Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00342/2012

THE IMMIGRATION ACTS

Heard at Field House
On 12 August 2013

Determination Promulgated
On 27 November 2013

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JIMMY ROLAND DELGADO-VILLOTA

Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr D Furner, Legal representative of Birnberg Pierce & Partners

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of a panel of the First-tier Tribunal (First-tier Tribunal Judge Metzer and Ms V S Street JP, non-legal member) promulgated on 20 June 2013 following a hearing at Taylor House on 11 June 2013.

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For ease of reference, I shall refer to the Secretary of State, who was the original respondent, as "the Secretary of State" and to Mr Delgado-Villota, who was the original appellant, as "the claimant".

2. The claimant is a citizen of Colombia who was born on 13 June 1981. His immigration history was recorded in the determination of the panel and can be summarised as follows. He entered the UK on 4 October 199 and claimed asylum, but that application was refused on 27 February 2000 and an appeal was lodged. On 28 February 2001, his appeal was dismissed and he was subsequently refused permission to appeal to the Upper Tribunal. He submitted a human rights claim on 9 May 2001.

3. The following year, on 26 April 2002, the claimant married an EEA national exercising treaty rights in this county and was granted a residence permit on 19 March 203 valid for five years. Having been granted permission to stay in the UK as the family member of an EEA national, he withdrew his human rights claim.

4. The claimant applied for permanent residence on 14 March 2008, and although that application was refused by the Secretary of Srate, his appeal against this refusal was allowed on 25 February 2010, under Article 8 of the ECHR. Although the claimant's Spanish wife had returned to Spain in November 2008, and he was no longer in a subsisting relationship with her, it would appear that by that time he had acquired the right of permanent residence under the Regulations. For this reason, permission was granted to appeal to the Upper Tribunal and on 16 November 2010 the Upper Tribunal upheld the claimant's appeal under the EEA Regulations. The claimant was granted permanent residency on 21 March 2011.

5. On 29 May 2009 (before his right to permanent residency had been established) the claimant was convicted of possessing a Class A drug, cocaine, with intent to supply and was sentenced to fifteen months' imprisonment. He was also convicted of entering into an arrangement to facilitate acquisition, retention, use or control of criminal property for which he was sentenced to six months' imprisonment to run concurrently with the other sentence of imprisonment imposed. At that time, the Secretary of State did not make a decision to deport him, but he was issued with a warning letter.

6. After the claimant had been granted permanent residence, on 27 September 2011, at the Inner London Crown Court, he was again convicted of possessing a Class A drug, cocaine, with intent to supply, and also of possessing a Class B drug, amphetamine, with intent to supply. He was sentenced for these offences on 27 February 2012; for the more serious offence of possessing the Class A drug with intent to supply, he was sentenced to 40 months' imprisonment and for the other offence he was sentenced to twelve months' imprisonment concurrent with the sentence for the more serious offence.

7. On 7 February 2013 the Secretary of State made a decision to make a deportation order, and it was the claimant's appeal against this decision which was allowed by

the First-tier Tribunal panel, which decision is now being appealed by the Secretary of State.

8. It is common ground that because this claimant now has a permanent right of residence under paragraph 15 of the EEA Regulations, under Regulation 21(3) a decision to deport him cannot be taken “except on serious grounds of public policy or public security”.

<u>The Panel’s Decision</u>

9. As already noted above, the panel allowed the claimant’s appeal. Although the panel stated that “We were not impressed with the appellant's manner when he gave evidence” and the fact that he “appeared to be down-playing and distancing himself from the offences” he had committed (at paragraph 27) and although in that paragraph it considers that if it had had to consider Article 8 “in the circumstances the principle of proportionality will be unlikely to have assisted the appellant”, nonetheless, it considered (at paragraph 28) “that since the decision primarily concerns Regulation 21 of the 2006 Regulations in accordance with *MG and VC* [2006] UKAIT 0053, it is necessary in an EEA case to show a current propensity to reoffend in order to make out any kind of public policy or public security grounds”.

