IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00147/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2015	**On 3 February 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

EREN ERENBILGE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss S Lloyd, Counsel, instructed by Rodman Pearce
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Cyprus born on 9 July 1982. He has been granted permission to appeal the decision of the First-tier Tribunal (comprising First-tier Tribunal Judge Cooper and Miss V S Street JP) dismissing his appeal against the decision of the respondent dated 17 January 2014 to deport him from the UK under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006.

2. The appellant was convicted of inflicting grievous bodily harm, contrary to Section 20 of the Offences Against the Person Act 1861, for which on 25 January 2013 he was sentenced to three years' imprisonment. Prior to this offence the appellant had on 9 December 2009 at Southwark Crown Court been convicted of two counts of sexual assault and sentenced to eight months' imprisonment for each count, concurrent, suspended for two years, and required to sign the Sex Offenders Register for five years. The respondent considered the index offence of which he had been convicted and his conduct in accordance with Regulation 21 of the 2006 EEA Regulations. The respondent was satisfied that the appellant posed a genuine, present and sufficiently serious threat to the interests of public policy if he were to be allowed to remain in the United Kingdom and that his deportation was justified under Regulation 21.

3. A further reason for the deportation was that there was no evidence from the appellant to show that he had resided here for a continuous period of five years or ten years. He had therefore not acquired the right of permanent residence under the Regulations, and so he was liable to be deported on grounds of public policy or public security.

4. The appellant's evidence to the First-tier Tribunal was that he had moved to the United Kingdom from Cyprus in 2005 and had resided and worked here since without being absent. For the previous five years he had a partner called Andria Angleas. Although they shared a home together, he gave a different as address for her. He said he was the father of a child called Toby Marr by a British woman called Tracy Marr. He was unable to provide the child's date of birth and stated that he had not seen the child for a while. He had lived with the child's mother for two and a half to three years.

5. He said that the judge did not remark that he was a violent person. He was no danger to the public, as he was acting in self-defence because the victim had tried to stab him with a weapon, a knife. It was only one punch to defend himself. He regretted the incident and wished he could turn the clock back.

6. The First-tier Tribunal considered that if, as the appellant claims, he has been continuously resident in the United Kingdom since 2005, at first sight it might appear that he had acquired a right of permanent residence. However Regulation 6 defines a qualified person. The categories under which the appellant might claim to be a qualified person would be as a job seeker or as a worker.

7. The First-tier Tribunal held that on his own account the appellant worked for about a year as a painter and decorator after arriving in 2005, but did not then work until the year before he was imprisoned, when he claims to have worked as a car sprayer and panel beater. No documentary evidence of either of these employments had been produced, although there was a letter at AB10 from Wendy Indge stating that she and her husband employed him maintaining rental properties in the Essex area from 2007 until the recession obliged them to "lose" him.

8. The Tribunal found that the only formal indicator of his work pattern was the letter from HMRC at AB11 recording his national insurance history. That discloses that he has never in fact paid any National Insurance Contributions and that for all or part of the years from 2006/7 to 2012/13 he was in receipt of Job Seekers Allowance. The Tribunal acknowledged that in 2007/8 and 2010/11 he did do approved training.

9. The Tribunal considered that Regulation 6, in its current and previous form (it was amended with effect from 1 January 2014) effectively provides that a person will not cease to be considered as a worker if he has been unemployed for no more than six months or can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged. The same criterion applies to a job seeker, namely that he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged. The Tribunal held that it was clear from the appellant's national insurance history that he was effectively unemployed for the whole of the years 2008/9 and 2009/10, in which he was given 53 and 51 credits respectively for National Insurance Contributions. In any event, the appellant produced no documentary evidence to prove he was in fact employed prior to being sent to prison. This led the Tribunal to conclude that, at least during the years 2008/9 and 2009/10 the appellant was unemployed.

