Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00089/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3 December 2014	**On 8 December 2014**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MICHAL ANGELOPOLOUS
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Adewoye instructed by Prime solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Greece born in Sierra Leone appeals with permission against the decision of First-tier Tribunal Miller dismissing his appeal against the respondent's decision to make a deportation order and to refuse him leave to remain in the United Kingdom on asylum, humanitarian protection, or human rights grounds.

Factual matrix

2. In the present case, the facts found by the First-tier Tribunal Judge were as follows. The applicant was born in March 1992 in Sierra Leone, and travelled to Greece with his family when he was about 2 years old. He became a Greek citizen and when he came to the United Kingdom in 2008, he was about 16 years old. His step-father remains in Greece and the appellant visited him there in 2009. His mother now lives in the Netherlands and his natural father may be living there too.

3. The appellant asserted that he left Greece because of racist attacks experienced there; the respondent accepted that, since he is black, that he was likely to have been harassed and discriminated against by the Greek police before coming to the United Kingdom.

4. The appellant's criminal history in the United Kingdom is set out in an EEA NOMS 1 report prepared on 25 March 2013. The applicant had two convictions in 2010, when he was 17 or 18 years old. The first, in June 2010, was for the use of threatening words and behaviour; in July 2010 he was convicted of being drunk and disorderly on a night bus, screaming at a member of the public; and in addition, during 2010 he was involved in a fight at the social services office for which he was banned from that office for six months, was a suspect in an ABH charge with two others, and was the subject in May 2010 of a rape allegation, as well as an arrest for being in possession of an offensive weapon in a public place and a public order offence, towards the end of 2010.

5. From 2011-2012, during his relationship with his former partner, there is a record of nine domestic violence incidents, including an occasion when the applicant dragged her when 35 weeks pregnant, and another when he punched her in the face while she was holding her baby. All of those incidents were fuelled by heavy drinking.

6. On 28 December 2012 the appellant attacked his former partner as they came out of a nightclub. Both parties were drunk. The appellant blamed his former partner for making him drink. He hit his former partner repeatedly with his fists, knocked her to the ground, and continued striking her in the face with his clenched fists while she lay on the ground. The appellant's former partner sustained a large cut above her eye, a black eye, cuts to her face requiring stitches, a swollen jaw, a chipped tooth, and grazing, scratching and cuts to her right foot. The sentencing judge described it as a 'very, very serious attack indeed' and even after giving credit for a guilty plea at the case management hearing, the appellant was sentenced to two years' imprisonment. At the end of his sentence, he remained in immigration detention and the deportation order was made.

7. The appellant's sister lives in the United Kingdom and they are close in age. She had a child herself in August 2010. She is training as a hairdresser and looking after her child. She would not be in a position to exercise effective supervision of the appellant's behaviour. While he was in prison, she did not visit him. (She did attend the hearing today.)

8. The appellant is the subject of a restraining order made by the sentencing judge preventing him until further notice from contacting his former partner or her son, either directly or indirectly, save through solicitors or social services in relation to the child or the child's affairs. There is inconclusive DNA evidence as to whether the appellant is his father. The boy is now a looked after child in the care of social services, with a view to adoption: the applicant has the right to one letter a year.

9. The appellant had only worked as an employee for a few months in McDonalds but stated that he had been working cash in hand at markets. The appellant was said to speak eight languages: Greek, French, Albanian, German, Russian, Creole, Mende and English. His educational achievements were low: while in prison, he was identified as dyslexic, but completed English Level 2 and studied for a Level 2 IT course while in prison. The appellant claimed to have a Maths A-level but no evidence to support that has been produced.

10. The report records that, according to social services, the appellant had previously been a regular cannabis smoker, but that he denied ever having used drugs. He did admit to having a problem with heavy drinking and stated that he wanted to address it. However, the appellant had failed to comply in 2010 with an Alcohol Treatment Requirement, a community service penalty.