10. Having considered that this was the test, (and that the burden was upon the Secretary of State to establish current propensity to offend), it considered itself “bound by the more recent evidence including the Probation Service describing the appellant posing as a ‘low-risk’ of serious harm and/or reconviction” (at paragraph 30). The panel acknowledged that there was “now a suggestion” that the claimant realised “that he must rid himself of this cycle of offending” and that he had made efforts to do so whilst in prison, because there were no discipline issues during this period.

11. On this basis, at paragraph 30 the panel considered that “we find the respondent has failed to establish to the relevant standard that the appellant has a current propensity to reoffend”.

12. For this reason, at paragraph 31, the panel concluded that “in all, the circumstances, we find the weight of evidence from the appellant his witness and the probation service suggests that the appellant has changed in his view of this serious offending and that he is now properly motivated to stay free from offending” and that accordingly (at paragraph 32) it was unnecessary to consider Rule 21(5) of the 2006 Regulations “taking into account Article 8 of the ECHR … as we find that the respondent has failed to establish to the relevant standard that there are serious grounds of public policy for the appellant to be deported, taking into account the necessity of showing a current propensity to reoffend in accordance with the *MG and VC* decision.”

Grounds of Appeal

13. The Secretary of State's grounds are contained in her application for permission to appeal. It is submitted that the panel's approach when considering that it was unnecessary to consider paragraph 21(5) of the 2006 EEA Regulations was wrong, first because it failed to give consideration to what would amount to "serious grounds". In particular (at paragraph 3 of the grounds) it is submitted that the panel had been wrong "not to give weight to the importance of preventing crime, public security, immigration control etc. that fall within such a consideration".

14. The crux of the Secretary of State's argument contained within the grounds is contained at paragraph 7, as follows:

> "Inadequacy of reasoning
>
> 7. The panel consider that propensity to reoffend is a major consideration in their reasoning (see paragraph s.28-30). That matter is of relevance but only where Regulation 21(5) is considered. A low risk of reoffending still indicates the risk, and it was incumbent upon the panel to assess whether that low risk still meant the serious grounds of public policy, together with the principles in Regulation 21(5) were met."

15. The Secretary of State was granted permission to appeal by Designated First-tier Tribunal Judge Garratt on 5 July 2013.

The Hearing

16. I heard arguments on behalf of both parties, which I recorded contemporaneously. As my note of these submissions is contained in the Record of Proceedings, I shall not set out below everything which was said to me during the course of the hearing. I have, however, had regard to everything which was said before me, as well as to all the documents contained within the file, whether or not the same is specifically referred to below.

17. The main argument made by Mr Tarlow on behalf of the Secretary of State was that even a low risk of reoffending needed to be considered. Also, given that the claimant had served two terms of imprisonment for serious offences, it was arguably perverse to say that he represented only a low risk of reoffending.

18. On behalf of the claimant, Mr Turner accepted, in answer to a question from the Tribunal, that the panel did have to take into account even a low risk of reoffending. However, the panel had referred to the Tribunal case of *MG and VC*, in which at paragraph 12 the Tribunal had referred to the European case of *Nazli and Others (External relations*) [2000] EUECJ C-340/97 as authority for the proposition that a current propensity to reoffend was required. The panel made findings on the basis

of the probation report, taking into account the claimant's conduct in prison and after release, to show that there was no propensity to reoffend.

19. When asked by the Tribunal where the panel had found that there was no risk of reoffending, Mr Furner replied that the panel had considered all the evidence and while it was correct that it had found that the risk was stated to be low rather than nil, nonetheless it considered that there was no propensity to reoffend and that was a sustainable finding. Mr Furner then referred the Tribunal to evidence which had been before the panel which indicated that the risk was low and that the claimant was "very motivated" to address his offending. The panel had considered the evidence which was before it and had considered that the claimant had changed his views regarding offending. It was entitled to find there was no propensity to reoffend after the claimant had been assessed as the lowest risk.

