Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00204/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
On 2 November 2015	**On 19 January 2016**

Before

UPPER TRIBUNAL JUDGES DEANS AND MACLEMAN

Between

MR ALEKSANDRS KOLOSOVS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Katani, Katani & Co, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DECISION AND REASONS

1) This is an appeal against an decision by Judge of the First-tier Tribunal Watters dismissing an appeal against a decision by the respondent to deport the appellant from the UK in terms of Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2) The appellant was born on 7 August 1984 and is a national of Latvia. On 4 October 2014 he was convicted of assaulting an officer in the execution of

his or her duty and assault to injury. The appellant was sentenced to imprisonment for one year and 8 months and given a supervision order for 10 months. The weapons used in the offence were confiscated, namely multiple replica shell casings, a BB revolver and ammunition.

3) In his evidence before the First-tier Tribunal the appellant claimed to have been in the UK since 2004. Since 2006 he has been in a relationship with his partner Mr Cliff Anderson. The judge heard evidence from the appellant and from Mr Anderson. The judge was not satisfied that the appellant had been residing in the UK since 2004 but accepted that he had lived in the UK from 2006. As the judge was not satisfied that the appellant had been in the UK for a continuous period of at least 10 years he was not entitled to the highest level of protection in terms of regulation 21(4). The judge was satisfied that the appellant was entitled to an enhanced level of protection as somebody who had had continuous residence for more than 5 years, and therefore his removal could be justified only on serious grounds of public policy or public security, in terms of regulation 21(3).

4) The judge noted that in October 2013 the appellant had been convicted of behaving in a threatening or abusive manner likely to cause a reasonable person to suffer fear or alarm. In respect of this the appellant was sentenced to a Community Payback Order of 6 months unpaid work. Weapons used in this offence were confiscated namely a black airsoft shotgun, an airsoft shotgun, ammunition, CO2 canisters and a BB speed loader with ammunition. When the appellant was convicted for the second offence, in October 2014, the judge recognised that the appellant had only one previous conviction but pointed out that this previous conviction itself involved the brandishing of a BB gun. This was described by the sentencing judge as a serious matter and he was troubled by the appellant's attitude to it. In his evidence the appellant had described the BB gun as a "cool adult toy". The sentencing judge said this was not a toy of any description but a powerful and dangerous weapon. When used irresponsibly it was a potentially lethal weapon. The appellant appeared to have taken careful aim with it and shot his victim in the head, not once but twice. The assault was described as calculated, cowardly and vicious. The pellets had to be surgically removed from the victim's scalp.

5) The Judge of the First-tier Tribunal was also troubled by the appellant's attitude. At the hearing before the First-tier Tribunal the appellant maintained that he was not guilty of any crime. The appellant did not recognise the seriousness of his offences, the effect on the victim, or the risk of very serious injury. The Judge of the First-tier Tribunal noted that the previous offence in 2013 had also involved the use of a BB gun, which had been brandished by the appellant. On the evidence the judge was satisfied that the appellant had a propensity to re-offend. There was no evidence of the appellant doing anything in prison by way of rehabilitation. The evidence showed no likelihood of rehabilitation in this country.

6) The Judge of the First-tier Tribunal went on to consider the nature of the appellant's offending conduct, which on both occasions involved BB guns. It was clear that the public was vulnerable to the effects of the appellant's re-offending. The judge was satisfied that the appellant's conduct represented a genuine, present and sufficiently serious threat to the public to justify deportation.

7) The judge went on to consider the appellant's age, state of health, family and economic situation, his length of residence in the UK, his social and cultural integration into the UK and the extend of his links with his country of origin. The judge found that the appellant had spent most of his life in Latvia. He was healthy and had been in the UK only since 2006. He still had considerable links with his country of origin. He had returned to Latvia on several occasions and his parents and sisters still lived there.

8) Having regard to proportionality, the judge found that the balance fell in favour of deportation. The judge took account of the appellant's relationship with his partner, who not only gave evidence at the appeal hearing but had visited the appellant in prison. The respondent had not accepted that the appellant and his partner were in a subsisting relationship. Nevertheless the judge accepted the partner's evidence to this effect and found that they had been in a relationship since 2006. Although the appellant's partner was currently working, he was looking to retire early. The judge found that there were few obstacles to the appellant and his partner carrying on their life together in Latvia. In addition there was nothing to suggest the appellant would not be able to find work in Latvia.

9) The Judge of the First-tier Tribunal went on to consider Article 8 of the Human Rights Convention. The judge found that the consequences of deportation would potentially engage Article 8 but this would have a legitimate aim. The appellant had been in the UK since 2006 and has had employment and established a life here. On the other hand, the seriousness of his offences had to be weighed against this. There was little evidence that the appellant had contributed to the community in the UK. The seriousness of the appellant's crimes outweighed any family or private life that he had in the UK.