10. The Tribunal said that the Regulations draw an implicit distinction between being registered as a job seeker and evidence of actually seeking employment with a genuine chance of being engaged; both requirements have to be proved. The appellant had not produced evidence to them that he was seeking employment and had a genuine chance of being engaged for the whole of that two year period. Consequently the Tribunal was not satisfied that the appellant had remained either as a worker or a job seeker, as defined by Regulation 6. They did not accept that he had met the test of spending a continuous period of five years here as a qualified person. Accordingly the Tribunal was not satisfied that the appellant had acquired a permanent right of residence under the Regulations.

11. The Tribunal held that a consequence of this finding is that only the lowest of the three standards justifying deportation under Regulation 21 has to be met, that is the decision to remove the appellant from the UK has to be taken on the grounds of public policy, public security or pubic health; the higher standards of serious grounds of public policy or public security or imperative grounds of public security, do not have to be met in this case.

12. In their consideration of the criteria set out in Regulation 21, the most significant of which is that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

13. The Tribunal found that there was no doubt at all that the index offence was a violent and unprovoked attack on a defenceless individual. The Tribunal considered the two OASys Reports dated 5 June 2013 and 11 December 2013. They also noted that

the NOMS 1 report referred to an OASys Report completed on 26 Novembver 2013 which they assumed was the latter of the two OASys Reports. They noted that the first OASys Report had assessed the appellant as presenting a medium risk of harm to those in the community, but the second one assessed him as presenting a higher risk of serious harm to the public. This was reflected in the NOMS 1, which refers to the later OASys Report assessing the risk of reconviction for violent type of offending as low but assessing the risk of serious harm to others as high, "based on the high levels of minimisation, denial and blame". The Tribunal noted the decision recorded on 17 October 2013 as to whether to recategorise the appellant when he was in prison at HMP Huntercombe, the material parts of which read:

> "A recategorisation board has taken place and it has been decided that you should remain in category C conditions for the following reasons:
>
> (1) At the point of sentence you were assessed as posing a medium risk of harm. However your offender manager currently assesses you as posing a high risk of harm towards the public. This is due to the nature of your offending, the minimisation of your offending and the lack of offence focused work undertaken.
>
> (2) You have demonstrated previous non-compliance with the terms of an order which heightens the risk of non-compliance with open conditions."

14. The Tribunal said they were particularly struck by the letter written by the appellant in which he continued to assert that he had assaulted his victim in self defence. The Tribunal considered that in cross-examination the appellant did not unequivocally abandon his claim that he was acting in self defence.

15. In assessing whether the appellant presented a current serious threat, the Tribunal took into account his convictions for sexual offences in 2009. They noted that these did not result in custodial sentences, albeit they were suspended and with the appellant being required to sign the Sex Offenders Register. They noted that it was also recorded that on 17 February 2011 he was convicted of failing to comply with the notification requirements under that order. Whilst the sexual offences were not violent physical assaults, they were nevertheless assaults which demonstrated a lack of respect for a women's personal integrity, and failing to comply with the notification in itself demonstrated a lack of respect for authority. The Tribunal acknowledged that the appellant has obtained a certificate of completion from the Forgiveness Project following attendance on a short course in the summer of 2013, but did not believe that he no longer presented a serious risk of violence to members of the public.

16. The Tribunal also considered the other factors under Regulation 21(6) but found that none of them carried any significant weight in the appellant's favour. He is a relatively young man in apparent good health. The Tribunal was not satisfied that the appellant has any significant family connections in this country. His economic

situation has been one of nearly continuous dependency upon the state for his maintenance since his arrival in the UK. Although he may have been in this country since 2005, he has some friends, for example, Miss Chase and Miss Indge, but there was no compelling evidence of his social and cultural integration into the United Kingdom. On his own account he has a family in Cyprus to whom he could turn.

17. The Tribunal concluded that the personal conduct of the appellant does present a genuine, present and sufficiently serious threat, affecting one of the fundamental interests of society, namely the interest in the public being able to walk the streets in safety.

