IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005758

First-tier Tribunal No: DA/00341/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

NAJAM UDDIN KHAN
(AMONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R de Mello, Counsel
For the Respondent: Mrs A Nolan, Senior Home Office Presenting Officer

Heard at Field House on 21 July 2023

DECISION AND REASONS

1. The appellant is an Italian national born on 6 October 1978. His appeal against deportation was dismissed by First-tier Tribunal Judge C J Chapman on 28 September 2022 under the Immigration (EEA) Regulations 2016.

2. The appellant and his partner came to the UK in December 2013. On 2 October 2019, the appellant was sentenced to 25 months' imprisonment for an offence of controlling or coercive behaviour in an intimate or family relationship. The appellant pleaded guilty to the offence and was also made the subject of a restraining order for 5 years.

3. The judge found the appellant was exercising Treaty rights from 1 April 2014 to 31 October 2014 and 15 March 2015 to 2 October 2019. The judge found that the appellant had failed to show that he was continuously employed or otherwise

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exercising Treaty rights during the period from 31 October 2014 to 15 March 2015 and therefore he was not entitled to permanent residence.

4. The OASys assessment carried out by the National Offender Management Service ('NOMS') on 22 September 2020, before the appellant was released from prison, concluded the appellant was at medium risk to the public. A letter from the appellant's case manager dated 5 October 2020 stated that the appellant was a low risk of re-offending. The judge found the respondent had established a real risk of the appellant committing further offences in the future, sufficient to cause serious harm.

5. Permission was granted by First-tier Tribunal Judge Monaghan on 4 November 2022 on the grounds it was arguable the judge had:
   (i) overlooked evidence of self-employment in concluding the appellant did not have permanent residence;
   (ii) applied the wrong standard of proof in assessing whether the appellant was a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
   (iii) erred in law in assessing the risk posed by the appellant.

Judge's findings

6. The judge made the following findings relevant to the grounds of appeal:

> "73. I return therefore to the period between 31 October 2014 and 15 March 2015. This was before the Appellant started his business. The HMRC records for the 2014 – 2015 tax year show that, in addition to the work for A1 supermarkets, the Appellant earned amounts of £189.30 and £474.30 for KPI Recruiting Limited. In his oral evidence, the Appellant accepted that these amounts were correct. He stated that he worked as a delivery driver and that he earned £100 to £110 each night. The amounts shown on his HMRC records therefore represent around 7 nights work in these four months or so. I am not satisfied that this amounts to continuous employment.
>
> 74. The Appellant also stated that during this period, he returned to Italy for one month and found some part-time work as an interpreter, his employer being a person called Waqas Butt from Stoke Civic centre, and that he was paid with tax deducted at source. However, this is not confirmed in the HMRC records, nor any other document, nor is there any evidence from Mr Butt or any other source to confirm this employment. If, as claimed, tax was being deducted at source, it is reasonable to expect that there would be some document, for example a wage slip or invoice, to confirm the work, but there is not.
>
> 75. I find therefore that the Appellant has not discharged the burden upon him of proving that he was continuously employed or otherwise exercising treaty rights during the period form 31 October 2014 to 15 March 2015. It follows that I am not satisfied that the Appellant is entitled to permanent residence based on 5 years exercising treaty rights."
>
> …
>
> "86. In the letter dated 1 November 2021, the Appellant's case manager confirms that, although she supported the Appellant's return to work, she cannot support him working in an environment in which children, vulnerable adults, or lone females are involved. I infer from this letter that there remains a risk to the public.
>
> 87. The letter from the Probation Service dated 22 September 2021 followed the Appellant's completion of the Spectrum Domestic Abuse Programme. The letter confirms that the Appellant completed the programme, engaged well,

and learned about how his cultural beliefs about relationships may be different from those in European society. However, the letter does not suggest that the Appellant accepted or recognised the need to change his behaviour or what steps he would take to do so. Indeed, it states that the Appellant held back regarding his abusive behaviour.

