



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00087/2017

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons Promulgated

On 13 August 2018

On 14 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

NIKOLAY GEORGIEV KOLEV

[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Paul Richardson, Counsel instructed by Dicksons solicitors

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his representations as to why he should not be deported from the United Kingdom, and to make a deportation order to Bulgaria, of which he is a citizen.

2. The reason for the appellant's deportation was that on 13 July 2015, he had been convicted of wounding with intent to do grievous bodily harm and sentenced to 3 years and 6 months' imprisonment. The applicant is an EEA national and the deportation order was made pursuant to Regulation 19(3)(b) and Regulation 21 of the Immigration (European Economic Area) Regulations 2006, on the grounds of public policy.
3. The appellant also appeals against the respondent's certification of her decision under both Regulation 24AA of the 2006 Regulations, because she considered that removal would not be contrary to the United Kingdom's obligations under the ECHR, notwithstanding that any appeal process had not yet begun and/or had not yet been finally determined, and under section 94B of the Nationality, Immigration and Asylum Act 2002 (as amended), because he considered that there was no real risk, before the appeal process was exhausted, of serious irreversible harm to the appellant if he were removed to Bulgaria, and that his removal pending the outcome of such appeal would not breach the appellant's human rights or those of any other person affected by his removal, again at the level of serious irreversible harm.
4. The respondent's decision reminded the appellant of his right to apply to be readmitted under Regulation 29AA of the 2006 Regulations, to attend the appeal hearing.
5. The appellant was removed to Bulgaria on 31 March 2016.

Background

6. The appellant probably came to the United Kingdom in 2011. There was an accountant's letter of 8 May 2011, concerning his cleaning services company. There was evidence of tax returns for the years 2011 – 2015 and a large number of educational courses relevant to the appellant's employment in the United Kingdom.
7. On 11 September 2014, when he had been in the United Kingdom for about 3½ years, the appellant got into an altercation at work. He had no previous offences or cautions and was a single man age 31, with no children. The other man had made a mess of an area where the appellant had just cleaned up. There was shouting and swearing on both sides, then the appellant hit his co-worker over the head with a broom, which broke into four parts. Fortunately, the victim was wearing a hard hat, but the victim sustained a cut to his head as a result of the hard hat cutting in from the force used.
8. The appellant unsuccessfully claimed self-defence but was convicted of wounding with intent and sentenced to 3½ years' imprisonment. While in prison, the appellant undertook as many courses as possible to enable him to understand why he had lashed out over a trivial matter. He took responsibility for the offence but continued to assert that he had been acting in self-defence.

First-tier Tribunal decision

9. The appellant lodged an appeal against his decision and sought Regulation 29AA leave to re-enter for the appeal hearing but the application was refused. The appellant did not

comply with a direction made on 16 March 2017, requiring him to lodge a witness statement.

10. On 10 April 2017, the appellant notified the First-tier Tribunal that he had been removed to Bulgaria. He indicated that he wished to appear via Skype and take part in the proceedings. Directions were made on 12 April 2017, including a requirement that the appellant notify the First-tier Tribunal if he wished to apply for an adjournment, and that he provide his address in Bulgaria. The directions indicated that if the appellant did not respond, the appeal would proceed in his absence.
11. On 17 April 2017, the appellant responded, again asking to appear by Skype, and providing an address in Bulgaria. It is unclear whether that email was linked to the file for the hearing on 19 April 2017.
12. On 19 April 2017, First-tier Judge Grimmett heard the appeal and decided to proceed on the basis of the evidence before her. She was not satisfied that the appellant had been in the United Kingdom in accordance with the Regulations for a period of 5 years, and thus she was not satisfied that he had acquired a permanent right of residence. Only the basic level of protection was available to him.
13. The First-tier Judge noted that while in the United Kingdom, the appellant remained in regular contact with his parents and his sister, who still lived in Bulgaria. The Judge found that returning the appellant to Bulgaria would not reduce the prospects of rehabilitation, and that the appellant had not demonstrated social and cultural integration into the United Kingdom, despite living here in accordance with the Regulations for 4½ years, working and studying to improve his job prospects.
14. The Judge considered Article 8 ECHR and section 117C(c) of the 2002 Act. The appellant had not shown that he was socially and culturally integrated into the United Kingdom, nor that there would be very significant obstacles to his integration into Bulgaria on return. There was no evidence from the appellant as to where he was living in Bulgaria, or what he was doing there, for example, whether he was working.
15. The First-tier Judge took into account all of the relevant evidence before her and dismissed the appeal.

