IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50947/2014

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice	**Decision & Reasons Promulgated**
On 10 August 2015	**On 24 August 2015**
Delivered orally	

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

ES
(ANONYMITY DIRECTION PRESERVED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C J (the Appellant's partner)
For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant, a citizen of France, born on 22 June 1984, against the decision of First-tier Tribunal Judge Colvin who, sitting at Hendon Magistrates' Court on 9 April 2015 and in a determination subsequently promulgated on 7 May 2015, dismissed the appeal of the Appellant against the decision of the Respondent dated 11 December 2014 to make a deportation order against him on the grounds of public policy/public security in accordance with Regulation 19(3)(b) and Regulation

21 of the Immigration (European Economic Area) Regulations 2006 and by virtue of Section 5(1) of the Immigration Act 1971.

2. The immigration history of the Appellant as succinctly summarised at paragraph 2 of the First-tier Tribunal Judge's determination is that:

> "He came to the UK in 2002 to join his mother and sisters. He first came to the attention of the authorities on 9 April 2005 for an offence of theft and possessing an offensive weapon for which he was subsequently convicted and sentenced to a community order and unpaid work requirement of 100 hours. Between 29 June 2006 and 23 August 2013 the appellant incurred 13 convictions for 25 offences. On 13 January 2014 at Lewes Crown Court the appellant was convicted of possessing with intent to supply a controlled drug Class A (heroin) and driving offences. On 16 May 2014 he was sentenced to a total of 3 years imprisonment and disqualified from driving for 6 months. He was served with the Deportation Order on 11 December 2014 and he lodged this appeal on 23 December 2014."

3. Under the heading "Assessment of Harm" the First-tier Tribunal Judge took account of the evidence that led him to conclude that the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and in so doing he took account of the OASys Report dated 15 December 2014 that stated that the Appellant's risk of re-offending was medium and the risk of serious harm to the public was low.

4. The Judge then proceeded to note and summarise in bullet points the following remarks elicited from that report:

> "• The appellant's response to probation supervision has not been successful in the past. He repeatedly breached his previous orders.
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> • There is an established pattern of abusive behaviour against intimate partners.
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> • The current offence is part of an established pattern of similar offending albeit previous convictions relate to possession of Class B whereas this is more serious as it relates to Class A.
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> • In custody the appellant had completed L2 English and L1 Maths. He is engaging with RAPt and wishes to complete the parenting course.
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> • The appellant states that he started using cannabis at the age of 18 and by 21 he was using cocaine. The heroin use was new which he started at the age of 27.
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> • The appellant says that the drugs influenced his mood and led him to be violent and aggressive towards certain friends and his partner and that he is no longer smoking drugs and feels his relationship is now stable.
>
> • The appellant is 'quite motivated' in addressing his offending. The positive factors to be maintained or developed are the appellant's willingness to engage in the Sentence Plan and address his offending behaviour."

The Judge went on to say that he was satisfied "on taking all this evidence into account" that the Appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

5. Under the heading "Rights of residence" at paragraph 16 of his determination the Judge had this to say:

> "16. The appellant is a national of France and therefore an EU citizen. He initially said in evidence that he came to the UK in 2000 to join his mother and sisters but altered this in cross-examination to 2002 after saying that he was aged 17 to 18 when he arrived. There is no corroborating evidence as to when the appellant did come to the UK and he was first sentenced to imprisonment in 2009."

6. I pause there, because Ms J who made representations on behalf of the Appellant, her partner, before me, referred to a tenancy agreement of 2001 that she maintained she had tried to produce before the First-tier Tribunal Judge who had said that it was not necessary. This of course is not a challenge that was raised before and it has not been accompanied by any statement of truth but nonetheless, as a matter of justice, I invited her to let me see a copy of the agreement which she showed to me and it was clear, indeed she realistically agreed, that there was nothing in that tenancy agreement that referred to the Appellant or indeed suggested or provided any form of evidence that he had been in this country in 2001. Further, I noted from the determination of the Judge and from his handwritten Record of Proceedings that in oral evidence, the Appellant made no suggestion that he had come here earlier than 2002 and in fact unequivocally stated that that was the year in which he came to the United Kingdom.

