IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00019/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th October 2015	**On 16th November 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE

Appellant

and

MR ALI SAJID AL-ABUDE
(ANONYMITY DIRECTION NOT MADE OR REQUESTED)

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Presenting Officer
For the Respondent: Mr A Malik, Counsel, Westminster Law Chambers

DECISION AND REASONS

1. The Secretary of State, with permission, appeals against the decision of the First-tier Tribunal who, in a decision promulgated on 23rd June 2015 allowed the Respondent's appeal against the Secretary of State's decision to refuse to revoke a deportation order under Regulation 24A(2) of the 2006 Regulations.

2. Whilst the appeal is brought by the Secretary of State, I shall refer to the parties as they were before the First-tier Tribunal.

3. The Appellant's immigration history can be stated as follows. The Appellant is a national of the Netherlands. He and his family originated from Iraq and in or about 1997 he and his family members were granted asylum and subsequently Dutch citizenship. It was thereafter in June 2006 that it is said by the Appellant's parents that they relocated to the United Kingdom. There is a dispute as to when he first arrived in the United Kingdom. The original deportation letter (issued on 22nd March 2012) made reference to his claim to having first arrived on 1st June 2007 and that he had come to the attention of the authorities on 14th January 2008 when he applied for an EEA registration certificate which was subsequently issued on 5th March 2008. However from the evidence that was given before the First-tier Tribunal, it was claimed that he had first arrived in the United Kingdom in June 2006.

4. The Appellant first came to the adverse attention of the authorities in the UK on 31st August 2009 when he was cautioned by the Metropolitan Police for possessing a knife/blade, sharp pointed article in a public place.

5. On 11th July 2011 he was arrested in connection with his involvement in an offence of burglary. He appeared before the Central Criminal Court on 19th December 2011 and pleaded guilty to an offence of burglary for which he was sentenced to a period of imprisonment of two years and four months. On 8th February 2012, he was notified of his liability to deportation but on 16th March 2012 signed a disclaimer stating he wished to return to the Netherlands. On 26th March 2012, the Secretary of State made a decision to make a deportation order and gave reasons for that decision which was subsequently signed on 28th March 2012. The Appellant was deported to the Netherlands on 5th April 2012 under the terms of the Early Removal Scheme.

6. On 2nd February 2013, the Appellant was apprehended on entry into the UK at Holyhead. As he had attempted to enter the UK in breach of the deportation order, he was arrested and issued with a notice of liability to removal. As he had returned to the UK before the end of his sentence (having been removed under the Early Removal Scheme), the Appellant was recalled to prison and served the remainder of his sentence. His new release date was calculated as 19th July 2013 and thus was deported on 20th July 2013 to the Netherlands.

7. On 2nd June 2014 application was made by the Appellant for his deportation order to be revoked and on 4th February 2015 a decision was taken by the Secretary of State to refuse to revoke the deportation order and the decision was accompanied by a decision letter of the same date.

8. The Appellant appealed that decision which led to his appeal being heard by the First-tier Tribunal sitting at Hendon Magistrate's Court on 10th June 2015. In a determination promulgated on 23rd June 2015, the appeal was allowed under the Immigration Rules as the judge recorded at [93] that he was satisfied the deportation should not continue under Regulation 24A(4).

9. The Secretary of State sought permission to appeal that decision on six separate grounds which can be summarised as follows; that the judge failed to give reasons for his conclusion that the Appellant had demonstrated a material change sufficient to trigger Regulation 24A(2), or to identify that change. The judge erred in treating the Appellant as if he had acquired a permanent right or residence under the 2006 Regulations and thus ought not to have applied the higher test of "serious grounds of public policy"; that he erred in conflating the test under Regulation 21(5) of Regulation 8 as Regulation 21 does not include questions about family life; that the judge failed to give any or any adequate reason for finding that the Appellant had been rehabilitated and that he had made a material misdirection in law in finding that the Appellant had re-entered the UK because he had been given the wrong sentencing date and that the judge had failed to give any or any adequate reason for finding that the Appellant had no real ties to Holland (paragraph [75]).

10. Permission was granted by the First-tier Tribunal on 23rd July 2015.

11. Thus the appeal came before the Upper Tribunal. Mr Wilding appeared on behalf of the Secretary of State and Mr Malik, of Counsel, appeared on behalf of the Appellant as he had before the First-tier Tribunal.

