Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00261/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2015	**On 8 December 2015**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARTIN CELIS
(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: The respondent did not appear and was not represented

DECISION AND REASONS

1. The respondent to this appeal, hereinafter "the claimant", has already been removed from the United Kingdom. On 13 October 2015, a few days before the hearing, I received a letter from claimant's unmarried partner apologising for her absence and explaining that she could not attend to support the claimant's appeal because she and their son had removed from the United Kingdom and she did not have the money to return for the purpose of the hearing.

2. The letter then set out in passionate terms the inconvenience and distress caused to her and her child by reason of the claimant's removal. She said how they had "lost everything". The letter made little attempt to engage with legal submissions but did express the view that she could not understand why the claimant had been removed. She said that she was living with her mother and had no contact with the claimant since his deportation.

3. The appellant in this case, hereinafter the "Secretary of State", appeals with permission a decision of the First-tier Tribunal allowing his appeal against the decision of the Secretary of State on 8 April 2015 to make an order for his removal with reference to Regulation 19(3) of the Immigration (European Economic Area) Regulation 2006 following his being made the subject of a deportation order on 13 March 2015.

4. I remind myself that my primary task is not to decide if the claimant's appeal against deportation should be allowed but to decide whether the Secretary of State has shown that the First-tier Tribunal's decision to allow the appeal is wrong in law.

5. The claimant has the two disadvantages of being absent from the United Kingdom and unrepresented. I am not aware of his having applied under paragraph 24AA of the Immigration (EEA) Regulations 2006 to the First-tier Tribunal for an order suspending his removal until his appeal was finally decided. Even so, it is fitting to endeavour to show the highest standards of fairness.

6. The Secretary of State's reasons for making the decision are set out in the decision dated 5 March 2015 and in a supplementary letter dated 16 June 2015.

7. The decision to make a deportation order notes that the claimant says that he arrived in the United Kingdom in 2005 and continues "you have not submitted any evidence of your arrival in the UK". I take this to mean that the claimant had not submitted any evidence beyond his own assertion. The Secretary of State noted, fairly, that as an EEA national he would not have been subject to immigration control. It follows that there is nothing to the claimant's detriment in there being no record of his arrival although he probably should have applied for a residence card soon after arriving.

8. The decision then deals with the claimant's criminal history.

9. He has been in trouble in the Czech Republic.

10. On 4 September 1995 he was given a suspended sentence of seven months' imprisonment and put on probation for offences of theft, criminal damage, unauthorised use of another person's property and an attempt to commit a crime.

11. On 30 April 1996 he was sent to prison for fourteen months for offences of theft and unauthorised use of property belonging to another and criminal damage.

12. On 17 December 1997 he was convicted of rape, theft, unauthorised use of property belonging to another, attempt to commit a crime, damage to property of others, being an accessory in criminal damage and matters described as "two counts of offender". He was sent to prison for six years six months and put on probation for a further five years of his release.

13. On 26 May 2003 he was convicted of theft and fined 10,000 CZK.

14. On 22 April 2004 he was sent to prison for ten months for theft, being an accomplice and accessory in criminal activity and an attempt to commit a crime.

15. There is then a break of more than six years when there is no record of his having committed any offences.

16. The next criminal sanction recorded was at the North Hampshire Magistrates' Court on 13 October 2011 when he was sentenced 100 hours unpaid work and

ordered to pay £85 for "failing to comply with notification". He was convicted of the offence in October 2010.

17. In the explanatory letter the Secretary of State said that the claimant had not established continuous residence in the United Kingdom in accordance with the 2006 Regulations and in particular she did not accept that the claimant had provided any evidence of exercising treaty rights for a continuous period of five years. The claimant accepted that he had been unemployed in the United Kingdom. A person does not exercises a treaty right merely by reason of being unemployed.

18. The Secretary of State then decided that deportation was justified on grounds of public policy or public security.

19. The letter shows that the Secretary of State expressly reminded herself of the requirements of Regulation 21(5) and in particular that "the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".

20. The letter then noted that the Secretary of State did not know the exact circumstances of the claimant's convictions but did note that he had been convicted of rape and that his sentence of imprisonment had not brought to an end his criminal behaviour. At paragraph 25 the Secretary of State said:

> "As noted above, you were convicted of rape in the Czech Republic on 17 December 1997. While the Home Office has seen no evidence that you have repeated this serious offence in the United Kingdom, you have shown by your subsequent convictions in the Czech Republic that you present a current risk of re-offending. It is therefore considered that the potential exists for you to commit further offences of this nature in the future, and that you pose a significant and unacceptable risk of harm to females in the United Kingdom."

21. The Secretary of State then noted that the claimant had not provided evidence that he had, for example, attended a programme of enhanced thinking skills or a victim awareness course and decided that it was not reasonable to leave the public vulnerable to the effects of his re-offending (this presumably is a reference to the public in the United Kingdom).

22. At paragraph 28 the Secretary of State said:

> "All the available evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."

23. The letter then addressed the need for decisions under the Regulations to be proportionate and to consider rehabilitation. The EEA Regulations are considered expressly at paragraph 38 and we are told:

> "You have committed serious criminal offences in the Czech Republic and, as explained above, there is a real risk that you may reoffend in the future. Account has been taken of the considerations outlined in EEA Regulation 21(6). Nevertheless, given the threat of serious harm that you pose to the public it is considered that your personal circumstances do not preclude your deportation being pursued. It is considered that the decision to deport you is proportionate and in accordance with the principles of Regulation 21(5)."

24. Article 8 of the European Convention on Human Rights was considered expressly and the Secretary of State considered the Immigration Rules and Section 117C of the Nationality, Immigration and Asylum Act 2002, although only to say, correctly, that they do not apply in EEA cases, as well as the need to make the best interests of the claimant's child a primary consideration before deciding that the claimant ought to be deported.