11. He produced various certificates obtained in prison, showing that on 24 October 2013 he completed two programmes run by the Rehabilitation for Addicted Prisoners Trust (RAPt) on Living Safely and Drug and Alcohol support; that on an unspecified date, he achieved the NCFE Level 1 Award in Creative Craft using Art and Design; that he was awarded 1 Credit at Level 1 for Personal and Social Development (for understanding length, weight and capacity); and material connected with the Thinking Skills Programme, which is the subject of the present challenge to the First-tier Tribunal determination. I deal with that in more detail below.

12. There was evidence regarding his education, showing that the appellant attended Lewisham College in 2008-2009 and achieved the 16-18 ESOL Foundation and numeracy qualifications at level E1 and E1/E2. In 2009-10, the appellant began courses for 16-18 Maths, English and vocational studies, at levels of E2 and E2/E3. He withdrew from all of the courses in September 2009 and there is no evidence of education thereafter.

First-tier Tribunal determination

13. The appellant relied on a witness statement from his sister, and both of them gave oral evidence to the First-tier Tribunal. The First-tier Tribunal judge considered all the evidence before him. He concluded that the appellant did not have a 'genuine and subsisting parental relationship' with his former partner's son, whether or not the child was his. There was evidence that the appellant had kept in touch with his step-father in Greece and had visited him in 2009, but, on his account, they lost contact

in 2012. The judge considered that they had had a reasonably strong relationship which had probably deteriorated as a result of the appellant's alcohol abuse. He placed little weight on the sister's evidence, since she had not visited the appellant in prison and in particular, he did not consider it likely that she would be able to help him rehabilitate himself in the community if he were discharged there.

14. The crucial paragraphs for the purpose of this appeal are paragraphs 36-39 of the determination:

> "36. The question obviously arises, nevertheless, as to the extent to which the appellant has reformed. I take account of the certificates which he has received, as a result of the programmes he has undergone whilst in prison. However, it is apparent that a considerable number of the pages of the 'Thinking Skills' programme report, dated the 11th December 2013, are missing, and it is not clear whether he ever completed his workbook, to which reference is made in a letter of the same date. It stated, under the heading 'Open Participation': 'There were times that he appeared less willing to try new skills and he did not always complete the between session tasks'. As I have said, given the fact that a large number of the pages of the report are missing, I have considerable concerns as to what else was contained within the report.
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> 37. It is important to look at the EEA NOMS1 report, which was prepared following a request made on the 24th May 2013. It provides further details regarding his offending, and rather more information with regard to where he was living following his arrival in the United Kingdom, than is evidenced elsewhere. It assesses the likelihood of reconviction as being OGP-77% (high) and OVP-81% (very high) and the risk of serious harm to others as being high in the case of a known adult and high to other members of the public. With regard to children, he is assessed as being a medium risk.
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> 38. In the light of all that I have stated, I do consider that the personal conduct of the appellant would represent 'a genuine, present and sufficiently serious threat' were he discharged into the community here. …"

Permission to appeal

15. The appellant sought permission to appeal on a number of grounds: failure to take into account material evidence (the complete Thinking Skills report); insufficient weight given to his attempts to rehabilitate himself; failure to consider rehabilitation by reference to the decision in *Essa v Secretary of State for the Home Department (EEA: rehabilitation/integration) Netherlands* [2013] UKUT 316 (IAC); failure to take full account of section 339C of the Immigration Rules HC 395 (as amended); and the best interests of the child, his former partner's son. First-tier Tribunal Judge Osborne considered the proposed grounds of appeal and then concluded that there was arguable merit only in the judge's having apparently overlooked much of the Thinking Skills Report. Permission to appeal was granted only on that ground.

Error of law hearing

16. At the hearing today, I was provided with a full copy of the material concerning the Thinking Skills course. The appellant's representative, Mr Adewoye, was instructed that the appellant had completed the course, but on the face of the documents before me, that is plainly incorrect. The material before me, which Mr Adewoye says was provided to the First-tier Tribunal, albeit there is no full copy of it in the file, consists of three documents:

    (a) A letter from HMP Highpoint to the appellant dated 11 December 2013, acknowledging 'completion of your session work for the Thinking Skills Programme' and stating that there would be a course review on Friday 20 December 2013, after which the appellant would be given a 'Further Workbook' and two months in which to complete it.