7. The Judge at paragraph 16 of his determination continued as follows:

> "However, even if it is accepted that he came in 2002 and therefore has 5 years continuous residence before 2009, **he has also to show that he was exercising Treaty rights during this period in order to come within Regulation 15.** The only evidence of the appellant working is a letter from employers, Mitchells & Butlers, confirming that he worked from August 2011 to March 2013 and a PAYE coding notice for 2011. There are no further tax documents such as P60s for this 5 year period 2002 and the appellant himself was somewhat vague as to his 'part-time jobs'. On the basis therefore of the evidence before me I am satisfied that the appellant has not shown that he has gained permanent residence under Regulations 15 and 21. It means that the lower test is applicable to the deportation: namely, that it is justified on grounds of public policy, public security or public health." (Emphasis added)

8. There can be no doubt upon my reading the determination, that the Judge most carefully considered in terms of Article 8 and in some detail, the Appellant's family life relationship with his children and partner in terms not least of the proportionality of his removal to France. This was set out with comprehensive reasons over paragraphs 24 to 33 of his decision. I do not propose to recite in full all of his reasoning but it is right to say, as drawn to my attention by Ms Fijiwala, that the Judge was clear that he accepted that the likelihood was that the Appellant did have a genuine and subsisting relationship with both children. This was of course a point also emphasised to me by Ms J in her representations.

9. The Judge then considered whether it would be unduly harsh on the children to be required to live in France if the Appellant was deported pointing out that in that assessment, that there were different considerations for each of the children. Most

importantly, he noted that the eldest child had her biological father in the UK with whom she continued a relationship and that she was well-established in her primary school at the age of 9. He went on to say that he did not therefore consider that it would be in her best interests and/or would be unduly harsh, to expect the eldest child to have to move to France and indeed, the Judge noted that according to Ms J in her evidence, the child's biological father would be unlikely to give permission. The Judge went on to say that as the best interests of both children were to remain living with their mother, this necessarily meant in practical terms that both children should remain in the UK.

10. The Judge continued at paragraph 28 of his determination that "It then had to be asked whether the effect of the Appellant's deportation would be unduly harsh on the children" and he recognised, as he put it, that this was "a more difficult issue to assess due to the lack of information about the children before me". The only evidence was that the eldest child had a relationship with her biological father and the younger daughter who was the child of the Appellant, was still very young at 2½ years. He recorded that Ms J had stated that the eldest child was not doing so well at school but there was no confirmation of this from the school. The Judge continued:

> "On this evidence alone, it is not in my view possible to say that it would be unduly harsh on the children, especially as the appellant will be deported to France which is relatively easy to visit. It is also said that the appellant's mother does travel to London and it may well be that she would be willing to assist in accompanying the children for stays with the appellant in France."

11. The Judge then turned to the relationship between the Appellant and Ms J who is a British citizen. He noted that they lived together for two years until March 2013 when the Appellant was asked to leave the family home due to his lifestyle of taking drugs. It seemed that the relationship between the appellant and Ms J did not continue after this and since November 2013 he had been detained. The Judge however recorded that Ms J in her evidence confirmed that she visited him in prison regularly and now wished for the relationship to continue, because she loved him and needed his support with the children.

12. The Judge noted that the Respondent in her deportation letter stated that the couple might have a genuine and subsisting relationship on account of the prison visits and he then referred to a letter from Macmillan Welfare Benefits Advice Service of May 2014 referring to Ms J as a lone parent. Again it is clear on a reading of the Judge's reasoning, that he found these matters to pose a difficult assessment for him, particularly in light of the fact that the Appellant was considered to be at medium risk of re-offending and therefore his "lifestyle" problems that caused the breakdown of his relationship previously, had yet to be tested but, on the balance of probabilities, he took the view that it had not been shown this was a "genuine and subsisting relationship at the present time - that is a relationship which goes beyond prison visiting".

13. However, for the sake of completeness, the Judge went on to say if he was wrong in reaching that view, it was necessary to consider the same test of undue harshness in

relation to Ms J. He had already found that in practical terms due to the circumstances of the eldest child, that Ms J did not have a choice about living in France. He continued:

> "So the real issue is whether it would be unduly harsh on her if the appellant is deported. This raises the issue of her health and the treatment/monitoring that she is still receiving at the Royal Marsden Hospital."