10) The application for permission to appeal was drafted on the basis that the judge did not properly assess the evidence about when the appellant had arrived in the UK and did not put to the appellant a discrepancy in his CV about any employment prior to 2006. In addition, it was contended that the judge had not properly considered the effect of the appellant's removal upon his partner. Permission was granted on all grounds, but chiefly on whether the Judge of the First-tier Tribunal had properly assessed the evidence of when the appellant first arrived in the UK.

11) A rule 24 notice was lodged on behalf of the respondent contending that the judge had provided a "plethora of reasons for concluding that the appellant has lived in the UK since 2006 and not 2004 or 2005."

Submissions

12) At the commencement of the hearing before us, Mr Katani informed us that new evidence had come to light over the previous weekend and he sought to lodge this. This new evidence was from HMRC and related to the length of time which the appellant had been in the UK. The new evidence provided definitive information that the appellant had been in the UK for over 10 years.

13) It was pointed out to Mr Katani that the first issue for the Tribunal to decide was whether the Judge of the First-tier Tribunal had made an error of law such that his decision should be set aside. If new evidence were to be introduced, an application should have been made under Rule 15A(2). Finally, even if the new evidence were to be admitted and did establish that the appellant had been in the UK since 2004, the appellant would not be entitled to enhanced protection based on 10 years' residence unless he could show that this residence fell to be taken into account in accordance with the decision of the European Court of Justice in MG, Case C-400/12, 16 January 2014, as subsequently considered in the Upper Tribunal at [2014] UKUT 392.

14) Mr Katani persisted that his client was entitled to the enhanced protected provided by 10 years' residence, in terms of regulation 21(4). This should have been recognised by the Home Office. The Judge of the First-tier Tribunal had applied too high a standard of proof. This was a question of "connecting the dots". The judge had referred to a discrepancy between the appellant's CV and a letter dated 1 October 2004 addressed to the appellant stating that his application under the "Accession State Worker Registration Scheme" had been approved by the Home Office. This letter was addressed to the appellant c/o Crosslee PLC in Halifax. In his oral evidence the appellant stated that he had started work at the White Knight tumble dryer factory in Halifax in August 2004 and worked there for 6-12 months. The judge found it very difficult to understand why there was no documentary evidence of this claimed employment. If the appellant had not retained evidence of this employment, then it should not have been difficult for him to contact the company and request a letter to assist his case. Furthermore, the claimed employment was not listed in the appellant's CV.

15) Before us Mr Katani submitted that the appellant had explained this omission in his witness statement.

16) Turning to Article 8, Mr Katani submitted that the Judge of the First-tier Tribunal had not considered the impact of the appellant's removal upon his partner. Such consideration was required in terms of Beoku-Betts [2008] UKHL 39. The couple had been in a relationship for 9 years. The impact on the appellant's partner would be devastating and this was not even considered. The judge had paid only lip service to this relationship, at paragraph 14 of the decision.

17) For the respondent, Mrs O'Brien said she relied on the rule 24 notice. The Judge of the First-tier Tribunal had come to a decision on the evidence before him. Where a person sought to establish a period of residence then contemporaneous documentary evidence was required and it was not sufficient to "connect the dots", as suggested on behalf of the appellant.

18) The judge had before him a registration document from 2004 issued under the Accession State Worker Registration Scheme but there was no evidence from HMRC relating to this period, although such evidence was produced for later years. The respondent had not accepted that the letter under the Accession State Worker Registration Scheme was enough to show continuous residence. The appellant's CV had not addressed the period prior to 2006. The findings made by the judge at paragraph 7 of the decision were open to him and were sustainable.

19) Mrs O'Brien continued that the judge had expressed concern about the appellant's attitude to his offending. This was not a straightforward matter of an unchallenged witness. The judge was expected to make a decision on the evidence in dispute. The decision made by the judge was open to him. The judge was not satisfied that the appellant was entitled to the enhanced protection based on 10 years' residence.

20) In relation to Article 8, Mrs O'Brien submitted that the decision should be informed by the relevant Immigration Rules in respect of non-EEA nationals. The position of the respondent was that even if it was accepted that the appellant was in a relationship with his partner, removal was not disproportionate given the nature of the appellant's offending and the possibility of continuing family life in Latvia. It was difficult to see how the interference with the appellant's private or family life would be disproportionate.

21) Finally, Mrs O'Brien opposed the admission of any new evidence at this stage in the proceedings.

