Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00061/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On Monday 20 July 2015	**On 23 July 2015**

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR TOMAS ROZNOVJAK
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Jarvis, Senior Home Office Presenting Officer
For the Respondent: Unrepresented and in person

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
No anonymity order was made by the First-tier Tribunal. We find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, we refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the appellant in this particular appeal.

2. This matter comes before us following the grant of permission by First-Tier Tribunal Judge Landes on 28 May 2015 in respect of the decision of First-Tier Tribunal Judge Burnett sitting with Mr Bompas (lay member) promulgated on 12 May 2015 ("the Decision"). The matter comes before us to decide whether there is an error of law in the Decision and, if so, to set aside and re-make the Decision or decide what further course is appropriate.

3. The appellant is a Czech national born on 5 April 1990. He arrived in the UK sometime in September 2009. He has worked in the UK since 2009 although the details of his employment, including the exact dates when he has worked are sketchy. From 2011, the appellant has accrued 18 convictions for 40 offences. These consist of offences of criminal damage, being drunk and disorderly, using threatening words of behaviour, breaches of court orders and theft. The appellant links his offending to a problem with alcohol consumption. He says that he has reformed and will not drink again in the future.

4. The respondent considers the appellant to be a persistent offender. In consequence, the respondent decided on 4 March 2015 to make a deportation order against him in accordance with regulations 19,21 and 24 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). The respondent relied in particular on 4 convictions. On 28 August 2014, the appellant was convicted of theft whilst subject to a suspended sentence. He was fined £100 but detained for 1 day in lieu of the fine. On 6 September 2014, the appellant was convicted of theft of a bottle of wine. He was sentenced to 14 days but since he was again subject to a suspended sentence, he was also sentenced to 2 weeks imprisonment concurrent to the 14 days, 2 weeks consecutive to the 14 days for a further offence of theft and a further term as he was subject to another suspended sentence. In all, the appellant was sentenced to a total of 10 weeks imprisonment. On 23 January 2015, the appellant was convicted of assault and sentenced to 1 day to be detained in the courthouse. On 29 January 2015, the appellant was convicted of 3 offences of theft and given consecutive sentences amounting to 11 weeks imprisonment.

5. The Tribunal allowed the appeal under the EEA Regulations on the basis that *"we do not find that the appellant as yet represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society"* [56]. The Tribunal also allowed the appeal on the basis that the respondent's decision was not in accordance with the law for failure to follow her published policy, an issue to which we return below.

6. Permission was granted on the basis that the Tribunal had not given the respondent the opportunity to make submissions concerning the policy

guidance and may have misinterpreted that guidance ("the Policy Issue"). The grant was also on the basis that the Tribunal may have inadequately reasoned the finding that the appellant was not yet a genuine, present and sufficiently serious threat ("the Regulations Issue").

Submissions

7. By written application received on 17 July 2015, Mr Jarvis applied to amend the respondent's grounds. He candidly accepted that his proposed amendment did include some new issues but, for the most part, the application was to clarify the respondent's position, in particular in relation to the Policy Issue. We indicated that we would hear from Mr Jarvis on the amended grounds and would form a view thereafter whether to agree to the application to amend.

8. The appellant was unrepresented at the hearing. We asked him via the interpreter why he was not represented. He indicated that he had been told that he was not eligible for legal aid and had therefore taken no further steps to secure representation. We indicated that, since he was unrepresented, we would do our best to ensure that all legal arguments, particularly those potentially in his favour were fully canvassed.

The Policy Issue

9. The Policy Issue focuses on a policy entitled *"Criminal Casework European Economic Area (EEA) foreign national offender (FNO) cases"* ("the Policy"). The document is said to be valid from 27 January 2014. The Policy Issue is addressed at [48] to [54] of the Decision. The Tribunal found that the Policy set a threshold for a decision by the respondent to deport an EEA national of two years custody in most cases or one year's custody in cases involving particular offences (such as drugs, sex or violence). That was not met in this case and so the decision to deport the appellant was, the Tribunal found, not in accordance with the law.

10. The respondent's grounds on this issue are three-fold. Firstly, the respondent argues that it was unfair for the Tribunal to take account of the Policy without at the very least giving the respondent the opportunity to make submissions about its relevance. Mr Jarvis accepted that ideally the respondent's representative should be armed with relevant policy and guidance but this would not always be the case. The approach in Macnikowski [2014] UKUT 00567 (IAC) should have been followed.

11. Secondly, the respondent argues that the Tribunal misinterpreted the Policy. In this regard, the original grounds at ground 1(A) focussed on the Tribunal's failure to refer to the full text as it had ignored a note that caseworkers should "*see section 3.2 of related link*". Mr Jarvis sought to amend this ground as it appears that the link concerned was withdrawn from the Home Office intranet on 13 February 2015 and so would not have been in place at the date of the respondent's decision. Instead, Mr Jarvis submitted that the Tribunal misinterpreted the Policy. He argued that it is not inconsistent or incompatible

with the Policy for the respondent to deport a persistent offender and he drew our attention to the reference to the Home Office submissions at [17] of the Decision; the criteria for a persistent offender being one of four custodial sentences in the last four years. Mr Jarvis submitted that because the Policy did not cover the case of a persistent offender, it was neither inconsistent nor unlawful for the respondent's decision not to consider the Policy. Mr Jarvis drew our attention to various provisions of the Policy which we set out below when reaching our decision. At our request, he also checked the Home Office file to ascertain if any consideration had been given to the Policy when the respondent's decision was reached but confirmed that there was no direct reference to it. The appellant had been referred to Criminal Casework by the prison. He indicated that the decision had been taken on the basis of persistent offending, meaning as far as the decision maker was concerned, four convictions in the previous three years.

