IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05671/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd February 2016	**On 26th February 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T S
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms S Sreeraman, Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel instructed by Jein Solicitors

DECISION AND REASONS

1. I shall refer to the parties as in the First-tier Tribunal. The Appellant is a citizen of the Netherlands born in 1975. His appeal against deportation was allowed by First-tier Tribunal Judge Perry under the Immigration (EEA) Regulations 2006 and on human rights grounds in a decision promulgated on 7th August 2015.

2. The Respondent appealed on the following grounds:

   (i) The judge had misdirected himself in law in reassessing the risk of reoffending contrary to the assessment in the OASys Report.

Further, in doing so the judge failed to give reasons for finding that the Appellant's removal would not be justified under Regulation 21;

(ii) The judge failed to give adequate reasons for why he disagreed with the OASys Report and why the oral evidence and statements from the Appellant's partner were compelling. The judge failed to give adequate reasons for why the Appellant's deportation was not proportionate under the EEA Regulations 2006;

(iii) The judge failed to give adequate reasons why the Appellant's removal would have an unduly harsh impact on his wife or children given that there was no evidence that the children would be neglected or suffer any harm.

3. Permission to appeal was granted by Upper Tribunal Judge Lindsley on 14th October 2015 on the ground that it was arguable that the First-tier Tribunal had not adequately engaged with the OASys Report conclusions on risk of reoffending and harm in coming to their conclusions, and thus had not properly considered relevant evidence before them. It was also arguable that the conclusion that it would be unduly harsh for the children to go to the Netherlands was inadequately reasoned.

4. The Appellant's immigration history is as follows. He entered the UK in April 2003 and applied for residence as an EEA national in June 2003. He was issued with a residence permit valid until July 2008. On 14th October 2003 he applied for a residence document as a spouse on behalf of his wife. It was accepted that the Appellant had permanent residence and his wife and eldest two children had since become British citizens. The Appellant's third child was in fact a Dutch national.

5. The Appellant was convicted in January 2005 of battery, in October 2009 of assault occasioning actual bodily harm for which he was sentenced to six months suspended for 24 months, and in July 2011 the Appellant was convicted of battery and sentenced to a three month restraining order. He was also convicted on the same date of failing to comply with the community requirements of a suspended sentence. He was sentenced to five months' imprisonment.

6. On 16th May 2014 the Appellant was convicted of conspiracy to defraud and sentenced to sixteen months' imprisonment. He did not appeal against the conviction or the sentence. In light of the conviction he was served with a notice of liability to deportation.

Submissions

7. Ms Sreeraman submitted that, although the First-tier Tribunal Judge rehearsed the evidence at length in his conclusions and findings, he failed to provide reasons for his conclusion at paragraph 68 that:

> "Taking these matters together, I am satisfied and so find that the Appellant has a genuine and subsisting relationship with his wife and the three children and this being the case I further find that the deportation of the Appellant would prejudice his prospects of rehabilitation. I further find that there is no real risk that he may reoffend in the future and that his deportation is neither justified or proportionate or in accordance with the principles of Regulation 21(5)."

8. At paragraph 60 the judge set out the Respondent's case and then the Appellant's case but did not give reasons for which position he preferred. The judge continued with this approach in the subsequent paragraphs but failed to give any reasons to support his finding at paragraph 68.

9. The judge's conclusion that there was no real risk that the Appellant will reoffend in the future was at odds with the OASys Report, which indicated that the Appellant was at low risk of reoffending. The judge made no reference to this in the decision. He referred to the OASys Report at paragraph 65 and acknowledged that the Appellant constituted a medium risk in the community, to the three children and his wife, but there was no acknowledgement of the assessment that the Appellant was at low risk of reoffending. Further, the judge failed to give adequate reasons for why he found there was no real risk that the Appellant would reoffend in the future.

10. The judge failed to set out his reasons for finding that the Appellant was not a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge failed to look at all the requirements of Regulation 21(5) of the EEA Regulations 2006, considering the Appellant's personal conduct as a whole, not just his own assessment of the OASys Report.

11. Mr Slatter relied on the Rule 24 response and submitted that the judge referred to the OASys Report at paragraphs 59 and 65. The reasons given in the refusal letter by the Respondent that the Appellant would be at risk of reoffending was on the basis that he would be unable to find employment and accommodation. The judge found that the Appellant when released on bail had returned to live with his wife and children. This post dated the OASys assessment. He found that the Appellant was at no real risk of reoffending because he had stable accommodation and was supported by his wife.

12. In relation to his wife and family, the judge gave clear reasons. The Respondent had disputed this relationship. However, on hearing evidence from the Appellant's wife and reading letters from his children it was open to the judge to find that the relationship was genuine and subsisting. There has been no challenge to this finding in the grounds of appeal. There was also no basis for saying that the Appellant was a risk to his family given that he had been living with them and his wife supported his appeal.

13. The assessment of low risk in the OASys Report was premised on the fact that the Appellant would be unable to obtain employment and accommodation. That was not in fact the case because the Appellant had the support of his wife. The judge clearly identified the crucial issues in this case which were rehabilitation and propensity to reoffend. The judge acknowledged that lack of a stable environment may tempt the Appellant to commit further offences, but given he was now in a stable family environment, the judge's finding that there was no real risk of reoffending was one which was open to him.

