Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00368/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2015	**On 28 January 2015**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A Everett
For the Respondent: Mr E Nicholson of Counsel

DECISION AND REASONS

1. For ease of reference the parties are hereafter referred to as they were before the First-tier Tribunal so that MM is the appellant and the Secretary of State for the Home Department is the respondent.

2. The appellant is a citizen of Trinidad and Tobago. He appealed the decision of the respondent to make a deportation order by virtue of

Section 32(5) of the UK Borders Act 2007. The First-tier Tribunal Judge hearing the appeal allowed the appeal against the deportation order. He dismissed the appeal against the refusal of indefinite leave under the Immigration Rules but allowed it under Article 8 ECHR.

3. The respondent sought permission to appeal that decision. Summarising the grounds seeking permission the respondent submitted as follows:-

   (a) The appellant is a foreign criminal and a persistent offender (paragraph 50 of the determination). The appellant has a long history of convictions and in 2010 was only granted entry clearance on appeal. He then received a further conviction for another motoring offence. No evidence has been provided to show that his repeated pattern of criminal activity will stop. The only qualified opinion available to the Tribunal was the OASys Report which shows that there was a continuing risk of reoffending. The Tribunal has made scant findings on this point and has, instead, "made a conscious effort to minimise the significance of the appellant's criminal profile" (paragraph 68). The appellant is a person who has committed a serious crime and who is at risk of committing further serious crimes. It is irrelevant for the Tribunal to get distracted by making findings on the degree of seriousness of the appellant's offences.

   (b) The determination is irredeemably flawed given the absence of findings on future risk.

   (c) There is an absence of any expert evidence to show the impact of deportation on the appellant, whether accompanied by his family or not and this renders the findings speculative and not sustainable in the absence of a suitable assessment of risk of future offending.

   (d) As to the Article 8 decision this is subject to the same flaws as set out above. The judge's findings in paragraph 96 are speculative and based upon assertions of the appellant and his family who are necessarily partial.

4. The judge granting permission to appeal refers to the First-tier Tribunal Judge confirming that the OASys Report confirmed that the risk of the appellant committing further serious offences was "imminent". That view contrasted with an independent risk assessment report prepared for the purpose of the appeal which appeared to assess the level of future risk as minimal. The judge granting permission found it arguable that the First-tier judge had not demonstrated that he had given sufficient consideration to the competing views in order to reach sustainable, evidence based findings.

5. As to Article 8 there was no expert evidence available for the judge to consider. The judge granting permission was satisfied that it is arguable that the findings of the judge were speculative and based solely on the

views of the appellant and his close family members who could not be expected to have any sort of independent perspective on the situation.

6. At the hearing Mr Nicholson, on behalf of the appellant, sought leave to file a Rule 24 response out-of-time. The extension was sought on the basis that the appellant was not represented at the hearing of his appeal and had only instructed his representatives on 12 December 2014. Ms Everett indicated that she did not find herself in difficulty in replying to matters set out in the Rule 24 response and on that basis I granted an extension of time and allowed the response to be filed and served. There would clearly be no prejudice to the respondent by so doing.

7. Although the judge granting permission to appeal refers to the First-tier Judge confirming that the OASys Report confirmed that the risk of the appellant committing further serious offences was "imminent" this is not in fact the case. The document referred to (at page 110 of the appellant's bundle) is not an OASys Report. It appears that none was available and that the comments made were in relation to a request for Offender Management Information and based upon previous pre-sentence reports. The comments were as follows:-

> "Since resident in the UK, Mr M has accrued five offences which are driving related. Three of these offences are for drink driving. The PSR (Pre Sentence Report) dated 13.2.09 assesses risk to the public as high and the PSR dated 20.5.13 assesses risk to the public as medium. It will be reasonable to assume that he will continue to drive disqualified/or under the influence of alcohol and therefore it is my assessment that the risk is imminent!"

