



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI 2022
004823

UI 2022 004824

First-tier Tribunal No:

HU/56427/2021

EA/50446/2020

IA/15506/2021 & IA/01521/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ERHAN AGOLLI

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms S. Anzani, instructed by Connaughts Solicitors

For the respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 28 November 2022

DECISION AND REASONS

1. There has been a lengthy delay in preparing this decision, in part due to a period of illness. For this I apologise because I know that the appellant will have been anxious to know the outcome.

Background

2. The legal history of this case has become tangled between EU law and UK domestic law. To understand the underlying basis of the appeal it is necessary to summarise some of the appellant's immigration history.
3. The appellant is an Albanian national i.e. a third country national who would otherwise require a visa to enter or remain in the UK. It is said that he entered the UK illegally on 04 April 2014.
4. The respondent's chronology indicates that the appellant made an application for an EEA residence card on 14 September 2015 based on his marriage to a Romanian citizen, which he said took place on 11 July 2015. The application was rejected as invalid on 13 November 2015.
5. On 12 October 2015 the appellant was convicted of possessing a class A drug with intent and possession of a false identity document with intent. He was sentenced to 30 months' imprisonment in the first matter and 2 months' imprisonment to run concurrently in the second matter.
6. The respondent served a public policy removal decision under The Immigration (European Economic Area) Regulations 2006 ('the EEA Regulations 2006') (in force at the time) dated 29 June 2016. The decision gave rise to a right of appeal. The decision was certified with reference to regulation 24AA of the EEA Regulations 2006, which allowed the respondent to remove the appellant pending any appeal if he would not face a real risk of serious irreversible harm. The appellant could apply to re-enter the UK to attend the appeal.
7. The same decision dated 21 June 2016 also considered human rights issues under domestic legislation. The respondent concluded that removal in consequence of the decision would not be unlawful under section 6 of the Human Rights Act 1998 ('HRA 1998'). The decision to refuse a human rights claim also gave rise to a right of appeal. The decision was certified under section 94B of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002'), which allowed the respondent to remove the appellant pending the outcome of the appeal if it would not be unlawful under section 6 HRA 1998 and the appellant would not face a real risk of serious irreversible harm.
8. Pursuant to the decision, a deportation order was signed under the Immigration Act 1971 ('IA 1971') on 30 June 2016. The appellant did not appeal. The appellant was removed to Albania on 21 July 2016.
9. The appellant says that he re-entered the UK illegally in breach of the deportation order on 19 December 2016, only five months after his removal. He remained in the UK in the knowledge that he was here unlawfully until 02 August 2019, when an application was made to revoke

the deportation order and for an EEA residence card to be issued. The application was rejected as invalid on 23 December 2019 because there was an outstanding deportation order. Later, the appellant told Lisa Davies, a forensic psychologist, that he waited until after his probation licence expired before making an application to regularise his status.

10. On 25 February 2020 the appellant made another application for an EEA residence card including an application to revoke the deportation order. The application was refused in a decision dated 12 October 2020. The appellant exercised his right of appeal under regulation 36 of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').
11. On 08 October 2020 a further application was made to revoke the deportation order issued in 2016, which raised EU law and human rights grounds. The application was refused in a decision dated 15 September 2021 stating that the appellant did not have a right of appeal.
12. Having taken legal advice, the appellant filed an out of time application to appeal the decision asserting that it was a decision to refuse a human rights claim. Following a course of case management in the First-tier Tribunal it seems that the respondent eventually agreed that it was a decision to refuse a human rights claim that attracted a right of appeal under section 82 NIAA 2022. A supplementary decision letter was issued on 28 July 2022 relating to human rights issues.
13. The two appeals were linked and heard together. The first appeal was an appeal under the EEA Regulations 2016 against the decision dated 12 October 2020 to refuse to revoke the deportation order and to refuse a residence card. The second appeal was an appeal under section 82 NIAA 2002 against the decisions dated 15 September 2021 and 28 July 2022 to refuse a human rights claim with reference to the provisions contained in the immigration rules relating to revocation of a deportation order.

