Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00364/2015

THE IMMIGRATION ACTS

Heard at Birmingham Magistrates Court	**Decision & Reasons Promulgated**
On 19 April 2016	**On 27 April 2016**

Before

UPPER TRIBUNAL JUDGE H H STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

[R P]

Respondent

Representation:
For the Appellant: Mr Mills, Home Office Presenting Officer
For the Respondent: Mr David

DECISION AND REASONS

1. The respondent (hereafter the claimant) is a citizen of Poland and hence an EEA national. He was born in 1975. On 5 August 2015 the appellant (hereafter the Secretary of State for the Home Department or SSHD) decided to make a deportation order against him under regulation 19(3)(b) of the Immigration (European Economic Areas) Regulations 2006 on the grounds of public policy and public security. That order was said to be consistent with the criteria set out in regulation 21, which provides:

"Decisions taken on public policy, public security and public health grounds

21. - (1) In this regulation a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease to which section 38 of the Public Health (Control of Disease)

> Act 1984 applies (detention in hospital of a person with a notifiable disease) shall not constitute grounds for the decision; and
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> (b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision."

2. The claimant came to the UK with his family in 2011 and it is not in dispute that whilst here he has been exercising Treaty rights either as a self-employed person or employed person by working as a motor mechanic. His family comprises his partner and their two children who are both minors and attending school in Leicester. His partner, who is also Polish, is now working and supporting the family.

3. The claimant had a conviction and suspended sentence in Germany in 2009 for trafficking cigarettes on the Polish/German border. But the SSHD's immediate reason for the decision to deport was the fact that on 10 April 2015 he had been sentenced to 16 months imprisonment for fraudulently evading customs duty. On 3 August 2013 customs officers had found half a million east European cigarettes on a farm in a country village which the claimant had rented. The duty due was £104,000 but that was in fact a second batch of a consignment, the claimant having already disposed of the first batch. The sentencing judge noted that the claimant accepted that the total duty evaded was a little over £200,000 and that the claimant's was a middleman role. The sentencing judge noted that the claimant had willingly and freely got involved with serious criminals on the Polish/Germany border and added: "Because you were caught [there], they took the view that you owed them money and I accept that you came to this country in order to put a distance between you and them, but that they traced you and required you to carry on dealing in un-dutied cigarettes as a means of paying off that debt". Whilst accepting this scenario, the sentencing judge went on to say that he did not accept the claimant's was in consequence a simple case of coercion or intimidation:

> "I do not accept that for this reason; your involvement with that gang originally was entirely voluntary as a result of your own free choice to get involved in crime on the German/Polish border and those who team up with serious criminals cannot then claim that as a result of that they are being pressured when they don't like it later on. However, there is some small mitigation on your behalf and I have regard to that, that you attempted to put distance between yourself and them."

4. Against the decision to deport him the claimant appealed. The claimant was removed to Poland on 27 August 2015 following a decision by the SSHD to certify his appeal under regulation 24AA. He was not therefore present for the appeal hearing fixed before First tier Tribunal (FtT) Judge R A Cox in November 2015. The judge recorded that the SSHD had refused an application made by the claimant to enter the UK to attend his appeal hearing.

5. In the absence of the claimant the judge heard evidence from the claimant's partner who spoke, inter alia, about her working history in the UK and the couple's children, the claimant's work in the UK as a car mechanic, the children's close attachment to him, the distress they had suffered while he was in prison and abroad; her belief that the claimant

would not offend again as the claimant had learnt his lesson, and the fact that the present separation from his family had been a great lesson to him, as well, so he would not get into to trouble again.

6. In a decision sent on 23 November 2015 Judge Cox allowed his appeal essentially because he did not consider that the claimant posed a present and sufficiently serious threat having regard to his personal conduct. At [16] the judge stated:

> "In my finding, he did not come here in 2011 with the intention of committing criminal offences, quite the reverse, and there is, as I have said, nothing before me to suggest that he was previously any sort of serial offender. I do not know what caused him to get involved with the gang on the Polish/German border but the fact that he was given a suspended sentence by the German court does not suggest that his involvement was high level. I find as a fact on the balance of probabilities that he would have not have offended against but for being tracked by the gang after coming to the UK. I add to that, as I should, his evident remorse as illustrated by his immediate guilty pleas, and as the judge commented, his frankness with the police.
>
> In sum, therefore, I do not find it probable, especially given his family responsibilities and given also that he now knows the risk of expulsion he would continue to run if he were to offend again in the UK, that he will now or henceforth represent genuine, present and sufficiently serious threat to British society…"

7. The SSHD's grounds contend that the judge had materially erred in finding that the claimant did not present a genuine, present and sufficiently serious threat to society. This was said to be because the judge made no mention of whether there was any information that the claimant had engaged with rehabilitation in the UK or otherwise. That undermined the finding that the claimant would not re-offend and failed to take into account that he had recently committed another offence very similar to the one had had committed in 2009. It was submitted that the judge had not adequately reasoned why rehabilitation could not take place in Poland or why the family could not return with the claimant to assist him. The judge had noted that the claimant was born in Poland and had spent the majority of his life there.