12. Mr Wilding relied upon the grounds and supplemented them by his oral submissions. They can be summarised as follows.

13. He made reference to Regulation 21(5) and the three thresholds. Mr Wilding submitted that the judge at [29] misstated the case on behalf of the Secretary of State and that this had been wrongly used as a starting point as to whether he had established a right of permanent residence. However at [18] he reached the opposite conclusion. Consequently it was wholly unclear as to whether there was any finding as to a right to permanent residence and at [79] it gave the impression that he was considering a higher threshold rather than the lower threshold. He submitted that the findings of fact whereby the judge reached the conclusion that he had been resident between the years of 2006 and 2011 was insufficient to show a permanent right of residence as there was an evidential lacuna before the judge as to whether the Appellant was a qualified person in his own right and whether there was evidence of being a family member with his father exercising treaty rights in the United Kingdom.

14. He further submitted that the judge failed to give reasons or adequate reasons when considering the issue under Regulation 21(5) as to whether the Appellant represented a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." In this respect the determination was contradictory and confusing at [53] the judge found that there was –

> "... not extensive evidence of remorse before me as the Appellant's father appeared to dispute some of the ingredients of the sentence, however the Appellant himself did not appeal that conviction or sentence and therefore I am bound as is he by the findings of guilt"

and did not consider the consequences of the Appellant returning to a family who did not accept his guilt. He submitted it was not clear as to the threshold that had been applied and at [70] of the determination the judge found that there was "very limited evidence of a material change of circumstances" yet at [71] gave a contrary view and at [77] the judge made reference to the "proportionality balance" before reaching a conclusion at [81] that he did not present as a genuine and sufficiently serious threat. Consequently, he submitted that paragraph [78] also made reference to his conduct as "may albeit not constitute a material change" yet reached the conclusion at [81] that he did not present a genuine, present and sufficiently serious threat. He submitted that there was a lack of structure, that the determination was inconsistent in its contents. He relied upon the written grounds in respect of Ground 5 and at Ground 3 that the judge erred by conflating the test under Regulation 21(5) of the Article 8 questions. Consequently he submitted that the determination should be set aside.

15. Mr Malik relied upon the skeleton argument that he had provided for the hearing and also referred to a bundle of documents that had been sent along with the skeleton argument. Those submissions can be summarised as follows. He submitted that he could not disagree with the submission made by Mr Wilding that in terms of layout and structure it could have been set out in a better way and could have been more succinct. However, the judge did not make a material error of law sufficient to set aside the appeal. As to the right of permanent residence, he referred to his skeleton argument at "submission 2". He submitted that the Respondent was wrong to contend that the judge erred in the test that he applied and that the judge at paragraphs [6, 16 and 18] correctly asserted that the Respondent's case was that he had first arrived on 1st June 2007 when the Appellant had stated he had arrived in June 2006 with his family (see paragraph [16]). He submitted that the judge had the opportunity of hearing the evidence of the witnesses as to when the family relocated and he directed the Tribunal to the statements within the bundle from the various family members which demonstrated that they relocated to the United Kingdom in June 2006 and that the judge was entitled to make a finding of fact that the residence of the Appellant ran from June 2006 until October 2011 and thus he had a permanent right of residence. Mr Malik also made reference in the skeleton argument and in his oral submissions to postdecision evidence at A4 comprising a letter from the HMRC dated 2nd July 2005 referring to child benefit being paid from 11th December 2006. He submitted that this was support for the Appellant's contention that he arrived in the UK in June 2006 and therefore he did not err in law in this respect. It was therefore open to the judge to find that his period of residence effectively ran from June 2006 until October 2011 and therefore applied the correct test of "serious grounds of public policy" and did not err in his approach.

16. As to the test under paragraph 21(5) and his propensity to re-offend, the judge considered the evidence given by the family members including his mother and father which indicated that he was acting in a very positive manner. There had been no record that in prison he had behaved in a disorderly manner and the judge therefore took all matters into account. Thus he submitted that there were letters from people who knew him at page 12, and that he had regretted his actions and had

been punished for his crime. The victim had written a letter to the court and that was also provided in the bundle. In his written submissions at submission 1, there were material changes in his circumstances and that he regretted and was remorseful for his actions, that he was learning to become a driving instructor and was involved in various community and voluntary projects and that notwithstanding the paragraph identified by Mr Wilding whereby the judge stated that he had not made any material changes at [70], the evidence demonstrated that he had made material changes since his deportation which had allowed him to personally develop and make invaluable contributions to the community and that at [71], the judge was right to say that there was a change from him being released which was a material change.

17. As to the issue of conflating Article 8, Mr Malik submitted that the judge heard evidence and had taken all matters into account.