18. Permission was granted to the appellant to argue the three grounds of appeal drafted by Miss Lloyd of Counsel.

19. The appeal first came before me on 14 November 2014. It became apparent that the details of the appellant's National insurance contributions (NICs) record relied on by the Tribunal required further explanation. On account of this I adjourned the hearing in order that further submissions could be made in relation to the law on Jobseeker's Allowance (JSA). Following the adjournment Miss Lloyd submitted written submissions dated 21 November 2014 and the HOPO, Mr Shilliday submitted his response dated 7 December 2014. A witness statement from Severine Ameur from Rodman Pierce Solicitors dated 8 December 2014 was submitted by the appellant's solicitors.

20. Miss Lloyd argued that the appellant is entitled to be considered as a permanent resident in accordance with Regulation 15(1)(a) of the 2006 EEA Regulations because he was a qualified person for the purpose of Regulation 6(1) for over five years; firstly, as a worker in accordance with Regulation 6(1)(b) in 2005, as he was engaged as a painter and decorator; and subsequently as a job seeker, in accordance with Regulation 6(1)(a), as he was in receipt of Job Seekers Allowance from the tax year 2006/7 to the tax year 2013/13. She argued that the Tribunal erred in law in concluding that the appellant was not a permanent resident because he had not produced evidence that he was seeking employment in the tax years 2008/9 to 2009/10 and had a genuine chance of being engaged for the whole of that two year period. She relied on the case of **A and Others v SSHD [2013] EWHC 1272 (Admin)** where it was held that it was too late for the Home Office and the First-tier Tribunal to contend that the claimant was not resident in the UK in accordance with the EEA Regulations when the state had treated her as being resident in accordance with the EEA Regulations, since she had been permitted child tax credits and had been housed by the local housing authority as a social tenant.

21. Relying on this case, Miss Lloyd argued that as there was evidence that the appellant has been granted Job Seekers Allowance by one arm of the state, it would be wrong for the respondent, and the courts, to go behind that award and require evidence in order to determine whether the appellant is a qualified person for the purpose of the 2006 EEA Regulations.

22. She relied on the witness statement from Miss Ameur who had telephoned the HM Revue and Customs on 8 December 2014 and spoken to a caseworker. The caseworker explained that the "number of credits" column of the letter of 14 February 2014 showed the number of weeks that the appellant was in receipt of a certain type of benefit for a particular tax year. For example, for the tax year 2006-2007 the appellant received Job Seekers Allowance for 22 weeks out of 52 weeks. The caseworker pointed out that the fact that "NICs paid" column for tax year 2006-2007 showed no contribution should not strictly be interpreted as meaning that the appellant was not working. She explained that if the appellant was working but earned less than the primary threshold (£153 per week for 2014-2015) he would not have paid any national insurance. The appellant would have national insurance contributions added to his record as long as he earned at least as much as the lower earnings limit (£111 per week for 2014-2015).

23. Miss Lloyd relied on an extract from MacDonald's paragraph 7.126 in relation to how the Job Seekers Allowance is assessed in terms of a person from abroad unless they come within the exceptions, prior to the amendment in 2014. She submitted that the assessment has not changed in any substantive way. I note that this was the finding made by the Tribunal. Mss Lloyd submitted that the appellant is either a worker in accordance with Regulation 85A(4) of the Jobseekers Allowance Regulations or as a worker in accordance with Article 7(3)(b), (c) and (d) of Council Directive No. 2004/38/EC. He retains the status of worker under Article 7(3)(b) if he is duly recorded involuntary employment after having been employed for more than a year and has registered as a job seeker with a relevant employment office; or subsection (c) if he is duly recorded involuntary unemployment after completion a fixed term of employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job seeker with the relevant employment officer. In either of these circumstances the status of a worker shall be retained for no more than six months. Ms Lloyd submitted that subsection (b) or (c) may apply to the appellant and therefore the appellant continues to be a qualifying person.

24. Mr Tarlow relied on the respondent's response dated 10 October 2004, and the response submitted by Mr Shilliday. He asked me to reject Ms Lloyd's arguments as it is not clear on what evidence the DWP handed out the Job Seekers Allowance to the appellant. For the purposes of the Regulations the appellant needs to provide evidence that he has been in the UK in accordance with the Regulations. He submitted that the Tribunal at paragraph 47 said that there was a distinction between being registered as a job seeker and evidence of actually seeking employment with a genuine chance of being engaged. According to the case of **Antonissen [1991] ECR 1-745, Case C-344/95**, the ECJ noted that there must be a "reasonable period" for job seekers to find work and gave six months as an example. Mr Tarlow submitted that there is a world of difference between six months and five years.