22) In response Mr Katani submitted that the appellant had not been found anything other than credible and what he said about his length of residence should be given weight. In respect of more recent residence it was much easier to connect the dots than it was in respect of the earlier period. It was unreasonable to expect the same level of documentary evidence from 10 years ago. It was normal in a CV for people to refer to their recent jobs rather than jobs from a longer time ago.

23) In relation to Article 8, Mr Katani reiterated that this had not been properly considered and the assessment of proportionality had not taken into account all the evidence.

Discussion

24) The case Mr Katani sought to advance before us was based on the premise that if the appellant was able to show that if he had resided in the UK for a

continuous period of at least 10 years prior to the decision to remove him then he would be entitled to the enhanced protection in regulation 21(4) and a decision to remove him could not be taken except on imperative grounds of public security. The assessment by the judge was made under regulation 21(3) in terms of which a decision to remove a person who has a permanent right of residence them may not be taken except on serious grounds of public policy or public security.

25) Even if we were to assume, however, that the appellant was in the UK continuously from 2004 and exercising Treaty rights, it does not follow that he would be entitled to the enhanced protection arising from 10 years' continuous residence under regulation 21(4). In MG the Court of Justice recognised that the criterion for gaining this enhanced protection was whether the Union citizen had lived in the member state for 10 years preceding the expulsion decision. The 10 year period was calculated by counting back from the date of decision. In determining whether the 10 years' residence was satisfied, all relevant factors had to be taken into account in each individual case, such as periods of absence from the host member state.

26) The Court then went on to consider whether periods of imprisonment could be taken into account in calculating the 10 year period or whether a period of imprisonment would be capable of interrupting the continuity of the period of residence. The Court pointed out that protection against expulsion was based on the degree of integration of the person concerned in the host member state. Accordingly the greater degree of integration of the Union citizen in the host member state, the greater degree of protection against expulsion. Where a national court had imposed a custodial sentence this was an indication that the person concerned had not respected the values of the society of the host member state, as reflected in its criminal law, and that, in consequence, taking into consideration periods of imprisonment for the purpose of the acquisition of a right of permanent residence would be contrary to the aim of the European Directive in question. In principle, a period of imprisonment would interrupt the continuity of a period of residence for the purpose of calculating the enhanced protection based on 10 years' residence. However, it was still necessary to consider the extent to which the non-continuous nature of the period of residence during the 10 years preceding the expulsion decision prevented the person from enjoying enhanced protection. An overall assessment had to be made of the person's situation at the time when the question of expulsion arose. In principle, periods of imprisonment, together with other factors going to make up the entirety of relevant considerations in each individual case, might be taken into account in determining whether the integrating links with the host member state had been broken and for determining whether enhanced protection would be granted. It was possible to have regard to a period of 10 years' residence prior to the imprisonment as part of the overall assessment required in determining whether the integrating links had been broken.

27) The judgment of the Court of Justice was considered by the Upper Tribunal when the case of MG came back before the Tribunal, reported as [2014] UKUT 00392. The Upper Tribunal stated that the judgment of the Court of Justice "should be understood as meaning that a period of imprisonment during those 10 years does not necessarily prevent a person from qualifying for enhanced protection if that person is sufficiently integrated. However, according to the same judgment, a period of imprisonment must have a negative impact insofar as establishing integration is concerned."

28) We mention these matters at this stage in order to show that even if the appellant had succeeded in showing 10 years' continuous residence in the UK, it did not necessarily follow from this that he would have been entitled to the enhanced protection from expulsion. Similarly, given the nature of his offences, it does not necessarily follow that if the appellant was entitled to the enhanced protection of regulation 21(4) it would not have been found that there were imperative grounds of public security to justify his removal. We would emphasise that a finding that the appellant has lived in the UK for a continuous period of 10 years does not lead automatically to a finding that he is entitled to the highest level of enhanced protection in regulation 21(4). Indeed, even with such enhanced protection his conduct was such that his removal might still have been held to be justified.

29) The first task for the appellant in his appeal to the Upper Tribunal, however, was to show an error of law by the Judge of the First-tier Tribunal. Reference has already been made to the judge's treatment at paragraph 7 of the evidence before him as to how long the appellant had been living in the UK. The judge made specific reference to the Home Office letter of 1 October 2004 informing the appellant that his application had been approved under the "Accession State Worker Registration Scheme". The judge noted a discrepancy between this letter and the CV provided by the appellant, in which his earliest period of employment in the UK was stated as being from February 2005 until July 2005. After July 2005 the appellant was not employed again until February 2006. The judge noted that the appellant had produced no documentary evidence relating to any employment in 2004. The judge questioned why the employment in 2004 was not listed on the appellant's CV. The judge found that the Home Office letter of 1 October 2004 was, by itself, insufficient to show that the appellant had lived in the UK since 2004.