First-tier Tribunal decision (05/09/22)

14. First-tier Tribunal Judge R.A. Singer ('the judge') dismissed the appeal in a decision sent on 05 September 2022. The decision was lengthy and followed a logical structure with reference to the relevant legal framework. The judge set out the history of the case and summarised the oral and documentary evidence that had been produced. Although there was no reference to regulation 34 of the EEA Regulations 2016 (applications to revoke from outside the UK), the judge went through the substantive legal test contained in regulation 27 (decision on public policy grounds) in considerable detail with reference to the evidence that was before him.
15. In assessing whether the appellant still posed a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society' the judge noted that there was no OASys assessment relating to

the risk the appellant was likely to pose at the date of the hearing. The judge made clear that he had taken into account the fact that the appellant had not been convicted of any further offences since 2015.

16. The judge considered the report prepared by Lisa Davies, a consultant forensic psychologist. After having interviewed the appellant, she assessed him to present a 'low' risk of reoffending whilst recognising that factors such as his criminal history, lack of stable employment, and the perceived need for financial gain might be factors that could increase the risk [71]-[72]. Having set out the findings made by Ms Davies in some detail, the judge went on to assess what weight could be placed on her assessment. He considered other evidence given by the appellant relating to financial motivations, which conflicted with the information that he provided to Ms Davies [73]-[74]. The judge made the following findings:

'75. Taking everything in the round, I find that the Appellant minimised his financial liabilities when he was speaking with Ms Davies, and that he played down the amount of money he was making from drugs in his evidence to me, as well as the length of time he was engaged in this criminal activity. This harms his general credibility. Although I accept Ms Davies has written her report in good faith, this also partially undermines her conclusion that the Appellant is at low risk of reoffending, because that was based, in part, on her erroneous belief that the Appellant had no known financial liabilities and him giving a reliable account of how much money was made from selling drugs and for how long. That having been said, I do accept that when she was writing the report the Appellant was not in employment, and now he is allowed to work, so, while that is capable of mitigating things to some extent in respect of financial protective factors, I find, it does undermine the Appellant's reliability in general because it shows that he was prepared to lie to the person who was preparing a report on whether or not he posed a risk to the public or a risk of committing further offences, and whether he has been fully frank with me in relation to his financial circumstances at the present time and the extent of his criminality in the past.

17. The judge went on to consider other discrepancies in the evidence given to Ms Davies and at the hearing, finding that the evidence indicated that the appellant was prepared to present himself differently to Ms Davies to 'propel her to a conclusion that he was at low risk of reoffending' [76]. The judge then took into account other factors that might have weighed in favour of the appellant's claim to rehabilitation [77] and relating to the strength of his family life in the UK [78]. The judge also went on to consider the factors outlined in Schedule 1 of the EEA Regulations 2016 [80] before coming to the following conclusion:

'81. I find that, evaluating all of the evidence, including the Appellant's past conduct, while I am satisfied that the Appellant poses much less of a risk of committing offences, than in the past there is a (sic) still a low to medium risk of reoffending, also taking into

account my findings set out above about the inconsistencies in this evidence in relation to his financial circumstances, and the amount of money he made from selling drugs and how long he sold drugs for. There is also a strong need in this case, because of the Appellant entering in breach of the deportation order, to maintain the integrity and effectiveness of the immigration control system and that of the Common Travel Area. There is a strong need in this case to prevent social harm, by not exposing society to the impact of the type of offending committed by the Appellant. There is a strong need in this case also to maintain public confidence the ability of the authorities to not only remove but also to exclude those with convictions such as this. These are all part of the fundamental interests of society, referenced above. Having regard to all of the evidence in the case, and the findings I have set out above, including taking into account his past conduct and that the threat does not need to be imminent, I find that the Appellant does pose a genuine, present and sufficiently serious threat affecting one (in fact more than one) of the fundamental interests of society.'

18. The judge then made detailed findings with reference to the EU principle of proportionality contained in regulation 27 and separate findings relating to the proportionality of removal with reference to the appellant's right to family life under Article 8 of the European Convention. This included an assessment relating to the best interests of the appellant's child. It is not necessary to summarise those findings for the purpose of this decision because they have not been challenged.