The Judge then went on to deal with the medical evidence in relation to Ms J's medical condition.

14. At paragraph 31 the Judge continued that: "This was then the key issue: would it be unduly harsh on Ms J to be required to manage the two children in these circumstances without the Appellant?" The evidence as to whether she had support from her own family was unclear. The Judge recorded that in oral evidence Ms J stated that she got no support from her mother and sister living in Aldershot but there was no corroboration of this and the letter from the Macmillan Welfare Benefits Advice Service of May 2014 referred to a friend assisting and that a house swap had been arranged for her sister to move in to assist with the children's care.

15. After further careful consideration the Judge at paragraph 32 said:

> "After careful deliberation I have reached the view that it would not be unduly harsh. Whilst I do not underestimate the very difficult personal circumstances faced by Ms J, it is the lack of evidence to show either that she is not assisted and/or is not coping with the children that in the end has led me to reach this view. However, I am also very aware that Ms J was put in the position of presenting this case herself as the appellant was not granted legal aid for a representative, a matter that is to be regretted in light of the circumstances of the case."

16. I again pause, because yet again before me, Ms J presented her partner's case with great eloquence and the Tribunal is grateful to her for taking the trouble to do so. At the outset of the hearing before me, I indeed carefully went through the nature of the hearing and my initial task, that she confirmed to me that she had understood, namely as to whether or not the determination of the First-tier Tribunal Judge disclosed an error or errors on a point of law, that may have been material to the outcome of the appeal.

17. Under the heading "Proportionality" at paragraph 33 of his decision, the First-tier Tribunal Judge made specific reference to Regulation 21 and Article 8 pointing out that he had to consider all these matters and make an assessment of proportionality. It would be as well to set out his conclusions:

> "On the one hand I am satisfied that due to the serious nature of the index offence and the medium risk of reoffending that the appellant represents a genuine, present an sufficiently serious threat to come within the EEA Regulations. I have also found that his prospects for rehabilitation are not prejudiced by being deported to France. He lived in France until the age of 18 where he still has family members such as his mother and sister. He has previously been employed as a chef and it is reasonable to expect that he could find similar employment in France. Whilst he is the stepfather and father of two young children I have not found that it would be unduly harsh on them if he is

> deported to France. In relation to Ms J, I have not found on the evidence that she and the appellant are presently in a genuine and subsisting relationship for the reasons given above. Even if it is considered that she is in a genuine and subsisting relationship I have not found on the evidence before me that it would be unduly harsh on her if the appellant is deported. In these circumstances, I am satisfied that the decision to deport the appellant is proportionate."

18. In granting permission to appeal, it was considered by the First-tier Tribunal Judge at paragraph 6 "at least arguable that although the Judge considered aspects of the character and quality of the Appellant's private life there has been insufficient reasoning of the issue of the ten year continuous residence point".

19. Thus the appeal came before me on 10 August 2015 when, as I carefully explained to Ms J, my first task was to decide whether the determination of the First-tier Tribunal Judge contained errors on a point of law that may have materially affected the outcome of the appeal. I proceeded to hear and carefully consider Ms J's submissions and those of Ms Fijiwala for the Respondent and I now give my decision.

Assessment

20. Whilst the grant of permission appears to be limited to what the Judge in granting permission stated at paragraph 6, I have decided for the sake of completeness and in order to place my reasons for finding there has been no error on a point of law in the Judge's determination in its proper context, to deal with the grounds of application as a whole.

21. It is submitted that given that the Presenting Officer conceded that the Appellant had established five years' continuous residence, that the Judge should not have undermined the concession by making a finding that the Appellant did not obtain five years' continuous residence. I have to say that I find that such a challenge is wholly misconceived.

22. Firstly, it is clear that as recorded by the Judge at paragraph 10 of his determination when summarising the Respondent's case and as reflected in the deportation letter, that he recorded that it was not accepted by the Respondent that the Appellant had been resident in the UK in accordance with the 2006 Regulations for a continuous period of five years because he had failed to provide adequate evidence that he had been exercising treaty rights for such a period and in any case he had received a number of custodial sentences which could not be included when calculating the length of residency. So clearly no concession was made by the Respondent, indeed it was to the contrary. It was not a matter of whether the Appellant had spent five continuous years here but whether he had spent that period of time in accordance with the requirements of the 2006 EEA Regulations.

