



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00082/2018

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
on 5 November 2018

Decision promulgated
on 12 November 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHMED ALI

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs Aboni Senior Home Office Presenting Officer.

For the Respondent: in person.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge Aziz who, in a decision promulgated on 12 July 2018, allowed the appeal against the decision to deport Mr Ali from the United Kingdom.

Background

2. Mr Ali is a citizen of the Netherlands born on 23 October 1990. His immigration history shows he arrived in the United Kingdom in 2015 and on 28 July 2017 was convicted at York Crown Court of conspiring to defraud for which he was sentenced, on 24 August 2017, to 12 months imprisonment. The Secretary of State wrote to Mr Ali on 10 November 2017 informing him that he intended to make a deportation order the grounds of public policy in accordance with Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016. A number of letters were written by Mr Ali's representative setting out reasons why he should not be deported. On 23 January 2018 the Secretary of State served a deportation order.
3. There is no dispute of the Judge's analysis of the facts or law and I find no error made in relation to the Judge's assessment of the offence leading to the deportation order. The Judge summarises those circumstances at [15 - 17] in the following terms:
 15. The circumstances of the appellant's offence were that in October 2014 the appellant along with his co-defendants was involved in a sophisticated conspiracy to defraud involving the use of cloned credit cards and debit cards in order to obtain high value goods. The money obtained during this conspiracy was used to furnish an extravagant lifestyle. This was a serious crime which was committed for profit and the appellant and his co-defendants operated as a gang. They were involved in a sophisticated fraud with a significant degree of planning and the amount that was expected to be realised was in excess of £10,000. They were thwarted by security staff.
 16. The sentencing judge commented that during the trial the appellant had betrayed a considerable degree of arrogance and a belief that he could talk his way out of trouble. The Judge came to the conclusion that he was heavily involved, *'from first to last in this conspiracy'*.
 17. Crimes involving the cloning of fraudulent bank cards are not a victimless offence. It is an attack on the banking system. The banks pass on the cost of dealing with fraudulent transactions to their customers. Moreover, individuals whose accounts were targeted would suffer the shock of intrusion into their financial affairs and distress and fear of liability for debts accrued by criminals. The appellant had shown no regard to this or the consequences for those who would be unable to access their accounts whilst the fraudulent transactions were being investigated.
4. The Judge accepts at [19] that it is reasonable to conclude that if Mr Ali does not find employment, he may associate himself with negative peers, revert to reoffending in order to finance his lifestyle and continue to pose a risk of harm to the public or a section of the public.
5. The Judge's findings are set out from [97] in which the Judge found each of the appellant's witnesses to have given an honest and truthful account with regard to the appellant's character, especially post arrest, and that the Judge had no real

issues with any of the evidence. The Judge refers to the sentencing remarks at [102] together with the other documentary evidence provided at [118].

6. At [120 - 123] are the core findings in the following terms:

120. As stated above, the first question which I need to address when assessing the respondent's deportation decision is whether the appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as is required under Regulation 27(5).
121. Looking at all the evidence in the round, I am not persuaded that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society as per Regulation 27(5)(c). The appellant is someone of previous good character. During a period in his life from 2013 - 2014 there were a unique set of circumstances (detailed in his evidence) that led to him becoming associated with negative peers. He ought to have been an intelligent enough individual to have realised that he should not have associated himself with these negative peers. Nevertheless, he did and was eventually arrested by the police in the autumn of 2014 for being involved in a sophisticated and serious fraud involving credit/debit cards. However, since his arrest his life has materially changed. His family life is now much more stable. He has gone on to marry and have a child. His family unit exert an extremely positive influence on him. He has found employment, plays semi-professional football and is engaged in a number of voluntary and charitable activities. All of these have played a positive impact upon him. Whilst it was completely wrong of him to maintain a not guilty plea, I accept that his reasons for doing so were because she was afraid of going to prison and being away from his wife and child. While this does not necessarily condone his behaviour, having heard from him I accept that he has very much reflected on what he has done and come to regret his actions. More than anyone else, he realises the impact that his offending has had on him and his family. His family members came to support him at the appeal hearing and the appellant knows that he has let them all down.
122. I am persuaded by Mr Bradshaw's key argument that this is essentially a man of previous good character, who, during one period of his life in 2013 - 2014, became involved in criminal wrongdoing but has since seen the error of his ways and will not return to any form of reoffending. The evidence has backed this up. He has not committed any further offences since 2014. He has established a stable family unit. He has found employment and is fully engaged in charitable and vocational activities. All of the reports from the probation services and other professional organisations indicate that he is someone of low risk of reoffending. Therefore, looking at all the evidence in the round, I come to an overall conclusion that the respondent has not been able to establish that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
123. In light of this finding, it is not necessary for me to go on to consider whether the deportation decision is proportional.