25. I find that the Tribunal did not err in law. The appellant has to establish that he has spent a continuous period of five years in the UK as a qualified person under the 2006 EEA Regulations; in this case either as a worker or jobseeker.

26. The five year period the Tribunal was looking at was from 2006/7 to 2012/13. The evidence from HMRC showed that the appellant was in receipt of Job Seekers Allowance for all of those years although they acknowledged that in 2007/8 and 2010/11 he did approved training. The Tribunal found that for all or part of those six years, he did not pay any national insurance contributions. I have considered the explanation from the caseworker at HMRC. I find that the explanations do not assist the appellant. There was no evidence as to what the primary threshold was in the two-year period 2008/9 and 2009/10 and there was no evidence that the appellant worked in that period. The fact is he received Job Seekers Allowance for the two-year period and paid no national insurance contributions at all as he was credited with 53 and 51 NICs credits. In the absence of evidence from the appellant or the HMRC clarifying what the position was in that two-year period, and in the absence of evidence that he was actually seeking employment with a genuine chance of being engaged, I find that the Tribunal's decision that the appellant had not met the test of spending a continuous period of five years here as a qualified person under the 2006 EEA Regulations, disclosed no error of law.

27. Accordingly, I reject Ms Lloyd's argument that the Tribunal should not go behind the treatment by the DWP in granting the appellant Job Seekers Allowance because that was evidence that the appellant had been accepted as a worker with retained rights and therefore was eligible for Job Seekers Allowance. I find that there was no evidence from the appellant to establish that he meets the requirements Article 7(3) of Directive No. 2004/38/EC. I find that the two year period of unemployment from 2008/9 to 2010/11 was fatal to his application as it has not been shown as in the case of **Antonissen** that this was a reasonable period in which it could be said he was seeking employment.

28. Miss Lloyd relied on her second ground which argued that the Tribunal failed to take into account the relevant consideration in relation to risk. She relied on **Essa (Rehabilitation/reintegration) [2013] UKUT 00316** where the Upper Tribunal clarified the test as set out in Regulation 21(5). The Upper Tribunal held that in any deportation of an EEA national, the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. They must represent a present threat by reason of propensity to offend or an unacceptably high risk of reoffending. Miss Lloyd submitted that in assessing the appellant as being a high risk of serious harm to the public, the Tribunal failed to take into account the fact that the appellant had been assessed by the Offender Manager as being at low risk of violent type offending and medium risk of non-violent type of offending. That was a material omission. Further, the appellant gave evidence that he was on conditional bail from the Criminal Court for a period of approximately eight months, during which time he was not accused of committing any further offences. This factor was

not taken into account in the assessment of the likelihood of the appellant's reoffending and the risk that he posed to the public.

29. I find that the Tribunal's failure to take into account the conclusions drawn by the Offender Manager does not materially undermine their decision. The Tribunal considered the two OASys Reports and the NOMS 1 Report and the decision whether to re-categorise the appellant when he was in prison at HMP Huntercombe. The Tribunal noted that the NOMS 1 Report which referred to the later OASys Report assessed the appellant's risk of reconviction for violent type offending as low which I find reflected the Offender Manager's assessment.

30. I also find that the Tribunal's failure to take into account that the appellant did not offend for eight months while he was on conditional bail discloses no arguable error of law. The fact is the appellant was thereafter given a three year custodial sentence for the offence of GBH.

31. Finally, I reject Ms Lloyd's third argument that the Tribunal failed to give reasons for their assessment of risk of reoffending. I find that the Tribunal did give reasons at paragraph 53.

32. I find that the Tribunal did not err in law in dismissing the appellant's appeal. The Tribunal's decision shall stand.

Signed Date **2 February 2015**

Upper Tribunal Judge Eshun