20. Although Mr Furner accepted that the claimant's previous behaviour had ruined his relationship, the evidence showed he had turned his life around and the assessment had to be concerned with future risk.

21. In answer to an observation from the Tribunal that the panel did not say that it had considered Rule 21(5) Mr Furner replied that although there may be serious grounds for deporting a person under Rule 21(3) it might nonetheless not be proportionate under Rule 21(5), but if a judge had found that the Secretary of State did not get past Rule 21(3), because of an absence of a risk of reoffending, it was hard to see what Rule 21(5) added. If, as Mr Furner submitted, a "current propensity to re-offend" is mandatory, it cannot be right that because a judge has found that there is no current propensity to reoffend, he must nonetheless go on to consider Rule 21(5). If there are no serious grounds for deporting a person, then the decision cannot be saved by the proportionality principle.

22. In this particular case, the Secretary of State cannot show that this would have made any difference. Also, at paragraphs 30 and 31, the panel had regard to all the factors set out within Rule 21(5) without saying that this is what it was doing. What Rule 21(5) does is to impose a limitation on the Secretary of State's power to deport, and when one looks at the matters which have to be considered within Rule 21(5) the panel's decision was consistent with all of them. The panel did not rely on past convictions although it had regard to them.

23. In answer to a question from the Tribunal as to whether, even though the risk of reoffending might be low, it was nonetheless a real one, and that the offences of which the claimant had previously been convicted did affect a fundamental interest of society, Mr Furner responded that that was not enough to save the Secretary of State's decision. There would still have to be a finding of a propensity to reoffend. In the case of *MG and VC*, the Tribunal had been dealing with an armed robber who had breached his licence, but still found that because of the "low risk" of reoffending, his deportation simply could not be justified.

24. In reply, Mr Tarlow submitted that a low risk was still a risk, and in those circumstances it must have been an error not to consider in particular the provisions of Rule 21(5)(c), which is whether or not the "personal conduct of [the claimant] [represented] a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It would be wrong for this Tribunal to conclude that the outcome of that assessment was inevitable. The assessment needed to be made, and in failing to make that assessment, the panel made a material error of law. Its decision should be set aside and remade.

25. With regard to the findings of fact, there had been no challenge save that it was perverse to find that the claimant did not have a propensity to re-offend given the two serious offences which he had committed. However, it was acknowledged that this had not been challenged in the grounds.

26. In answer to the observation of the Tribunal that the panel had not found that the claimant had a "current propensity to re-offend", Mr Tarlow submitted that the risk would need to be assessed in light of that finding. It was not axiomatic that a differently constituted Tribunal would come to the same conclusions as this panel had come to. The Tribunal could have come to a different conclusion on the evidence before it, and could have found that even though the risk of reoffending might be low, even a low risk was sufficient to engage Rule 21(5)(c), which is to say that the claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

27. I allowed Mr Furner to make further submissions in response to these submissions on behalf of the Secretary of State, and he submitted that the concept of "propensity to re-offend" did not carry with it a concept of seriousness. However, when the Tribunal referred Mr Furner to paragraph 61 of the decision in *Nazli*, where the Tribunal had said that an EEA national who had acquired a right of permanent residence could only be expelled "if that measure is justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy" and that the court had not there said this necessarily had to be more than a low risk, Mr Furner replied that that depended on an exercise of judgment, and that the panel had exercised that judgment in paragraphs 30 and 31. The panel had properly directed itself that it was for the Secretary of State to show that there was a propensity to reoffend and that the Secretary of State had not led any evidence in this regard.

28. On consideration, it was accepted on behalf of both parties that if this Tribunal found that there was an error of law in the panel's determination such that the decision would have to be remade, the appropriate course in light of the Presidential Guidance which has been given would be for the appeal to be remitted to the First-tier Tribunal for rehearing. This was because of the degree of fact finding which would be required, and also as Mr Furner pointed out, there would need to be an Article 8 assessment, because although the panel had found that it would be very difficult for the claimant to succeed under Article 8, nonetheless this aspect of his case had not been properly considered.