12. Thirdly, by way of a new ground 1(E), Mr Jarvis submitted that, if the Tribunal had been right to find that the respondent's decision was not in accordance with the law for failure to apply the Policy, the appropriate course was to allow the appeal on that basis and remit the matter to the respondent to make a lawful decision. The Tribunal should not have gone on to decide the appeal by reference to the EEA Regulations. If the respondent's decision was unlawful, the arguments based on the EEA Regulations fall away and arguably the Tribunal has no jurisdiction to go further. The appeal should not have been allowed under the EEA Regulations.

The Regulations Issue

13. The respondent's ground 1(C) argues that the Tribunal failed to make findings in relation to its conclusion that the appellant did not yet pose a genuine, present and sufficiently serious threat. The Tribunal decided, apparently without evidence other than the appellant's assertion, that his offending was alcohol related and that he would not drink again [33]. There is no probation report in relation to risk of future offending – probably because the appellant's offending is below the threshold for preparation of such reports. However, Mr Jarvis pointed out that, if it was the appellant's case that he had reformed and no longer had a problem with alcohol, it should have been possible for him to produce something from the prison to that effect. Mr Jarvis confirmed in response to a question from us that the respondent's position in relation to whether the offending was "sufficiently serious" was that the offences had to be considered cumulatively. However, the respondent's primary position on this issue is that the Tribunal failed to engage with whether the requisite threat existed and failed to consider such things as whether the appellant understood his behaviour, what were the precursors to the offending and what will happen in the future.

14. Mr Jarvis also developed submissions in relation to Ground 1(D) of the original grounds and Ground 1(F) of the proposed amended grounds. Ground 1(D) concerns the Tribunal's comment at [41] that the respondent could have

confirmed the appellant's employment history. In relation to Ground 1(D), Mr Jarvis did accept that the Tribunal could direct the respondent to produce relevant information but otherwise the onus was on the appellant to make out his case.

15. Ground 1(F) deals with the Tribunal's approach to periods of imprisonment. Mr Jarvis submitted that there was an error in the Tribunal's finding that short periods of imprisonment should be disregarded and did not break the appellant's integration [46]. Mr Jarvis agreed with us though that the comment made about the appellant's employment history and the Tribunal's attitude to the length of the periods of detention appeared to relate to the Tribunal's consideration of whether the appellant had acquired permanent residence under the EEA Regulations and would therefore be entitled to the higher level of protection. Since the Tribunal appeared to accept at [40] that there was not enough evidence for the Tribunal to find that he had acquired permanent residence and had proceeded to consider deportation at [47] based on the "*first level of protection*", any error would not be material.

16. Mr Jarvis did however point out that if there were an error in the approach in particular to the effect of the length of detention and whether the appellant might have benefited from permanent residence [45], this could have infected the Tribunal's reasoning on whether the appellant constituted a genuine, present and sufficiently serious threat and on the proportionality exercise enjoined by regulation 21(5)(a) of the EEA Regulations.

17. The appellant also addressed us briefly. He indicated that he had not committed serious offences; the totality of his criminal record was less than 5 months. He had read the case of Macknikowski and the facts there were very different. In that case, the appellant was not working whereas he had been working and in that case the appellant had been convicted for a violent offence whereas his offences were not generally of that nature. He indicated that he was not familiar with the Policy and could not make submissions about it.

Decision and reasons

18. We have considered whether to allow Mr Jarvis' application to amend the respondent's grounds of appeal. We have decided to do so. The appellant appeared in person and was unrepresented. As such, it fell to us to deal with the detail of the respondent's grounds and we do not therefore consider that there was any prejudice to the appellant in allowing this late amendment. The major amendment was to the Policy Issue, in particular the interpretation of the Policy. It would have been wrong to shut out the amendment, based as it was on the correct factual position, prevailing at the date of decision.

The Regulations Issue

19. We begin with the Regulations Issue since if the Tribunal was right to allow the appeal on the basis that the appellant did not pose a genuine, present and

sufficiently serious threat, the allowing of the appeal also on the basis that the respondent's decision was not in accordance with the law would be immaterial.

