IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00996/2014

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 16 February 2015	**On 27 February 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SZABIN ARGYELAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Home Office Presenting Officer
For the Respondent: No legal representative

DECISION AND REASONS

1. Although the Secretary of State is the appellant before the Upper Tribunal, I shall continue to refer to Mr Szabin Argyelan as the appellant herein.

2. This is a re-hearing of the appellant's appeal against the decision of the respondent made on 19 May 2014 to make a deportation order against him by virtue of Section 5(1) of the Immigration Act 1971. The appellant is a citizen of Hungary, born on 10 August 1972.

3. He claims to have arrived in the United Kingdom in December 2000. As this was more than three years before Hungary gained accession to the European Union, the Secretary of State said he would have been subject to immigration control. Furthermore there was no evidence to corroborate his claim of the date of entry. Home Office records show that on 16 August 2005 he applied for an EEA registration certificate, but this application was withdrawn on 7 October 2005. The appellant has not provided evidence of continuous residence in the UK since the claimed date of arrival, or that he has been exercising treaty rights.

4. On 4 December 2009 the appellant was convicted of an offence of shoplifting and given a conditional discharge for twelve months. Subsequently, between November 2010 and March 2014, he was convicted of some 37 offences, principally of shoplifting, being in breach of community orders and failing to attend, etc. On 1 March 2014 he was convicted of an offence of shoplifting and a further offence of having committed that offence during the operational period of a suspended sentence and was subjected to a sentence of twelve weeks' imprisonment for the shoplifting and eleven weeks' imprisonment to run consecutively for the second offence. After completion of that sentence he was detained in immigration detention and has not been at liberty since then.

5. On 19 May 2014 the Secretary of State gave formal notice to the appellant of her decision to make a deportation order against him on the basis that between 4 December 2009 and 1 March 2014 he was convicted 37 times in relation to 38 offences in the UK. The Secretary of State considered the offences of which he had been convicted and his conduct, in accordance with Regulation 21 of the Immigration (European Economic Area) Regulations 2006. She 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 UK and that his deportation was justified under Regulation 21. She therefore decided under Regulation 19(3)(b) that he should be removed and an order be made in accordance with Regulation 24(3), requiring the appellant to leave the UK and prohibiting him from re-entering while the order was in force. For the purpose of the order Section 3(5)(a) of the Immigration Act 1971 will apply.

6. In a determination promulgated on 4 September 2014, First-tier Tribunal Judge Blundy allowed the appellant's appeal. The judge found the appellant to be a credible witness. He accepted on a balance of probabilities that he came to this country in November or December 2000. Therefore he accepted that the appellant has resided in the UK for a continuous period of at least ten years prior to the respondent's decision. By virtue of Regulation 21(4), the respondent's decision being a decision taken on the grounds of pubic policy, public security or public health, "may not be taken except on imperative grounds of public security" because he found that the appellant is indeed an EEA national. The appellant does not have to show that he has been exercising treaty rights over any part of

that period of ten years' residence. The judge had accepted the appellant's evidence as to his employment until sometime after he committed his first offence. The judge was satisfied on a balance of probabilities that the appellant was indeed exercising treaty rights as a worker for a continuous period of five years since Hungary joined the EA on 1 May 2004. He was therefore satisfied that the appellant has a permanent right of residence in the UK in accordance with Regulation 15. However, because he had also found that the appellant as an EEA national, had resided in the UK for a continuous period of at least ten years prior to the respondent's decision, the only issue before him was whether or not the respondent's decision may be justified on "imperative grounds of public security". The judge found that the Secretary of State's decision letter did not seek to justify the decision on that ground at all. The Secretary of State simply sought to justify her decision on grounds of public policy, and not on grounds of public security, which was a completely different concept.

7. The judge said that no jurisprudence was brought to his attention as to what precisely constitutes "imperative grounds of public security". It was not defined in the Regulations. Nevertheless the judge thought that it clearly meant that for deportation to be justified in the appellant's circumstances, it must be imperative, or absolutely vital, in order to protect the security of the public.

8. The judge then held as follows:

> "*29. I find that the appellant is not now any significant risk to the public or the security of the public at all. His detention since the beginning of March has had the desirable effect of enabling him to rid himself of his addiction to drugs. The courses he has undertaken will have benefited him. His brother, who clearly introduced him to drug scene is also facing deportation and is therefore in no position to lead him astray. The appellant has considerable insight into his past problems and appeared to me to be strongly motivated to avoid any relapse. His basic plan, to move away from the area and people connected with his past abuse of drugs, and move back to north London, an area which he knows, demonstrates a resolve to regain his life as it was. For all these reasons I find that the appellant's deportation cannot be justified on 'imperative grounds of public security'*."

