Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00401/2017

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 23 July 2018	**On 14 August 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

MARIÁN [A]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Christie, Counsel instructed by Wilson Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The respondent has sought and obtained permission to appeal in this deportation appeal and to avoid any confusion, I refer to the parties as they were before the First-tier Tribunal. The determination was promulgated by First-tier Tribunal Judge Moore on 2 March 2018 following a hearing at Taylor House on 9 February 2018. The appeal was against a decision to make a deportation order on 27 July 2017 on the grounds of public policy and/or public security in accordance with reg. 23 (6)(b) and reg. 27 of the Immigration (EEA) Regulations 2016. The judge found that the appellant's evidence showed he had arrived here in April 2007,

had undertaken gardening work and that his absences for employment had been temporary. He concluded that the appellant's integration attracted the higher level of protection and that the imperative grounds required for his expulsion had not been made out. Accordingly, the appeal was allowed.

2. The appellant is a Slovak national born on 20 October 1978. He claimed to have arrived in the UK with his partner, [AL]. His mother and two siblings were already here at the time (although his mother and one sibling have since returned to Slovakia). He claimed to have work, cash in hand on a self employed basis in a window cleaning business managed by his brother and also developed a gardening business. He was not registered with HMRC until May 2010. In December 2007 and December 2008 he claimed to have returned to Slovakia to work for four months (on both occasions) at a ski resort. In December 2009 he went for an extended holiday until February 2010. On 10 May 2017 at Harrow Crown Court he was convicted in respect of three counts of possession of /making indecent photographs of children and sentenced to six months imprisonment following a guilty plea. He is required to be on the Sexual Offenders Register for seven years as well as being subject to a Sexual Harm Prevention Order for the same duration. The charge sheet shows that between 15 December 2014 and 13 September 2015 he made 575 moving and still images at category A, 518 at category B and 11,898 at category C. These were found on two computer devices; one belonged to his partner.

3. The respondent took issue with the evidence that the judge relied on to reach his finding that the appellant had been in the UK since April 2007 and argued that he had failed to give adequate reasons for accepting it was reliable evidence. The 'evidence' consisted of two diaries belonging to the appellant's partner which were adduced on the morning of the hearing and which purported to have been for 2007 as well as three letters from people for whom the appellant claimed to have undertaken gardening work. It is argued that there was no independent documentary evidence of his claimed ten years' residence or to confirm his claimed date of arrival. The grounds also take issue with the weight placed on a rehabilitation programme the appellant attended at his own expense, arguing that no consideration was given to the contents of the programme nor its credentials in terms of its effect on the appellant's current and future risk to children.

4. Permission to appeal was granted by Upper Tribunal Judge Coker on 15 May 2018.

5. The Hearing

6. At the hearing before me on 23 July 2018, I heard submissions from the parties. Mr Melvin relied on the grounds and submitted that there were inadequate reasons given for why the judge found the appellant was entitled to the enhanced category of protection. He maintained there was very little evidence in the way of official documents as to the appellant's residence since 2007 and he did not

even register with HMRC until 2011. It was not acceptable that the judge had relied on the cash in hand work and diaries and notes instead of reliable independent evidence. Those who wrote the notes did not even attend the hearing. It was accepted that he had worked between 2011 and 2016 so the lower level of protection was engaged. The judge's finding that imperative grounds were required for expulsion had infected his conclusions.

7. Mr Melvin also submitted that there had been errors with the finding on re-offending. The finding that there was a low risk of re-offending contradicted the OASys report. There was no analysis of the contents of the programme undertaken by the appellant or how it could help him.

8. Ms Christie replied. She relied upon her Rule 24 response and submitted that there had been no error identified. The grounds were just a disagreement with the conclusions of the judge. The conclusions were not irrational. The judge had done enough to show the parties why he had made his findings. The respondent was wrong to say that there was no evidence of employment before 2011. There had been corroborating evidence from the appellant's brother who gave oral evidence. The respondent had only referred to two periods of absence in 2008 and 2009. The judge had properly addressed the issue of residence at paragraphs 19-21 of his determination. He found the appellant's absences did not interfere with his integration. There were no errors in respect to the first ground.

9. With respect to the second ground, Ms Christie argued that the expert had prepared a report and was aware of her obligations to the Tribunal. Risk of re-offending needed to be assessed not just on the basis of the conviction but also the present risk. The appellant had complied with the requirements upon him. He had notified the police when he bought a new mobile phone. The judge noted his remorse and had recognised that he had been assessed as posing a medium risk in his OASys report but considered the present risk was low. The judge also looked at the home work the appellant had done and took account of the probation officer's comments. Rehabilitation could properly be taken into account.

