Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00257/2014**

THE IMMIGRATION ACTS

Heard at: Field House **Decision and Reasons Promulgated**
On 24th November 2015 **On 11th December 2015**

Before

Upper Tribunal Judge Bruce

Between

Secretary of State for the Home Department

Appellant

and

Zdravko Yordanov Zdravkov
(No Anonymity Direction Made)

Respondent

For the Appellant: **Mr Melvin, Senior Home Office Presenting Officer**
For the Respondent: -

DETERMINATION AND REASONS

1. The Respondent is a national of Bulgaria born in 1982. On the 3rd February 2015 the First-tier Tribunal (Judge Page and Ms VS Street JP) allowed his appeal against the Secretary of State's decision to deport him pursuant to section 32(5) of the Borders Act 2007. The Secretary of State now has permission[1] to appeal against that decision.

2. This matter first came before me on the 20th October 2015. The Respondent did not attend. It was clear that this was because he did not know about the hearing. The last address that the Tribunal had on file had been his place of detention, yet Mr Melvin was able to tell me that the Respondent had been released from detention in May 2015.

[1] Permission granted by Upper Tribunal Judge Blum

I was not satisfied on that occasion that it would be in the interests of justice to proceed in the Respondent's absence. Although the Tribunal did not have a current address for the Respondent, the Secretary of State did. Mr Melvin was able to supply me with this address, given by the Respondent upon his release, at the hearing. I therefore adjourned the matter so that notice of hearing could be served on all parties.

3. This was done on the 26th October 2015 when a notice of hearing was sent to the last known address held for the Respondent by the Secretary of State. The Respondent did not attend the hearing before me. I am satisfied that on this occasion it would not be contrary to the interests of justice to proceed. I was not satisfied that a further adjournment would result in the Respondent's attendance at a later date. I therefore proceeded to hear submissions from Mr Melvin, and I reserved my decision.

The Appeal Before the First-tier Tribunal

4. The Secretary of State's case before the First-tier Tribunal was that the deportation was justified on grounds of public policy or security. The Respondent had, since his arrival in the United Kingdom, been convicted on four occasions of six offences: he had been cautioned for common assault in August 2011, received a conditional discharge for damaging property and failing to surrender to custody in December of that year, was fined and subject to a restraining order in July 2012, received a suspended sentence of 12 weeks' imprisonment in October 2013 for battery which was activated a month later when he was brought back to court on charges of damaging property. He was sentenced to a further week in prison on that occasion. The Secretary of State noted that the Respondent had failed to comply with his community order: this indicated that he had not undertaken the necessary rehabilitation and he therefore remained a risk to the public. His record showed him to have an "anti-social attitude".

5. The First-tier Tribunal agreed that the Respondent had not acquired a permanent right of residence in the United Kingdom and so attracted no enhanced protection against removal. If the Secretary of State could show his removal to be justified on the grounds of public policy or security he would not succeed in his appeal; the determination sets out Regulation 21 of the Immigration (European Economic Area) Regulations 2006 in full. The Tribunal directs itself to the established principles of proportionality, in particular that the conduct of the person in question must represent a genuine, present and sufficiently serious threat to the fundamental interests of society. Relevant to this was the question of rehabilitation and propensity to reoffend.

6. Applying these principles to the facts the determination notes that the Respondent has been convicted of a number of offences arising from

"domestic incidents" and that he has failed to comply with various orders. Live evidence was taken from a DC Barnes of Operation Nexus who expressed a fear that the Respondent would return to his place of former habitual residence, Haringey in North London, where the likelihood was that he would take up with his girlfriend, a woman with a criminal record to put the Respondent's "in the shade". Much of her offending, as his, was linked to excessive consumption of alcohol. DC Barnes believed that this relationship would have a "negative impact" on the Respondent. In his favour was the evidence that he did come to the United Kingdom with an intention to work, has in fact worked, and that he had taken numerous courses whilst in prison.

