Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00236/2018

THE IMMIGRATION ACTS

Heard at : Field House
On : 27 September 2018

Decision & Reasons Promulgated
On 10 October 2018

Before

THE HONOURABLE LADY RAE
SITTING AS JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KANESAPILLAI RATNASINGHAM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr R Spurling, instructed by Clapham Law LLP

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Ratnasingham's appeal against a decision to deport him from the United Kingdom pursuant to regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Mr Ratnasingham as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of France, originally from Sri Lanka, born on 29 April 1961. He claims to have arrived in the United Kingdom in 1997. On 6 July 2006, and again on 11 August 2010, he was issued with a registration certificate. On 9 August 2016 he was convicted at Harrow Crown Court of fraud by abuse of position and on 21 September 2016 he was sentenced to three years' imprisonment and ordered to pay a victim surcharge of £120. On 16 November 2016 he was served with a liability for deportation notice and on 18 September 2017 the respondent made a decision to deport him under regulation 27 of the EEA Regulations.

4. In the deportation decision, the respondent accepted that the evidence produced by the appellant of his employment in the UK was sufficient to demonstrate that he had acquired the right to permanent residence. However, owing to large gaps in the evidence from 2004 to 2008 and 2014 to 2015, the respondent did not accept that the appellant had been continuously resident in the UK for 10 years in accordance with the EEA Regulations. Accordingly consideration was given to whether his deportation was justified on serious grounds of public policy. The respondent noted that the circumstances of the appellant's offence was that over a period of 17 months he had abused his position of trust by defrauding his employer of a sum of approximately £58,000. The respondent considered there to be insufficient evidence that the appellant had addressed his offending behaviour, that there remained a risk of him re-offending and that he continued to pose a risk of harm to the public. The respondent considered that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy and that it would not be unduly harsh to expect him to return to France. The respondent considered there to be a lack of evidence to show that the appellant had a subsisting relationship with his wife and two adult children in the UK. It was considered that the decision to deport the appellant was proportionate and in accordance with the principles of regulation 27(5) and (6) of the EEA Regulations and, further, that his deportation would not breach his Article 8 rights under the ECHR.

5. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 10 May 2018 by First-tier Tribunal Judge M A Khan. The appellant appeared without a legal representative. He produced a witness statement for his appeal, in which he set out his circumstances. He explained in his statement that he had arrived in the UK in 1997 with his wife and two children and was given a ten year residency card on arrival which was renewed in 2007. His children were currently at university and working part-time and his wife worked. He had been living in the UK for 21 years and had bought a house here. He had worked since shortly after coming to the UK, at a food factory for seven years and then as a shop worker for 11 years. He had always been in full-time employment in the UK and had never been in receipt of benefits. He had always been a law-abiding citizen until he committed the offence which was stupid and out of character. His wife was not working at the time and he was struggling to pay the bills and to pay his mother's medical expenses in Sri Lanka. His mother was dying at the time and had since passed away. He had completed several courses in prison and had shown genuine remorse for his actions. He had no one in France and did not want to go back there.

6. The appellant adopted his statement as his evidence and gave further oral evidence before the Tribunal, explaining that he had sent the money which he had defrauded from his employer to his mother in Sri Lanka. He was currently separated from his wife and was living with a friend in a flat. His sons were at university. The submissions made on behalf of the respondent accepted that the appellant had established that he had been living in the UK for five years but not for 10 years, although it was accepted that he had been issued registration documents on two occasions.

7. Judge Khan noted that the appellant was unable to demonstrate his 10 years of residence in the UK by way of documentary evidence and accepted the appellant's explanation that his passport and registration certificates had been taken by the police when he was arrested. He noted that the respondent's own records showed that the appellant had been in the UK for more than 10 years in any event. The judge considered the relevant test to be that in regulation 19(3)(b) of the EEA Regulations 2016, with reference to "serious grounds" of public policy. He found that the appellant's offending behaviour was a one off event at his age and he did not pose any further risk of committing serious crime. He found that the respondent had failed to establish that the appellant's deportation was justified or proportionate and he allowed the appeal.

8. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed to consider in any substance whether the appellant posed a genuine, present and sufficiently serious threat and whether serious grounds were made out and that the judge's reasoning was totally inadequate.

9. Permission to appeal was granted in the First-tier Tribunal on 9 July 2018.

10. In a Rule 24 response submitted by legal representatives who had since been instructed by the appellant, it was accepted that the judge had erred in identifying and applying the correct law and regulations but it was submitted that that was not a material error. The judge had effectively accepted that the appellant met the ten year period of residence and the respondent had failed to show that there were imperative grounds of public security to justify deportation.

Appeal hearing and submissions

11. The appellant was legally represented before us and produced a bundle of documentary evidence including evidence that was before the First-tier Tribunal and evidence of employment and other matters which had not been before the First-tier Tribunal. Both parties made submissions.

