



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00357/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre

**Decision &
Promulgated**

Reasons

On 9 February 2018

On 9 April 2018

Before

**MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CNV

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms R Petterson, Senior Home Office Presenting Officer
For the Respondent: Miss R L Penfold instructed by Sonn MacMillan Walker,
Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) we make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (CNV). A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The respondent is a citizen of Romania who was born on 2 November 1992. He last entered the United Kingdom on 19 August 2004 as a

dependant of his father who was already in the UK. On 27 November 2006, he was granted limited leave to remain in the UK until 27 November 2011 as a dependant of his father. On 21 February 2007, he was issued with a registration certificate as a dependant of his father.

3. On 27 November 2015, the respondent was convicted at the Taunton Crown Court of possessing a class A controlled drug (namely cocaine) with intent to supply, possessing a class B controlled drug (namely cannabis), and facilitating the acquisition/acquiring/possessing criminal property. He was sentenced to a term of three years' imprisonment on the first count and two years' imprisonment to run concurrently on the third count. No separate penalty was imposed on count two.
4. On 10 February 2016, the respondent was notified by the Secretary of State of her intention to make a deportation order against him on the grounds of public policy in accordance with the (then) applicable EEA Regulations, namely reg 13(3)(b) and reg 21 of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003 as amended) ("the 2006 Regulations").
5. On three occasions thereafter - 10 March 2016, 9 February 2017 and 3 March 2017 - the respondent's representatives made submissions on his behalf against his deportation.
6. On 21 June 2017, the Secretary of State made a decision to make a deportation order and remove the respondent on the grounds of public policy under the (now in force) reg 23(6)(b) and reg 27 of the Immigration (EEA) Regulations 2016 (SI 2016/1052) ("the 2016 Regulations").

The Appeal to the First-tier Tribunal

7. The respondent appealed to the First-tier Tribunal. Judge M A Khan allowed his appeal. Having considered the evidence, including from a number of witnesses and documents including a psychiatric report, Judge Khan concluded in para 42 of his decision that:

"42. In the circumstances, on the evidence before me, I find that it has not been established that the appellant's personal conduct represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society, in particular the public policy aspect upon which the respondent has based her decision to make the deportation order against the appellant".

The Appeal to the Upper Tribunal

8. The Secretary of State sought, and was granted on 23 August 2017 by the First-tier Tribunal (Judge Scott-Baker), permission to appeal against Judge Khan's decision.
9. The single ground of appeal is that Judge Khan erred in law by failing to apply the correct Regulations. The grounds contend that, as a result of Schedule 6(5) to the 2016 Regulations, those Regulations (rather than the 2006 Regulations which were applied by Judge Khan) applied in the

respondent's appeal. As a result, it is contended, Judge Khan erred in law by failing to apply Schedule 1 to the 2016 Regulations which sets out the relevant "considerations of public policy, public security and the fundamental interests of society etc."

Discussion

10. Before us, Ms Petterson who represented the Secretary of State accepted that the judge's factual findings were not challenged. The scope of the Secretary of State's appeal was limited to the ground that the judge had erred in law by failing to apply the relevant parts of Schedule 1 to the 2016 Regulations, in particular as set out in the grounds at para 7(g) of Schedule 1 that:

"The fundamental interests of society in the United Kingdom include -

....

- (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but there is a wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union); ..."

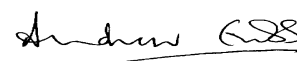
11. Ms Petterson, in response to a question from us, accepted that the 2016 Regulations did not change the applicable EU law in respect of the deportation of an EU national. She accepted that what had to be taken into account under the 2016 Regulations set out in Schedule 1 was the same as had to be taken into account prior to those Regulations under EU law and the 2006 Regulations. While she maintained the Secretary of State's position that, in not applying Schedule 1 of the 2016 Regulations, Judge Khan had erred in law, she accepted that his error was not material to the outcome of the respondent's appeal.
12. In the light of those submissions, we did not call on Ms Penfold and indicated that the Secretary of State's appeal would be dismissed.
13. It was common ground before us that as the Secretary of State's decision subject to appeal was made on 21 June 2017. After the 2016 Regulations came into force on 1 February 2017, the relevant Regulations to be applied both by the Secretary of State and by Judge Khan on appeal were the 2016 Regulations. That, in our judgment, clearly follows from para 5 of Schedule 6(5) to the 2016 Regulations, in particular para 5(1) and (2) which it is unnecessary to set out in full.
14. We also accept that by virtue of reg 27(8), Judge Khan was required, in determining whether the respondent's deportation was justified on grounds of public policy to: "have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and fundamental interests of society etc.)". We are satisfied that Judge Khan did err in law in failing to consider the 2016 Regulations.

15. However, Ms Petterson was unable to identify any relevant consideration in Schedule 1 which Judge Khan had failed to take into account in reaching his conclusion that the respondent's personal conduct did not represent a genuine and sufficiently serious threat affecting one of the fundamental interests of society. Ms Petterson accepted that none of the judge's findings were challenged by the Secretary of State. At paras 38-42, Judge Khan considered the evidence, including relating to the respondent's rehabilitation. As we have already noted, Ms Petterson accepted that the relevant considerations under EU law were not changed by the 2016 Regulations. In those circumstances, we are wholly unpersuaded that Judge Khan failed properly to consider the relevant considerations under EU law even though he made no specific reference to the 2016 Regulations, in particular Schedule 1 to those Regulations. His error was not, therefore, material to his allowing the respondent's appeal - a conclusion accepted by Ms Petterson before us. Consequently, there is no proper basis to set aside the First-tier Tribunal's decision which stands.

Decision

16. For these reasons, the Secretary of State's appeal to the Upper Tribunal is dismissed.
17. The First-tier Tribunal's decision to allow the respondent's appeal stands.

Signed



A Grubb
Judge of the Upper Tribunal

6, April 2018