    (b) A certificate recording that the appellant 'attended the Thinking Skills Programme (TSP) at HMP Highpoint, December 2013'.

    (c) A copy of a TSP Post Programme Report dated 11 December 2013, of which all 15 pages are now before me.

17. The first point to make is that, given the chronology, the certificate is not a certificate of completion of the TSP Programme, but, as it expressly states, a certificate of attending the December 2013 session work. No copy of the 'Further Workbook' appears in the bundle.

18. The second question is the weight which the Post Programme Report will bear. The pages which were not before the First-tier Tribunal judge when he considered the application were pages 2, 4, 6, 8, 10, 12, 14 and 15. There appears to have been a photocopying error: presumably the original was double-sided and only the odd-numbered pages were copied.

19. The report notes, on page 2, that the appellant's OASys report identified that he needed to develop his ability to engage in pro-social activities, manage his emotions, and consider the consequences of his actions, as well as developing his ability to understand others' views and those of the wider community, and challenge his pro-criminal attitudes. The appellant had previously had counselling for his trauma and flashbacks caused by seeing his uncle and others die during the war in Sierra Leone, presumably before he was two years old, since that is when he is said to have left Sierra Leone. It was considered that he could benefit from further counselling. The report records that at one point during his imprisonment, the appellant was placed on basic regime for fighting, after someone made a remark about his mother. He was aware that 'he has difficulty with emotional control' but when a further difficulty occurred during the basic regime phase, the appellant did manage not to fight again. The appellant on page 4 had stated that 'he no longer drinks alcohol' and was said to understand the importance of avoiding it in future. He had 'shown

some insight into the benefits of avoiding previous drinking friends and places that have a focus on alcohol consumption'. It is difficult to know what weight a statement that the appellant no longer drinks alcohol will bear, given that he has been in prison since his conviction, where presumably there is little or no alcohol available to him. The box for 'Participant's comments' on page 4 is blank.

20. In section 2 of the report, headed 'The Conditions of Success', as noted in the determination, it records that during the course, the appellant indulged in 'side talking and play fighting' and had to be reminded to focus on the Thinking Skills Programme to which he 'maintained some openness' (page 5 of the report). On page 6, that comment continues, recording that when he was 'side talking and laughing [he] made efforts to stop when asked by facilitators, demonstrating more respectful behaviour. [He] is encouraged to maintain his respectful behaviour should he engage in future courses in order for him to gain the most from them'. Under the heading 'Supportive Participation', the report records that 'at times' the appellant demonstrated support on the programme and was involved with discussions. The box for 'Participant's comments' on page 6 is blank.

21. Under section 3, headed 'Participant's understanding and action' the report records that it was only during the course that the appellant recognised that his former partner had not forced him to drink alcohol on the night he attacked her. The appellant 'recognised the signs of his emotional arousal as clenching his fists and gritting his teeth while screwing his face up' and that in future he would 'keep calm using thought stopping and thinking of the costs and benefits of what he is doing', as well as watching television and going to the gym. The evidence is repeated and slightly amplified concerning two incidents, the first of which involved a fight, and the second, during the punishment for the first offence, where he had restrained himself by 'considering the consequences of remaining on basic regime and its impact on his deportation case'. Again, the box headed 'Participant's comments and suggestions' on page 8 is blank.

22. The next section of the report is headed 'Problem solving Module' and contains further consideration of the fighting incident, and the need for the appellant to address the risk of deportation and seek contact with his son. Again, the 'Comments' box on page 10 is blank.