23. Secondly, at paragraph 11 of his determination and in summarising the Presenting Officer's submissions, the Judge recorded that the Presenting Officer relied upon the deportation letter and that as the Appellant's first imprisonment was in 2009 it was

accepted that he had five years' continuous residence. In other words the concession, if that is what it was, amounted to an acceptance that the Appellant had lived in the UK for five years, but the question for the First-tier Tribunal Judge, was whether the Appellant had enjoyed five years' continuous residence in the UK in accordance with the Regulations, a point also and clearly made in the Respondent's decision letter, and the Judge found that it had not.

24. In that regard, and contrary to the assertion in the grounds, the Judge never accepted that the Appellant had arrived in this country from France in 2002. Indeed at paragraph 16 of his determination the Judge recorded that the Appellant had initially stated in evidence that he came to the UK in 2000 to join his mother and sisters

> "... but altered this in cross-examination to 2002 after saying he was aged 17 to 18 when he arrived. There is no corroborating evidence as to when the Appellant did come to the UK and he was first sentenced to imprisonment in 2009".

The Judge continued:

> "Even if it was accepted that the appellant came here in 2002 and therefore had five years' continuous residence before 2009 he still had to show that he was exercising Treaty rights during this period in order to come within Regulation 15. The only evidence of the appellant working is a letter from his employers confirming that he worked from August 2002 to March 2013 and a PAYE coding notice for 2011. There are no further tax documents such as P60s for this five year period from 2002 and the appellant himself was somewhat vague as to his 'part-time jobs'.
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> "**On the basis therefore of the evidence before me** I am satisfied that the appellant has not shown that he has gained permanent residence under Regulations 15 and 21. It means that the lower test is applicable to the deportation: namely, that it is justified on grounds of public policy, public security or public health." (Emphasis added)

25. The grounds further contend that the Judge failed to consider as a real possibility, that the Appellant had been in the UK for a continuous period of ten years prior to the date of decision meaning the highest threshold would be applied. Indeed in that regard Ms Fijiwala had referred me to relevant case law including that of the Second Chamber in a preliminary ruling in MG Case C-400/12 16 January 2014, that in summary pointed out, that if the person failed to meet the continuous residence period of five years, then of course, it must inevitably have an adverse impact on whether or not he has completed ten years such residence.

26. Firstly, such a contention falls away because it is predicated on the mistaken premise that the Judge had accepted that the Appellant came to the UK in 2002 (see above).

27. Secondly, the provisions of Regulation 21(4) (a) lay down that it first has to be established that the first five years amounted to continuous residence in accordance with the Regulations. If that is established then to move up to the next threshold level the Appellant has to show ten years' continuous residence. However, in this case the Judge had already made a sustainable finding that the Appellant had not in accordance with the Regulations. It follows that in the light of that finding, it did not matter whether the Appellant could establish that he had been present in the United

Kingdom for ten years. Thus contrary to the assertion in the grounds, it was not incumbent upon the Judge to consider this possibility as in the light of his earlier finding this could not be, as described in the grounds, "a crucial aspect" of the Appellant's case.

28. The grounds continued: there was a range of different ways in which the Appellant might have been exercising treaty rights from 2002 onwards and that it was incumbent upon the Judge to make "findings of fact in relation to what periods of time from 2002 onwards the Appellant was exercising treaty rights". Such a challenge is again wholly misconceived.

29. Firstly, the grounds acknowledge that "there was a paucity of documentation before the Tribunal relating to the exercising of treaty rights". Further, that the Appellant had no legal representative would hardly have negated the fact that it was incumbent on the Appellant, upon whom the burden of proof lay, and certainly not the Judge, to establish that he was exercising treaty rights in the period of five years that he claimed to have been continuously residing in the United Kingdom.

