IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00449/2015

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 18 April 2016	**On 3 May 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

MR DOMINIC CHARLES KOCHER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Leskin, Birnberg Peirce & Partners
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Foudy who dismissed his appeal under Regulation 26 of the Immigration (European Economic Area) Regulations 2006 against the respondent's decision to deport him to France. The appellant is a citizen

of France born on 8 February 1979. His wife is a French citizen. They have three children. His wife and children reside in the UK.

2. On 10 March 2014 the appellant was convicted at Chester Crown Court of murder. He was sentenced to life imprisonment with a minimum recommendation of 23 years to be served in prison.

3. The respondent issued a deportation order pursuant to Regulation 19 of the 2006 EEA Regulations on 16 September 2015. The respondent seeks to deport the appellant so far in advance of his anticipated release date so that he can be transferred to a French prison. The appellant also has German citizenship.

4. The appellant and his family came to the UK in 2006. In 2009 the appellant and accomplices bludgeoned to death Christophe Borgye, a near neighbour and acquaintance, in his own home. The murder was pre-planned by the appellant who bought weapons in advance as well as bricks and cement with which to build a tomb in which the victim's body was hidden. The appellant deceived police, friends and the family of the victim by saying that the victim had moved to China. He maintained the deception for over four years. The crime was only revealed when an accomplice confessed. The appellant pleaded not guilty and still denies his guilt. He is a trusted prisoner and receives privileges as a result. He wishes to serve his sentence in a UK prison so that his wife and children can visit him as they intend to remain in the UK.

5. The judge stated that the respondent must satisfy her that a transfer to a French prison would enhance the possibility of the social rehabilitation of the appellant. It is for the appellant to satisfy her that his circumstances are such that he should not be deported from the UK.

6. The judge made the following findings

> *"19. However it is usual for deportation orders to be signed towards the end of a sentence of imprisonment, as the jurisprudence recognises. This is because the issues that might militate against deportation may well be very different in 23 years time from today. However deportation is possible under the Council Framework Decision Principle 9 where it would lead to a transfer to a French prison and would* 'serve the purpose of facilitating the social rehabilitation of the sentenced person'. *This is the main issue for me to decide.*
>
> *20. I am satisfied that transfer to a French prison would serve that purpose for the following reasons:*
>
> - *The Appellant is a French citizen who has spent most of his life in France. I find that he is bound to be more familiar and*

comfortable in his home country where he is familiar with the culture and surrounded by fellow citizens;

- *As a foreign criminal in the UK the Appellant might well be subjected to racial abuse from other prisoners; this is likely to hamper rehabilitation;*

- *In a French prison the Appellant would be living in a situation where his first language is the main language spoken. This is likely to improve his prospects of rehabilitation;*

- *The Appellant's mother lives in France and could more easily visit him there;*

- *In the Appellant's own letter dated 29 September 2015 (Respondent Bundle 2) he stated that he and his family intended to leave the UK upon his release from prison. It is therefore likely that France in any event, transfer of the Appellant would simply bring that relocation forward a little. His family would therefore be in a position to visit him in France as they do in the UK.*

21. I am not at all persuaded by Mr Leskin's argument that as the Appellant denies his guilt he is not going to be rehabilitated in any event. Mr Justice MacDuff described the evidence against the Appellant as overwhelming. Given the Appellant's propensity for manipulation of others I am satisfied that when his attempts to appeal his conviction fail he will probably resign himself to his sentence and make some belated efforts to rehabilitate.

22. I am not satisfied that the health problems of the Appellant are sufficient to make the deportation of the Appellant disproportionate. He is not close to death. He suffers from common conditions that he will certainly be treated for in a French prison. He lived in France with conditions for many years without coming to serious harm".

7. Permission was granted on grounds which argued that the only valid reason for the appellant to be deported would be if that would assist his rehabilitation and that as he still has twenty years of the minimum sentence to remain there is nothing to indicate that that would be the case.

8. Mr Leskin relied on paragraphs 52 to 54 of **Dumliauskas and Others [2015] EWCA Civ 145** where the Court of Appeal accepted on the authority of the judgment of the Court of Appeal in **Daha Essa** that the Secretary of State, and therefore the Tribunal, must consider the relative prospects of rehabilitation, in the sense of ceasing to commit crime, when

considering whether an offender should be deported. However, different considerations apply to questions of evidence and the weight to be given to the prospects of rehabilitation. As to evidence, as a matter of practicality, it is easier for the Secretary of State to obtain evidence as to support services in other member states. In the absence of evidence, it is not to be assumed that medical services and support for, by way of example, reforming drug addicts, are materially different in other member states from those available here. The Court of Appeal went on to say that the whole point of deportation is to remove from this country someone whose offending renders him a risk to the public. The Directive recognises that the more serious the risk of reoffending, and the offences that he may commit, the greater the right to interference with the right of residence. In other words, the greater the risk of reoffending, the greater the right to deport.

9. Mr Leskin also relied on the decision of the Upper Tribunal in **MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC)**, paragraph 29(e), where the Upper Tribunal in explaining **Dumliauskas** held that *"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".*

10. Mr Leskin submitted that in this case the respondent has to show in the circumstances that the appellant would be better off in France; that his removal to France would facilitate or enhance his rehabilitation. The Secretary of State needs to put forward the conditions in a French prison which will enhance the appellant.

11. Mr Leskin submitted that the judge's findings at paragraph 20 are speculative. It is the prison culture that the appellant will experience. He has lived in the UK for ten years. He writes fluent English and there is no suggestion that he cannot speak it. As to racial abuse, there is no suggestion that he is suffering adversely because he is French. There are letters from prison officers to show that he is a good prisoner. The fact that his mother is in France does not outweigh the presence of his wife and children in the UK who visit him regularly here.