Grounds of appeal

19. The appellant applied for permission to appeal to the Upper Tribunal. The grounds asserted that the First-tier Tribunal's findings relating to the level of risk the appellant posed were flawed. The grounds argued that, despite his concerns, the judge still found that the appellant posed less of a risk than in the past and had noted that the appellant was remorseful and said that he would not reoffend. Although the grounds acknowledged that it was open to the judge to take into account inconsistencies in the appellant's evidence, 'nothing in the findings ultimately reached by the FTTJ, pointed to the appellant being a genuine, present and sufficiently serious threat.' It was argued that Schedule 1 of the EEA Regulations 2016 recognised that removal of a person who is able to provide substantive evidence that they don't demonstrate a threat is less likely to be proportionate.

Grant of permission

20. First-tier Tribunal Judge Hatton granted permission to appeal without giving reasons as to why the grounds, as pleaded, were arguable. Instead, the judge raised a different point of his own motion, finding that it was arguable that the First-tier Tribunal failed to apply the test of 'material

change in circumstances' contained in regulation 34 EEA Regulations 2016.

Hearing

21. I have considered the evidence that was before the First-tier Tribunal, the First-tier Tribunal decision, the grounds of appeal, and the oral submissions made by the parties at the hearing. The submissions are a matter of record, but I will refer to them, where relevant, in my findings.

Decision and reasons

22. It is important to note the proper context of this appeal. The appellant did not appeal the initial decision to remove him on public policy grounds. When the appellant was removed to Albania, the effect of the deportation order was to excluded him from returning to the UK.
23. Under Article 32 of the Citizens' Rights Directive (2004/38/EC) a person who was removed on public policy grounds was excluded from returning and could only apply for the exclusion order to be lifted after 'a reasonable period' and, depending on the circumstances, in any event after three years from the enforcement of the order. A person would need to put forward arguments to establish that there had been a 'material change in the circumstances' which justified the decision ordering their exclusion. The person had no right of entry into the territory of the Member State while their application was being considered. The wording of Article 32 was transposed into domestic law through regulation 34 EEA Regulations 2016.
24. The starting point in terms of the facts of this case is that the appellant did not wait for a reasonable period before applying to revoke the deportation order and did not apply from outside the UK as required. Instead, he re-entered the UK illegally within a few months in breach of the exclusion order and evaded the attention of the authorities because he was still subject to probation licence conditions. It was open to the judge to note that there were public interest considerations beyond the mere fact of his past convictions that affected the fundamental interests of society given the appellant's contempt for the law (both criminal and immigration law). Even though the appellant could only apply for revocation of the deportation order from outside the UK, the respondent exercised discretion to consider the application in country.
25. The grounds made submissions on what weight should have been placed on the risk assessment conducted by Ms Davies but do not go so far as to argue that the judge's conclusion was irrational in light of that evidence. In my assessment, the grounds amount to a disagreement with the outcome of the judge's evaluation of the evidence and do not disclose a material error of law.

26. The appellant argues that the risk assessment showed that the appellant no longer posed a genuine, present and sufficiently serious risk, but the judge gave detailed and sustainable reasons to explain why he came to a different conclusion. It was open to the judge to consider the discrepancies in the appellant's evidence, which suggested that he might have been seeking to portray a different picture to Ms Davies. The judge gave due respect to Ms Davies' opinion and made clear that he had considered all the factors that might tell in favour of the appellant. However, it was open to the judge to consider credibility issues relating to the appellant's evidence when he was assessing what weight should be placed on the risk assessment. It was also open to him to consider a wider set of factors that went beyond the specific risk assessments conducted by Ms Davies in relation to reoffending, when considering whether the appellant posed a sufficiently serious risk in the context of the test contained in regulation 27 EEA Regulations 2016. For these reasons, I conclude that it is not arguable that the First-tier Tribunal's findings were outside a range of reasonable responses to the evidence.
27. The First-tier Tribunal judge who granted permission raised a point of their own motion that was not argued in the grounds. Even if I were to consider an argument that was not pleaded, I find that any failure to make specific findings relating to the test of 'material change in circumstances' would not have made any material difference to the outcome of the appeal. It is implicit in the judge's finding that the appellant continued to pose a genuine, present and sufficiently serious threat (albeit at a slightly lower level than before) that there had been no material change in circumstances since the original deportation order was signed.
28. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of a material error of law.

DECISION

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

Signed M. Canavan Date 21 April 2023
Upper Tribunal Judge Canavan