Bail

29. It is right that I record that subsequent to the hearing, following representations on behalf of the claimant by Mr Furner, and with the agreement of the Secretary of State's case worker, Ms Andrea Collier, I varied the claimant's bail conditions, and allowed him to change his address.

Discussion

30. The relevant parts of Regulation 21 of the 2006 EEA Regulations provide as follows:

"**Decisions taken on public policy, public security and public health ground**

21. (1) In these regulations 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 [which it is accepted that this claimant has acquired by reason of being the family member of an EEA national exercising treaty rights for the requisite period] except on serious grounds of public policy or public security. ...

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the

person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin. ..."

31. There is no reference in Regulation 21 to a need to establish that an applicant has a "propensity to offend". What is required is that a decision can only be taken in respect of the person who has acquired a permanent right of residence under Regulation 15 on "serious grounds of public policy or public security". When considering what amounts to such serious grounds, a decision to remove a person can only be taken if that person represents "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It is certainly arguable that even if this claimant represents only a low risk of committing further offences of dealing in Class A drugs (which the courts have stated time and again affect the fundamental interests of society) this in itself is a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" as to justify the removal of this claimant as being on "serious grounds of public policy or public security". It is this argument which the Secretary of State says that the panel should have considered, and in respect of which it is said that the panel's failure to consider this was a material error of law.

32. In supporting the panel's view that in order to justify the deportation on "serious grounds" the Secretary of Srate needed to establish that this claimant had a "propensity to offend", Mr Furner relied on what the Tribunal had stated at paragraph 12 of *MG and VC,* apparently relying on the European case of *Nazli*. What was stated at paragraph 12 of *MG and VC* was as follows:

> "12. Subsequent UK cases ... have held that particularly disgraceful criminal conduct may of itself meet the reaction of deportation of an EEA national without reference to propensity to reoffend but *Nazli* ... suggests clearly that those views were unsound as a matter of community law."

33. That is the only reference to the expression "propensity to offend" in that judgment and in my view is not intended to mean anything more than that the Tribunal must look to future risk, rather than to past conduct. This, after all, was what the court was saying at paragraph 61 of *Nazli*, when it was held that a state had to show that the expulsion of such a person was "justified because his personal conduct indicates a specific risk of new and serious prejudice to the requirements of public policy".

34. In other words, if one goes to what the Regulations actually say, the expression to which one must have regard is "risk" or "threat" that is sufficiently serious as to justify a decision maker saying that removal is justified on "serious grounds" rather than "propensity to offend", which leaves open the question of how strong that propensity might be. If the panel had found that this claimant did not pose any risk of reoffending, or even only a nominal risk, its finding might have been sustainable (although on the facts of this case it may well have been perverse). However, it found that he posed a low risk of reoffending. In my judgment, that is still a risk which it needed to consider properly, because the nature of the offending which

might be committed is such as to arguably affect one of the fundamental interests of society.

35. Accordingly, I consider that the panel made a material error of law in not considering first whether or not the Secretary of State's decision could be justified on serious grounds of public policy or public security, and then whether, in any event, such a decision would be proportionate, having taken into account the factors set out in Regulation 21(5) and (6).

36. Accordingly, the decision will have to be remade.

37. Having considered the representations made on behalf of both parties, and having had in mind also paragraph 7 of the Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, I consider that the appropriate procedure is to remit this appeal back to the First-tier Tribunal, to be considered by any panel, but not one including either Judge Metzer or Ms Street. My primary reason for so finding is that the nature and extent of the judicial finding which will be required in order for the decision to be re-made is such that, having regard to the overriding objective, it is appropriate to remit this case back to the First-tier Tribunal.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law and direct that this appeal be remitted to the First-tier Tribunal, sitting at Taylor House, for rehearing.

Signed: Date: 13 November 2013

Upper Tribunal Judge Craig