Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: DA/00596/2015
IA/32106/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 December 2017	**On 21 February 2018**

Before

THE HONOURABLE LADY RAE
UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AGRON XHEPA
(ANONYMITY DIRECTION NOT MADE)

Respondent

DECISION AND REASONS

1. As appears on the case numbers, this is a conjoined appeal dealing both with a decision in relation to the Immigration (European Economic Area) Regulations 2006 (2006 No 1003) and a deportation appeal. The appellant is the Secretary of State who appeals against a determination of First-tier Tribunal Judge Bart-Stewart promulgated on 11 September 2017 following a hearing on 24 August 2017.

2. For the sake of continuity we shall refer to Mr Agron Xhepa as the appellant as he was before the First-tier Tribunal.

3. The appellant is a national of Albania who was born on 23 June 1976. His appeal arises under Reg. 26 of the 2006 Regulations against the decision

© CROWN COPYRIGHT 2018

dated 16 September 2015. We have applied the 2006 Regulations rather than the 2016 EEA Regulations. He arrived in the United Kingdom in 1999 and made various claims, some of which were unsuccessful. However, we are concerned with the consequences that follow the appellant being sentenced by the Dutch authorities to a period of 30 months' imprisonment of which he served fifteen. The offence was committed in 2013. He had served his sentence by 11 September 2014 when he lawfully re-entered the United Kingdom following a grant of entry clearance to him by the British authorities. The judge recited the relevant provisions. Regulation 21 provides:

> (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

4. Thereafter the Regulations go on to say that the decision must comply with the principles of proportionality. It was this task that the judge was required to carry out in his consideration. The judge correctly decided that the appellant was entitled to a permanent right of residence and therefore had the benefit of the higher level of protection afforded by its being required to be established that the decision to remove him had to be made on *serious* grounds of public policy or public security.

5. The relevant offence being an offence which was committed in Holland was an offence in relation to which there were none of the normal reports which would be available in the case of an offence committed in the United Kingdom, such as probation reports, an OASys Report or similar reports dealing with the risk of reoffending. The judge however did have the benefit of the remarks which were made by the sentencing judge in the Amsterdam District Court on 13 December 2013. The offence was one of wilfully trading in approximately 5.169 kilograms of cocaine. He was arrested on 18 June 2013 and, in the course of sentencing, the judge said:

> "[The appellant] has made himself culpable by transporting cocaine in a quantity that was suitable for further distribution. Hard drugs and trading therein pose a serious threat to society, not only because it is a threat to public health, but also because the criminality that goes hand in hand with the distributing of narcotics is induced further. All that [the appellant] has made subservient to his drive for fast financial profit".

6. It appears that the prosecuting counsel had suggested a sentence of 40 months' imprisonment. In the event, the judge imposed one of 30 months with the effect that, in accordance with Dutch law, the applicant served only fifteen months.

7. The First-tier Tribunal Judge was well aware of the equivocal stance adopted by the appellant as to the nature of the offending. In paragraph 77 of the determination, he recorded:

> "It is unclear whether the appellant accepts his guilt. The evidence suggests that he is only remorseful of the consequences of conviction, there is no challenge to the fact that he was convicted of a serious offence and sentenced to a term of imprisonment. That is one of the purposes of imprisonment and can be a powerful deterrent against future offending."

No challenge is made to that broad approach.

8. The First-tier Tribunal Judge also had in mind that there was an earlier illegal entry. He also said this in paragraph 77:

> "As regards his illegal entry, he made a voluntary departure and obtained entry clearance to return as a family member. He also obtained entry clearance and returned after completing his sentence."

9. Paragraph 79 is crucial:

> "There is no suggestion that the appellant has been arrested and prosecuted in the UK. He has produced a certificate from the authorities in Albania that confirms he is not known to the authorities there. As he was not convicted in the UK there is no probation or OASys Report that might assess the risk of reoffending. The Dutch prosecutor sought a sentence of 40 months but the court decided not to exceed to their request. There is no evidence before me that he has been involved in any further criminal activity and the evidence was the only offence albeit a serious one. There is no evidence before me that the appellant has a propensity to reoffend or of a threat to the public that is genuine and present."