8. The grounds also attacked the judge's reasoning in attaching significant weight to the fact that in 2011 the claimant had not come to the UK with the intention of not committing any further offences. This was said to have been wrong because in fact did go on to commit such offences and the sentencing judge had not accepted this was because of coercion or intimidation. Further, the claimant was in a relationship before the offence and his family had proved unable to deter him.

9. I am grateful to both parties for their concise submissions. In his Mr Mills highlighted that the judge had failed to consider that the underlying reason why the claimant had offended was an unpaid debt, yet the judge had failed to take into account that that debt remained unpaid and the gang who had traced him in the UK would still have an interest in wanting it repaid. When previously faced with a choice as to whether to go to the police, the claimant had not done so and there was no reason to think that he would again. The fact that the criminal gang had kept away from the claimant since his arrest did not mean they would not approach him again, once his deportation challenge

was resolved. Mr David submitted that there was no evidence to indicate that subsequent to the claimant's arrest and conviction the gang had made any approaches to him. As regards rehabilitation Mr Mills reiterated the point that the claimant's family responsibilities had not stopped the claimant offending before. Mr David argued that the judge had not treated rehabilitation as a factor of any particular significance. The partner's evidence, which the judge was entitled to accept, was that the clamant had not previously understood the consequences of offending in terms of separation from his family.

10. There is no dispute that the claimant'[s case fell to be decided under the 2006 Regulations as to whether his deportation was justified on grounds of public policy or public security. It was accepted by Mr David that the claimant had not exercised Treaty rights for five years and so could not pray in aid the higher level of protection based on a need on the part of the SSHD to show "serious grounds of public policy or security…"

11. In assessing the claimant's case there are two cases of particular importance. One is Straszewski v Secreatry of State for the Home Department [2015] EWCA Civ 1245. In that judgment Moore Bick was concerned with the case of a person who had acquired a right of permanent residence, but at [30] expressed in general terms the view that save in exceptional circumstances the decision on whether deportation is consistent with the Directive:

> "…is to be determined solely by reference to the conduct of the offender (no doubt viewed in the context of any previous offending) and the likelihood of re-offending. General considerations of deterrence and public revulsion normally have no part to play in the matter."

12. At [25] Moore-Bick noted:

> ""Public policy" for these purposes includes the policy which is reflected in the interest of the state in protecting its citizens from violent crime and the theft of their property. These are fundamental interests of society and therefore, although regulation 21(3) does not speak in terms of the risk of causing harm by future offending, in a case of this kind that is the risk which the Secretary of State is called upon to assess when considering deportation. That requires an evaluation to be made of the likelihood that the person concerned will offend again and what the consequences are likely to be if he does. In addition, the need for the conduct of the person concerned to represent a "sufficiently serious" threat to one of the fundamental interests of society requires the decision-maker to balance the risk of future harm against the need to give effect to the right of free movement. In any given case an evaluative exercise of that kind may admit of more than one answer. If so, provided that all appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in the sense of falling outside the range of permissible decisions."

13. The other case is MC (Essa principles recast) [2015] UKUT 520 (IAC) The headnote to that decision states:

> *1. Essa rehabilitation principles are specific to decisions taken on public policy, public security and public health grounds under regulation 21 of the 2006 EEA Regulations.*

2. It is only if the personal conduct of the person concerned is found to represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 21(5)(c)) that it becomes relevant to consider whether the decision is proportionate taking into account all the considerations identified in regulation 21(5)-(6).

3. There is no specific reference in the expulsion provisions of either Directive 2004/38/EC or the 2006 EEA Regulations to rehabilitation, but it has been seen by the Court of Justice as an aspect of integration, which is one of the factors referred to in Article 28(1) and regulation 21(6) (Essa (2013) at [23]).

4. Rehabilitation is not an issue to be addressed in every EEA deportation or removal decision taken under regulation 21; it will not be relevant, for example, if rehabilitation has already been completed (Essa (2013) at [32]-[33]).

5. Reference to prospects of rehabilitation concerns reasonable prospects of a person ceasing to commit crime (Essa (2013) at [35]), not the mere possibility of rehabilitation. Mere capability of rehabilitation is not to be equated with reasonable prospect of rehabilitation.

