Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/15943/2012

THE IMMIGRATION ACTS

Heard at Cardiff	**Decision & Reasons Promulgated**
on 24 May 2016	**on 1 June 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

M E

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

No appearance by or for the appellant

For the respondent: Mr I Richards, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, aged 49, is originally from Somalia. He has acquired Dutch nationality. He says that he has lived in the UK since 2002, but has failed to demonstrate that he has a permanent right of residence in terms of the Immigration (European Economic Area) Regulations 2006 ("the regulations").

2. On 12 March 2010 the appellant was convicted at Bristol Crown Court of committing arson recklessly and sentenced to 8 years imprisonment.

3. On 28 June 2012 the respondent decided to make a deportation order under the regulations. Her reasons are explained in a letter of the same date.

4. The appellant filed notice of appeal to the First-tier Tribunal on 16 July 2012. His grounds were that he had resided lawfully in the UK for 10 years and so the decision ought to have been subject to imperative grounds of public security; and that as his wife and children all resided in the UK, he had no family ties in Holland, and he suffered from serious mental illness, the decision to deport would be in breach of article 8 of the ECHR.

5. A panel of the First-tier Tribunal comprising Judge Page and Mrs J Holt heard the appellant's appeal at Newport on 2 October 2012. The panel found that the appellant had not established either 10 or 5 years continuous residence in the UK for purposes of the regulations, and so the criterion was that removal required to be justified on grounds of public policy, public security or public health (paragraph 74). The panel went on to find that deportation was justified in terms of the regulations and was proportionate in terms of articles 3 and 8 of the ECHR.

6. The appellant appealed to the Upper Tribunal. His case was heard on 15 April 2013 by a panel comprising the President, the Hon Mr Justice Blake, and Deputy Upper Tribunal Judge Phillips. In terms of a ruling and directions dated 19 April 2013 that panel dealt with six points of error of law argued on behalf of the appellant, finding force principally in point 3, failure to consider whether the prospects of the appellant's rehabilitation would be promoted or diminished by his deportation (paragraphs 14 and 15) and in the connected point 6, the sufficiency of the reasoning of the FtT about the impact of deportation on the welfare of the children (paragraph 16). The other four points found no favour. The decision of the FtT was set aside and directions were given for its remaking in the UT.

7. That remaking proceeded on 5 September 2013 before a panel comprising Upper Tribunal Judge Grubb and Deputy Upper Tribunal Judge Phillips. At paragraph 29 of its determination promulgated on 28th October 2013 the panel said that the prospects of the appellant's rehabilitation had to be considered in the proportionality balance, and although not themselves determinative were a factor which "weighs very heavily indeed". Later in the same paragraph the panel said, "… the evidence… shows quite clearly that the appellant's psychiatric rehabilitation is continuing, progressing and controlled in a secured environment and further that is being benefited by the proximity and support of close family members. We cannot be satisfied that this rehabilitation will continue were the appellant to be deported to the Netherlands and further we are satisfied on the unequivocal evidence of Dr Taylor that even if mental health treatment was available to the appellant his deportation is like to have a significant detrimental effect on his mental health."

8. The panel concluded at paragraph 30 that the deportation of the appellant was not a proportionate response within the terms of regulations 21 (5) and 21 (6) and remade the decision by allowing the appeal.

9. The Secretary of State appealed successfully to the Court of Appeal. Judgement was given by Sir Stanley Burton, Jackson and Floyd LJJ agreeing: *SSHD v AD, LW and ME*, [2015] EWCA Civ 145.

10. A letter dated 7 January 2016 from the solicitors who previously acted for the appellant states that the Supreme Court has refused permission to appeal and that they are without instructions from the appellant and unable to represent him further.

11. On 4 March 2016 the UT issued notice of the hearing on 24 May 2016 to the appellant, whose address is HM Prison Bristol. Nothing further has been heard from him or from any representative. I was advised through the tribunal clerk that the appellant had not arrived at the court buildings in Cardiff, having declined earlier in the morning to be transported from the prison to the hearing.

12. Mr Richards submitted that the hearing should proceed.

13. There was nothing to indicate that the appellant was likely to take any further part in the proceedings or that the UT would be better placed to make its decision if the hearing were to be put off to a later date.

14. In those circumstances, I considered that in terms of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 38, it was in the interests of justice to proceed with the hearing.

15. Mr Richards submitted as follows. He pointed out the extent to which the Secretary of State had been successful in the Court of Appeal, in particular regarding the relative insignificance of the prospects of rehabilitation in the Netherlands as opposed to the UK, and the equal availability of care in the Netherlands. It appears that the appellant has completed his custodial sentence, and that his address is currently at a prison because he is in immigration detention. His behaviour presents such difficulties that he is not suitable to be held in a detention centre. The Secretary of State's position is that deportation remains justified under the regulations, for reasons given in the original decision dated 28 June 2012 and in supplementary decisions dated 7 June and 30 August 2013, read in light of the decision of the Court. Any improved prospects of rehabilitation in the UK were not material enough to make a difference in this case. Mr Richards accepted that Dr Taylor had given a strong opinion regarding the appellant’s mental health prospects in the Netherlands. While that issue still had to be weighed in the proportionality analysis, Dr Taylor’s report was now outdated. The appellant has made no progress in rehabilitation in the UK. If his behaviour had stabilised, that was due only to the constraints to which he was subject. There was a significant risk to the public.

