Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51099/2014

THE IMMIGRATION ACTS

Heard at Field House
On 25th November 2015

Determination Promulgated
On 9th December 2015

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL G A BLACK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Mr Vladimir Gaxha

Respondent

Representation:
For the Appellant: Mr D. Clerke (Home Office Presenting Officer)
For the Respondent: Ms R. Akther (Counsel instructed by Metrolaw solicitors)

DETERMINATION AND REASONS

1. This matter comes before me for consideration as to whether or not there is a material error of law in the decision promulgated by the First-tier Tribunal (Judge Mayall) on 27th April 2015 in which the Tribunal allowed the appeal on immigration grounds having decided that deportation was not justified on "imperative grounds of public security".

2. For convenience I shall refer to the parties following the First-tier proceedings, although the appellant in this matter is the Secretary of State.

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Background

3. The appellant is a citizen of Albania who was granted a permanent right of residence under the EEA Regulations, Regulation 15, issued on 14.12.2011 valid until 12.12.2021. On 7th October 2011 the appellant was convicted of harassment and given a community order with costs. On 25th June 2013 at Lewes Crown Court he was convicted and sentenced to 4 years imprisonment for two counts of conspiracy to supply and possession with intent to supply a class A drugs namely cocaine [3 & 4].

4. The Respondent made a decision to remove the appellant in a letter dated 15.12.2014 relying on the grounds of public policy in accordance with Regulation 19(3)(b) and Regulation 21 of the Immigration EEA Regulations 2006 ("EEA regs."). The appellant appealed under section 84 Nationality, Immigration and Asylum Act 2002 (as amended) which allows the decision to be treated as an immigration decision by virtue of section regulation 26(7) EEA Regs. This is not a deportation decision as such for the purposes of the Immigration Act 2014. The respondent certified under the new regulation 24AA that the appellant would not face a real risk of serious irreversible harm if removed before his appeal was heard. The appellant was not present at the First-tier hearing nor at the hearing before me and was not granted temporary admission despite having permanent residence.

First-tier Tribunal decision

5. The Tribunal considered the EEA regulations and in applying Regulation 21 found that the appellant had lived in the UK for a continuous period of 10 years in accordance with the EEA regulations and that the Secretary of State could not justify his deportation on the imperative grounds of public security (Regulation 21(4) EEA regs).

Grounds for permission

6. The respondent contends that the Tribunal erred by applying the imperative grounds test which was not applicable as the appellant was not an EEA national. There was no evidence that the EEA Regulations were engaged prior to 2007.

Permission to appeal

7. Permission was granted on renewal by Upper Tribunal Judge Grubb who found that the Tribunal erred in law by applying the imperative public security test under regulation 21(4) EEA regs which only applied to EEA nationals. As a person with a permanent right of residence the applicable test was "serious grounds".

Submisssions

8. Mr Clerke relied on the grounds of the application and further submitted that in the event of an error of law being found the Upper Tribunal was able to remake the decision by applying the correct rules to the findings made by the Tribunal as to risk and/or Article 8 ECHR in the event of the seriousness test being met. It was conceded that the appellant established a family life with his partner who was now pregnant with their baby due in early 2016.

9. Ms Akhter agreed that there was an error in law by the Tribunal. She submitted that the appeal should be remitted to the First-tier for a hearing *de novo* as the appellant was entitled to have his appeal determined with reference to the correct rules and there were significant changes in the circumstances as his partner was pregnant. His partner had visited the appellant in Albania no less that 8 times. The situation had changed as there was now a British citizen child to be considered. Regulation 21(5) required an extensive examination of the relevant issues.

Error of law decision

10. I am entirely satisfied that the Tribunal materially erred in applying the test on imperative grounds under reg 21(4) which applies to EEA nationals only and therefore cannot apply to the appellant who is a citizen of Albania.

11. I set aside the decision.

12. In considering the options for further hearing I decided that the matter could be remade before the Upper Tribunal on the basis of submissions and oral evidence from the appellant's partner Ms C who was at the hearing. There was no real challenge as to the findings made by the First-tier Tribunal as to the seriousness of the offence. The Upper Tribunal was in a position to make an assessment of the evidence by applying the serious grounds test and if applicable Article 8 ECHR.