88. Looking at the evidence from NOMS and the Probation Service overall, I find little to suggest that the risks identified have been fully or properly addressed other than by participating in a course which was a condition of the Appellant's prison licence in any event. The Probation Service's supervision of the Appellant appears to have come to end at the end of 2021 so there is no further objective evidence about the level of risk or any continuing rehabilitation."

…

"94. I remind myself that the Appellant has not reoffended since being released from prison 18 months ago but this, in itself, is not a complete answer to future risk, and the threat need not be imminent. I am satisfied that the Appellant continues to pose the risks identified in the OASys report and of the level of harm that might ensue. This was clearly the concern of His Honour Judge Kershaw when imposing the restraining order – an order which remains in existence for another 2 years.

95. I find therefore that the Respondent has established a real risk of the Appellant committing further offences in the future, sufficient to cause serious harm, if he finds himself in one of the trigger circumstances identified in the OASys report. I find this to cross the threshold to warrant deportation.

96. There are, however, other factors to consider which I do as follows."

Ground 1

7. Mr de Mello relied on the grounds and submitted there was a letter from HMRC dated 19 August 2019 which demonstrated the appellant was exercising Treaty rights notwithstanding he was not in continuous employment. The judge failed to refer to this evidence at [73] of the decision. Mr de Mello submitted this letter should have been specifically addressed through enquiry or reasons because it was material to whether the appellant was exercising Treaty rights. The appellant was not cross-examined on this letter and had discharged the burden of showing he was exercising Treaty rights. Mr de Mello accepted the judge had taken into account HMRC records and that there was no other evidence that the appellant was self-employed in 2014-2015.

8. In addition, the judge had failed to consider whether the business rate demand from the council suggested the appellant was exercising Treaty rights as a self-employed person when setting up his business and opening an internet café in March 2015. Mr de Mello accepted the evidence in the witness statement was sparce but there was sufficient evidence to show the appellant was exercising Treaty rights as a self-employed person in 2014-2015. The judge had confined the issue too narrowly at [73] and should have explained why the appellant was not exercising Treaty rights given the HMRC letter of 19 February 2019.

9. Mrs Nolan relied on the rule 24 response and submitted the judge had considered the HMRC letter dated 19 February 2019 at [73]. The judge referred to the specific amounts set out in the letter and the appellant confirmed in oral evidence that these were correct. The appellant also stated he returned to Italy between October 2014 and March 2015. There was no documentary evidence of self-employment and no evidence in the appellant's witness statement that he

was self-employed at this time. The judge made a full and detailed assessment of the evidence including the business rate demand which showed the appellant opened an internet café on 15 March 2015. The judge considered all relevant evidence and his findings at [66] to [74] were open to him on the evidence before him.

Conclusions on Ground 1

10. It is apparent from [73] that the judge considered the letter from HMRC dated 19 February 2019. The appellant accepted the amounts earned from KPI recruiting in the tax year 2014-2015 as those recorded in the letter. This letter related to the appellant's tax credit awards to 2016. It stated that the information given to HMRC in 2016 was different to amount shown in HMRC records. In relation to self-employment, the letter estimated income of £5,000.

11. It is accepted there was no mention in the appellant's statement of self-employed income in 2014-2015 and there was no other documentary evidence of self-employed income at that time. The appellant was represented at the hearing before the First-tier Tribunal. I rely on Lata (FtT; principle controversial issues) [2023] UKUT 000163 (IAC): "A party that fails to identify an issue before the First-tier Tribunal is unlikely to have a good ground of appeal before the Upper Tribunal."

12. There was no obligation on the judge to make further enquiries. The business rate demand supported the appellant's evidence that he opened an internet café on 15 March 2015. There was insufficient evidence to show that the appellant was self-employed or otherwise exercising Treaty rights from 31 October 2014 to 15 March 2015. The judge's finding that the appellant had failed to show he was entitled to permanent residence in the UK was open to him on the evidence before him. There was no error of law in relation to ground 1.

Ground 2

13. Mr de Mello acknowledged the judge correctly set out the burden and standard of proof at [58] but submitted he had failed to apply the correct standard at [95].