10. Mr Melvin relied on his earlier submissions and the grounds.

11. That completed the hearing. I reserved my determination which I now give with reasons. The appellant's representatives confirmed by letter dated 16 July 2018 that they would not have been prepared to proceed with a resumed hearing had an error of law been found on the day. This was because further documentary evidence had to be adduced and the appellant's partner was pregnant and unable to attend the hearing.

12. Findings and Conclusions

13. There are two criticisms of the judge's determination and I deal with each in turn. I do so having considered all the evidence before me and having regard to the submissions made at the hearing.

14. The first complaint has to do with the judge's assessment of and findings on the evidence said to establish the appellant's arrival in April 2007 and subsequent residence, at least until 2010 when it is accepted he registered with HMRC and had shown evidence of his presence and employment. Two diaries for 2007 said to belong to the appellant's partner were submitted at the hearing. These were not adduced in compliance with directions and no explanation has been given for their late submission. The respondent objected to the admission of the late evidence but the judge nevertheless admitted the items; indeed, he went on to accept that they demonstrated the arrival of the appellant and his partner in 2007 and also the appellant's self employment. This is relevant as once the appellant could establish his date of arrival and continuous residence, he could only be expelled on grounds of imperative public safety. The respondent argues that the evidence was not independent and hence not reliable and that inadequate reasons were given by the judge for accepting it.

15. There are several issues arising. First, the entries for the small 2007 diary are not translated. Whilst the judge refers to an entry in April 2007 as confirming travel to London, he makes no comment about similar entries in June and September. As the diaries were from 2007, why were they not adduced earlier and only submitted on the date of the hearing. If they belonged to the appellant's partner, why were they completed by the appellant (at paragraph 3). What was their purpose. Why were they retained. Why were there two diaries for the same year. Were the originals produced at the hearing. The judge does not set out the nature of the evidence given by the appellant, his partner or his brother on these or indeed any other matters. Nor does he identify what it was about the evidence that he found credible or how it supported his finding that the diaries were reliable. He gives no reason for why he concluded the entries were contemporaneous or why he found they related to the appellant's work and not to his partner's. Nor has he considered the fact that the 2008 schedule does not always accurately correspond with the entries in the 2008 diary. With respect to the three letters from clients, the judge does not explain why he accepts these as reliable given that there is no identification attached pertaining to the authors and when they did not attend the hearing. The judge does not address the issue of why there is no independent evidence for the appellant's residence, given the amount of evidence adduced since 2011.

16. The judge was also wrong to maintain that there had been only two absences from the UK in the early years. By the appellant's own evidence in his witness statement there were at least three. There is, however, no independent evidence to confirm any of his travel.

17. It follows that I concur with the respondent's view that the judge's reasoning for accepting the appellant's claim to have been continuously resident in the UK since 2007 is inadequate. The judge erred in finding that the appellant had therefore shown that he was entitled to the enhanced level of protection and his findings and conclusions were infected by this error. That in itself is sufficient to set aside the decision.

18. There is, however, a second complaint relating to the judge's assessment of the risk of re-offending.

19. Plainly, the judge erred in maintaining that the appellant had always been assessed as a low risk of re-offending. The evidence suggests that he has previously been assessed both as being of high risk and of a medium risk to vulnerable persons, including women and children. Whilst it is accepted that the appellant attended the Lucy Faithful rehabilitation programme, his attendance of five sessions over a period of a month does not accord with the course information provided which indicates that it is for a ten week duration and there is no independent evidence of how the programme assists offenders or of its rate of success. The judge did not consider the seriousness of the consequences of re-offending if this were to occur (Kamki [2017] EWCA Civ 1715) nor was there any meaningful consideration of the rehabilitation on offer in Slovakia where the appellant has his mother and his sister and her family (Essa [2012] CIV 1718). His assessment was in any event based on the premise that imperative grounds for expulsion were required and so would need to be undertaken once a fresh decision on the first point (the duration of residence) is made.

20. Decision

21. The First-tier Tribunal made errors of law and the decision to allow the appeal is set aside.

22. It shall be re-made following a fresh hearing on all issues before a different judge of the First-tier Tribunal. No findings are preserved.

23. Anonymity

24. The First-tier Tribunal made no order for anonymity and nor do I.

Signed

Upper Tribunal Judge

Date: 1 August 2018