30. The grounds in support of the misconceived contention that the burden somehow lay on the Judge, have continued to rely upon the mistaken understanding that the Judge had found that the Appellant had left France in 2002. He did not so find. In fact the Judge had simply in the alternative and on an "even if" basis, considered the Appellant's position in terms of the 2006 Regulations.

31. The grounds contend that the Presenting Officer had "conceded that the Appellant had five years' continuous residence" but as I have already made clear that is very different from his having conceded that the Appellant was exercising treaty rights during that period in accordance with the Regulations and the Presenting Officer made no such concession.

32. Finally, it is said the Appellant made reference to "part-time jobs" and that the Judge should have made findings as to the periods of employment; how long they lasted; whether the Appellant's evidence was credible in relation to those periods of employment and whether, as a consequence of the claimed part-time jobs, he was exercising treaty rights. Such a contention fails to appreciate that the Judge was entitled to look at all the evidence put before him and make a clear finding of fact on that evidence and that is precisely what the Judge did in concluding at paragraph 16 and on the basis of the evidence before him, that he was satisfied that the Appellant had not shown that he had gained permanent residence under Regulations 15 and 21. To thus contend as the grounds so do, that the Judge had to first undertake some further investigation of his own, is in such circumstances wholly misconceived. Finally, in that regard, it is notable that even now, the Appellant has not offered any or any cogent evidence that he was exercising treaty rights throughout the five year period.

33. As to the challenge to the Judge's Article 8 assessment, the First-tier Tribunal Judge was clear at paragraph 33 of his determination, that in considering the

proportionality of the Appellant's removal to his home country of France, he was satisfied "that due to the serious nature of the index offence and the medium risk of re-offending the Appellant represented a genuine, present and sufficiently serious threat to come within the EEA Regulations." The Judge also found that the Appellant's prospects for rehabilitation were not prejudiced by being deported to France where he had lived, on his evidence, until the age of 18 and where he still had family members including his mother and sister and where he had previously been employed as a chef and it was reasonable to expect him to find similar employment in France.

34. The Judge had clearly considered the best interests of the Appellant's child and stepchild, indeed making it clear at paragraph 24 of his determination, that it was important to address their best interests first. He noted that both children were British citizens and upon a careful consideration of the evidence, the Judge accepted that the likelihood was that the Appellant did have a genuine and subsisting relationship with them.

35. The First-tier Tribunal Judge went on to properly observe in a detailed and well-reasoned determination that I consider was prepared with evident care, that there were different considerations for each of the children because of the eldest child's continuing relationship with her biological father in the United Kingdom and vice versa as well as the fact that she was established and settled in her school. It was therefore not in her best interests, indeed it would be unduly harsh to expect her to move to France and the evidence was that her biological father was not understandably likely to give permission in any event. The best interests of both children were found to be to remain living with their mother and this "necessarily meant in practical terms that both children remain in the UK with their mother".

36. The Judge went on to conclude on the evidence before him that it would not be unduly harsh for the children to be separated from the Appellant, especially as the Appellant would be deported to France. That was relatively easy to visit and it might be that on occasions their mother would be able to assist in accompanying the children for stays with the Appellant in France.

37. I do not understand the First-tier Judge to have been minimising the impact of the removal of the Appellant on the children. The Judge was merely observing that removal need not necessarily lead to a total and permanent rupture. The ultimate question was whether the separation of the children from the Appellant resulting from their mother's decision for the reasons identified such as her health and in particular the circumstances of her eldest daughter not to accompany the Appellant to France, be justified in the present circumstances in the interests of public policy and public order. The First-tier Tribunal Judge concluded that it was. It was a decision to which on the evidence before him, he was entitled to come.

38. In conclusion, I find this is not a case where the First-tier Tribunal Judge's reasoning was such that the Tribunal were unable to understand the thought processes he employed in reaching his decision – see R (Iran) [2005] EWCA Civ 982. I find that the

Judge properly identified and recorded the matters that he considered to be critical to his decision on the material issues raised before him in this appeal.

Notice of Decision

39. The making of the previous decision involved the making of no error on a point of law such as to be material to the outcome and I therefore do not set aside the decision.

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

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 his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction can lead to contempt of court proceedings.

Signed Date: 18 August 2015

Upper Tribunal Judge Goldstein