18. I asked Mr Malik if he would deal with the point made by Mr Wilding relating to the Appellant's lack of remorse in the light of a document within the Respondent's bundle that had been produced with the Grounds of Appeal (a letter dated 20th February 2015). Mr Malik submitted that the evidence given by his parents as the judge noted was that his father was critical of the court but it was accepted that he had pleaded guilty to the offence. The judge did consider the father's response but that he was now trying to be a different person. He submitted that if the Appellant was not remorseful he would not have wanted to change his behaviour. He reminded the court that the victim himself was supportive of the Appellant (and referred to the letter). Consequently he submitted that the Appellant was not a danger to the public and that whilst it was not written in clear terms, the decision on the whole supported that view.

19. He submitted that if an error of law was found, the case should be remitted to the First-tier Tribunal.

20. Mr Wilding by way of reply submitted that the new evidence referred to by Mr Malik could not be taken into account as it was not before the First-tier Tribunal but even if that material had been taken into account, it did not demonstrate that he had acquired a permanent right of residence and that there was an evidential gap as to whether the Appellant himself had any comprehensive sickness insurance or whether his father had demonstrated he was exercising treaty rights during that period if he was relying as a family member.

21. He further submitted it was not clear on the findings of fact and there was a lack of clarity generally which made the assessment flawed. He submitted there were material errors of law in the determination and it should be set aside.

22. At the conclusion of the submissions I indicated that I would reserve my decision.

Discussion

23. I have had the opportunity of considering the helpful submissions provided by both advocates and having done so, I have reached the conclusion that the First-tier

Tribunal erred in law and that the decision that was reached should be set aside. I shall therefore set out my reasons for reaching that view.

24. Both advocates in their respective submissions have made reference to the lack of structure in the determination and lack of clarity in the findings reached and at times the contradictory nature of the findings that have been made. Those matters, as outlined and particularised in the Secretary of State's grounds, led to the failure to apply the correct legal framework and analyse the evidence at each stage before reaching a decision on the material aspects of this appeal.

25. The legal framework to the appeal is set out at Regulation 24A of the 2006 Regulations, which is the sole route for revocation of an EEA deportation order. By Regulation 24A(1) a deportation order remains in force until it is revoked and by Regulation 24A(3) it refers to an application which a person subject to a deportation order is entitled to make. The application is described in the previous subsection (Regulation 24A(2) as follows:-

> "A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there has been a material changes in the circumstances that justify the making of the order."

26. At Regulation 24A(3) it states "An application under paragraph [2] shall set out the material change of circumstances relied upon by the applicant...".

27. By Regulation 24A(4) the Secretary of State shall revoke a deportation order if she considers that the criteria for making such an order is no longer justified. In making that assessment, matters that are raised in the application as showing material change of circumstances are taken into account as are the principles set out in Regulation 21(5). Insofar as relevant it provides as follows:-

> "21 (1) In this regulation a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.
>
> ...
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this Regulation, be taken in accordance with the following principles –
>
> (a) the decision with comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision; and

(e) a person's previous criminal convictions do not in themselves justify the decision."

28. In considering this issue the judge was required to consider whether the continuation of the deportation was justified on grounds of public policy, public security or public health in accordance with Regulation 21. The scheme of the 2006 Regulations and those who face removal as the consequence of a "relevant decision" as defined, is to provide three levels of protection. The lowest level of protection is provided by Regulation 21(1) which requires that a "relevant decision" is to be taken on the grounds of public policy, public security or public health and the intermediate level of protection, which apples to someone who has acquired a permanent right of residence such a decision can only be taken on serious grounds of public policy or public security (21(3)). The third and highest level of protection applies to someone who has accumulated ten years' continuous residence and a decision cannot be taken except on "imperative grounds of public security" (Regulation 21(4)).

29. It is clear from the determination that the judge did not deal with this aspect of the Regulations and where he purported to deal with it, did not make an assessment of the relevant evidence. Whilst the judged recorded at [18] the Respondent's view that "It was not accepted that he had been resident in the UK in accordance with the 2006 Regulations for five years and therefore had not acquired a permanent right of residence", at [29] the judge recorded "In relation to proportionality the Respondent relied on the fact that the Appellant had five years' continuous residence." The refusal letter clearly set out at paragraphs [12]-[15] that it was not accepted that he had acquired a permanent right of residence when in the United Kingdom and therefore the lowest threshold applied.

30. Further at [79] the judge referred to his previous conviction of burglary in the following terms:-

> "Whilst obviously a significant and serious offence this was not an offence involving terrorism, violence or the sale of drugs which is guarded in terms of European jurisprudence of the most serious criminal offences."