14. In any event, any error in relation to the assessment of risk of reoffending was not material. The OASys Report found that the Appellant was at low risk of reoffending and since the Appellant had obtained permanent residence the test to satisfy was that of serious grounds for concluding that the Appellant would be a threat to public policy. The assessment of low risk of reoffending set out in the OASys Report did not meet that test.

15. The judge at paragraph 46 correctly directed himself on Regulation 21(5) and identified the factors which he had taken into account. It was clear to the Respondent why the Appellant succeeded under Regulation 21, namely because of a genuine and subsisting relationship with his wife and children he was at no real risk of reoffending and therefore there were no serious grounds of public policy in this case. There was no material error of law in the judge's decision and the Respondent's grounds amounted to a reasons challenge.

16. In response, Ms Sreeraman submitted that the judge acknowledged that if the Appellant got into financial difficulties he may be tempted to reoffend. This was relevant to his propensity to reoffend and the conclusion at paragraph 68 was unreasoned. The Appellant's relationship with his wife was subsisting at the time of the offence and therefore there were no adequate reasons why the risk had diminished.

17. In relation to the remaining grounds, Ms Sreeraman accepted that if there was no error in relation to the EEA Regulations 2006 then the remaining grounds were irrelevant. However, if an error was found in relation to the EEA Regulations 2006, in that there were serious grounds of public policy in the Appellant's case, then the assessment of Article 8 was fundamentally flawed because the judge had approached it on the basis that he was not a serious threat to public policy. The judge's conclusions at paragraphs 69 onwards were not in the alternative to his findings under the EEA Regulations 2006.

Discussion and Conclusion

18. It was accepted that the Appellant had been resident in the UK in accordance with the EEA Regulations 2006 for a continuous period of five years. He had therefore acquired a permanent right of residence and deportation could only be justified on serious grounds of public policy or public security.

19. The judge properly directed himself on Regulation 21(5) and referred to the components of the Regulation at paragraph 56, namely the decision must comply with the principle of proportionality; the decision must be based exclusively on the Appellant's personal conduct; the personal conduct of the Appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society; matters isolated from the particulars of the case do not justify deportation decision; and the Appellant's previous convictions do not in themselves justify deportation.

20. The judge took into account the nature of the Appellant's offence, namely that he was a willing participant in a conspiracy to tamper with ATM machines in order to defraud bank account holders. The enterprise was organised and sophisticated and involved obtaining and adapting skimming devices, placing miniature cameras to capture the input PINs of innocent customers and downloading the results to laptops so that fraudulent withdrawals could thereafter be made. The Appellant's involvement was limited to driving fellow gang members to and from the bank. The crime was a serious one and the Appellant received a sentence of sixteen months.

21. It is clear from the decision that the judge took into account the OASys Report and he specifically referred to it at paragraphs 59 and 65, although he made no specific reference to the assessment of risk of reoffending. The weight to be attached to the OASys Report was a matter for the judge. The judge also acknowledged at paragraph 60 that the Appellant may be at risk of reoffending if he faced financial hardship and was therefore tempted to engage in similar illegal activity, as a driver, as he did in relation to his conviction for conspiracy to defraud in 2014.

22. The judge took into account the Appellant's previous convictions for domestic violence and the evidence that the Appellant had been living with his wife and children since his release on bail, a matter which post dated the OASys Report. The judge set out his findings in relation to the Appellant's relationship with his family at paragraphs 61 to 67.

23. Taking into account all these matters, the judge's finding that there was no real risk that the Appellant would reoffend in the future was one which was open to him on the evidence. The matters set out at paragraphs 56 to 67 demonstrate adequate reasons to support such a finding.

24. Insofar as the judge may have erred in reassessing the risk of reoffending, contrary to what was stated in the OASys Report, such a reassessment was not material to the decision that deportation was not justified or proportionate in accordance with the principles in Regulation 21(5).

25. The threshold test that the Appellant's deportation should be justified on serious grounds of public policy or public security was not made out on the basis of the OASys Report. The Appellant was a driver in the conspiracy and had been assessed at low risk of reoffending.

26. The failure to give reasons was not material because the assessment in the OASys Report that the Appellant was at low risk of reoffending was insufficient, given the judge's unchallenged findings in relation to his family circumstances, to support a finding that deportation was justified on serious grounds of public policy or public security.

27. Accordingly, I am of the view that there was no error of law in the judge's decision to allow the appeal under the EEA Regulations 2006. His reasoning might well have been clearer, but the reasons given were adequate.

28. In any event, on the facts of the case and the assessment in the OASys Report it cannot be said that the personal conduct of this Appellant, taking into account all the facts of his case, justify deportation on serious grounds of public policy or public security.

29. Since there was no error in the judge's decision under the EEA Regulations 2006, there is in effect no requirement to consider Article 8 and I agree with Ms Sreeraman that grounds 2 and 3 would only merit further consideration if the Respondent's appeal succeeded in relation to ground 1 under the EEA Regulations 2006.

30. There was no error of law in the judge's decision promulgated on 7th August 2015 and I dismiss the Respondent's appeal.

Notice of Decision

The appeal is dismissed

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 her or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: **J Frances** Date: 22nd February 2016

Upper Tribunal Judge Frances