23. The 'Positive Relationships Module' begins on page 10 and finishes on page 12, with another blank 'Comments' box. The appellant had considered 'areas where he may have been controlling in the past' and considered how to distance himself from his alcohol drinking social circle. He 'showed some ability to consider others' perspectives': he was aware that his former partner's son would be feeling abandoned as the appellant had not been in touch with him. As a result of the programme, the appellant wrote the boy a letter and sent a card through social services. The appellant stated that he had grown up without a father himself and did not want his son to 'suffer the same fate'. He realised that in order to

be a role model for his son, he needed to 'stay offence free and free from alcohol to prove he can be a responsible parent'.

24. Section four on page 13 is a summary of recommendations. Page 15, which includes provision for signature by the facilitators, the supervisor, and the appellant, is not completed and bears no signatures or dates.

25. I do not consider that the omitted pages improve the appellant's case on rehabilitation or risk to the public. The picture which emerges is of a young man who has real difficulty with his emotions and temper, whose ability not to return to alcohol is asserted but untested, and who, even knowing that it might affect this deportation appeal, got into at least one fight in prison. The documents before me cannot reasonably be described, as in the grounds of appeal they were, as evidencing the appellant having complete the TSP programme in record time over 11 days rate than two months. The appellant's involvement with this course appears to have ground to a halt when he was given the feedback form: he did not complete any of the 'Comments' boxes (all of which, coincidentally, were on the omitted even numbered pages) and the form was not signed off. There is no sign of the workbook which was intended to record his progress over the next two months. The certificate produced does no more than record his attendance at the December 2013 course.

Legal Framework

26. The appellant is an EEA citizen and accordingly a decision to remove him can be made only under regulation 19 with regulation 21 of the Immigration (European Economic Area) Regulations 2006 (as amended). The appellant conceded at the hearing that he was not a person who, by reason of having acquired permanent residence, could benefit from paragraph 21(3) of the Regulations, or who could show more than 10 years residence here, thereby engaging the 'imperative grounds' provision in paragraph 21(4).

27. The relevant provisions in relation to the removal of EEA citizens who have neither permanent residence nor residence in excess of 10 years are set out in paragraphs 19 and 21 of the Regulations as follow:

> **"19.— Exclusion and removal from the United Kingdom**
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> **…** (3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if– … (b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21…
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> (5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

21. — Decisions taken on public policy, public security and public health grounds

(1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health. ...

(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."

28. The Upper Tribunal has given guidance on the operation of these provisions in *Essa,* the judicial headnote of which, so far as relevant to this appeal, is as follows:

"...3. For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. *If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.*

4. At the other end of the scale, if there are no reasonable prospects of rehabilitation, the claimant is a present threat and is likely to remain so for the indefinite future, it cannot be seen how the prospects of rehabilitation could constitute a significant factor in the balance. *Thus, recidivist offenders, career criminals, adult offenders who have failed to engage with treatment programmes, claimants with propensity to commit sexual or violent offences and the like may well fall into this category.*

5. What is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is *the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person.*"

[Emphasis added]

29. The evidence in this application did not indicate any shift at all in the OASys assessment of the appellant, since only one such assessment was relied upon. The progress made between sentence and licence is unimpressive. The appellant cannot rationally be described as 'well-advanced in rehabilitation' as set out in subparagraph (3) of the headnote: on the contrary, he is a recidivist offender, an adult who has failed to engage with treatment problems and has the propensity still to commit sexual or violent offences. He did not insert any comments in the comments boxes on the assessment; it is unsigned by anyone; he fidgeted and talked in the sessions and had to be reminded to concentrate; he committed a further offence while in prison (contrary to his evidence at the First-tier Tribunal hearing); and although the writers of the report have done their best to put a good spin on his behaviour, there is very little in the report to indicate that the appellant was making real efforts to change his ways.

30. I am satisfied, on the evidence, that even had the First-tier Tribunal Judge addressed his mind to the even pages and page 15, the signatures page of the document, it would not have changed his assessment of the appeal and he would still have dismissed the appeal on all grounds. Any error by him in overlooking the full version of the TSP Programme Report, if indeed the full version was before him, is not material to the outcome of the appeal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. I do not set aside the decision.

Date: Signed

Upper Tribunal Judge Gleeson