I agree with Mr Wilding's decision that it can be inferred from that paragraph that he was thinking in terms of the higher threshold when making an assessment under 21(5)(c).

31. As a result of the misstatement of the Respondent's case at [29] and at [30] where the judge recorded that the Secretary of State took the view that "There were some grounds of public policy, public security or public health, to maintain the decision under Regulation 21" he made no further reference to this issue until the findings set out at [50]-[52] where the judge set out that he was satisfied that the Appellant had been resident between June 2006 until his period of custody commencing in October 2011. I observed that at paragraph [30] when recording the view of the Respondent that there was "some grounds of public policy, public security or public health" that the use of the word "some" in that sentence might have been an error and that the judge was referring to "serious" which is consistent with the intermediate level of

someone who had acquired a permanent right of residence. Thus it appears possible that the judge found that he had acquired a permanent right of residence based on the length of his residence. However as set out earlier at [29] he had misstated the Respondent's case, at [79] he appeared to be stating that the highest level was being considered and the presumption at [51]-[52] was that he had found that the intermediate category applied and consequently there was a lack of clarity in the judge's determination as to the correct level. Mr Malik in his written submissions and in his oral submissions submitted that the findings at [51]-[52] were open to him to find that the Appellant has indeed established a permanent right of residence and therefore applied the test of "serious grounds of public policy" based on the evidence given by the family members which the judge accepted that he had entered the UK in June 2006 and resided in the UK until his incarceration in October 2011. In support of this submission, he relied upon fresh evidence that had not been placed before the First-tier Tribunal and also not served upon the Tribunal in accordance with Rule 15 of the Tribunal Procedure Rules. It consisted of a letter from the HMRC dated 2nd July 2015 confirming that the Appellant's father was in receipt of child benefit in respect of the Appellant from 11th December 2006. However as Mr Wilding submitted, even if the document was taken into account now, it would not demonstrate that he had acquired permanent residence under the EEA Regulations. The Appellant could have been a qualified person in his own right or as a family member. The evidence relating to his father's own status as a qualified person was that he had established a business in 2008 (paragraph [5]) but there was no evidence that he was a qualified person or exercising treaty rights in 2006. Furthermore there was no evidence as to any comprehensive sickness insurance for the Appellant and there was a lack of any supporting evidence in this regard before the Tribunal. The documentary evidence before the First-tier Tribunal from a witness statement of the Appellant's brother referred to him obtaining permanent residence in 2013. The judge made no reference to these issues and in the absence of consideration of the evidence (or lack of it) could not have reached the decision that there was a permanent right of residence, if indeed that is what he did apply.

32. This was relevant to the analysis of Regulation 21(5). The question raised is whether or not in the light of the material and assessed at the date of the hearing that the requirement of Regulation 21(5) was being satisfied and in particular whether or not the Appellant represented a "genuine, present and sufficiently threat affecting one of the fundamental interests of society", so as to justify the continuation of the deportation order. In this respect it is necessary to establish a future risk of reoffending and the nature and seriousness of such offences. In this respect past offending may be relevant in assessing future risk but the fact that he has a previous conviction cannot provide the justification. In this respect the judge made a contrary self-direction in law at [65] citing issues of the deterrence in contrast with that at [85].

33. In respect of issues of personal conduct of the Appellant and an analysis of 21(5)(c) the determination I find lacks clarity and an absence of reasoning. They can be set out and summarised as follows:-

(i) At [71] the judge recorded a finding that:-

> "In considering whether there has been a material change of circumstances I find that there is very limited evidence of a material change of circumstance other than that one would normally expect of a young man who has been released from prison and is seeking to rehabilitate himself...".

At [71] the judge referred to his community work in Holland and that he was seeking employment but "is not itself a significant material change given that he was effectively a person of previous good character before his sentence of imprisonment." The judge went on to state "There is obviously a change from his being released, one in which in my view constitutes to a material change sufficient to trigger Regulation 24A(2) and 24A(3)." It is unclear from paragraph 71 as to whether or not the judge did find that the Appellant's circumstances have changed following his deportation order in the light of the findings at [70]-[71].

(ii) The judge makes reference to the deportation and that it must be justified on grounds of public policy or public security and then makes a self-direction law at [65] listing matters including the issue of deterrence and whether the assessment of deportation is "conducive to the public good" citing the decision of **N (Kenya)** in contrast to that set out at [85] where he made a self-direction in the opposing terms (and arguably the right terms).

