



IAC-FH-CK-V1

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

Appeal Number: DA/00032/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 2 July 2015**

**Decision & Reasons Promulgated
On 11 August 2015**

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR RICHARD APPIAH
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr J Parkinson, Home Office Presenting Officer

For the Respondent: No Appearance

DECISION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Beach, who allowed the appeal of the claimant, a citizen of the Netherlands and therefore an EEA citizen. The claimant's appeal was against the respondent's decision to make a deportation order removing him to the Netherlands pursuant to Regulation 19(1B) and 21 of the Immigration (European Economic Area) Regulations 2006 (as amended).

2. The Secretary of State made a decision to deport the claimant on 15 July 2013: on 30 July 2013, a deportation order was signed. At paragraph 17 of the Secretary of State's further reasons for deportation letter on 11 February 2014, she accepted that the claimant had acquired a permanent right of residence in the United Kingdom. She did not consider that there was sufficient evidence to suggest that the claimant had properly addressed the reasons for his offending behaviour, and that the offence was very serious.

Background

3. The claimant came to the United Kingdom from the Netherlands. He was able to show that he had worked here for 5 years from December 2009. He demonstrated to the Secretary of State that he had married a naturalised British citizen and had two children here. Family life between the claimant, his wife and those children was accepted, although his links to four other children in the United Kingdom were not.
4. The claimant came to the attention of the authorities on two occasions:
 - (a) In November 2007, the claimant was cautioned for common assault and destruction or damage to property.
 - (b) In September 2011, the claimant was arrested on his return from the Netherlands and subjected to an x-ray examination. He was found to be in possession of approximately one kilogram of a Class A drug, 100% pure cocaine, which he had swallowed in 99 small containers. The claimant pleaded guilty, but the offence was sufficiently serious that he still received a sentence of 5 years imprisonment.
5. It appears that the claimant undertook various training courses whilst in prison as a result of which he had achieved a college induction covering health and safety awareness and food safety awareness, a level 2 food safety certificate, and industrial cleaning certificate and various other matters of that sort including three credits at level 1 on a course entitled employability and life skills. Before his imprisonment the claimant was working as a bus driver and it is difficult to see exactly what relevance these new qualifications might have to that career.
6. A report from the National Offender Management Service (NOMS) indicated that the claimant was a low reconviction risk. The risk of harm to others would be

“...mainly the fact that [the claimant] would be giving these drugs to people. ...This is [the claimant's] first conviction therefore it is my assessment that he would be a low risk of further conviction of the same nature.”

First-tier Tribunal decision

7. In its decision, the First-tier Tribunal found that having regard to the gravity of the offence committed but also to the claimant's warm and loving family unit who seek to support him as do his eldest children from his previous relationship and a low risk of reconviction together with his having displayed some insight into his offence and accessed educational courses in prison that the claimant was not a sufficiently serious, genuine and present threat to the fundamental interests of society. The claimant came to the United Kingdom on a date which remains unclear, but which the First-tier Judge found to be no longer than five years before his conviction in September 2011. The First-tier Tribunal Judge therefore applied the 'serious grounds' test when assessing whether the claimant could lawfully be removed to the Netherlands.

Secretary of State's challenge

8. The basis of the Secretary of State's appeal in the first application was that:
 - (1) the judge misdirected herself and that the claimant is a genuine, present and sufficiently serious threat to the fundamental interests of society and that the claimant's conviction and the length of his sentence so demonstrate;
 - (2) the best interests of the claimant's children are a primary consideration but that the public interest needs to be properly weighed against the circumstances; and that
 - (3) the First-tier Tribunal failed to engage with section 117C(6) of the Nationality, Immigration and Asylum Act 2002.
9. In the renewal grounds, the respondent relied on the first grounds but also argued that the assessment of the threat which the claimant posed to United Kingdom society was inadequately reasoned. She posited a theory that since the claimant regularly visited the Netherlands for the purpose of gambling there, the very risky course he had taken might be one which had been forced upon him because he had a gambling debt.

Permission to appeal

10. Permission to appeal was granted on the basis that the First-tier Tribunal had arguably erred in failing to give adequate reasons for finding that the claimant was not a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Permission was not granted on the respondent's argument that the First-tier Tribunal erred in law by failing to take into account section 117B of the Nationality, Immigration and Asylum Act 2002 because a decision under the EEA Regulations is not a consideration of Article 8 ECHR made under the Immigration Acts.
11. The only issue before us therefore is whether the First-tier Tribunal properly applied the EEA Regulations.

Discussion

12. We reminded ourselves of the relevant provisions of Part 4 of the Regulations, which deal with refusal of admission and removal, as follows:

“Exclusion and removal from the United Kingdom

19. ...(1B) If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom.

Decisions taken on public policy, public security and public health grounds

21. (1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security. ...

(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 must comply with the principle of proportionality;
- (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;
- (e) a person’s previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.”

13. The claimant falls to be considered as a permanent resident to whom the 'serious grounds of public policy' test applies. Even at the lowest end of the sentencing range, his attempt to import a very large amount of a Class A drug from his EEA country of nationality attracted a sentence of 5 years. The respondent was fully entitled to consider that 'serious grounds of public policy' exist, particularly given the confusing and somewhat contradictory statement by NOMS that the only reason why the claimant might still be a risk is that he might supply drugs to others.
14. So far as the EEA Regulations are concerned we are satisfied that the First-tier Tribunal Judge did misdirect herself as to the gravity of the index offence and that the respondent was entitled to consider that the index offence was sufficiently serious to create a serious, genuine and present threat to the fundamental interests of society.
15. Our attention has been drawn to the decision of the Upper Tribunal in *Badewa (ss 117A-D and EEA Regulations)* [2015] UKUT 329 (IAC) which holds that the proper approach is to deal first with the question of the EEA Regulations and second, if Article 8 has been raised as a ground of appeal, with the provisions of Sections 117A - 117D.
16. As regards Article 8 the judge did assess the best interests of the children. The claimant on his account has a total of six children in the United Kingdom and two in Ghana. Her assessment appears at paragraphs 36 to 37 of the decision and we must apply paragraph 117C and D in particular to the assessment of the interests of those children. Paragraph 117B notes that the maintenance of effective immigration controls is in the public interest and paragraph 117C that the deportation of foreign criminals is in the public interest and that the more serious the offence committed by a foreign criminal the greater the public interest in deportation. Subparagraph 117C(6) states that:

"In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2",

set out at 117C(4) and (5), Exception 2 being the parental relationship with a qualifying child.
17. It is not clear from the determination that compelling circumstances over and above the parental links were established. It is accepted by the judge that the claimant has a warm relationship with all eight of his children including two who live with his British wife, another four in the United Kingdom and two abroad but those considerations are governed by Exception 2 and more than the parental relationship is required here. Some of his children have visited him in prison, but the youngest three have not: they maintain contact by telephone and the youngest thinks already that his father is living in Amsterdam. Even had we been seised of the Article 8/section 117C argument, we do not consider that on a proper

assessment of the factual matrix the existence of his extended family in the United Kingdom would have been determinative of the appeal.

18. The First-tier Tribunal Judge's determination does not establish that there are very compelling circumstances over and above his parental role and the affection between him and his children and accordingly we find that she made a material error of law both in relation to Regulation 21 and also in relation to Part 5A of the 2002 Act.

Conclusions

The making of the previous decision involved the making of an error on a point of law.

We set aside the decision and remake it by dismissing the appeal.

Anonymity

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Upper Tribunal Judge Gleeson