Remaking the decision

Summary of oral evidence

13. I heard evidence from the appellant's partner who I found to be entirely reliable. I find that she is pregnant, her baby is due in early 2016 and the appellant is the father. The appellant is living in Albania in unsettled circumstances staying with friends and relatives where there is space for him. His partner has visited him on at least 8 occasions and she regards their relationship as enduring and significant. She has a strong family life in the UK and has worked hard to establish a good career. The appellant's offending had had an enormous impact on her and the appellant while he was on bail, in prison and since he was returned to Albania. She firmly believed that he would not re-offend. In cross examination Ms C confirmed that the pregnancy was planned and the baby conceived after the

appellant's appeal was allowed and therefore in circumstance where the couple believed the appellant would not be deported. Once the baby was born she would not be able to travel to Albania and it would be difficult for her and the baby to live there because of the language barrier.

Submissions

14. Mr Clerke submitted that the offence was serious, a lengthy term of imprisonment was imposed and the risk of re-offending established that the criteria under regulation 21(5) of a present and serious risk were met. The Tribunal found some ambiguity in the appellant's response to his conviction to the extent that he appeared not to have accepted his guilt. He relied on **Badewa**. The Tribunal was entitled to find the appellant at a medium risk of re offending. He relied on public security and public policy.

15. As to Article 8 family life the appellant's partner could live in Albania together with their baby. It would not be unduly harsh for the family to settle in Albania. The Tribunal would have to consider the public interest factors in s.117C of the 2002 Act.

16. Ms Akhter submitted that the test of serious grounds had not been met in particular having regard to reg 21(5) (3). The OASys assessment found that the appellant was at low risk to the public of reoffending, and a medium risk to a named person. The appellant has a significant residence in the UK of 13 years where he has worked and established a strong family life. He came to the UK as a minor.

17. The appellant was not a habitual offender and had served his time in prison. There was no offending between 2011 and 2013 and he was removed in December 2014. The one offence albeit serious could not meet the test. With reference to the provisions there was no proportionality issue as the appellant served his prison sentence, his partner has given credible evidence as to the impact and level of remorse, the OASys was reliable evidence as to risk and there was no evidence of any on going risk. The test was at a high level because of permanent residence. He did not show that he was a present, genuine, serious threat to public security or on public policy grounds under 21(4)(c).

18. Ms Akhter submitted that the circumstances changed now that the appellant was going to be a father. He had family settled in the UK. It would be unduly harsh for the family life to be established in Albania. His deportation would result in a 10 years ban from the UK which in the present circumstances was disproportionate. Ms Akhter relied on the same submissions in respect of Article 8.

Discussion and decision

19. In remaking the decision I observe that the appellant did not give oral evidence at the First-tier hearing since his removal to Albania was certified by the Secretary of

State. I do not have the certification decision but I am assuming that the Respondent took the view that because of the length of sentence (4 years) there were no operational reasons in existence to conclude that the appellant would not be suitable for certification, notwithstanding his permanent residence in the UK. In any event the certification is not a matter for the Tribunal to adjudicate. I have the benefit of his witness statement and the oral evidence from his partner. It is accepted by the Secretary of State that the appellant was granted permanent residence and that he was exercising Treaty rights as a family member and since his divorce he had been self employed. I have considered the relevant legal provisions under Regulation 21(3) & (5) EEA regs and decided that the appellant is entitled to the protection at the second level because it has not been shown that he "represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." I have had regard to the relevant criteria in the Regulations at 21(6) and conclude that he does not present such a threat on grounds of public security or on the grounds of public policy. Consequently there is no necessity to consider proportionality but in any event I conclude that the decision is not proportionate. My reasons are as follows.

20. I find that the appellant was convicted of two counts of very serious offences which involved conspiracy to and intent to supply a class A drugs with a street value of £920.00 and the appellant was sentenced to 4 years imprisonment. On that basis the initial threshold for considering deportation is met on policy grounds because of the length of the sentence and that serious harm has been caused to the public by the supply of drugs. However, having regard to the length of residence, the grant of permanent residence and my finding that the appellant has established a significant degree of integration in the UK, I conclude that his circumstances meet the rationale for protection from removal/deportation.

