IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00032/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 November 2015	**On 13 November 2015**

Before

UPPER TRIBUNAL JUDGE WARR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DNO
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Kandola, Home Office Presenting Officer
For the Respondent: Mr K Smyth, Solicitor, Kesar & Co Solicitors (Tonbridge)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Nigeria born on 14 January 1974, as the appellant herein.

2. On 17 February 2015 the respondent decided to make a deportation order and the appellant appealed under the Immigration (European Economic Area) Regulations 2006.

3. The appellant's appeal came before First-tier Tribunal Judge Cameron on 27 July 2015. The judge noted that it was accepted that the appellant was

a family member of an EEA national and that it was also accepted that he had acquired a permanent right of residence by virtue of a five year period of continuous residence. The judge noted that in those circumstances the appellant's removal must be justified on serious grounds of public policy or public security.

4. The appellant was convicted at Croydon Crown Court on 30 April 2009 of being knowingly concerned in fraudulent evasion of prohibition or restriction on importation of Class A controlled drugs. A confiscation order was made and the appellant was also convicted for possessing Class B controlled drugs with intent to supply for which he was sentenced to twelve months' imprisonment to be served concurrently.

5. The judge heard oral evidence from the appellant and his partner.

6. For reasons that will become apparent it is not necessary to summarise the judge's determination in detail as there is only one issue that arises. The following extract from the judge's decision is of relevance in relation to that issue:

> "90. There is no doubt from the reports available that the appellant has undertaken a considerable number of courses whilst he has been in prison both in relation to rehabilitation and also training. He has worked while in prison and had enhanced status and no adjudications.
>
> 91. Notwithstanding the seriousness of the appellant's offence he has been assessed as being at low risk of both reoffending and of harm to the public. That risk assessment has been confirmed by the probation services. I do however take into account the serious nature of the offence which is clearly shown from the sentence received. I also take note particularly of the detrimental effect drugs have on society generally and in particular where Class A drugs are involved the high likelihood that drug users will commit additional offences in order to fund their habit. This is an issue which was accepted by the probation within the OASys Report.
>
> 92. I also take note of the fact that the appellant as always indicated that the offence itself took place because of a difficulty he found himself in after taking a loan to start a business. He has given evidence in relation to threats made to both himself and his family and although there is no corroborative evidence of this from the authorities, he now states that the monies have been repaid and that the threats have stopped.
>
> 93. The appellant has one previous conviction in relation to a motoring offence and the probation report clearly indicates that he he did not have an offending history. Taking into account all of those factors placed before me and notwithstanding that the probation report does indicate that the appellant has some work to be undertaken in relation to his overall thinking in relation to offending, I am satisfied that the assessment as to his being a low risk of reoffending and at low risk of harm to the public is a sustainable one.
>
> 94. I have had regard to **Essa, R (On the Application Of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor** **[2012]**

EWCA Civ 1718. The appellant has undertaken a number of courses while in prison and it is clear from the report that given his offending and low-risk he is not suitable for any additional courses. The current probation assessment is that he is complying with his licence conditions and is utilising his time constructively towards employment.

95. I take into account in particular paragraphs 54 and 55 of **Dumliauskas [2015] EWCA Civ 145**. It is clear that the prospects of rehabilitation are not irrelevant to the proportionality exercise and that the longer the person has been in a state the more weight these [sic] should be given to those prospects.

96. I have not received any additional evidence with regard to what if any assistance may be available to the appellant if he were returned to Nigeria but given that he has completed all the relevant courses he can in this country and given that he has employment skills both as a barber and also from courses he has undertaken whilst in custody I am not satisfied notwithstanding that there is no direct rehabilitation provisions in Nigeria that the appellant would be at appreciably higher risk of reoffending if he were deported compared to that risk if he were not deported."

7. The appellant and his partner have an autistic daughter. He has been in a relationship with his partner since 2005 and their daughter was born on 14 July 2006.

8. The judge found that the appellant was at low risk of reoffending and at low risk of harm to the public. In paragraph 124 of the decision the judge stated as follows:

> "Although the offence itself is a particularly serious one and the effect of drugs on the public is considerable given that drugs addicts particularly those addicted to Class A drugs are likely to commit offences to fund their habit, I am not satisfied on the evidence available that the appellant does currently represent a genuine, present and sufficiently serious threat such that his removal would be justified under Regulation 21."

