Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00600/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 5 June 2019	**On 28 June 2019**

Before

THE HONOURABLE MR JUSTICE FREEDMAN
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ENTRI [K]
(anonymity direction not made)

Respondent

Representation:
For the appellant: Mr L. Tarlow, Senior Home Office Presenting Officer
For the respondent: Mr J. Collins, instructed by Sentinel Solicitors

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant before the Upper Tribunal.

2. The appellant appealed the respondent's decision dated 10 October 2017 to remove him under The Immigration (European Economic Area)

Regulations 2016 ("the EEA Regulations 2016") on grounds of public policy and public security. First-tier Tribunal Judge George ("the judge") allowed the appeal in a decision promulgated on 21 March 2019. References to a number in brackets are to paragraph numbers of that decision.

3. The judge began her decision by summarising the appellant's brief immigration history [1]. The appellant entered the UK in or around October 2015 and there was some evidence to show that he had been exercising his treaty rights as a European citizen working in construction.

4. At [2], the judge noted that on 19 June 2017 the appellant pleaded guilty to the production of cannabis for which he was sentenced to a term of eight months' imprisonment. She noted the date of the respondent's decision and that it was certified under regulation 33 of the EEA Regulations 2016. The appellant was not removed but decided to leave the UK voluntarily. The judge noted correctly that the appellant had not acquired a right of permanent residence and that the case therefore needed to be considered under the lowest threshold contained in regulation 27 [5].

5. She summarised the decision letter and the reasons given by the respondent for making the decision [7-10]. She set out the documentary evidence which was fairly limited on both sides [11-13]. The judge then went on to summarise the relevant legal framework. It is not suggested that anything in that summary is incorrect or that she failed to apply the correct test.

6. The judge identified the main legal issue she was required to determine, which was whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society [28]. She summarised what happened at the hearing. The hearing proceeded in the absence of the appellant because he was not produced from detention, but those representing him took the view that it was in his interest to proceed given that further delay would lead to his continued detention. The judge noted that the Home Office Presenting Officer on the day accepted that the case was on a "low-level" on grounds of public policy and security [34].

7. Her main findings are at [43-45].

> "43. The offence is of producing cannabis. This is not the same as simple possession but it is not in the league of 'hard drugs'. If I had not known what the offence was and simply read the respondent's deportation decision from paragraphs [20] to [21], I would have thought that the appellant had been convicted of an offence involving Class A drugs. He has not. It seems to me that the respondent's decision seems to be a standard paragraph. It talks about hard drugs and drug addiction. I do not have evidence that cannabis (even the production of it) leads to addiction and that this would drive someone to commit crimes. Paragraph [20] talks about "those involved in supplying drugs". There is no

> evidence that the appellant has been involved in the supply of drugs. It is a different offence from production. The letter at paragraph [21] talks about users becoming addicted and developing serious mental and physical health problems. This refers to hard drugs. I do not have any evidence before me to state that the use of cannabis does cause serious mental and physical health problems. I have already identified that there is no evidence before me to suggest that the use of cannabis leads to addiction.
>
> 44. The appellant has only committed the one offence and he accepted responsibility for it. Although he offered an explanation of being in the wrong place at the wrong time, he did accept full responsibility. He entered a guilty plea.
>
> 45. The appellant has had no further convictions so that there can be no present threat. In the overall scheme of drug offences, the appellant's offence falls within the lower range. I find that there is no sufficiently serious threat – particularly in the light of the fact that there has been no other offending."

8. At [48-49] the judge went on to consider whether there was any evidence to suggest that the appellant might reoffend. She concluded that the assertion made by the Secretary of State that the appellant posed a significant threat to the safety and security of the public was simply not borne out by the limited evidence produced. Having considered the evidence, she concluded that there was nothing to suggest that the appellant's presence in the UK was likely to cause any difficulties at all [52]. She noted that there was only evidence of a single offence and that there was no other evidence to suggest that the appellant had committed offences here or elsewhere such that he would pose a genuine, present and sufficiently serious threat. For those reasons the appeal was allowed.

9. At [55] the judge correctly stated that the deportation decision interfered with the appellant's rights of free movement and his rights under the EU treaties. However, she went on to state that the appeal was allowed "on human rights grounds" which is an obvious error of law that needs to be corrected. For that reason, the decision must be set aside. In assessing the extent to which the decision needs to be remade we have considered whether there are any errors in the substance of the judge's decision. We conclude that Secretary of State's grounds do not disclose any material errors of law in the judge's findings.

10. The first point made in the grounds is a general submission that the appellant's immigration history in leaving the UK and then re-entering without making a formal application under regulation 41 was a relevant consideration. Whilst it is the case that the judge perhaps did not recognise that no formal application was made under regulation 41 for temporary admission, it is difficult to see how this point taken alone could have made any material difference to the overall outcome of the appeal given the dearth of evidence relating to the risk of reoffending.

11. The appellant left the UK and only returned in December 2018. The Tribunal records show that this was after the First-tier Tribunal held a case management hearing in September 2018 and indicated that the appeal would shortly be listed for hearing. It seems that the progress of the appeal may have been the prompt for the appellant to return, albeit he did not do so through the correct channels outlined in the EEA Regulations 2016. Whilst this is a matter that the judge could have taken some account of, as we have already said, we do not think this is a significantly strong point to undermine the overall conclusion that the appellant did not pose genuine, present and sufficiently serious threat.

12. The second ground asserts that the judge made contradictory findings as to whether the appellant was involved in the supply of drugs or took drugs himself. This ground amounts to nothing more than a general assertion. The burden was on the Secretary of State to produce evidence to show the extent and the nature of the offence, but none was provided. Production of cannabis is not the same offence as supply of class B drugs. It was open to the judge to take into account the fact that the sentence was at the lower end of the scale for a drugs offence. It was unlikely that the appellant would have undertaken rehabilitation courses during such a short sentence. He would only have been in prison for around four months. In the absence of any other information about the offence it was open to her to conclude that the fact that he had not undertaken rehabilitation courses in prison was not a factor that had much bearing on the risk of reoffending. We conclude that those findings were open to her to make on the evidence.

13. Mr Tarlow did not make any submissions, and did not rely in any meaningful way, on the third point, which amounts to no more than a general assertion that the family members had not prevented him committing an offence previously. Again, even if it had been argued, we find that this is a fairly minor point that would not make any material difference to the outcome.

14. The final point related to the judge's findings at [44-45]. She noted that the evidence showed that the appellant had committed one offence and that he accepted responsibility for it. She noted that there was no evidence of further convictions to indicate that he may be someone who constituted a present threat. The respondent points out that shortly after his conviction and release from prison a decision was made to remove the appellant. He left voluntarily and spent most of the time after that outside the UK. Whilst that is the case, we note that the Secretary of State often produces evidence of offences committed in other EU countries if he considers it relevant. The burden was on the Secretary of State to show that the appellant presented a sufficiently serious threat. We conclude that it was open to the judge to conclude that there was no evidence to indicate that he committed any other offences and to proceed to determine the appeal on that basis.

15. The decision must be set aside on the technical point relating to the ground of appeal. However, we conclude that the substantive findings made by the First-tier Tribunal did not involve the making of errors of law. We remake the decision and allow the appeal on EU law grounds based on the substantive findings made by the First-tier Tribunal.

16. We conclude that the respondent's decision breaches the appellant's rights under the EU Treaties in respect of entry into or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on EU law grounds

Signed  Date 26 June 2019
Upper Tribunal Judge Canavan