12. Mr Leskin submitted that in the Reasons for Refusal Letter the respondent at paragraph 36 said that having regard to all the available information, it is concluded that deportation to France would not prejudice the prospects of the appellant's rehabilitation. In any event, it is considered that interference in his rehabilitation would be proportionate and justified when balanced against the continuing risk he poses to the public. Mr Leskin submitted that this may be the case but it is not the same as meeting the test of enhancing or facilitating his social rehabilitation.

13. Mr Bramble submitted that there was a VIP document in the bundles submitted by the respondent which was before the judge. The VIP document contained information about prisons in France. It refers to the

tasks of the prison administration in that in collaboration with public partners and associations, the prison administration implements integration services for inmates and for persons having a restriction on freedom: hosting, training, employment and medical care. Under family relationship, it states that inmates can be visited by family and friends in parlours. There is a possibility to work for the prison itself, each prison has a library available to all inmates. There is a probation and integration service in conjunction with the prison directors, the cultural organisations of towns and local areas, programme activities like artistic workshops. Prisoners have access to computer devices. Mr Bramble submitted that the VIP sets out goals in what is required in French prison. Unfortunately the judge did not set out the submissions of the parties.

14. Mr. Bramble submitted that under Principle 9 of the Council Framework Decision 2008/909/JHA, the enforcement of the sentence in the executing state should enhance the possibility of social rehabilitation of the sentenced person. Mr Bramble submitted that the key word here is *"possibility"* of social rehabilitation. Principle 9 gives examples of what should be taken into account, such as, the person's attachment to the executing state, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing state.

15. Mr Bramble submitted that the appellant was born in France and that was where he lived for a number of years. He has a linguistic attachment to France. In the light of the evidence, the judge's findings at paragraph 20 were open to her. He further submitted that if the judge had taken into account the VIP document which clearly sets out what is available in a French prison, her conclusions would not have been any different.

16. In reply Mr Leskin was very critical of the VIP document. He said the document contained criticisms of the services provided in French prisons. There was nothing in it to outweigh the situation in a British prison or facilitate or enhance the appellant's social rehabilitation.

17. I find on the evidence and following consideration of the submissions by the parties that the judge's decision discloses no error of law.

18. It is rather unfortunate that the judge did not consider the VIP document which was before her.

19. Article 3(1) of the Council Framework Decision states:

> *"The purpose of this Framework Decision is to establish the rules under which a member state, with a view to facilitating the social rehabilitation of the sentenced person, is to recognise a judgment and enforce the sentence".*

20. Article 4(2) states:

> *"The forwarding of the judgment and the certificate may take place where the competent authority of the issuing state where appropriate after consultations between the competent authorities of the issuing and the executing states, is satisfied that the enforcement of the sentence by the executing state would serve the purpose of facilitating the social rehabilitation of the sentenced person".*

21. Principle 9 which the judge relied on states:

> *"Enforcement of the sentence in the executing state should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing state will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing state should take into account such elements as for example the person's attachment to the executing state, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing state".*

22. Having cited the relevant principle and articles, I agree with Mr Bramble that the key word is *"possibility"* of social rehabilitation of the sentenced person. It is in satisfying itself that the enforcement of the sentence by the executing state will serve the purpose of facilitating the social rehabilitation of the sentenced person that examples are given as to what evidence should be taken into account.

23. In **Dumliauskas** the Court of Appeal in looking at what evidence is required and the weight to be attached to the prospects of rehabilitation said that it is easier for the Secretary of State to obtain evidence as to support services in other member states. In this case the Secretary of State submitted the VIP document which contained within it evidence of the support services available in French prisons. Unfortunately, the judge did not consider this document, which in my opinion, would have greatly assisted her in reaching her conclusions. In any event, I find that on the evidence that was before her, the judge's conclusion were open to her for the following reasons.

24. At paragraph 20 the judge set out in five bullet points her reasons for finding that the transfer to a Fresh prison would enhance the possibility of social rehabilitation of the appellant as set out in Principle 9. The first bullet point contains a finding of fact, and that is the appellant is a French citizen who has spent most of his life in France. I find that the judge's second reason was open to her as the appellant would be spending time in a French prison where most of the inmates will in all probability be French nationals. I accept that the finding in the second bullet point was speculative. I find that the third bullet point is linked to the reasons set out in the first bullet point and was a finding open to the judge. The fourth bullet point makes a finding of fact.

25. With regard to the fifth bullet point, I find that the judge was entitled to consider the appellant's own letter dated 29 September 2015 that he and his family intended to leave the UK upon his release from prison. There was no indication by the appellant in his letter that he was intending to go to Germany upon his release, as submitted by Mr. Leskin. The judge was entitled to find that being in a French prison his family would be in a position to visit him in France as they do in the UK. I also find that the judge's finding at paragraph 21 was open to her and does not disclose an error of law.

26. I find that the VIP document contains evidence that support the judge's findings. The criticisms relied on by Mr. Leskin do not in my opinion detract from the judge's findings. The appellant committed a horrendous crime and the sentence he received reflected the nature of the offence. The judge applied the correct test as set out in Principle 9 and considered the factors set out therein. I find on the evidence that the judge's decision does not disclose an error of law.

27. I uphold the judge's decision and dismiss the appellant's appeal.

28. No anonymity direction is made.

Signed Date

Upper Tribunal Judge Eshun