12. Mr Wilding submitted that there was an absence of reasoned findings in regard to the risk of re-offending. There was no assessment of whether the appellant posed a genuine, present and sufficiently serious threat. It was not accepted that the judge's errors in identifying the law and regulations were immaterial. It was not sufficient for the judge to find that the appellant had been in the UK for ten years in order for him to benefit from the imperative grounds test, but he was required to then go on and made a qualitative assessment of whether the appellant's integrative links had been broken as a result of his imprisonment. Mr Wilding relied on the case of B (Citizenship of the European Union - Right to move and reside freely - Enhanced protection against expulsion - Judgment) [2018] EUECJ C-316/16 in that respect. With regard to his findings on serious grounds, the

judge failed to consider the gravity of the offence and the lack of courses and rehabilitative work undertaken by the appellant.

13. Mr Spurling submitted that the judge had accepted the appellant's evidence about his employment and therefore accepted that the appellant had been residing in the UK for over ten years prior to his imprisonment. In the case of B it was considered that imprisonment did not automatically break the integrative links where 10 years had been established prior to custody. The respondent had failed to show that the appellant's integrative links had been broken. There had been no challenge to the judge's findings on the appellant's length of residence and exercise of treaty rights in the UK and there was therefore sufficient for the imperative grounds test to be engaged. Even if the test was serious grounds, the judge's decision still stood. The judge had considered risk of re-offending at [25] and noted the evidence that the offence had been committed for a reason and not because the appellant was a serial fraudster. There was no propensity to re-offend. The judge's errors were therefore not material.

14. We advised the parties that we did not consider the First-tier Tribunal Judge to have materially erred in law such that his decision needed to be set aside. Our reasons for so concluding are as follows.

Consideration and findings.

15. There cannot be any doubt that the judge's decision is not a thorough or well-written one. It refers to the 2006 Regulations rather than the 2016 Regulations, it is lacking in detailed reasoning and it lacks clear findings on the distinct tests of serious grounds and imperative grounds. The relevant question, however, is whether the decision is materially flawed to the extent that it cannot stand and must be set aside. We find that there is sufficient reasoning for the decision to stand and that the errors made by the judge are not ultimately material.

16. As Mr Wilding properly submitted, the fact that ten years' residence and exercise of treaty rights prior to imprisonment is accepted is not in itself sufficient to entitle an applicant to the benefit of the imperative grounds threshold, as there has to be an assessment of whether the integrative links to the UK have been broken by the criminal offending and the imprisonment. Plainly the judge did not specifically undertake such an analysis. However, as Mr Spurling submitted, he did give consideration to the appellant's circumstances overall and to the nature of and reason for his offending, in line with the reasoning in B at [72] and [73]. The judge clearly accepted the appellant's account of his circumstances and length of residence in the UK and, as Mr Wilding confirmed, those credibility findings have not been challenged. Accordingly the judge's assessment was made on the basis of his acceptance that the appellant had been living and working in the UK for 18 years before his conviction, that he had a wife and two sons in the UK (albeit that he was at the time separated from his wife), that he had no ties to France and that he regretted having committed the offence which was a one-off offence resulting from a desire to send money to his mother to pay for her medical care in Sri Lanka. In the light of such accepted evidence we find merit in Mr Spurling's submission that there was sufficient for the judge to find that appellant was entitled to benefit from the imperative grounds threshold.

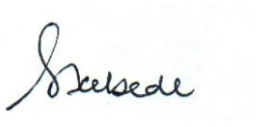
17. However, and in any event, it seems from [25] that the judge's decision was ultimately made on the basis of the serious grounds test and we find sufficient reasoning to conclude that he was entitled to allow the appeal on that basis. The respondent's grounds assert that the judge failed to consider whether the appellant posed a genuine, present and sufficiently serious threat and Mr Wilding submitted that the judge gave no reasoning for concluding that the appellant did not pose a risk of re-offending. However the judge did offer some reasoning at [25], albeit brief, namely that it was a one-off offence committed by a man of his age. Plainly that was a reflection of the Crown Court Judge's sentencing remarks which referred to the appellant being a man of 55 years with no previous blot on his otherwise good character. Further, whilst the respondent's skeleton argument refers to a failure by the judge to refer to the OASys report, it is clear from the judge's decision at [7] that he took the report into account. In any event there is nothing in that report to support a conclusion that the appellant posed any risk of re-offending.

18. It was Mr Wilding's submission that there was no consideration by the judge of the appellant's recognition of the gravity of the offence and no evidence of any courses undertaken by the appellant in prison to address his offending. However that was a matter addressed by the appellant in his statement at [5] and [6] and which was supported by evidence of courses he had undertaken in prison. The judge at [18] of his decision accepted that he had considered all of that evidence and at [21] he made it clear that he accepted the appellant's evidence. It is clear that he therefore accepted the appellant's account of his reason for committing the offence and his expression of regret and remorse and that he was aware of the efforts made by the appellant to improve himself. Accordingly we are persuaded that there was sufficient reasoning provided in the judge's decision for the parties to know why the judge considered that the deportation decision was not justified under the EEA Regulations and why he had allowed the appeal. We are, furthermore, satisfied that it was open to the judge to reach the conclusions that he did and to allow the appeal on the basis that he did.

19. For all of these reasons we have decided to uphold the judge's decision.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The Secretary of State's appeal is accordingly dismissed and the decision of the First-tier Tribunal to allow Mr Ratnasingham's appeal stands.

Signed 

Upper Tribunal Judge Kebede Dated: 28 September 2018