6. Where relevant (see (4) above) such prospects are a factor to be taken into account in the proportionality assessment required by regulation 21(5) and (6) ((Dumliauskas [41]).

7. Such prospects are to be taken into account even if not raised by the offender (Dumliauskas [52]).

8. Gauging such prospects requires assessing the relative prospects of rehabilitation in the host Member State as compared with those in the Member State of origin, but, in the absence of evidence, it is not to be assumed that prospects are materially different in that other Member State (Dumliauskas [46], [52]-[53] and [59]).

9. Matters that are relevant when examining the prospects of the rehabilitation of offenders include family ties and responsibilities, accommodation, education, training, employment, active membership of a community and the like (Essa (2013) at [34]). However, lack of access to a Probation Officer or equivalent in the other Member State should not, in general, preclude deportation (Dumliauskas [55])

10. In the absence of integration and a right of permanent residence, the future prospects of integration cannot be a weighty factor (Dumliauskas [44] and [54]). Even when such prospects have significant weight they are not a trump card, as what the Directive and the 2006 EEA Regulations require is a wide-ranging holistic assessment. Both recognise that the more serious the risk of reoffending, and the offences that a person may commit, the greater the right to interfere with the right of residence (Dumliauskas at [46] and [54]).

14. As emphasised in Straszewski I am only entitled to interference in the judge's decision if it is vitiated by legal error. It is not sufficient that I disagree with the judge on the facts. In this case I am not persuaded that the decision of the judge was erroneous in law.

15. In the first place the judge heard evidence from the claimant's partner and evaluated this together with the documentary evidence. Having done so, he found the partner to be a

credible witness. Accordingly he was entitled to attach significant weight to her evidence. This point is important because the judge relied on the partner's evidence in finding at [15] that the reason the claimant had not gone to the police for help when the gang traced him in the UK was because he was frightened of doing so and in finding at [17] that "he now knows the risk of expulsion he would continue to run if he were to offend again". At [15] the judge had found that the evidence of the partner chimed with the remarks of the sentencing judge in that it demonstrated that:

> "The [claimant] came here with his family and it is not challenged that he thereafter exercised Treaty rights as a worker and a self employed person as a car mechanic. It is sufficiently evident that he was seeking to live a legitimate life here within the Regulations and a law abiding one. The clear inference I draw is that he would have continued to conduct himself and his family life in that way but for the fact that the gang traced him and made demands that he pay off what they perceived as his debt to them. One could argue that, faced with that, he should have gone to the police for help and perhaps he was foolish not to, but equally it is plausible, as his partner said in her evidence, that he was frightened of doing so, perhaps because of threats made to him".

16. Those were findings open to him and the SSHD's grounds do not seek to challenge them as such.

17. Secondly, in light of his factual findings it was clearly open to the judge to assess that the claimant was not likely to re-offend. Mr Mills is right to say that the judge did not directly address the issue of whether the claimant would continue to be vulnerable to the gang who had traced him in the UK renewing its demand that he repay his debt. At the same time, the judge clearly gave careful consideration to the circumstances which had led to claimant to offend in response to this gang's demands and his finding that he would not re-offend clearly entailed that he was satisfied that the claimant would not respond by re-offending. In any event, Mr Mill's suggestion that the gang was likely to start circling the claimant again was at best speculative and set against it is the fact that he had been back in society for some 19 months in the UK without any suggestion that they had re-contacted him during that time, or indeed in Poland where he has been since August 2015. If they knew of his criminal law and deportation difficulties, they would also be likely to know that the UK authorities had taken a close interest in the fact that a non-UK gang was involved.

18. Thirdly, I would accept, on the authority of MC, that if the judge had attached significant weight to the issue of the claimant's capacity to rehabilitate that would have been an error, because he did not have permanent residence. But there is nothing to indicate that the judge attached any particular weight to the issue of rehabilitation. On the judge's assessment the claimant was not likely to offend because he had not come to the UK with the intention of offending and had only done so because of gang pressure at a time when he had not appreciated the likely deportation consequences. Further he had expressed evident remorse ([16]). The fact that his appreciation of deportation consequences had been deepened by realising the distress his separation caused his wife and children was part of the factual matrix but not as such a specific rehabilitative step. Given those findings, rehabilitation was not a significant factor.

19. For the above reasons I conclude that the First tier Tribunal judge did not materially err in law and accordingly his decision to allow the claimant's appeal against the deportation order must stand.

Signed H H Storey

Date 23 April 2016

Judge of the Upper Tribunal