population. In that case it was accepted that in some circumstances the definition encompasses instances of serious criminality such as organised crime/trafficking.
17. It is not made out that the offences for which the appellant was convicted satisfy this definition. In relation to the future, the Judge was correct to focus on the propensity of the appellant to re-offend. It was not made out before the Judge that this is an exceptionally serious case in which the question of deterrence or public revulsion could play a part. The author of the grounds claims the Judge erred by looking at the position if the appellant was released from prison. Although the author of the ground seemed to infer that the appellant was imprisoned as a result of the danger he presented to society he was imprisoned because he had been convicted of an offence which a judge of the Crown Court correctly found was punishable by a substantial period of imprisonment. It does not appear in the evidence there is a finding of ‘dangerousness’ by the Criminal court and nor is it made out that the appellant did pose a risk in the future of reoffending when he was in the confines of the prison system.
18. In relation to the question of rehabilitation, at [85 – 86] the Judge writes:
 - “85. The Appellant’s parents gave evidence. I have summarised that above. The father of the Appellant was particularly impressive. He is an extremely hard working man. He has brought up his family in this country after spending a number of years in Holland. Although the background detail was not provided, nor was it necessary, I assume that the Appellant’s parents migrated from Somalia as a consequence of the civil war. I have no doubt whatsoever that both parents of the Appellant, and the Appellant’s brothers, are indeed ashamed by the behaviour of the Appellant, and rightly so. His family have behaved entirely properly since coming to the United Kingdom and the Appellant’s parents are both dedicated and respectful individuals who contributed to British society by the usual payment of tax and other dues.
 - 86 I believe and find that both the Appellant’s parents and his adult brothers are now fully aware of the need for the Appellants to abide by the laws of this country and not to commit further offences. My assessment in the round is that whilst they were not previously able to influence the Appellant appropriately, they will be able to do so now. In the past the Appellant has been able to disguise his criminal activities to the extent that his parents have not been aware of them, at least in any significant detail. That option will simply not subsist for the Appellant

in the future. He has brought shame to his family that he has the opportunity to make amends. His parents have set an excellent example and I believe that as a consequence of the possibility of deportation to the Netherlands both parents will put significant effort into ensuring that the Appellant does not offend again. Of course there will be support in terms of probation when the Appellant has concluded his sentence. I am satisfied that the Appellant is motivated to rehabilitate and not to commit further offences.”

19. The finding by the Judge that the appellant had rehabilitated and that with family support was not likely to commit further offences is a finding within the range of those available to the Judge on the evidence. On that evidence no genuine threat had been established.
20. The “imperative grounds of public security” presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness: *Tsakouridis (European citizenship)* [2010] EUECJ C-145/09, *I v Oberbürgermeisterin der Stadt Remscheid (Case C-348/09)* [2012] Q.B. 799. See also *FV (Italy) v SSHD* [2013] 1 W.L.R. 3339 relied upon by Ms Tobin for its application.
21. The difficulty for the Secretary of State is that an experienced judge clearly considered the relevant matters applicable to this appeal and, even if not setting out the decision in the manner the author of the grounds would have preferred, makes a clear finding supported by adequate reasons that the respondent had not established that the applicable threshold had been crossed. The finding the appellants deportation will be contrary to the Regulations, on the facts, has not been shown to be a finding outside the range of those reasonably available to the Judge on the evidence.
22. Whilst the Judge is criticised in relation to the article 8 assessment, the Judge allowed the appeal under the Regulations and was therefore not required to do more. The Judge did not carry out a full article 8 assessment as a result indicating that if he had to do so the likely outcome would have been a finding the deportation decision was not proportionate. That is an indication and no more and one in the alternative which forms no part of the Judges primary findings.
23. If the appellant reoffends the proposed changes to the applicable law following the United Kingdom leaving the European Union may mean he may not have the benefit of such protection in the future.

Decision

24. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

25. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 28 October 2020