8. The OASys Report is dated 15 November 2013 and is re-produced at pages 74 to 106 of the appellant's bundle. The respondent refers to this report in her grounds as the only qualified opinion available to the Tribunal. No particular section of the document is referred to in the grounds it being said only that it "showed that there was a continuing risk of reoffending". However, nothing is said about any imminent risk posed by the appellant in any category. On the contrary with regard to the likelihood of serious harm to others the report scores the respondent as posing a low risk both in custody and in the community in respect of every category of person (appellant's bundle page 106; page 33 of the OASys Report). Similarly the report scores the appellant as posing a "low" probability of reoffending (appellant's bundle page 74; page 32 of the OASys Report).

9. The importance of this is that the respondent submits that the judge made scant findings regarding a continuing risk of reoffending and has made a conscious effort to minimise the significance of the appellant's criminal profile. Although it is apparent that the respondent disagrees with the judge paragraph 68 of the determination does evaluate the convictions. The judge finds that although the circumstances of the dangerous driving were undeniably serious the judge (in the criminal proceedings) indicated in his sentencing remarks that it would have attracted a sentence of

eighteen months' imprisonment on conviction after trial and this to the First-tier Tribunal Judge indicated that it was not the most serious offence of dangerous driving for which a sentence of two years' imprisonment would have been available on conviction after trial. He summarised his view that the offences committed are not of the most serious character, a finding that he was entitled to make on the facts for the reasons given.

10. The judge was aware of and made reference to the appellant being a persistent offender because he has committed five offences of driving whilst disqualified between 2003 and 2013. The judge set against those findings the undisputed facts that the appellant has a subsisting relationship with a qualifying partner and with three qualifying children. Between paragraphs 62 and 70 of the determination he provided full reasons as to why the effect of the appellant's deportation both on his wife and children would be unduly harsh. He directed himself correctly as to the law and for good reasons concluded that the adverse consequences for the appellant's children outweigh the public interest in the appellant's deportation and that the effect on them would be unduly harsh, that is to say excessively severe. He came to the same conclusion in paragraph 70 of the effect of his deportation upon his partner. His partner and children are all UK citizens.

11. I add that the judge had before him also an Article 8 report dated 1 January 2014 (paragraph 30) and an independent Risk Assessment and Risk Management Plan prepared by a qualified Probation Officer (page 37 of the appellant's bundle and following) which concluded that it is extremely unlikely that the appellant will commit further driving offences in the future because he is facing deportation; his wife and children could not relocate to Trinidad with him; he has shown remorse for his offences and an understanding of the reasons why he committed the offences and their impact upon his family and himself; if he is given one last chance to remain in the United Kingdom, it was considered extremely unlikely that he will ever knowingly jeopardise his and his family's future together again.

12. I agree with the appellant's submission that the judge carefully considered all of the evidence before him and took note of that relating to the appellant's rehabilitation (see paras 5, 7, 8 and 96 of the determination). Given the absence of qualified evidence indicative of anything other than a low risk of reoffending it is difficult to see what else the judge could have been expected to do. The evidence itself indicated that the risk was low. The respondent should not succeed in her submission that the judge should have reached a finding of the appellant's propensity to reoffend when the respondent has failed to demonstrate that such a propensity exists. The OASys Report was dated more than one year earlier than the hearing before the Tribunal. The judge was both entitled and obliged to consider the evidence of rehabilitation since it went to the issue of risk of reoffending. His subsequent conclusions are neither irrational nor perverse.

13. As to the findings set out at paragraph 96 being "speculative" according to the respondent, on the evidence before him the judge was entitled to conclude as he did. It hardly needs to be said that although friends and family may be partial the fact that they have given evidence in one form or another is to be accorded some weight. Indeed the absence of the provision of any such evidence often leads to adverse comments being made in submissions.

14. In any event the judge did not rely solely upon evidence that was provided by the respondent and members of the family. There were many other matters that the judge took into account listed at paragraphs 8, 30-32 and 33.

Decision

15. For the reasons set out above the judge has not erred and his decision which was promulgated on 23 October 2014 stands. Therefore the appellant succeeds in his appeal.

16. I was not addressed in relation to the matter of anonymity but such a direction has been given previously to protect the children it would appear and that direction is maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Pinkerton