Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00481/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 22 MARCH 2019	**On 27 March 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DILTON [A]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Mills, Senior Home Office Presenting Officer
For the Respondent: Mr Holt

DECISION AND REASONS

1. I shall refer in this decision to the Secretary of State as the 'respondent' and to the respondent as the 'appellant' as they respectively appeared before the First-tier Tribunal.

2. The appellant was born on 7 November 1994 and is a male citizen of Portugal. On 17 July 2018, a decision was made to deport the appellant to Portugal under section 5(1) of the Immigration Act 1971. The appellant appealed to the First-tier Tribunal which,

in a decision promulgation on 17 October 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The appellant first came to the attention of the United Kingdom authorities in December 2010 when he was arrested for robbery. Between 7 January 2011 and 5 September 2016, the appellant received four convictions for seven offences including theft and drugs. In particular, on 3 August 2016 at Nottingham Crown Court, the appellant was convicted of producing a controlled drug (Class B) possessing a controlled drug with the intent to supply (heroin: Class A). He was sentenced on 5 September 2016 to total 3 years and 10 months imprisonment and ordered to pay the victim surcharge of £120.

The 2006 or the 2016 Regulations. 'imminent'; 'present'

4. The Secretary of State submits that the judge applied the wrong regulations and, in consequence, failed to have regard to the fact that the threat posed by an individual to one of the fundamental interests of society 'does not need to be imminent.'

5. It is clear that the judge did refer to the former regulations of 2006 at [61]; she refers to the test in 'regulation 21(5)'. Both parties agree that the relevant regulations are the Immigration (European Economic Area) Regulations 2016 in particular, regulation 27(5) which has replaced the former 2006 regulation 21(5). The wording of the relevant regulation is very similar to that which it replaced although it does require a decision maker to have regard to whether 'the personal conduct of the person concerned must represent[s] a genuine present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and *that the threat does not need to be imminent*' [my emphasis]. The respondent argues that, by applying the former regulation, the judge fell into error because she allowed the appeal purely on the basis that there was insufficient evidence to show that the appellant poses a current threat and in doing so, she ignored or gave insufficient weight to the report of OAsys which assessed the future risk posed by the appellant of reoffending as medium, giving a percentage chance of reoffending in the next two years as 56%. The judges was concerned with identifying the existence of an imminent threat and in consequence her analysis was flawed.

6. I do not find that this submission has merit. First, I am satisfied the judge, while she does refer to the former regulation, also had in her mind the appropriate regulation which she sets out in full at [11] I am not satisfied that anything in the decision indicates that the judge applied the former regulation or failed to have regard to relevant regulation which she has quoted verbatim. Secondly, whilst she refers to the former regulation 21(5) she does not quote it or expressly indicate that she has applied it. Thirdly, the judge did have regard to the OAsys report and its conclusions (which she summarises accurately) and there is no suggestion that she rejected that evidence. Rather, she considered it together with all the other evidence which he was entitled to consider, including the oral testimony of the appellant himself. I find that the judge's reference to the former regulations did not lead her into error.

The OAsys report/the appellant's evidence: Perversity?

7. The argument advanced by Mr Mills, for the Secretary of State, may be summarised as follows. The OAsys report represented a professional and objective assessment of the likelihood of the appellant reoffending in the next 2 years. The percentage chance indicated was 56%. On the standard of the balance of probabilities, therefore, it was more likely that the appellant would reoffend in the next 2 years than that he would not. Set against that evidence, the appellant himself claimed that he did not intend to reoffend but that he intended to rehabilitate himself. The appellant, at the time he gave oral testimony to the judge, had not long left prison and there was simply no basis for the judge to accept his evidence in preference to that of the report. By doing so, her reasoning was perverse.

8. Having considered the decision very carefully and, as urged by Mr Holt for the appellant, holistically, I am satisfied the judge has not fallen into error. First, I agree with Mr Holt that the judge was required to carry out a robust fact-finding exercise. She had the opportunity of hearing oral evidence, which the Upper Tribunal has not enjoyed. I accept that the apportionment of weight to various items of evidence was a matter for the judge and I do not find that she has reached perverse findings or that she has carried out the fact-finding exercise in anything other than a judicial manner. Another judge, faced with the same facts, may have reached a different outcome but that is not the point. It was open to the judge to attach weight to the appellant's evidence. Significantly, at [53], it is clear that the judge did not simply accept the appellant's word that he had reformed his behaviour. The judge considered his evidence in the context of his recently-formed family life with his partner and child. The judge was not taking at face value the evidence of an individual whose personal circumstances had not change since he had committed criminal offences; the appellant circumstances had changed and the judge was right to consider his evidence in the context of his new circumstances.

9. Secondly, whilst I acknowledge, as I believe did the judge, the weight properly attaching to the OAsys report, it does not follow that if such a report indicates a likelihood of reoffending greater than 50% that such an opinion would inevitably outweigh all other evidence and lead inexorably to the conclusion that an individual must represent a present threat. In essence, Mr Mills suggested that the judge's acceptance of the appellant as a reformed character was premature, coming to soon after his release from custody. Indeed, he proposed that, if I were to find an error of law and set aside the decision, it would be appropriate for there to be a new fact-finding exercise which would consider the appellant and his family's current circumstances. That is a suggestion which does not sit easily with the assertion that the judge reached a perverse conclusion. Rather, it indicates that the passage of time together with a lack of offending might enable the appellant to succeed in his appeal on remittal. At the core of this appeal is the question whether it was open to the judge to prefer the evidence of the appellant so soon after his release from custody to that contained in the report. I find that it was. I find that the judge was aware of the pitfalls which might endanger her analysis. At [55-57], she makes specific reference to *Essa* [2013] UKUT 00316 (IAC) and *MC* [2015] UKUT 00520 (IAC). She noted that,

'the Tribunal in *MC* held the reference to the prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime, not the mere possibility of rehabilitation. It also held that matters are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment active membership of the community and the like.' I find that the judge had that principle firmly in mind when she considered the appellant's testimony and I do not accept that she simply accepted the appellant's assurances shorn of any context. Ultimately, she reached a decision which was open to her on her findings. Notwithstanding her reference to a former regulation, I find that she had proper regard to and applied the correct regulation and also applied appropriate jurisprudence. She gave appropriate weight to the OAsys report but properly considered it together with all the relevant evidence. I find that she did not err in law for the reasons advanced in the grounds of appeal or at all.

Notice of Decision

10. This appeal is dismissed

Signed Date 22 March 2019

Upper Tribunal Judge Lane