Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00121/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 26 June 2017	**On 1 August 2017**

Before

Upper Tribunal Judge Southern

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMINE GHOUL

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr F. Farhat, of Gulbenkian Andonian, solicitors

DECISION

1. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge O'Rourke who, by a determination promulgated on 26 April 2017, allowed the appeal against a decision of the Secretary of State, made on 19 December 2016 to make a deportation order, the Secretary of State having concluded pursuant to Regulation 19(3)(b) of the Immigration (EEA) Regulations 2006 ("the regulations") that such an order was justified on the grounds of public policy.

2. That means, of course, that it is the Secretary of State that is the appellant before the Upper Tribunal. However, as it will be necessary to reproduce extracts from the judgment of the First-tier Tribunal Judge, it is convenient to refer in this judgment to the parties as they were before the First-tier Tribunal.

3. The appellant is a citizen of Hungary, although he is also an Algerian national as his father is an Algerian national. His parents have returned to live in Algeria. The appellant claimed to have been living in the United Kingdom since 2004, although in the absence of evidence to establish that, the respondent did not accept that to be true. The appellant has accumulated criminal convictions. These were recorded by the judge as follows:

    i. 28 December 2006; theft from the person; sentenced to 28 days' imprisonment, suspended for 2 years;
    ii. 26 September 2012; racially aggravated harassment; £100 fine;
    iii. 27 October 2016; possessing Class A drugs with intent to supply; 16 months' imprisonment.

    However, it seems that may not be an altogether accurate list, because, according to the respondent, the sentences to which the appellant has been subject include a supervision requirement under the terms of a Community Order, as well as an alcohol treatment requirement. Unfortunately, the parties were unable to provide me with either a copy of the appellant's official antecedents nor a copy of the sentencing remarks of the judge who imposed the most recent sentence of imprisonment.

4. As the respondent did not accept that the appellant had been able to establish that he had spent a continuous period of five years during which he had resided in the United Kingdom in accordance with the regulations, nor that he had lived continuously in the United Kingdom for a continous period of ten years (counting back from the date of the decision, that continuity having been broken by the last sentence of imprisonment) the respondent concluded that the appellant was not entitled to any enhanced level of protection from removal. The respondent was satisfied that the appellant presented a genuine, present and sufficiently serious threat to the interests of public policy and security so that his deportation was justified:

> "In the absence of evidence that there has been any improvement in your personal circumstances since your conviction, or that you have successfully addressed the issues that prompted you to offend, it is considered reasonable to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public**...**

…

… you claim to have arrived in the United Kingdom in 2004 aged 17 years, however you have failed to provide documentary evidence to support this claim. You have not provided any evidence of exercising your treaty rights and evidence to show that you have been resident in the United Kingdom in accordance with the 2006 Regulations for a continuous period of 5 years or more…

It is not accepted that you are socially and culturally integrated in the United Kingdom. This is because despite indicating that you have worked in the United Kingdom since you arrived around 2004, you have provided no documentary evidence to substantiate this claim whatsoever, or that you have done anything constructive with your time here…"

5. The judge allowed the appeal because he found that the appellant had resided in the United Kingdom for at least ten years and so was entitled to the highest level of protection provided by the regulation, so that the appellant could not be removed other than on imperative grounds of public security. At paragraph 13 of his determination the judge said:

"All that is required by regulation 21(4) for the threshold of "imperative" grounds for removal to be reached is that the person has "resided" in the UK for at least ten years…. Accordingly, the appellant meets the requirements of the regulation 21(4)(a) and therefore the grounds of public security relied upon by the respondent must be "imperative". The word "imperative" must bear its natural meaning "absolutely necessary; unavoidable.

Does the appellant's personal conduct represent a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" (Reg 21(5)(c))? I do not consider, cumulatively that his history of offending adds up to such a threat. His first two offences were minor, dissimilar and six years apart and the sentencing court in his most recent conviction clearly accepted his evidence that he had a lesser role in the offence, acting out of naievity and without involvement in the greater offence and had no involvement in other drugs related activities….

Based on my conclusion that the appellant does not represent a genuine, present and sufficient threat to, in this case, public security, there are, I find, no imperative grounds that make it absolutely necessary or unavoidable that he be removed from the UK."

6. That reasoning discloses clear errors of law. The continuity of the appellant's residence, counting back from the date of the decsion under challenge in these proceedings, has been punctuated by the sentence of imprisonment imposed. The basis upon which the judge concluded that imperative grounds were required is simply not sustainable. Further, the respondent made clear in the decision letter

that it was not accepted that the appellant had achieved a continuous period of residence in accordance with the regulations of at least five years either, nor that he had established integration into the United Kingdom. Despite what is said by the judge at paragraph 12(iii), the evidence before the judge did not in fact demonstrate a continuous period of five years during which Treaty rights had been exercised, and simple presence was not sufficient. As Mr Tufan pointed out in oral submissions, there is no evidence of any earnings for the tax year 2009/2010. Therefore, the appellant was entitled only to the basic level of protection and it was an error of law for the judge to determine the appeal on the basis that he enjoyed an enhanced level of protection.

