Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01156/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 22 December 2015	**On 2 February 2016**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR MIKULAS GECZI

Respondent

Representation:

For the Appellant: Mr S Staunton, Home Office Presenting Officer
For the Respondent: Mr P Haywood of Counsel

DECISION AND REASONS

1, The respondent (hereafter "the claimant") is a citizen of Slovakia and thus an EEA national aged 37 who came to the UK in 2005. Following the decision of the appellant (hereafter the Secretary of State or SSHD") to deport him dated 4 June 2014 he appealed to the First-tier Tribunal. On 23 December 2015 a panel comprising First-tier Tribunal Judge Chana and Non-Legal Member, Mrs V Street, allowed his appeal. The reason why the SSHD moved to deport the claimant was that since he first came to the adverse attention of the police in

October 2005 he had developed into a persistent offender:. He had chalked up 33 convictions for 68 offences (3 offences against property, 6 fraud and kindred offences, 16 theft and kindred offences, 6 public order offences, 28 offences relating to police/courts. Prisons, 2 drugs offences and 7 miscellaneous offences). On 15 October 2010 he had taken possession of his partner's car keys and without permission and when under the influence of alcohol had stolen her vehicle and proceeded to hit a stationary transit van, a pedestrian on a footpath and a brick wall before walking away from the scene only to be arrested by the police shortly after. For this he was sentenced to 12 months' imprisonment. On 26 January 2011 he had been sent a warning letter from the Home Office stating that should he again come to their adverse attention, consideration would be given to his deportation. He had then re-offended and had most recently done so on 19 October 2013 when he was convicted of breaking an anti-social behaviour order for which he was sentenced on 7 November 2013 to 26 weeks. He had also breached the conditions of his bail several times in 2014. In her reasons for refusal letter the SSHD said she considered him a persistent offender and did not accept he had shown remorse. The letter concluded: "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".

2. The SSHD was successful in obtaining a grant of permission to appeal. Her grounds were essentially that the panel had failed to provide adequate reasons for its finding that the claimant was not a genuine, present and sufficiently serious threat. This failure was said to be demonstrated by (i) its recognition that there were continuing risk factors indicating that he had a propensity to re-offend; and (ii) its failure to deal properly with the evidence relating to his prospects of rehabilitation.

3. Mr Staunton developed these grounds, urging me to find that the panel had attached too much weight to the role of alcoholism in the claimant's offending history.

4. Mr Haywood submitted that, as illustrated by the terms in which Mr Stauntaon sought to develop the grounds (viz. his reference to "too much weight") the SSHD's grounds were essentially a mere disagreement with the panel's findings of fact. If there was an alternative view as to causation of the claimant's offending (other than alcoholism), the SSHD had not stated what it was.

5. I raised three matters with the representatives: first, whether the panel's treatment of the issue of rehabilitation was consistent with the guidance given by the Court of Appeal in Secretary of State for the Home Department v Dumliauskas & Ors [2015] EWCA Civ 145 and by the Upper Tribunal in MC (Essa principles recast) [2015] UKUT 520 (IAC); second whether when considering the claimant's history of offending the panel had had regard to their cumulative effect; and third, whether the panel was entitled to place such reliance on the fact that the claimant had demonstrated a significant improvement in his rehabilitation over a period as short as 3 weeks. Mr Staunton said he considered the panel had failed to address these three

matters correctly. Mr Haywood submitted that in the first place none of these matters had been raised in the grounds and further that in any event the panel's treatment of the rehabilitation issue was consistent with Daumliaskas and MC, it had considered his criminal offending cumulatively and it was entitled to attach significant weight to the latest progress made by the claimant since getting more -involved with Alcoholics Anonymous.

Discussion

6. I am not persuaded that the panel materially erred in law. Whilst its decision can be described as a generous one, it was one that was open to it on the evidence. I can only interfere in the findings of fact of a First-tier Tribunal if they are vitiated by legal error. It may be, in light of what I note in the final paragraph, that the claimant's success in resisting deportation (through success in his appeal) proves short-lived, but it remains that the SSHD's grounds are not made out.

7. First it must be observed that the grounds are limited in scope and do not challenge the panel's primary findings of fact. In this regard it must be borne in mind that the panel saw and heard from the claimant, his partner and two other witnesses. It accepted his evidence as credible, found his partner to be a very credible witness whose evidence was unshaken by robust cross-examination and also found Mr Harding, who is the claimant's mentor at Alcoholics Anonymous, to be "very credible". As a corollary it must also be observed that based on the written and oral evidence it was one of the findings of the panel that the cause of the claimant's offending was his alcoholism: see e.g. [52}. Mr Harding, whose evidence the panel found to be very credible, also confirmed that the [claimant's] offending had been due to his heavy drinking. (I note further that in her refusal decision the SSHD also regarded the claimant's offending as due to his alcoholism.) The panel also found as a fact that (i) although the claimant had a pattern of offending, more recently his offending had "decreased"[71, see also [41]]; (ii) that the issue of whether he would reoffend turned on whether he would continue his addiction to alcohol ([73]; that he had shown remorse [[74]; that he had not drunk since September 2014 and was now taking the AA meetings seriously and "he is committed to give up drinking" [66]); that he in the process of rehabilitation and working towards becoming a reformed individual ([75]); that he is in a stable relationship with his partner who had decided to give him one last chance [65]); that she is a British citizen whose own family includes an elderly and frail mother ([36]); and that he now has a steady job ([74]). As a result of these and other considerations the panel concluded he did not have a propensity to re-offend, notwithstanding the NOMS assessment that he was a medium risk of re-offending [73]).