9. In a determination promulgated on 26 November 2014, I found that the judge materially erred in law firstly in requiring the Secretary of State to prove that the appellant had been in the UK exercising treaty rights. I found that the burden remained on the appellant to satisfy the Tribunal that he has been exercising treaty rights in light of corroborative evidence, whilst he has been in the UK and therefore a qualified person in accordance with Regulation 15 of the 2006 EEA Regulations.

10. The second error was the judge's misdirection in law that the appellant has acquired ten years' residence in the UK. This finding was made in the absence of documentary evidence and the judge's failure to consider the European Court's decision in **MG [2014] EUECJ C-400/12**. This is a case which requires the claimant to demonstrate ten years' residence from the date of the immigration decision, and that any period of imprisonment in that intervening period had the effect of interrupting the appellant's residence and therefore affects the level of protection afforded to him. The Secretary of State's decision in this case is dated 19 May 2014. Ten years from that date would mean that the appellant would have to show that he has been resident in the UK from 19 May 2014 to May 2004 and that throughout that period, he has not been in prison in order to acquire the high level of protection which in this case on the evidence, the judge wrongly accorded him.

11. At today's hearing the appellant submitted a letter to him from HMRC dated 9 December 2014. The letter gave his national insurance number. It states that the date of entry into the national insurance scheme was 2 May 2004. Their records show that he ceased self-assessment in 2009. It also gave his various addresses from 28 June 2004 until 14 September 2013. The date of his marriage was stated to be 26 February 1996.

12. The appellant said that this was all the information the HMRC would give him. They did not give him any information about his employment record in the UK.

13. He confirmed that he came to the UK in December 2000 on a tourist visa and overstayed his leave. Since Hungary joined the EU on 1 May 2004, he has been in the UK exercising treaty rights as a worker. He had no evidence of his employment.

14. Mr Avery relied on the respondent's Reasons for Refusal Letter dated 19 May 2014. He said that the appellant has a history of offending in the UK. They are theft related offences. There is no significant evidence to prove that the appellant can be accorded any other level of protection other than the basic level of protection which means that his removal is justified on public policy grounds.

15. Mr Avery said we have the PNC record of the appellant. His previous convictions have not deterred him from re-offending. He has a propensity to offend and has continued a desire not to engage with the rehabilitation process. In addition he committed a drugs-related offence for which he was given a community order of twelve months' supervision on 17 August 2011. He was given a drug rehabilitation requirement of six months' non-residential drug/alcohol treatment. The appellant's offences have a financial impact on the companies involved and overall price increase in due course which customers will be subjected to. It is hard to justify why the appellant should be allowed to stay. He has re-offended whilst on licence and has failed to learn from his past. The Secretary of State's view

is that the only option is the removal of the appellant from the UK which is justified under the EEA Regulations.

16. With regard to Article 8, Mr Avery relied on what was set out in the Secretary of State's Reasons for Refusal Letter.

17. The appellant said that from 2000 until 2010, a period of ten years, he did not offend. In 2010 he picked up a drug habit from his brother and committed various offences of theft in order to feed his drugs habit. He has been on six or seven different courses which included drug-related courses and a victim awareness course. He said that the courses have made a difference to his life.

18. With regard to Article 8, he said he has a family life with his son who is 7 years old although he accepted that he has not seen his son or the child's mother since he has been in prison.

19. He said that from 2004 until 2010 he was in full-time employment. He had three jobs.

20. Mr Avery submitted that if I were to find that the appellant has been exercising treaty rights for five years, then removal would have to be justified on serious grounds of public policy. The Secretary of State's position is that as there is no evidence of the appellant's employment in the UK, he has the lower level protection which is on public policy grounds only.

Findings

21. In the light of the appellant's failure to provide evidence of exercising treaty rights or of residence in accordance with the EEA Regulations for a period of five years or more, the Secretary of State took the view that the appellant has not acquired the right of permanent residence in the UK. This led the Secretary of State considered whether the appellant's deportation is warranted on grounds of public policy or public security. Mr. Avery submitted that the decision to deport the appellant was taken on grounds of public policy. However, if I were to find that the appellant has exercised treaty rights for 5 years, then his deportation would have to be justified on serious grounds of public policy

22. The appellant has still not provided evidence of exercising treaty rights or residing in the UK in accordance with the EEA Regulations for a continuous period of five years. In my error of law decision I ruled out the ten year period of residence given that he started committing offences before he had been in residence for ten years.