7. However, the judge found also that the appellant did not represent a genuine, present and sufficiently serious threat to public security. If that finding was sound and open to the judge for the reasons given, then the error in applying an enhanced level of protection may not be a material one. I am, though, satisfied that the reasoning that led to the conclusions of the judge is founded upon an inaccurate understanding of the facts and is simply not sustainable.

8. At paragraph 5 of his judgment, the judge noted that the respondent had issued a supplementary decision letter dated 20 January 2017. The respondent did not accept the assertion made on behalf of the appellant that he had learnt "a valuable lesson" whilst in prison because he had provided no evidence of having completed successfully any relevant courses whilst in prison. The respondent explained why it was not accepted that the appellant had completed five years' continuous residence in accordance with the regulations such as to give rise to entitlement of a permanent right of residence and so an enhanced, intermediate, level of protection such as to require serious grounds, nor ten years' continuous residence such as to give rise to the highest level of protect such as to require "imperative grounds". The respondent observed that, given the conviction for possession Class A drugs with intent to supply, and the absence of evidence of successful completion of rehabilitation programmes, taking into account the appellant's previous record of offending he constituted a continuing risk of reoffending such that his deportation would have been justified whatever the claimed level of protection.

9. The reasoning and findings of the judge are set out at paragraphs 12-13 of his judgment. The judge began by saying that apart from his most recent offence:

> "… the appellant's past offending behaviour has been intermittent and at a low level, as indicated by the sentences he received: 28 days imprisonment suspended and a £100 fine…"

That observation discloses a seriously flawed approach. A sentence of imprisonment, even if suspended, can be imposed by the court only if the offence is considered to be so serious that only a custodial sentence can be justified. To categorise it as low level offending is therefore to significantly understate the seriousness of the offending behaviour. Further, as I have observed above, the information before the judge indicated that, apart from the sentence of imprisonment, suspended for two years, the appellant had been made subject to a community order with an alcohol treatment order. That appears not to have been taken into account by the judge at all.

10. Next, the judge considered the offence of possessing Class A drugs with intent to supply. The judge said:

> "His latest offence is clearly at a different level. However, it is clear from the sentence he received (in the absence of sentencing remarks) that the court accepted his account of being a peripheral figure in those events. His sentence was below the "starting point" suggested in the guidance and it was accepted that his was a "lesser role" which is defined in the guidance as including "engaged by pressure… involvement through naivety… very little, if any, awareness or understanding of the scale of the operation."

Earlier in his judgment, the judge had recoded a submission advanced on behalf of the appellant that he appears to have accepted that:

> "… he was awarded a sentence below the 18-month "starting point" for such offences, for a lesser role…"

If this is correct, which in the absence of sentencing remarks it is impossible to be confident about, then this would be, for the purposes of the applicable sentencing guideline, a Category 4 offence involving a small amount of Class A drugs. But as the appellant pleaded guilty, he would be entitled to a discount of up to one third of the sentence identified as a starting point so that a sentence of 16 months would mean, if he entered that plea at the first opportunity, that in this case the judge took as his starting point not 18 months' custody but 24 months. Again, if it is correct that the judge identified this as a Category 4 case, that would mean that the judge must have found present aggravating factors such as to require the starting point to be raised. The First-tier Tribunal Judge appears also to overlooked that the characteristics that justified placing the offence into a "lesser role" for the purposes of the sentencing guidelines were not limited to those to which he referred but included also that the appellant played a limited function under direction and that he had no influence on those above in a chain.

11. The main difficulties with the decision under appeal are, though, the incorrect assessment of the level of protection from removal enjoyed by the appellant and the misunderstanding by the judge of the nature and seriousness of the appellant's record of offending. It is not a case where, but for those errors, the outcome was bound to be the same and therefore those are material errors of law which mean

that the decision of the judge to allow the appeal cannot stand. The appeal to the Upper Tribunal is allowed to the extent that the decision of First-tier Tribunal Judge O'Rourke is set aside to be remade by a different judge of that Tribunal. As the appellant was not produced from custody at the hearing before the Upper Tribunal he has had no opportunity to give evidence about his current circumstances. In addition, the sentencing remarks of the judge who imposed the sentence of 16 months' imprisonment should if possible be before the Tribunal as should a complete list of the appellant's record of offending.

Summary of decision

12. First-tier Tribunal Judge O'Rourke made a material error of law and his decision to allow the appeal is set aside.

13. The appeal is remitted to the First-tier Tribunal to be determined afresh.

Signed 

Upper Tribunal Judge Southern

Date: 28 July 2017