Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00110/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4th July 2019	**On 12th July 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

WALDEMAR [M]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Aitken, instructed by UK Migration Lawyers Ltd
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The First-tier Tribunal decision was set aside by me (following a hearing at which the appellant was represented by Mr J Rendle), in a decision promulgated on 7th May 2019 for the following reasons:

> 1. By a decision promulgated on 29th January 2019, First-tier Tribunal Judge Kaler dismissed the appellant's appeal against deportation. Permission to appeal was sought on rather confusing grounds but granted on the judge being able to identify one issue namely that it was arguable that the judge had impermissibly changed the OASys assessment of future risk to medium from low.

2. Mr Rendle very helpfully identified another ground upon which he relied namely that there was an absence of weight attached to the appellant's imminent fatherhood/relationship with his girlfriend. He also sought permission to amend the grounds in order to seek to challenge the finding of the First-tier Tribunal that the appellant's mother had not been exercising Treaty Rights, submitting that the evidence before the Tribunal pointed to her being self-sufficient for a relevant period of time.

3. Mr Walker had no objection to the widening of the grounds relied upon. I granted permission to amend.

4. Although Mr Rendle submitted that the three grounds cumulatively were such as to amount to an error of law, I indicated that I did not consider the lack of weight on the imminent fatherhood/relationship to be an error given the lack of evidence before the tribunal of the relationship, I nevertheless accepted the submission (to which Mr Walker did not object) that there was an error of law in the finding that the appellant did not have permanent residence and that there was just enough to sustain the submission that the First-tier Tribunal judge had failed to give adequate reasons for his conclusion the appellant was at medium risk of causing future harm. That the outcome to the appeal will be any different does not necessarily follow.

5. In the circumstances I set aside the decision to be remade.

2. I made directions for the future conduct of the hearing, with which both parties complied.

3. Mr Walker accepted the appellant's mother had been exercising Treaty Rights at the required time and that Mr [M] had, at the date of the index offence, conviction and deportation decision, permanent residence as an EU citizen. As such his deportation is predicated upon whether there are serious grounds of public policy and security that require his deportation. Mr Aitken accepted that, although there has been an appeal filed on Article 8 grounds following the service on the appellant of a s120 notice, the issues of the proportionality of the decision are subsumed within the appeal under the regulations; if the appellant does not succeed under the Regulations he would be very unlikely to be able to succeed on human rights grounds.

4. There was no dispute as to the factual matrix; consequently, I did not hear oral evidence. I heard submissions from Mr Walker, did not trouble Mr Aitken and on conclusion of the hearing informed the appellant that I allowed his appeal and my written reasons would follow.

Undisputed facts

(i) The appellant, who was born on 28 July 1995 is a dual citizen of Portugal and Mozambique. He left Mozambique aged 2 and has not been there since. He has been in the UK since the age of 12 and has Permanent Residence as an EU national. He remains close to his mother, stepfather and siblings who reside in the UK. He has no relatives or other ties in Portugal, whether practical or emotional, other than a knowledge of social and cultural mores having been brought up by his mother and stepfather.

(ii) Although he has now been resident in the UK for more than 10 years, he does not qualify for the higher threshold of protection.

(iii) He attended school until aged 16; he is now working as a tyre fitter.

(iv) He is in a genuine and subsisting relationship with Ms Webb-Hamden, a British Citizen. She has a child from an earlier relationship who calls the appellant "dad" and who has no contact with her birth father. Ms Webb-Hamden and the appellant have a new baby together. They do not live together.

(v) On 3rd June 2016, aged just short of 21, he was sentenced, following a plea of guilty, to a total of 3 years and 9 months in a Young Offenders Institution for dealing in crack cocaine and heroin. The judge's sentencing remarks refer, rightly, to such drugs as dealing in death and refer to the appellant's role as being significant and motivated by financial advantage.

(vi) Whilst serving his sentence, the appellant had two adjudications against him: possession of a Samsung phone and 2 USB charging leads; possession of a SIM card and an unknown herbal substance.