23. The only evidence I have is the appellant's oral evidence that prior to 2010 he was in full-time employment and had had three jobs. The evidence from HMRC states that he entered the national insurance scheme on 2

May 2004. His records show that he ceased self-employment in 2009. It is not precise as to when in 2009 he ceased self-assessment. As Hungary joined the EU on 1 May 2004, it is from this period that the appellant has to show that he has been exercising treaty rights or has resided in the UK in accordance with the EEA Regulations for a continuous period of five years. The PNC record of the appellant's criminal behaviour shows that on 19 June 2009 he entered a guilty plea on the charge of theft, shoplifting and was convicted on 4 December 2009. This evidence means that the appellant must have ceased self-assessment in the month of June 2009. This would mean that from 2 May 2004 until 19 June 2009 the appellant would have acquired a record of five years of national insurance contributions. However, the letter from HMRC states that this record should not be viewed as a work history, or as a comprehensive record of employment over any given period of time. In accordance with Regulation 15(1)(a) a person shall acquire the right to reside in the United Kingdom permanently in the case of an EEA national who has resided in the UK in accordance with the Regulations for a continuous period of five years. The evidence is insufficient to enable me to find that the appellant has acquired the right of permanent residence in the UK. The evidence from HMRC would suggest that he was in the national insurance contribution scheme for a period of five years but that evidence does not lead me to find that the appellant was exercising treaty rights or was residing in accordance with the EEA Regulations over the five year period. Accordingly, I find that the appellant has not acquired a permanent right of residence in the UK.

24. Consequently I have to consider whether the appellant's deportation is justified on grounds of public policy or public security.

25. The evidence shows that the appellant has been a persistent offender from June 2009 until 24 October 2010 when he pleaded guilty to theft and on 14 March 2014 was given a sentence of imprisonment for eight weeks to run concurrent from a previous similar offence. He committed the last offence when he was on bail. In fact, in total, the appellant has been convicted of some 37 offences, principally of shoplifting, being in breach of community order and drugs offences. He said he picked up the drugs habit from his brother who, from the evidence before the judge, was also facing deportation for his criminal behaviour. He has been in immigration detention now for nine months. This followed completion of his sentence for shoplifting. The appellant claims he has been rehabilitated and that the courses he has taken in prison have made a difference to his life. However, as the appellant has not been released from detention, we have no way of knowing whether he has indeed learnt his lesson and has been properly rehabilitated. His last offence was committed whilst he was on bail. His offending behaviour covered a period of at least four years. The appellant's offending behaviour has an impact on the companies he stole from which eventually impacts on prices generally to the customer. I find that as a result of his behaviour, he has not had any regard to the impact his offences would have on society generally. He was more concerned with

feeding his drugs habit. He claimed that he has undertaken six or seven courses whilst in prison and the courses have made a difference to his life. He has not submitted evidence of any certificates that he achieved as a result of these courses and has failed to produce evidence of his efforts to rehabilitate himself. I also find that his offences demonstrate that he has not integrated into the UK society to any significant extent.

26. Accordingly I find that his deportation is justified on grounds of public policy.

27. I find that evidence of the appellant's Article 8 family life in this country is woefully inadequate. He separated from his partner and has not seen his 7 year old son for quite a while. Mother and child have not visited him in prison. He has a daughter in Hungary with whom he informed the judge he had contact by phone and postcards. His daughter is 16 years old. He therefore has family to return to in Hungary.

28. As to his private life, while there is no evidence that the appellant has been in the UK since 2000, the evidence from HMRC indicates that he has been here for at least ten years from 2 May 2004. His criminal behaviour from June 2009 shows that the appellant has not properly integrated into British society. He claimed he picked up the drugs habit from his brother. His brother was also facing deportation. He claims that the drug-related courses and the victim awareness course have made a difference to his life. However, because he is in prison there is no telling whether these courses have indeed made a difference to his life. He claimed in evidence before the judge that he had not seen his son for a couple of years because he had agreed with his partner that he needed to get clean before he saw him. The judge made a comment that the appellant's detention since the beginning of March has had the desirable effect of enabling him to rid himself of his addiction to drugs. Despite this, the evidence from the appellant was that his former partner and child have not been to visit him in prison. I am not satisfied on the evidence that his deportation would be disproportionate to his family and private life.

Notice of Decision

29. The appellant's appeal is dismissed.

Signed Date **25 February 2015**

Upper Tribunal Judge Eshun