21. In considering the matter I have taken into account the recent Upper Tribunal decision of **MC (Essa principles recast) Portugal [2015] 00520 UKUT (IAC)** and **Macnikaoski [2014] UKUT 00567 (IAC)** and the Court of Appeal in **SSHD v Dumliaukas & ors [2015] EWCA Civ 145**. Where as in this instance the appellant has permanent residence and a high degree of integration is established, weight can be attached to prospects of rehabilitation and comparisons can be made with those prospect in the country of origin, namely Albania. There must also be a reasonable prospect of the person ceasing to commit crime not merely a possibility. The Tribunal is to consider relevant factors including family ties, accommodation, education, training and employment, and any active membership of the community.

22. I find that the appellant has convictions for two offences. The first was for harassment of his former partner and in respect of which he has been assessed as a medium risk of re offending (see OASys report). Having regard to the fact that he is now in a new and long term relationship I am satisfied that the risk to the named individual of any further offences will have decreased. I have taken into account that the commission of the second offence put the appellant in breach of a 12 month community order.

23. It is clear that there has been some increase in offending by the appellant, however, whilst in no way minimising the first offence, I am satisfied that the Appellant cannot be shown to have escalated his level of criminality significantly on the grounds that the first offence is of a very different nature. I am satisfied that the index offence stands alone as a serious offence and the appellant is not a persistent offender. It is a very serious offence as was reflected in the remarks made and sentence imposed by the sentencing judge. There were no direct victims however. The offence was committed in December 2011 and he will remain on licence until June 2017.

24. In considering risk I rely on the OASys report as the relevant evidence and which places the appellant at a low level of risk of reoffending and low risk of serious harm. Even though the First-tier Judge found a medium level of risk, that does not alter my decision or considerations. There is no evidence of the appellant being involved in prolific offending and has no other convictions for possession or supply of drugs or serious violence. He has not committed further offences and there is no evidence of any personal difficulties such as drug addiction which could influence his risk of re offending, although he was described as a "heavy user" by the sentencing Judge. The motive for the offences was personal financial gain. In light of those risk factors, length of residence, lack of past or continuing offending in drugs, and taken with the high level of family support and substantial integration in the UK, I am satisfied that there is a reasonable prospect of the appellant ceasing to commit further crimes in the UK. He has family support, accommodation with his partner and prospects of employment. His partner is in an established career of 13 years which she intends to progress in future. The prospects of rehabilitation in the UK are greater than in Albania where the appellant has not lived for a significant period of time. I accept also that he came to the UK when he was a minor and has spent his formative years in the UK. I accept the evidence from Ms C that his life there is unsettled and he has no accommodation or support.

25. I find that the appellant now aged 30 years, has worked in the UK for a number of years in regular employment in his own company and as a bricklayer. There was no evidence to show that the job was open to him, but I am satisfied that he would be able to find similar employment in the UK. He has close family members in the UK including his brother and other family members. He is involved in a significant and long term relationship with his partner, who herself has strong family support, and he is soon to become a father. Whilst it was reasonable for the respondent to raise concerns as to the decision to have a baby at this time when the circumstances could be described as "precarious", I place less weight on that factor having regard to the reliable evidence of Ms C. She stated that they wanted to have a child together and that because the appellant had won his appeal it was reasonable for them to conclude that he would not be deported.

26. The evidence in the OASys report indicates that the appellant gained the status of an enhanced prisoner whilst in prison and did not present any behavioural problems. He engaged with the educational department and the BICS course and

worked in the prison garden. He was motivated to complete suitable courses but no suitable courses were found. It is stated that he accepted responsibility for the offending and that he recognised the wider impact on the community of his offending. I place weight on these conclusions and the indication that the appellant was assessed as "very capable" in terms of his capacity to change and reduce offending, which is relevant to the rehabilitation issue.

27. As I have allowed the appeal under the immigration rules, it is not necessary for me to consider Article 8 ECHR.

Decision

28. Accordingly I allow the appeal on Immigration grounds under the EEA Regulation 21.

Signed Date 30.11.2015

GA Black
Deputy Judge of the Upper Tribunal

No anonymity order made

To the respondent

No fee award is made.

Signed Date 30.11.2015

GA Black
Deputy Judge of the Upper Tribunal