8. The judge did not need in the circumstances to consider the further grounds in relation to Article 8 but observed that the best interests of the daughter were to remain with both her parents and that the daughter had bonded with the appellant and it was in her best interests to remain with both her parents in the United Kingdom.

9. The respondent applied for permission to appeal. The second ground of appeal concerned the issue of rehabilitation which the judge dealt with in the extract from the determination which I have set out above. Reference was made to **SE (Zimbabwe) v Secretary of State [2014] EWCA Civ 256** and the appellant could not benefit from the case of **Essa** because he was not an EEA national himself but just the family member of an EEA national. The judge had erred in finding at paragraph 95 that the "prospects of rehabilitation are not irrelevant to the proportionality exercise".

10. The application for permission to appeal was renewed in respect of the first ground of appeal where it had been argued that the judge had failed to take into account material matters and had erred in concluding that the appellant was at low risk of reoffending. This application was considered by Upper Tribunal Judge Canavan and in a decision dated 28 September 2015 she refused to grant permission in relation to the first ground.

11. Mr Smyth filed a response to the grounds on 16 September 2015. In the response Mr Smyth submitted in relation to ground 1 that the judge had properly directed himself and that the complaint by the Secretary of State was nothing more than a disagreement with the findings of the judge.

12. In relation to the ground on which permission was granted, it was pointed out that the First-tier Judge had not in fact placed any weight on the appellant's prospect of rehabilitation in Nigeria and reference was made to paragraph 96 of the decision which I have set out above. Any reliance placed by the judge on the point was immaterial.

13. Reference was made to **Secretary of State v Dumliauskas**. The appellant did not represent a genuine and present threat and could not be deported under the EEA Regulations. At the hearing Mr Smyth referred me to **MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC)**.

14. Mr Kandola, while not instructed to withdraw the appeal, acknowledged the difficulties in advancing the proposition in the ground relating to rehabilitation. However, he sought to raise a new point that the appellant had not achieved permanent residence on the chronology. There was no evidence that the appellant's wife – the EU citizen – had exercised treaty rights and was a qualified person. Mr Kandola acknowledged that the matter had been conceded by the respondent in the refusal letter and that the concession had been maintained at the hearing. Further, the point had not been mentioned in the first set of grounds or in the second and no notice had been given of the intention to raise it before me. Mr Kandola accepted that rehabilitation could be raised as part of the proportionality exercise. Mr Smyth relied on his written response.

15. At the conclusion of the hearing I reserved my decision. I can of course only interfere with the judge's decision if it was flawed in law. Permission was only granted on the rehabilitation issue. The short answer to that point is that the judge, as is quite clear from paragraph 96 of the determination which I have set out above, did not find that the question of rehabilitation made any difference in this case – the applicant would not be at appreciably higher risk of reoffending if he were deported than if he remained in this country. Even if it were an error (and Mr Kandola, while not instructed to withdraw the argument, did not advance it with any great enthusiasm) it is quite clear that it played no material part in the judge's reasoning.

16. In relation to the point that Mr Kandola sought to raise at the hearing, as I have made clear, this did not feature in the refusal letter, the hearing or in

either set of grounds and no advance warning was given of an application to withdraw a concession that had been clearly made in the decision and at the hearing. It was clearly accepted, for example, in paragraph 15 of the refusal letter that the appellant was a family member of an EEA national and in paragraph 19 it was accepted that the appellant had acquired a permanent right of residence.

17. The respondent's position having been so clearly stated, it would be grossly unfair to permit at such a very late stage a fresh point to be taken in relation to the matter. I unhesitatingly refused the application.

18. Permission to appeal in relation to the other matters was properly considered and refused by the Tribunal. I agree with the comments made by Mr Smyth in his helpful response in relation to ground 1 of the original grounds. In relation to the point on which permission was granted I find that any error was immaterial in the circumstances of this case.

Notice of Decision

19. Accordingly, for the reasons I have given, the Secretary of State's appeal is dismissed and I direct that the decision of the First-tier Judge shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The First-tier Judge made an anonymity order no doubt because of a child being involved and that anonymity order continues.

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

No fee is paid or payable and therefore there can be no fee award.

Signed Date 10 November 2015

Upper Tribunal Judge Warr