20. The conclusion of the Tribunal in relation to whether the appellant poses a genuine, present and sufficiently serious threat is at [56] to the effect that he does not yet present the requisite threat. That could suggest that the Tribunal considered that the threat was not present. There are however other indications that the Tribunal considered that the threat was not "sufficiently serious"; at [34] the Tribunal notes that the offences were "*not that serious in the scheme of criminal offending behaviour*". We also agree with the respondent that the evidential basis for the link between the offending and the appellant's alcohol consumption is not clear. There are a number of offences which may well be so linked, for example the theft of bottles of alcohol and being arrested for being drunk and disorderly, but in relation to other offences the link is less clear. It is not clear either what weight the Tribunal placed at [33] on the appellant's own assertion unsupported by independent evidence that his conduct would improve and he would not offend again because he had stopped drinking [13]. Neither is it clear that this was accepted by the Tribunal since at [36], the Tribunal goes on to indicate that "*currently there is a possibility that the appellant may offend again*".

21. Although, as noted at paragraph [15] above, we do not consider that the Tribunal's findings on length of sentence and integration are relevant as they appear to be part of the consideration of whether the appellant has acquired a right of permanent residence, we are also concerned that these considerations may have been taken into account when weighing the seriousness of the offences against the criteria for deportation in the EEA Regulations, particularly where the findings as to whether the appellant had acquired permanent residence are not unambiguous (see for example [45]).

22. We do not preclude the possibility that a pattern of relatively minor offences could, when considered cumulatively, constitute a genuine, sufficiently serious threat to one of the fundamental interests of society. We were certainly not referred to any authority to suggest it could not.

23. For the above reasons, we conclude that the Tribunal has materially erred in law by failing to adequately reason its finding that the appellant does not represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

The Policy Issue

24. We set out below the relevant passages of the Policy:-

> "This guidance tells criminal casework (CC) staff the process when they consider if deportation of foreign national offenders (FNOs) and their family members from the European Economic Area (EEA) is appropriate…

You must be satisfied the person's conduct represents a genuine, present and sufficiently serious threat which affects one of these fundamental interests of society (for further information on the definitions of serious public policy or security and imperative grounds of public security, see section 3.2 of related link: 08 Enforcement action taken against EEA nationals and family members)…

In cases of EEA FNOs, one of the workflow teams must check the CCD referral form to make sure the FNO meets the internal EEA deportation threshold criteria:

- Custodial sentences of two years (24 months) or over for any offences, or
- Custodial sentences of one year (12 months) or over if the offence is related to:
  - Drugs
  - Sex
  - Violence, or
  - Other serious criminal activity

…

In the majority of cases the two-year threshold applies for a case to be accepted into CC. There may be rare occasions when CC accepts a case that falls below the threshold, for example on instruction from a Minister or the chief executive…

If the prison decides to refer an EEA national FNO case to CC for exceptional reasons, they must provide reasons why it is exceptional. This means the FNO is identified as one or more of the following:

- A Multi-Agency Public Protection Agency (MAPPA) case
- Serving an extended sentence for public protection
- Serving an extended sentence under the Criminal Justice Act 1991
- Serving an indeterminate sentence of imprisonment for public protection
- Has a previous conviction for a sexual or violent offence that attracted a sentence of two years or more

If none of these factors apply, a workflow team officer must check the reason for referral with the FNO's offender manager. If there are no specific reasons given, the case is not pursued.

…

If the FNO does not meet the deportation threshold criteria, and the prison provides insufficient reasons to justify the referral on exceptional grounds, CC will not pursue the case…."

25. We have no difficulty with Mr Jarvis's submission that the respondent's decision could only be unlawful if the Policy was clearly intended to apply to an offender in the appellant's position and had not been considered. If the Policy was clearly not intended to apply to the appellant's situation, the decision to deport could not then be inconsistent or incompatible with it. However, we were not persuaded by Mr Jarvis' eloquent submissions that the Policy could not apply to a persistent offender. The Policy clearly states that it sets out thresholds for deportation of EEA nationals which are defined by reference to the length of a custodial sentence of one or, in most cases, two years. It makes clear that if those thresholds are not reached then, unless the case is referred by the Secretary of State or Chief Executive (which would, we assume, be a case of some importance) or if the "exceptional" criteria are not met for a referral from a prison, Criminal Casework will not pursue the case.

26. In those circumstances, we do not find an error of law in the Decision in relation to the interpretation of the Policy. On the face of the policy, the appellant's custodial sentence was below the threshold. The appellant's case needed to be considered therefore under the Policy, in order to determine whether his was a case where, in spite of falling below the thresholds, deportation action should still be taken based on an instruction from the Secretary of State or a Minister or following referral by a prison for an exceptional reason. There is therefore no error of law in the Decision on the Policy Issue.

DECISION

27. The First-Tier Tribunal decision did involve the making of an error on a point of law. We set aside the Decision allowing the appeal under the EEA Regulations.

28. We re-make the Decision as follows. As we have concluded that there was no error of law in the Decision allowing the appeal on the basis that the respondent's decision was not in accordance with the law for the respondent's failure to apply the Policy, we do not consider it necessary to remake the Decision under the EEA Regulations since it will be for the respondent to reconsider the appellant's case in light of our conclusion on the Policy Issue and the appellant will be given a further right of appeal if the respondent decides to make a further decision to deport.

Signed Date 22 July 2015

Upper Tribunal Judge Smith