10. The First-tier Tribunal Judge went on to deal with proportionality in paragraph 80 as an alternative finding. It must be said at this stage that the family life of the appellant had developed in the United Kingdom with his Polish wife and Polish daughter is of some materiality in the assessment made by the judge:

> "The appellant's only family in the UK is his wife a Polish national who has been exercising treaty rights in the UK for a substantial period of time and his daughter N who is now age 9. N is also a Polish national. N has been diagnosed with ADHD. She has delayed speech and mild hearing loss. The mother described her as being like a 5-year-old in behaviour. This was confirmed by Lucyna Maria Dul whom I found to be honest and straightforward. It is also confirmed by the medical evidence and the observation of independent social worker Shulamit Greenstein in her report dated 16 June 2016."

Once again no challenge is made to those findings.

11. The nub of the challenge made by the Secretary of State is the judge's findings in relation to paragraph 89 of the determination. Having dealt with the overall position the First-tier Tribunal Judge turns to the basis upon which the appellant was granted entry clearance by the British Embassy following the completion of his sentence. She says in

considering whether the best interest of the appellant's child and also his family life should outweigh the public interest:

> "I also have regard to the fact the appellant was given entry clearance to join his wife and child by the British Embassy following the completion of his sentence. The Presenting Officer confirmed that the conviction was disclosed in his application. It is difficult to comprehend why a public interest should require the appellant's deportation several years after his release when he was allowed to re-enter the country immediately following his sentence. The fact of his conviction is not enough. Any risk would have been greater in September 2013 than [at] the date of decision. Had the appellant not applied for a residence card it is likely that he would be still living with his wife and child."

12. This is the principal, in our judgment the only, viable ground of appeal presented by the Secretary of State. The basis of the challenge is that it is said that the judge relied upon the fact that the appellant had been given entry clearance to join his wife and child by the British Embassy as being affirmative evidence that there was no public interest in preventing the appellant's entry into the United Kingdom. That was, indeed, a matter which the judge was entitled to take into account. It would be, on the face of it, perverse if a decision to grant him entry clearance, notwithstanding the fact that he had a conviction, was subsequently followed by a decision to refuse him a residence card, acknowledging his right to remain in the United Kingdom, on the basis that he had that same conviction which the Entry Clearance Officer had deemed insufficient to prevent his entry.

13. The way it is put in the grounds of appeal is that, as is obvious from the start of the judgment, the appellant was sentenced to 30 months' imprisonment in Holland for the relevant offence. The Secretary of State then goes on to say that, whilst the appellant was serving his prison sentence, he applied to the ECO on 27 June 2014 for a family permit. In doing so, the appellant was asked in question 33.

> "Do you have any criminal convictions in any country including spent/unspent convictions and traffic offences?"

to which he replied

> "Yes. [*Details*] 18 June 2013 Convicted drug offences, 15 months."

It is said that the grant of entry clearance was made on the basis of a wilful (or at least if it was not wilful, it was an actual) mis-statement in that his true sentence was double that declared.

14. There is an immediate difficulty with challenging the First-tier Tribunal Judge's determination on that score and, indeed, in challenging it before us in the Upper Tribunal. The document of 27 June 2014 is still not before the Tribunal. More importantly, it was not before the First-tier Tribunal. Nor was there a suggestion made before the First-tier Tribunal that the grant of entry clearance was made on the basis of a material misrepresentation. What we see in paragraph 89 of the determination is simply that the Presenting Officer confirmed that the conviction was

disclosed in his application. It was on this basis that the judge properly concluded

> "It is difficult to comprehend why the public interest should require the appellant's deportation several years after his release when he was allowed to re-enter the country immediately following his sentence."

