



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00197/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11 January 2016

Decision & Reasons Promulgated
On 26 January 2016

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDREI BONCU
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr. H. Ti, solicitor, Kesar & Co Solicitors

For the Respondent: Mr. D. Clarke, Home Office Presenting Officer

DECISION AND REASONS

History of Appeal

1. The Respondent, who was born on 8 February 1986, is a citizen of Romania. He first arrived in the United Kingdom in October 2012 for a short visit. He then returned to the United Kingdom in August 2013 to stay with a cousin.
2. On 17 November 2014 he attended Lloyds Bank in order to withdraw money from a bank account he had opened in the name of Simon Denk, said to be a German national. He was searched and found to be in possession of two false documents. On

22 December 2014 he was convicted of one count of possessing or controlling identity documents and two counts of dishonestly making false representations and sentenced to 12 months imprisonment.

3. On 26 March 2015 the Respondent informed him of her intention to deport him from the United Kingdom and on 6 April 2015 representations were submitted on his behalf. On 5 May 2015 the Respondent made a decision to deport him and he appealed against this decision on 18 May 2015.
4. His claim was also certified under regulation 24AA of the EEA Regulations. As a consequence, he was deported to Romania on 8 June 2015 and his appeal proceeded in his absence. First-tier Tribunal Judge Walker dismissed his appeal on 5 July 2015 and the Appellant appealed against his decision on 8 July 2015. Permission to appeal was granted by First-tier Tribunal Judge Simpson on 12 August 2015.

Error of Law Hearing

5. Under regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (the "EEA Regulations") an EEA national may be removed if the Respondent has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.
6. Regulation 21(5)(b) of the EEA regulations states that a decision to deport an EEA national on public policy grounds must be based exclusively on the personal conduct of that person. However, in paragraph 30(4) – (7) of his decision, First-tier Tribunal Judge Walker relied on the fact that the OASys Assessment on the Appellant mentioned that a Barclays pin machine and a TV licence in the name of another person had been found in the car he had been using on 17 November 2014 and that the car did not belong to him. It also said that Lloyds Bank subsequently stated that it had another five bank accounts in different German names, which had been opened with ID cards bearing the Appellant's photograph. The Appellant was never charged with any offences connected with these items or factors and there was no further evidence to indicate that he had committed further offences.
7. In addition, their existence did not cause the expert OASys assessor to conclude that there was any more than a low risk of the Appellant re-offending. In particular, she said that there was only a 9% risk of him re-offending within a year and a 16% chance of him re-offending within two years. Furthermore, First-tier Tribunal Judge Walker did not ask the Appellant's cousin or his solicitor, who were present at the appeal hearing, whether the Appellant could give any explanation for the suspicions he had about the Appellant's additional criminality. (If he had done so the Appellant would have been able to provide some additional evidence about his suspicions, as shown by the witness statement submitted on his behalf at the error of law hearing.)
8. I do not rely on the fact that the criminal judge's sentencing remarks did not refer to these additional incidents as they would not have been part of the prosecution's case and the OASys assessment would have yet to be written. The Home Office Presenting Officer also argued that First-tier Tribunal Judge Walker was entitled to take into account "evidence" before him in the form of the contents of the OASys assessment. However, as I noted above, regulation 21(5)(b) of the EEA Regulations

states that a decision must be based exclusively on the Appellant's personal conduct and there had been no evidential finding about the incidents which the Respondent was relying upon.

9. Regulation 21(5)(c) also states that the Appellant's personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In the current case his risk of re-offending had been found to be low and in his witness statement the Appellant had said he was ashamed of his actions and felt that he had let his family down and brought shame on them and had learnt his lesson. Both Iulian Varlan and Norbert Peter also said that they believed that the Appellant genuinely regretted his actions and would not offend again and risk going to prison. First-tier Tribunal Judge Walker gave little weight to Norbert Peter's evidence as he did not attend in person but it is not that case that he gave no weight to it. There was also no evidence of any risk of re-offending in the Appellant's behaviour since the offences in question. Instead, he had returned to live with his parents and had obtained a job offer from his cousin in London. Therefore, there was insufficient evidence to find that he presented a genuine, present and sufficiently serious threat to society.
10. In addition, regulation 21(5)(e) states that a person's previous criminal convictions do not in themselves justify his or her deportation. This provision applies to all convictions however serious. Therefore, even if the Appellant's conduct met the threshold for serious criminal activity as asserted by the Judge in paragraph 30 (13) of his decision, he still had to consider the other factors contained in regulation 21(5). These factors restrict the situations in which an EEA national can be lawfully deported, as correctly submitted by the Appellant's solicitor in his oral submissions. This was not addressed by First-tier Tribunal Judge Walker in his decision.
11. First-tier Tribunal Judge Walker did undertake a proportionality assessment in paragraph 30(10) as required by regulation 21(5)(a) but when doing so he did not refer to the totality of the evidence or all of the factors listed in regulation 21(6) of the EEA Regulations.
12. For all of these reasons I find that First-tier Tribunal Judge Walker's decision did include material errors of law.

Decision

13. I allow the Appellant's appeal and set aside First-tier Tribunal Judge Walker's decision.
14. I remit the Appellant's appeal to the First-tier Tribunal for a *de novo* hearing before a First-tier Tribunal Judge other than First-tier Tribunal Judge Walker.

Date: 15 January 2016

Nadine Finch

Upper Tribunal Judge Finch