30) We consider that this was a conclusion which the judge was entitled to reach upon the evidence before him and for the reasons which he gave. We do not find any error or law in the judge's finding on this matter.

31) In the application for permission to appeal it is argued that the lack of evidence of the appellant's residence in the UK between 2004 and 2006 did not necessarily mean that the appellant was not in the UK. This may be so, but bearing in mind the burden of proof upon the appellant the absence of evidence will not lead to a finding that the appellant was in the UK and does not affect the judge's conclusion.

32) In the application for permission to appeal it was contended on behalf of the appellant that the discrepancy between his CV and the letter of 1 October 2004 should have been put to the appellant for explanation at the hearing before the First-tier Tribunal. At this hearing the judge not only had the documentary evidence before him but he heard the appellant's oral evidence. In his evidence the appellant maintained that he had been living in the UK since 2004. The judge did not accept the appellant's evidence on this point. The judge was entitled to have regard to the paucity of the documentary evidence relating to the period of alleged residence before 2006, including the lack of evidence from HMRC for this period, as well as the apparent discrepancy between the CV and the Home Office letter of 1 October 2004. When making his findings it was not incumbent upon the judge to have regard to an apparent discrepancy in the documentary evidence only where it had been specifically put to the appellant, even assuming that this particular matter was not.

33) It was argued for the appellant that the judge had applied too high a standard of proof. There is nothing in the judge's decision, however, to support this proposition. The judge was entitled to have regard to omissions in the documentary evidence and to his concerns about the appellant's attitude to the offences of which he was convicted.

34) For the sake of completeness we should add that we are not persuaded that the absence before the First-tier Tribunal of the evidence from HMRC on which the appellant now seeks to rely amounts to an error of law. This point was not argued before us, but in the case of MM (unfairness; E & R) Sudan [2014] UKUT 00105 the Upper Tribunal considered the circumstances in which an error of fact, such as a mistake as the availability of particular evidence, might amount to an error of law. We do not consider, however, that in the circumstances of this appeal any mistake as to the availability of evidence was such as to amount to unfairness sufficient to vitiate the decision of the First-tier Tribunal, and indeed no argument to this effect was made before us.

35) The other area in which it has been suggested that the judge erred in law was in relation to his treatment of the appellant's relationship with his partner. The judge accepted the evidence given by the appellant's partner but found that there were few obstacles to the appellant and his partner carrying on their life together in Latvia.

36) It was argued for the appellant that the judge had not properly considered the impact of the appellant's removal on his partner. It is difficult to see, however, what factors relating to this the judge failed to take into account, according to the evidence presented. The judge accepted that the appellant and his partner are in a subsisting relationship. The appellant's partner gave evidence that he hoped to take early retirement. In his submission before us Mr Katani referred to possible language or cultural difficulties for the appellant's partner in relocating to Latvia and made a comment also about the appellant's partner's age. The judge did not say there were no obstacles to the appellant and his partner continuing family

life in Latvia but, “few obstacles”. This was a conclusion the judge was entitled to reach for the reasons which he gave. Both in assessing proportionality under regulation 21(6) and under Article 8 the judge had proper regard to the appellant’s private and family life and to the effect on the appellant’s partner of the appellant’s removal. The judge decided in relation to regulation 21 that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy and public security such as to justify his deportation. Under Article 8, the interference with the appellant and his partner’s private or family life was outweighed by the public interest.

37) In conclusion, we are not satisfied that the Judge of the First-tier Tribunal made an error of law such that his decision should be set aside. We have not looked at the additional evidence which Mr Katani sought to lodge. It may be that in light of this additional evidence the judge would have accepted that the appellant arrived in the UK in 2004. Nevertheless, the judge was required to make a decision on the basis of the evidence before him. On the evidence that was before him at the date of the hearing he was entitled to reach the conclusions which he did.

38) Furthermore, even if the appellant were able to show 10 years’ continuous residence in the UK, for the reasons set out above it does not follow that he would necessarily be entitled to the enhanced level of protection in regulation 21(4) for those with 10 years’ continuous residence. There are a number of hurdles that the appellant would have to overcome in showing entitlement to such a protection. Although we are not required to make a decision in respect of this, it seems to us that where the appellant has been convicted not once but on two occasions of offences involving BB firearms, this would be an indication that he has not respected the values of the society of the host member state, as reflected in its criminal law, and that any integrating links forged with the host member state had been broken.

Conclusions

39) The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

40) We do not set aside the decision.

Anonymity

41) The First-tier Tribunal did not make an order for anonymity. We have not been asked to make such an order and we see no reason of substance for so doing.

Signed Date

Upper Tribunal Judge Deans