14. Mrs Nolan submitted the judge set out the burden and standard of proof at [58] and summarised the evidence. The finding at [95] that the respondent had established a real risk of the appellant committing further offence related to the assessment in the OASys report and the appellant's conduct. It should be read in the context of the decision as a whole. This finding related to the risk of future offending and not whether the appellant was a genuine, present and sufficiently serious threat.

Conclusions on ground 2

15. I am persuaded by Mrs Nolan's submission. At [95] and the preceding paragraphs the judge is considering the risk of re-offending and the level of harm. It is apparent from [96] that the judge then goes on to consider whether the appellant is a genuine, present and sufficiently serious threat to one of the fundamental interests of society on the totality of the evidence. There was no challenge in the grounds to these subsequent findings.

16. I am satisfied the judge properly directed himself in law at [58] to [60] and he applied the relevant burden and standard of proof in finding that the appellant's personal conduct did represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, namely the avoidance of violent crime. There was no material error of law in relation to the standard of proof as alleged in ground 2.

Ground 3

17. The grounds submit the judge's assessment at [94], that the appellant continued to pose the risk identified in the OASys report, pre-dated the appellant's completion of the Spectrum Domestic Violence course and the judge erred in law in finding the appellant posed the same risk as he did prior to completing the course.

18. Mr de Mello relied on [57] of the refusal letter, the letter from probation dated 27 October 2021 and [84] of the judge's decision in which the judge accepted the appellant had not re-offended. He submitted the judge had erred in law at [86] of the decision in drawing an inference that the appellant was at risk to the public. He submitted the judge was wrong to find at [89] that there was evidence which contradicted the appellant's insight into his conduct. The appellant was a threat to a narrow class of persons. The inferences drawn by the judge were not open to him and he erred in law in his assessment of the letters from Councillor Wanger, friends and associates at [91] and [92]. The judge's conclusion at [94] that the appellant continued to pose the risks identified in the OASys report was not supported by the evidence and was infected by the application of the incorrect standard of proof.

19. Mrs Nolan submitted the inference that the appellant posed a risk to the public was open to the judge given the 5-year restraining order, the OASys report stating there was a medium risk of harm to the public and the lack of assurance in the second OASys report and letter from the probation service dated 2 November 2021. The judge acknowledged that the appellant had completed the Spectrum Domestic Abuse Programme at [87] and considered the evidence from NOMS and the probation service overall. He found there was little to suggest the risks identified had been addressed other than a course completed whilst the appellant was on licence. The judge was entitled to attach little weight to the letters of support and to conclude there was little evidence the appellant had gained an insight into his offending behaviour. There was no error in relation to the judge's assessment of the risk posed by the appellant.

<u>Conclusion on ground 3</u>

20. It is apparent from [87] that the judge took into account the Spectrum Domestic Violence Course. In the refusal letter the respondent stated at [57] that the appellant continued to pose a risk of harm to the public, namely the appellant's wife and partner. The letter from probation services supports the appellant's return to work that did not involve working unsupervised with children, vulnerable adults and lone females. The judge's inference that the appellant remained a risk to the public was open to him on the evidence before him. The appeal before the First-tier Tribunal was a full merits appeal and was not limited to reviewing the respondent's decision.

21. Further, it was open to the judge to find that there was evidence which contradicted the appellant's insight into his conduct. The judge considered all relevant matters and gave adequate reasons for the weight he attached to the letters submitted in support of the appellant's claim. There was no material error of law in respect of the judge's findings on the risk posed by the appellant pursuant to ground 3.

Summary

22. Reading the decision as a whole, the judge took into account all relevant evidence and properly directed himself in law. The judge gave adequate reasons for the weight he attached to the documentary evidence and his findings were open to him on the evidence before him.

23. Accordingly, for the reasons given above, I find there was no material error of law in the decision dated 28 September 2022 and I dismiss the appellant's appeal.

Notice of Decision

The appeal is dismissed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023