8. Second, it is clear that the panel correctly addressed itself as to the applicable law and properly based its assessment on the principles set out in leading cases such as Bouchereau [1981] 2 All ER 924; Joined Cases C-482/01 and C-493/01, Orfanopoulos and Oliveri; and Secretary of State for the Home Department v FV (Italy) [2012] EWCA Civ 1199. The panel correctly found that the claimant could not benefit from the higher levels of protection set out in regulation 21 of the Immigration (European Economic Area) Regulations 2006

because his period of residence had been interrupted by periods of imprisonment: see [55]. This principle now has binding effect through the Court of Justice judgment in Onuekwere v Secretary of State for the Home Department, Case C-378/12, It is true that the panel was somewhat ambivalent about whether its decision to allow the appeal was based on its conclusion that the claimant did not represent a genuine, present and sufficiently serious threat to the fundamental interests of society [as stated at [78] or because it considered that his deportation was disproportionate [as stated in [79]. However, leaving aside that its ambivalence regarding this was not a point taken in the SSHD's grounds, it is sufficiently clear that the panel considered the claimant succeeded on both counts and that when considering each they took into account all relevant factors specified in regulation 21 including the claimant's quite appalling history of offending and the fact that he had been given a warning [72]). There is no reason to suppose it ignored the considerable expense his offending had caused the UK justice system, or the harm he had caused others.

9. Third, in finding that the claimant did not have a propensity to re-offend it cannot be said that it failed to take into account relevant matters. In particular, it took into account that the NOMS assessment had assessed him as at a medium risk of re-offending and that the Home Office had warned him in 2011 that if he offended again he would face deportation, yet he had offended again. In this regard I shall address a matter raised by me during the hearing when I posed the question whether the panel could be said to have considered the claimant's history of offending cumulatively as well as individually (at [71] it described his convictions as "relatively minor ones other than the drink-driving offence". I raised this matter on the premise that for the purposes of conducting the assessment required by regulation 21 it would be erroneous for a decision-maker to assess the seriousness of the offending only by reference to each individual offence. Regulation 21 clearly requires a holistic assessment. What it requires is a decision on the conduct of a person in relation to whether that poses a sufficiently serious threat to the requirements of public policy. Albeit the panel made several comments relating to the fact that claimant's offences, taken individually, were relatively minor, save for the 2011 offence involving knocking down a pedestrian, it also had proper regard to the claimant's overall pattern of offending: see e.g. [71] (which stated that the panel took a very dim view of his "repeated offending"; [63] (which stated that his crimes were "prolific"); and ; Indeed its conclusion that he did not have a propensity to re-offend stemmed from its finding that his offences were decreasing and were tapering off in terms of seriousness [[71]).

10. Fourth, even if a different panel may have assessed the prospects of rehabilitation differently, the panel's assessment was reached having taken into account all of the relevant evidence. It clearly attached significant weight to the factors pointing on the one hand to the claimant being most likely to rehabilitate by staying in the UK and on the other hand facing negative influences (all of his family there were alcoholics: see [69]) and lack of support services in Slovakia. In this regard, I have considered whether the panel's approach was consistent with the guidance given in Daumliaskas and MC. One of the principal points decided in these cases is that for a person who is only entitled to the baseline level of protection (and has not acquired permanent

residence) substantial weight cannot be given to prospects of rehabilitation. Although this was not a matter raised in the grounds, the SSHD when drafting her grounds had not had the benefit of the guidance given in these two cases. If the panel's decision was at odds with the Court of Appeal guidance I would have found its decision vitiated by legal error. However, I am satisfied its assessment was not contrary to such guidance. In particular, there is nothing to indicate that the panel attached substantial weight to the claimant's prospects of rehabilitation. It did attach significant weight to it, as can be seen from [68] but no more than that and what weight it did attach was closely tied in with its weighing up of factors going to the issue of proportionality, rather than the issue of re-offending.

11. For the above reasons the First-tier Tribunal did not err in law and its decision to allow the claimant's appeal must stand.

12. I end with the following observation. At the hearing before me the claimant did not attend, nor did his partner. This was in contrast to the position before the First-tier Tribunal when he, his partner and two witnesses attended. Directions sent to the claimant made clear that if the Upper Tribunal decided to set aside the decision of the First tier Tribunal it could go on in the same hearing and re-make the decision. I asked Mr Haywood if he knew why the claimant had not attended- or his wife. He said he had been informed that the claimant was in detention but had no instructions as to the whys or wherefores or as to why his wife was not in attendance. Given that my decision was confined to deciding whether there was an error of law in a First-tier Tribunal decision made in December 2014, I am not entitled to have regard to evidence regarding subsequent developments and it is fair to say that in any event the mere information furnished by Mr Hayward, although of concern, is not sufficient to draw any inferences. At the same time, if it turns out that the claimant has offended again, then he must be aware (i) that he himself said in evidence before the First tier Tribunal that "if it happens again I will throw up my hands and will buy a ticket myself and return to Slovakia" [46], [66]); (ii) his partner gave evidence that if the claimant drinks again she will not take him back ([48], [65]); and (iii) that the panel found that the claimant "understands that this is his last chance to give up alcohol" ([49]). Independently of whether in such a scenario the claimant would honour his word, the Secretary of State would have strong cause to make a further deportation decision, knowing this time that the cycle of alcoholism and re-offending has been shown to endure.

Signed:

Date: 31 December 2015

Judge of the Upper Tribunal