Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA002932016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 22 May 2017	**On 2 June 2017**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR NEVEL AYDAN YUSUF
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Senior Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Brunnen promulgated on 23 December 2016, allowing Mr Yusuf's appeal against the decision made by the Secretary of State on 8 June 2016 to remove him from the United Kingdom and to make a deportation order against him. Those

decisions were made under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").

2. The respondent is a citizen of Bulgaria who came to the United Kingdom with his wife in 2011. They lived initially in London before moving to North Wales where both of them worked in a local factory.

3. On 18 August 2015 the respondent caused a serious road traffic accident and on 25 November 2015 in the Crown Court at Mold he was convicted, having pleaded guilty, causing serious injury by dangerous driving and driving with excess alcohol. He was sentenced to 28 months' imprisonment as well to other orders made in respect of his driving licence. The Secretary of State wrote to the respondent on 16 December 2016 notifying him that because of his criminal convictions she intended to make a deportation order against him on the grounds of public policy/public security pursuant to Regulations 19(3)(b) and 21 of the EEA Regulations. The applicant also certified the decision pursuant to Regulation 24.A of the 2006 Regulations and the applicant was later removed. The decision letter of 8 June 2016 was supplemented by a further decision dated 12 July 2016.

4. It is not suggested that the respondent had acquired permanent right of residence.

5. In her refusal letters the Secretary of State concluded that the respondent had a propensity to reoffend and that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation on public policy grounds. She considered that his removal would be proportionate and, having had regard to **Essa [2012] EWCA Civil 1718,** there was no indication that he had undertaken rehabilitative work and there is no reason why he could not continue towards rehabilitation in Bulgaria with the support of family members. A decision was also taken pursuant to Article 8, Human Rights Convention and the Secretary of State went on to certify the case pursuant to Section 94B of the 2002 Act.

6. When the matter came before the First-tier Tribunal the respondent was unrepresented.

7. In his decision the judge concluded that:-

   (i) it was for the Secretary of State to establish that the respondent's removal was justified;

   (ii) having asked the Secretary of State's representative to make submissions as to the respondent's propensity to reoffend and to his representing a genuine, present and sufficiently serious threat, the representative found it difficult to find any support for the Secretary of State's case and the available evidence;

   (iii) the Secretary of State had not established any other justification for the decision other than the respondent's previous criminal convictions, contrary to Regulation 21(5)(e);

(iv) the evidence only shows that on one occasion the respondent drank to excess and caused a serious accident from which it was not possible to extrapolate a propensity to reoffend [25], the sentencing judge having accepted that the respondent was a hardworking man who had committed the offence "in a moment of madness";

(v) the Secretary of State had failed to establish on the balance of probabilities that the removal of the respondent complied with the requirements of Regulation 21(5)(c) or (e) [27] and therefore did not comply with 21(5)(a) either.

8. The judge therefore allowed the appeal.

9. The Secretary of State has sought permission to appeal on the grounds that the judge had made a material misdirection of law in failing to correctly consider rehabilitation in conformity with the findings of the Upper Tribunal in **MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC)** when considering risk to the public, it being submitted that the judge had erred absent lack of independent evidence that the offending risk factors had been removed or that the appellant was rehabilitated; and, that it was for the appellant to prove that he has sufficiently addressed his offending triggers.

10. On 21 March 2017 First-tier Tribunal Judge Grimmett granted permission, stating:-

The respondent says the judge failed to make a proper finding as to rehabilitation following **MC [2015] UKUT 00520 (IAC)**. This is arguable as the judge made no reference to rehabilitation in his decision.

11. The respondent was not represented at the hearing and, when inquiries were made of Pembridge Solicitors who still are on the record as representing him, they explained that they were without instructions. I was given that this had been the position before the First-tier Tribunal, persuaded that there was no basis on which I should not proceed to determine the appeal.

12. I heard brief submissions from Mr Bramble who candidly accepted that the Secretary of State had not challenged the judge's finding that the appellant did not show any propensity to reoffend and did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The Law

13. Regulation 21(5), EEA Regulations provides as follows:-

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.

14. It is important to note in this case that, as was held by the Court of Appeal in **Dumliauskas [2015] EWCA Civ 145** at [40]

I have to say that I have considerable difficulty with what was said by the Advocate General in relation to rehabilitation. In the first place, it had no, or very little, relevance to the questions referred to the Court, which concerned the meaning of "imperative grounds of public security". **Secondly, it is only if there is a risk of reoffending that the power to expel arises** [emphasis added] It is illogical, therefore, to require the competent authority "to take account of factors showing that the decision adopted (i.e., to expel) is such as *to prevent* the risk of re-offending", when it is that very risk that gives rise to the power to make that decision. Secondly, in general "the conditions of [a criminal's] release" will be applicable and enforceable only in the Member State in which he has been convicted and doubtless imprisoned. …

15. The sentence highlighted is confirmed at paragraph [55].

16. In **MC** the Upper Tribunal held as follows:-

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. …

17. The issue and extent to which rehabilitation can be taken into account logically only arises if there is a propensity to reoffend. That is because it is considered in assessing proportionality, and issue which arises only if a propensity to offend is found. The judge in this case found to the contrary, concluding that the respondent did not present a genuine, present and sufficiently serious threat. If there is no such propensity, then future rehabilitation is not an issue.

18. As Mr Bramble accepted there is no challenge to the finding that the respondent did not represented a genuine, serious and sufficiently serious threat. I consider that conclusion was one open to the judge given the very clear observation by the sentencing judge that the respondent had only one conviction albeit for a very serious offence, and that it was a moment of madness. It is difficult to see how one could extrapolate from that a propensity to reoffend in the future, nor was the Secretary of State able to make effective submissions on that point, nor is there other evidence of propensity to offend.

19. In these circumstances the issue of the prospects of rehabilitation did not need to be considered, and therefore I consider that the Secretary of State has not made out her ground of appeal and I therefore dismiss it.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

2. No anonymity direction is made.

Signed Date 1 June 2017

Upper Tribunal Judge Rintoul