16. Mr Richards fairly withdrew one point of distinction which the respondent previously made between the situation in the UK and in the Netherlands. The appellant uses *khat* whenever he has the opportunity, even against advice. That substance is no longer legally available in the UK, so the situation in that respect is the same as in the Netherlands. (The UT in its previous decision accepted medical opinion to the effect that use of *khat* had no detrimental effect on the appellant.)

17. I reserved my decision.

18. The facts have been set out at length in previous tribunal decisions and by the Court, and need not be rehearsed again in detail.

19. The following passages in the judgement of the Court are particularly relevant in identifying the task remaining to the UT.

20. At paragraph 3 the issue was set out:

> In each case, the Secretary of State has appealed to this Court on the ground that the relative prospects of rehabilitation are irrelevant in the case of someone who has no permanent right of residence in this country. She also contends that the Tribunal gave manifestly excessive weight to rehabilitation, and that the evidence before the Tribunal did not justify its finding that rehabilitation was more likely in this country rather than the country of nationality.

21. At paragraph 48 the discussion was introduced:

> I am unable to accept the Secretary of State's submission that the prospects of rehabilitation are irrelevant unless the offender has a permanent right of residence. Quite apart from the authority of the judgment of the CA in *Daha Essa*, to which I have referred above, rehabilitation is not infrequently linked to the health of the offender. That is obviously the case in respect of ME and AD. ME's offending was inextricably linked to his mental health, as is the risk of his reoffending. In Article 28.1, health is expressly referred to as a factor to be taken into account in the determination of proportionality. If ME remains mentally healthy, he is unlikely to reoffend; if his mental health deteriorates, he is liable to reoffend.

22. The last paragraph of the discussion is 54:

> Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public. The Directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport.

23. And from the conclusions, at paragraphs 56 and 59:

> I would allow the Secretary of State's application to amend her grounds of appeal to include the contention that the weight given to rehabilitation was manifestly excessive.
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> …
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> In the case of ME, the Upper Tribunal seems to have accepted that mental health care in the Netherlands was of high quality, and he would be able to report to the local authorities to obtain assistance. In these circumstances, it was inconsistent to proceed on the basis that his treatment in the UK was known and that in the Netherlands was a speculative unknown i.e. that on the evidence before the Tribunal there was a sufficiently substantial difference between his care here and his care in the Netherlands. Since this was a consideration that led the Upper Tribunal to its decision, I consider that the Secretary of State's appeal in this case too should be allowed and his case remitted to the Upper Tribunal. I would add that if the Tribunal had proceeded solely on the basis that ME's deportation would damage his mental health, my conclusion might have been different.

24. The essential points to be borne in mind in light of the judgement of the Court are that the prospects of rehabilitation are not irrelevant, but are not to be given substantial weight; that mental health treatment (and any other public care) available to the appellant in his country of nationality is of no lesser quality than in the UK; and that any likely damage to the appellant's mental health through deportation is a factor on his side.

25. The relevant part of the regulations is as follows:

> **Decisions taken on public policy, public security and public health grounds**
>
> **21.**—(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
> …
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles–
> (a) the decision must comply with the principle of proportionality;
> (b) the decision must be based exclusively on the personal conduct of the person concerned;
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
> (e) a person's previous criminal convictions do not in themselves justify the decision.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

26. It is difficult if not impossible to differentiate between the prospects of the appellant's rehabilitation and of improvement or stability in his mental health. However, the history is such that the prospects for either are not encouraging. In 2008 he was thought to be suffering from paranoid schizophrenia. In 2009 – 2010 that diagnosis was doubted, but since 2012

it has been reconfirmed. At least when not compliant with medication he is unstable, disinhibited, violent and aggressive and presents a significant risk not only to himself but to others and to property. He has a history of failing to comply voluntarily with medication. His disorder is of a relapsing nature. The progress he appeared to be making in May 2013 towards discharge into the community has evidently come to nothing. I can only conclude that he continues to present a risk unless subject to controlled conditions. If he were to be released into the community, the risk would be significant. On deportation to the Netherlands, the respondent would be under a duty to ensure that the authorities there were well aware of the history and circumstances of their returning national. He presents the same problems wherever he may be. It is a controlled environment rather than any other factor which presently keeps the public safe from him. He has not lived with his wife and children since 2005. Although there was evidence of some family contact up to 2013, which was beneficial, there is no updating information. Any contact which relatives may still have with him might be kept up in various ways, including visits. His wife and children are all also citizens of the Netherlands.

27. The interests of public policy and public security would be served by the appellant's removal. He presents a genuine, present and serious threat to the fundamental interests of society in the security of the persons and property of its citizens. There is nothing presently to suggest that the outlook for him is much improved by keeping him here. Although he has been here most of the time since 2002 that has been spent mainly in detention for mental health, criminal or immigration reasons. There is no evidence of any significant social and cultural integration. I find nothing in the principles set out in regulation 21(5) or the considerations set out in regulation 21(6) which makes deportation a disproportionate step.

28. The decision of the FtT which was set aside earlier in proceedings is remade to the same effect: the appellant's appeal against deportation, as originally brought to the FtT, is **dismissed**.

29. An anonymity order made earlier in the proceedings remains in place.

Hugh Macleman

31 May 2016
Upper Tribunal Judge Macleman