7. The Secretary of State applied for permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

4. It is arguable, as contended in the Grounds of Appeal at [7], that in the balancing exercise seen to be applied at [119] the FTT fails to attach sufficient weight to the

fact that the appellant maintained his not guilty plea (rather than guilty plea as stated) until 2017; and to the fact that the appellant had limited opportunity to reoffend given that he had only been released from detention in February 2018. It is arguable that the comments by the FTTJ about maintaining a not guilty plea seen at [121] are inconsistent with the judge's sentencing remarks set out at [102] especially those about the arrogance displayed by the appellant; and that these might cumulatively illustrate that the "FTTJ had failed to appreciate the seriousness of the offence" as contended at [8].

8. The appellant has filed a Rule 42 Response repeating submissions made on his behalf at the hearing in opposing the Secretary of State's application.

Error of law

9. Mrs Aboni relied upon the grounds of appeal submitting that the Judge had erred in law in allowing the appeal in a case in which the appellant had committed a serious offence.
10. Even if, as pleaded at [5] of the Grounds the fact the appellant had not committed any offences since autumn 2014 is at best a neutral factor in accordance with the Secretary of State's submissions it is still a factor the Judge was entitled to take into account. The Judge examines the circumstances of the offence and notes this is the only conviction Mr Ali has against his name. The Judge does not challenge the lawfulness of the decision to deport which it is accepted the Secretary of State was entitled to make. Whether that decision is sustainable in law or susceptible to challenge by way of appeal is not arguable as Mr Ali was given an in country right of appeal against the same and was not removed from the United Kingdom.
11. The Judge was only able to comment upon evidence made available and it is the Secretary of State who determined the date of the deportation decision which led to the appeal. The fact there may have been a short period between the Mr Ali's release from detention and the date of the hearing is as a consequence of the chronology which only the Secretary of State, arguably, had any control or influence upon. No arguable legal error is made out in the Judge concluding that since release the appellant had not reoffended. There was nothing on the evidence before the Judge to permit, at this stage, a finding of the existence of evidence to show a propensity to reoffend in the future, giving rise to the required risk under the Regulations.
12. The grounds at [9] assert the decision to deport Mr Ali was proportionate but the Judge was not required to consider proportionality in a case in which the core finding is that it had not been made out that Mr Ali presented a genuine present and sufficiently serious threat affecting a fundamental interest of the society of the United Kingdom.
13. Mr Ali was, arguably, entitled to maintain his not guilty plea in the proceedings before the Crown Court. Effective disposal of litigation for those who are guilty is encouraged by the discounts given on sentencing to those who plead guilty at the earliest opportunity. Mr Ali did not choose to benefit from any such discount but chose to exercise his right as a citizen to plead his innocence until proven guilty does not, arguably, indicate Mr Ali lacks remorse, without more.

A person is entitled to plead 'not guilty' even if they know they have committed the offence solely for the purposes of seeing if the Crown Prosecution Service can prove their case to the requisite criminal standard.

14. The Judge does not allow the appeal on the basis this is a first offence solely or the explanation by Mr Ali as to why he maintained his guilty plea. The Judge clearly took all relevant aspects of the evidence and submissions into account before arriving at the overall conclusion.
15. It is not disputed that the offence for which Mr Ali was convicted is a serious offence within the terms of the Regulations. This is, however, not a case that was made out before the Judge in which the personal conduct of Mr Ali caused deep public revulsion, sufficient to warrant removal.
16. Relevant cases which have been considered include *Secretary of State for the Home Department v Robinson (Jamaica)* [2018] EWCA Civ 85 in which the Court decided that *Bouchereau* continued to bind the courts of this country albeit it was confined to the sort of case where the facts were very extreme as one was looking for a threat to the requirements of public policy caused simply by past conduct which has caused deep public revulsion. The Court of Appeal declined to give an exhaustive definition but suggested that grave offences of sexual abuse or violence against young children might have been the sort of case the court was thinking of.
17. In *Bonsignore (1975) ECR 297 (ECJ)* it was said that, if a finding is made that a threat to public security exists it "implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy".
18. In *Commission v the Netherlands Case C-50/06* the Commission said that under article 3(1) of the Directive 64/221 measures taken on the grounds of public policy or public security were to be based exclusively on the conduct of the person concerned. Article 3(2) specified that previous criminal convictions were not in themselves to constitute grounds for taking such measures. They could be taken into account only in so far as the circumstances which had given rise to that conviction were evidence of personal conduct constituting a present threat to the requirement of public policy.
19. In *Secretary of State for the Home Department v Arturas Dumliauskas, Lukasz Wozniak and ME (Netherlands)* [2015] EWCA Civ 145 it was stated at paragraphs 40 and 55 that if there is no real risk of reoffending then the power to deport nationals of other Member States on the grounds of public policy or public security does not arise.
20. It is not made out the conclusion of the Judge that the appellant's conduct did not represent a threat to the fundamental interests of society as a result of a real risk of further offending is outside the range of findings reasonably available on the evidence. It does not matter that another judge may make a different finding or come to a different conclusion. It has not been made out Judge Aziz has erred in law in a manner material to the decision to allow the appeal sufficient to enable the Upper Tribunal to interfere in this judgement.

Decision

- 21. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

22. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 5 November 2018