25. At paragraph 70 the Secretary of State decided that there would not be any real risk of serious irreversible harm if he removed pending the outcome of any appeal.

26. In the supplementary letter of 16 June 2015 the Secretary of State commented on evidence produced by the claimant showing that he had worked for Hawk Engineering but concluded this only showed work for a period of three years, not five.

27. At paragraph 18 the Secretary of State says:

> "You have an extensive criminal history in Czech Republic which demonstrates that you present a risk of re-offending and the potential exists for you to commit further offences in the future. Rape is a serious offence and while the Home Office has seen no evidence that you have repeated this serious offence in the UK, you have shown by your subsequent convictions in Czech Republic that you pose a significant and unacceptable risk of harm to the public and in particular to females in the United Kingdom."

28. I have perused carefully the list of previous convictions in the Secretary of State's papers that appear to have come from the authorities in the Czech Republic. I am most concerned about the entry dated 22 April 2004 at the District Court at Jicin for an offence of theft. Under the heading "Sentence" I read the word "pardon" – date: 16.11.2009". This word does not appear under the record of the other convictions. I do not understand what it means and am aware that a great deal could have got lost in translation but I do wonder if the conviction relied on in April 2004 ought to be relied on at all.

29. Notwithstanding the above concerns I cannot agree with the First-tier Tribunal Judge that the claimant has proved that he has five years' lawful residence in the United Kingdom exercising treaty rights. Certainly he has been in the United Kingdom exercising treaty rights by working for about three years. Clearly he has strong links with the United Kingdom. At the date of decision he had a family, a home and a car there. It is also clear that he has been engaged in some kind of economic activity by trading on eBay. I cannot agree that this supports the conclusion that for a period of five years he has been continuously resident in the United Kingdom and exercising treaty rights. I do not accept without more that petty trading on eBay is sufficient and there really is no evidence of anything else. He did not argue, for example, that he was energetically looking for work. Neither is it clear that the claimant' resided continuously in the United Kingdom. With respect to the First-tier Tribunal Judge I find that he erred in concluding that the claimant had established five years' continuous residence.

30. This has no impact whatsoever on his finding that the appellant's conduct does not represent "a genuine and sufficiently serious threat affecting the fundamental interests of society".

31. The First-tier Tribunal Judge may have mudded the water slightly at paragraph 21 where he said:

> "It might have been arguable that his removal, as a past defaulter from requirements relating to the sex offenders register, would have been justified, had he not accrued a right of permanent residence in this country."

32. The difficulty is that although it *might* have been arguable it was not argued. It has never been the Secretary of State's case that the claimant should be deported because of his failure to co-operate with the requirements relating to the sex offenders' register. Knowing nothing about the circumstances of the breach other than the fact that they occurred I have to say that I find the omission extraordinary but it may be that it only seems extraordinary because I do not know the circumstances. The claimant has not filled in the gap but there is no reason why he should have filled in the gap. He had no reason to think it was an issue as the Secretary of State had not relied upon that conviction.

33. This hypothetical observation in paragraph 21 does not, in my judgment, in any way cloud the finding at paragraph 19 that the claimant's conduct did not represent a genuine and sufficiently serious threat affecting the fundament interests of society.

34. Further the finding was not challenged in the Secretary of State's grounds of appeal to the Upper Tribunal.

35. In fact I agree with the First-tier Tribunal's finding but even if I disagreed with it completely or regarded it as perverse or bizarre there would be little I could do about it because it had not been challenged to the grounds.

36. At ground 14 the Secretary of State contends, "the legal errors identified above are of central materiality to the appeal". This might be read with paragraph 13 which is the quotation from paragraph 21 of the Decision to indicate some dissatisfaction with the finding about the nature of the threat to society. For the reasons given above it does not. The First-tier Tribunal was simply acknowledging that a point might have been argued.

37. Mr Clarke did not apply to amend the grounds. I think it extremely unlikely that I would have given permission given the claimant's absence from the United Kingdom and that he is not represented. It would have represented a major change at this late stage and would probably have been unfair to the absent and unrepresented litigant.

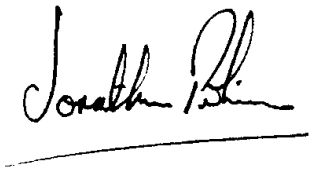
38. It follows that any error made by the First-tier Tribunal in its assessment of the degree of protection to which the claimant is entitled is completely irrelevant as the Secretary of State's claim fails at the first hurdle. Even on the lowest level of protection on the judge's finding, which is unchallenged, the claimant cannot be removed.

39. I wish to make it plain that I identify wholly with Judge the First-tier Tribunal's finding on this point. I do not see how a conviction for an offence of rape in 1997 can support a conclusion that a person is a danger to society now in 2015 without more. The Secretary of State relied on more. She relied on two convictions for dishonesty the most recent one being in 2004. That just will not do. If there are better reasons for the decision they were not relied upon.

40. However I should add that, as the First-tier Tribunal Judge found and as the Secretary of State declined to challenge, the Decision did not take account of the claimant's conviction in 2011 for failing to report. If that conviction is thought to be important then the Secretary of State might want to make a further decision to deport the claimant. I see nothing about this decision or the decision of the First-tier Tribunal that would, of itself, prevent a further decision on grounds not relied upon in the decision that is the subject of this appeal.

41. It follows therefore that I dismiss the Secretary of State's appeal against the decision of the First-tier Tribunal. The First-tier Tribunal's decision stands.

Signed



Jonathan Perkins
Judge of the Upper Tribunal

Dated 3 December 2015