IAC-TH-CP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00209/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 February 2016	**On 21 March 2016**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANGELO PUGGIONI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr K Norton
For the Respondent: Ms R Moffatt

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Moller allowing an appeal by Mr Puggioni (whom I shall refer to hereafter as "the appellant") from a decision made in April 2015.

2. The Secretary of State sought permission to appeal the decision on three grounds. Firstly it is claimed that the judge failed to give reasons or any

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adequate reasons for findings on material matters. In paragraph 49 of the decision the judge accepted what she described as the unchallenged oral evidence of Ms Kabakidi (the mother of the appellant's two children) which was that the appellant and his parents all said he stopped drinking alcohol in prison and remains abstinent in Italy (to where he was removed). The judge accepted the appellant's evidence that he has a desire to address his alcohol use and offending and this is based on the appellant's witness statement, pre-sentence report and Ms Kabakidi's evidence. The respondent alleges that the judge failed to provide reasons as to why she preferred the hearsay evidence of the appellant's sobriety rather than considering his historic failure to address his issues and repeated offending.

3. The claim is made also that the judge independently assessed the appellant as being at low risk of reoffending despite him having been assessed by the Probation Service as medium risk. The appellant provided no independent evidence that the risk was reduced and no evidence that he had sought any outside assistance in addressing the "binge drinking" which was, according the appellant, the causal link with his offending. Furthermore complaint is made that the judge's finding that being gainfully employed is likely to reduce the chance of misusing alcohol or reoffending is inadequately reasoned to the extent that it is perverse when considered in the light of the judge's finding that he had been in employment or self-employment for at least five continuous years between 2007 and 2014. That finding is clearly at odds with the appellant's criminal convictions and his own reasons given for offending.

4. The second ground alleges a mistake of fact by the judge. She records that the appellant did not come to the attention of the criminal justice system between 2010 and 2014. This is factually inaccurate in that he was convicted at East London Magistrates' Court on 13 July 2012. Whilst accepting that this is a minor mistake it is submitted that when considered along with the first ground it demonstrates a lack of consideration of the appellant's criminal convictions, his propensity to reoffend and is material to the conclusion that he would behave appropriately in the future and therefore cannot pose a genuine, present and serious threat (affecting one of the fundamental interests of society). The respondent submits that there remain serious grounds of public policy for the deportation of the appellant.

5. The third ground is a submission that the judge's approach is unlawful regarding Article 8 and part VA of the Nationality, Immigration and Asylum Act 2002. It is argued by the respondent that the approach taken by the judge is unlawful on the basis that it is superficial and fails to take account of all relevant public interest factors. In particular she has failed to have regard to Section 117 of that Act.

6. After hearing helpful submissions from both representatives I announced at the hearing that I considered that any errors in the decision of the F-tT Judge were not material. The decision and the reasons given for coming to

that decision have been adequately reasoned. The findings of the judge were open to her.

7. Dealing with the third ground first (Article 8 and part VA of the 2002 Act) the case of **<u>Badewa</u> (ss 117A-D and EEA Regulations) [2015] UKUT 00329 (IAC)** shows that human rights have a part to play in an analysis of an EEA decision but, as per the headnote, the correct approach to be applied by Tribunal judges in relation to sections 117A-D of the NIAA 2002 (as amended) in the context of EEA removal decisions is:-

   "(i) first to decide if a person satisfies requirements of the Immigration (European Economic Area) Regulations 2006. In this context Sections 117A-D has no application;

   (ii) second where a person has raised Article 8 as a ground of appeal, Sections 117A-D applies."

   It appeared to be common ground in submissions before me that if the judge did not fall into material error in her decision and reasoning for allowing the appeal under the EEA Regulations it was bound to be immaterial that she had failed to deal with Article 8 and the public interest considerations as set out in Sections 117A-D of the 2002 Act correctly.

   I have concluded for reasons that I set out hereafter that the judge was entitled to find as she did for the appellant under the EEA Regulations and therefore I do not need to consider further the Article 8 challenge.

8. In considering the other grounds alleging material errors of law in the decision to allow the appeal it is helpful to set out the judge's main findings in relation to the appellant and his drinking excess alcohol which on any view has been the main triggering event for his offending. These findings were helpfully set out in the appellant's counsel's skeleton argument:-

   (a) the appellant was employed and/or self-employed for at least five continuous years between 2007-2014;

   (b) the appellant has a desire to address his alcohol abuse and offending, he has remained sober both in prison and since his release;

   (c) the appellant's intention to avoid alcohol is realistic and reflects a change in attitude;

   (d) in the light of evidence that the appellant is sober the risk of reoffending is low;

   (e) the appellant is remorseful and regrets his behaviour.

   (f) the appellant gained a number of qualifications in prison; he has also undertaken vocational study in the UK;

(g) the entirety of Ms Kabakidi's evidence on the appellant's relationship with his children was accepted.

9. These findings led the Tribunal to conclude that the appellant has had permanent residence in the United Kingdom for the appropriate period and to a finding that he does not pose a genuine and sufficiently serious threat to a fundamental interest of society. Finally the decision did not comply with the principle of proportionality and as per Regulation 21(6) of the EEA Regulations the proportionality assessment necessarily involved some consideration of the effect of deportation on the appellant's children and other factors set out in the decision.

10. In relation to ground 1 therefore - being the challenge to the existence and/or adequacy of the Tribunal's reasons - this fails since detailed reasons for the judge's findings were given that the appellant does not represent a sufficiently serious threat to justify deportation. Ground 1 amounts to nothing more than a disagreement with those findings. The Tribunal gave full and proper reasons for the finding that the appellant has a realistic intention to refrain from alcohol abuse. The Tribunal referred to the pre-sentence report; the findings of the sentencing judge; the evidence of the appellant and Ms Kabakidi (who was conceded to be a credible witness). Further the Tribunal acknowledged that the evidence from Ms Kabakidi about the appellant's abstinence was partly hearsay and therefore less persuasive but nevertheless gives proper reasons why she finds the appellant's abstinence credible.

11. I agree with the submission also that for the purpose of a decision under Regulation 21 of the EEA Regulations it is the proper function of the F-tT – not the Probation Service – to make a decision on the level of risk as at the date of hearing. The Probation Service's views some months prior to the hearing were a relevant factor in the assessment but those views were properly taken into account as to why in the light of the finding of the appellant's abstinence from alcohol the judge disagreed with the Probation Service's conclusion. These were findings and reasons properly open to the Tribunal.

12. It was not irrational either for the Tribunal to find that the appellant has the necessary skills to obtain work in the United Kingdom and that gainful employment is likely to further reduce the risk of reoffending particularly in the context of the earlier findings that the appellant has had a real and sustainable change in attitude. The judge's findings did not go as far as to find that he was necessarily employed and/or in self-employment for the full seven year period of residence in the UK. None of this is perverse.

13. As to ground 2 - that the F-tT made a material mistake of fact - it is clear that the judge was aware of the appellant's previous convictions because she notes at paragraph 46 that he was convicted of two public order offences in 2007, criminal damage in 2012 and possession of an imitation firearm with intent to cause fear of violence on 6 October 2014. The respondent herself appears to recognise that the mistake made by the

judge is “minor”. In any event the omission of the conviction in 2012 is not material to the outcome as the judge gives a series of properly reasoned arguments as to why the appellant does not pose a genuine, present and serious threat.

14. For these reasons the decision of the F-tT is upheld.

15. An anonymity direction was not made in the First-tier Tribunal; there was no application for such a direction before me and I find no good reason to make one in all the circumstances.

Signed Date

Upper Tribunal Judge Pinkerton