7. Weighing all of this evidence together the First-tier Tribunal concluded that DC Barnes was right to have concerns about the Respondent's relationship with his girlfriend:

> "35…If the past is a reliable guide to the future there is an obvious risk of further domestic discord – and possible offences – should the appellant return to Haringey and a relationship with Ashley McKay. However this is not enough to establish that the appellant poses sufficient risk to the public for his deportation to be justified on the grounds of public policy, public security or public health.
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> 36. However, we find on the balance of probabilities that the respondent has made out a case for saying, that if this appellant returns to his relationship with Ashley McKay then given his volatile nature and her problems with alcohol, there is likely to be more minor offending if he has been drinking alcohol and there are any domestic arguments or incidents with her. But that is not the risk to the general public that the respondent has argued for to justify the appellant's deportation. The respondent's risk assessment is based entirely on the appellant's previous convictions and his relationship with his previous associates in Haringey. There is no general risk to the public".

8. For these reasons, the appeal was allowed.

The Appeal to the Upper Tribunal

9. The Secretary of State submits that the decision must be set aside for the following reasons:

   i) In respect of the finding that the Respondent does not present a genuine present and sufficiently serious threat so as to justify his expulsion, the Tribunal has failed to give adequate reasons, has made findings contrary to the evidence, and has

failed to take relevant evidence into account;

ii) In its consideration of proportionality the Tribunal has failed to consider whether there is a propensity to reoffend, and whether the Respondent is integrated into UK society.

10. To these written grounds of appeal Mr Melvin added that the central core of the determination, paragraphs 35 and 36, were irrational, or approaching irrationality. The finding that the Respondent *did* present a risk of reoffending in Haringey could not be squared with the finding that he did not present a sufficiently serious threat to warrant his deportation.

My Findings

11. In this deportation action it was for the Secretary of State to establish that the personal conduct of the Respondent represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The Secretary of State sought to discharge this burden by pointing to the Respondent's six offences in a period of four years' residence, his failure to complete courses which would satisfy the Secretary of State that he had been rehabilitated, his problems with alcohol and his tempestuous relationship with a woman whose criminal record put the Respondent's "in the shade". Although the Secretary of State failed to comply with the directions to produce various documents including the OASyS assessment and pre-sentencing report, the Secretary of State was able to rely on the evidence of a live witness, DC Barnes. Her evidence then, formed the centrepiece of the Secretary of State's case.

12. The evidence of DC Barnes is recorded and evaluated at paragraphs 25-28. It is summarised at 27 as being that the Respondent only posed a risk in Haringey. That evidence is endorsed by the Tribunal at paragraph 36 to support the overall conclusion that the Respondent does not present a "general risk to the public". I am satisfied that in reaching this conclusion the First-tier Tribunal has failed to take relevant matters into account. DC Barnes directed her evidence at the risk that the Respondent posed in Haringey simply because that is where she believed he would go:

> "Her assessment of risk was that the appellant had no friends outside of Haringey, London, where the appellant lived before, so she feared that the appellant would return to Haringey to his former associates and drink alcohol" [25]

The fact that the risk posed was localised did not mean that it did not impact upon society as a whole. That is because the domestic discord between the Respondent and his partner or friends had wider

ramifications once public services became involved. This determination nowhere recognises the cost to society of the multiple police call-outs, interventions, prosecutions, sentences and involvement of agencies such as the probation service. Nor, as Mr Melvin points out, was any consideration given to the upset or distress that the Respondent's behaviour might cause to people in his local community. The finding that further offences were likely [at 28] should have led the Tribunal to an analysis of whether such offences could be deemed a sufficiently serious threat to warrant deportation. As it is such analysis appears to be confined to noting that there is no risk to the general public (as opposed to his girlfriend or other associates). For the reasons given, I consider this to be an incomplete assessment and the determination must be set aside.

13. As the determination is set aside I need not address the remaining grounds in any detail. I would only add that there is some merit in Mr Melvin's argument that the *ratio* of this decision "approaches" irrationality: in the vast majority of actions taken under Regulation 21 it is likely that the risk posed will be 'localised' rather than posing a risk to the general public throughout the whole country. The question is whether the behaviour in question reaches the threshold set out in Regulation 21(5)(c).

14. Having had regard to the extent of fact finding required in the re-making of this decision, I consider it appropriate that this matter be remitted to the First-tier Tribunal. It is to be hoped that the Respondent will avail himself of the opportunity to attend a further hearing, give evidence and make representations on his own behalf.

Decisions

15. The determination of the First-tier Tribunal contains an error of law and it is set aside.

16. The matter is remitted to the First-tier Tribunal in order to be remade.

17. I make no direction for anonymity.

Upper Tribunal Judge Bruce
28th November
2015