(iii) At [90] he sets out his conclusion that:-

> "I come to the view that continuing this deportation order would be disproportionate to comply with the principles of proportionality. It cannot be based on the personal conduct of the person concerned as the does not present a genuine present and sufficiently serious threat affecting the maintenance of law and order in the United Kingdom or the prevention of crime."

However this is arguably the wrong test as Regulation 21(5)(b) makes it plain that the decision must be based on the personal conduct of the person concerned and therefore the judge did not apply the correct test at 21(5)(c).

34. I am also satisfied that the judge did not take into account material considerations when reaching a decision as to whether he was a "genuine present and sufficiently serious threat" (Regulation 21(5)(c)). It wholly open to the judge to take into account and find that he had not committed any further offences since his release in 2013 and also to take into account the community work that he had undertaken and the steps taken to provide employment for the future. However when considering his personal conduct, his past offending was relevant when considering future risk (although the fact that he had a past conviction or the seriousness of it could not justify or provide the necessary justification). In this respect his finding at [92] that there was nothing in his character or conduct to show that he had not been rehabilitated or not learnt his lesson was inconsistent with the finding made at [53] in which the judge recorded:-

> "I find that there is not extensive evidence of remorse before me as the Appellant's father appears to dispute some of the ingredients of the sentence, however the Appellant himself did not appeal that conviction or sentence and therefore I am bound as is he by the findings of guilt."

It is further inconsistent with the statement of the Appellant himself dated 20th February 2015 (in the Respondent's bundle) in which he gave an account of the offence and where he clearly disputed the offence and the circumstances of it, including the amount of money that was said to have been taken during the burglary (some £100,000). I take into account Mr Malik's submission that this was written on his behalf and that the Appellant signed the document on 20th February 2015 and it was submitted on his behalf. However, it would have been open to the judge to reject that statement or attribute little weight to it but this was evidence that was material to the overall assessment which was not taken into account when making an assessment of his personal conduct and the risk under 21(5)(c). Furthermore, the Secretary of State set out in the refusal letter that he had not provided evidence of any courses that he had attended, either in the UK or in the Netherlands either during his sentence or after his sentence which would have led to any form of rehabilitation. That point is also not considered within the analysis of the evidence. This was a case where it does not appear that an OASys Report had been provided.

35. Furthermore as the grounds set out it is unclear as to what he factored into the analysis of Regulation 21(5) when considering paragraphs [70]-[80] when he reached the conclusion at [81] that he did not present a genuine present and sufficiently serious threat. In those earlier paragraphs he made reference to the family, their circumstances and his lack of ties to Holland although he had lived there for a period of ten years (see [75]). The judge appeared to be taking into account factors relating to the proportionality balance and at [75] sets out that the Appellant had "no real ties to Holland other than those in the ten years where he spent there closely related to his family" then at [76] and [77] reasoned that all his family were now in the United Kingdom and therefore the "proportionality balance falls in favour of the Appellant and the nature of his cultural, linguistic and family ties." I agree with the submission made by Mr Wilding that that showed a conflation of the issues.

36. I take into account the submissions made by Mr Malik that there was positive evidence before the Tribunal as to his circumstances in Holland now and that he acknowledged in his submissions that whilst there was a lack of structure and consequently clarity in the analysis that any errors were not material. However I have reached the conclusion that the Secretary of State as the losing party was entitled to know upon which basis the overall decision was reached and that all the evidence was properly assessed in accordance with the legal framework. Consequently I have reached the conclusion that the errors of law are material and therefore I set aside the decision.

37. As to remaking the decision, Mr Malik submitted that in the event of an error of law being found that the correct approach would be for the appeal to be remitted to the First-tier Tribunal and indicated that there would be further evidence provided. I observed that a request had been made by the solicitors on 11th May 2015 for the OASys Report and the presentence report but none of those appeared in the bundle and therefore should be obtained. Furthermore, this has been conducted as an out-of-country appeal and it was canvassed as to whether the Appellant would wish to give oral evidence by way of a video-link so that he could take part in the

proceedings. That is a matter that Mr Malik would like to consider further. Consequently I accept his submission that the Tribunal will be required to make further findings of fact and that the correct course is as he submits for the matter to be remitted to the First-tier Tribunal.

38. Therefore the decision of the First-tier Tribunal shall be set aside and the case to be remitted to the First-tier Tribunal for a hearing in accordance with Section 12(2)(b) of the Tribunal's Court and Enforcement Act under paragraph 7.2 of the Practice Statement of 10th February 2010 (as amended).

39. No anonymity direction is made or requested.

Signed Date

Upper Tribunal Judge Reeds