15. There can be no material mistake or misdirection on the part of the judge if he was not alerted to the fact that the application made in June 2014 was made on the basis of a material mis-statement.

16. It does not entirely end there because we have before *us* the application dated December 2014, some six months after the material mis-statement. This is what the applicant said in the application that he made for a permanent residence card:

> 'The applicant was absent from 13 June 2013 to 11 September 2014. He was serving a 15 month custodial sentence in the Netherlands [8.3] ... The nature of the offence: possession of drugs ... Sentence given: 30 months - 15 months served. Released on 11 September 2014 [9.2].'

He then repeats that by saying [also 9.2] in answer to the question 'What was the period of imprisonment?'

> '30 months but 15 months served.'

17. Now all this was said in an application at which time no allegation had been made against him that he had misstated the position in his June 2014 application. He was not therefore alerted to the allegation that he was being dishonest in that earlier application. It remains, therefore, a startling piece of evidence that some six months later, he clearly revealed the entire truth about that conviction.

18. That however may be by-the-by because, in our judgment, it cannot be said that the judge erred in law in failing to take into account a document that was not before the First-tier Tribunal Judge, that is, the application 27 June 2014 and which was not, in terms, raised by the Presenting Officer. He, so it is said in paragraph 89, merely confirmed that the application for the conviction was disclosed in his application. For that reason alone, this appeal must fail on ground 1.

19. There are other reasons why we consider that the judge was right. It is said that the judge reached a wrong conclusion in relation to the serious risk of reoffending and that it was sufficient that the offence was committed and the appellant either had not plainly accepted the offence or indeed denied the offence and that these factors alone were sufficient evidence that there was a serious risk and harm to society such as to trigger the threshold for his removal or the refusal of a residence card.

20. In our judgment, it does not follow that to be equivocal about, or indeed deny, guilt is sufficient in itself to establish that there is a risk of

reoffending. It is perfectly true that the Secretary of State is in a difficult position in relation to offences which are committed outside the jurisdiction because such offences may only be recorded by a single line in the record which is kept internationally (or at least across Europe) in relation to criminal offenders. The European documentation may be very limited and may not address the issue of risk of reoffending but that does not mean that it is not a burden placed upon the Secretary of State to establish that there is such a risk if she alleges it.

21. The risk of reoffending is not established merely because an appellant did not accept his guilt, otherwise in every case of a 'not guilty' plea, that alone would be enough to say that there is a risk of reoffending because the offender has not squared up to the offence which is put against him. That cannot on its own be sufficient evidence to establish a risk of reoffending. Were it to be evidence at all, it must be taken in the context that for this appellant it was a single offence. He cannot be treated as a repeat offender which builds up a picture of an individual who has a propensity to reoffend and is, therefore, likely to do so in the future. Nor is there the sort of evidence that one often has in such cases, when looking at British documentation, that the individual was short of cash and decided to use the easy way out by committing a criminal offence, drawing the inference that, if he were in similar difficulties in the future, he would also turn to crime. Such a simple relationship of offending to risk is not one which is open to us, on the facts of this case. It would be pure speculation. In those circumstances we are not satisfied that ground 2 is established.

22. Ground 3 is predicated upon the First-tier Tribunal Judge being in error. Inevitably, the proportionality exercise will have been skewed if the judge failed to give appropriate weight to the public interest. This goes back to ground 1. For the reasons we have given, we reject the Secretary of State's submission that the judge was wrong. It follows that we also find the First-tier Tribunal Judge reached a sustainable finding of fact in relation to the proportionality of permitting the appellant to remain with his wife and child in the United Kingdom.

23. Accordingly we dismiss the appeal of the Secretary of State and record that the determination of the First-tier Tribunal Judge shall stand.

DECISION

The First-tier Tribunal Judge made no error on a point of law and her determination of the appeal shall stand.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

Date: 19 February 2018