(vii) He was convicted of driving without insurance in December 2018 for which he received 6 penalty points.

(viii) The OGRS score, which estimates the percentage probability of re-offending for years 1 and 2 after discharge, is 8% and 15% respectively.

(ix) The appellant has spent nearly half his life in the UK. Prior to the index offence he was a person of good character and is socially and culturally integrated in the UK.

(x) The OASys report prepared on 19th September 2017 records that the appellant recognises the impact and consequences of offending on victims, community and wider society; records that he was at that time in various plans for rehabilitation. Various certificates confirm completion of some of these courses.

(xi) The appellant was released from prison on 29th January 2018; his licence expires on 14th December 2019.

Discussion

5. The principles to be considered in a deportation such as the appellants are well known and are set out succinctly in the decision letter of the SSHD dated 25th January 2018. Mr Walker relied upon the content of that letter, the particular very serious nature of the appellant's index offence and that in the OASys report he was considered to be at medium risk of re-offending.

6. The Guidance to interpreting OASys information states

> "… evidence suggests that offenders in the Low likelihood of reoffending band are unlikely to benefit from additional interventions to reduce their offending, such as cognitive skills programmes, while the intensity of probation case management varies in line with the likelihood of reoffending band as well as Risk of Serious Harm….

> In the case of a serving prisoner, the assessment of Risk of Serious Harm is based on the following:
>
> - Identified controls are in place at the time of release into the community, most typically through the licence, and
> - The Offender Manager monitoring the offender's compliance with these controls on an ongoing basis until the sentence end date
>
> …
>
> It is vital to remember, therefore, that all assessments take into account the likelihood of a further offence occurring and the level of impact of that harm should an offence occur.
>
> …
>
> The risk of serious harm is only considered to be low in the community if the appropriate controls are in place to manage and monitor the offender throughout and can be acted upon to reduce harmful behaviours occurring …"

7. The appellant has without doubt been convicted of a very serious offence. He received a lengthy sentence for a first offence and there is no doubt but that the supply of drugs of this nature has a severe and negative impact on society as a whole as well as for the individuals who become addicted. There is evidence in the bundle that the appellant has completed some of the recommended courses but not all. He remains on licence, and as said in the OASys guidance, the assessment of risk is predicated upon him being subject to controls. In the decision letter the respondent takes the view that in the absence of an improvement in his personal circumstances or that he has addressed the issues which caused him to offend, then it was reasonable for the respondent to conclude that there remained a risk of him reoffending.

8. The OASYS report as it appears in the bundle does not specifically state whether the appellant is considered to be at low, medium or high risk of re-offending. Taking account of the guidance to interpreting OASys reports I am satisfied that he is at low risk. I do however note that the OASys report is predicated upon an offender being subject to some form of control and I am aware that he remains on licence at present. I have taken this into account in my overall assessment.

9. I am satisfied there has been a significant change in the appellant's personal circumstances. He not only has his own child with his partner, but her toddler looks to him and treats him as her father. He is working full time and provides considerable effective emotional input to the family as a father and partner.

10. The available evidence does not indicate a propensity to reoffend. The OASys report does not consider this to be significantly the case and, although he remains on licence and has a driving conviction since release, he has not been recalled off licence and has not come to police attention in connection with drugs related issues. Deterrence and public revulsion do not play a significant part in the decision to be taken in this case; this appellant's conviction cannot be described as an exceptionally serious case. Although the respondent refers

to the evidence indicating a propensity to reoffend, the decision letter does not provide references to information that led to the respondent reaching that conclusion and Mr Walker did not draw my attention to any such information. On the evidence before me I cannot reasonably conclude that the appellant has a propensity to reoffend.

11. Taking full account of the appellant's conviction, that he has permanent residence in the UK and his personal circumstances I am satisfied t hat the decision to deport him is not proportionate.

12. The respondent's decision to deport the appellant is not justified on grounds serious grounds of public policy. I allow the appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Date 9th July 2019

Upper Tribunal Judge Coker