Permission to appeal

16. The appellant sought permission to appeal on the basis that there was evidence before the First-tier Tribunal that his actions were out of character, that he had engaged fully with the prison regime and his offender supervisor, and had been very well behaved in prison. He argued that the Judge's approach was wrong: although he recognised that he was not entitled to more than the basic level of protection as an EEA citizen, he asserted that he was at an advanced stage of rehabilitation and that he had become well integrated in United Kingdom society.
17. The appellant contended that too much weight had been placed on his lack of United Kingdom family ties and noted that he was considered to present a low risk of

reoffending; his probation officer had expressed the opinion that the appellant would have been likely to comply with licence conditions. He argued that his removal was disproportionate and that the First-tier Tribunal had erred in finding that it was proportionate.

18. Permission to appeal was granted by First-tier Judge Froom, for the following reasons:

“1. It is arguable that there was unfairness in the First-tier Judge’s decision to proceed. Whilst the appellant had not, in the strict sense, complied with all the directions of 12 April, it is arguable an unrepresented appellant would be unfairly disadvantaged by having this requirement imposed on him. He did, in fact, reply on 17 April [2 days before the First-tier Tribunal hearing] confirming his residential address and repeating his request to link in to the hearing by Skype. The directions are drafted in terms of the only link which could be acceptable being provided via an ISDN line. It is arguable the appellant might not have recognised the distinction and was waiting to be told whether he could link in by Skype. The decision does not make it clear whether the First-tier Judge was aware of the appellant’s response of 17 April.

2. The grounds also challenge the substance of the decision. The First-tier Judge considered the case was finely balanced. It is appropriate to grant permission to argue this ground as well, given the overlap with the first ground.”

19. Following the grant of permission to appeal, Mr Justice McCloskey directed that the appellant be brought back for the hearing of his application. He was readmitted and detained until the appeal could be heard. He has been returned to Bulgaria now.

Rule 24 Reply

20. There was no Rule 24 Reply.

21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

Appellant’s evidence

22. As the appellant had been brought from Bulgaria for the hearing, I heard oral evidence from him to enable me to assess whether, had he appeared before the First-tier Tribunal by Skype or some other electronic means, that would have made a material difference to the outcome of the appeal. The appellant had prepared an updated witness statement and gave oral evidence.

23. In his witness statement dated 6 August 2018, the appellant confirmed his address in Bulgaria and indicated that he wished his statement to stand as his evidence-in-chief. The statement was adopted at the beginning of the appellant’s oral evidence. The appellant said in his witness statement that came to the United Kingdom on 4 April 2011 to work and settle down. He had hoped to improve his English language skills and provide a better life for himself and his family. He wanted to integrate in British society and contribute to the community here.

24. The appellant found work in the United Kingdom through a Bulgarian employment agency. He paid a lot of money to get the appropriate legal registrations so that he could start work as soon as possible after his arrival, and his self-employed registration was arranged by the agency on 5 April 2011. He worked in a golf club near Morpeth for a time, and was issued with a National Insurance number. With another colleague, he relocated to London in September 2011 and worked as a kitchen assistant, before applying for a Construction Skills Certification Scheme (CSCS) card and beginning to work in construction. The appellant worked through a number of construction workers employment agencies, as a landscaping labourer, gardener, demolition operative and so on. He complete his tax returns and paid all contributions due in each tax year.
25. The applicant then dealt with the index offence. He said he bitterly regretted the physical pain and emotional scars he had caused the victim and his family, and the trouble caused to the police and the Court who had to investigate his actions. Despite the conviction, he said he did not have the intent to cause such damage as he had and would like to apologise for his actions, which were out of character.
26. The appellant said he was usually quite a calm person and had never overreacted like this before. It was a 'spur of the moment' occurrence. The victim and the appellant were both arguing and swearing at each other, though he accepted that this in no way justified his behaviour in hitting the victim with a broom stick. He had learned from his mistake. He had taken thinking skills and victim awareness courses in prison, and dedicated his imprisonment to rehabilitation, to improving his work skills and becoming a better person.
27. The appellant believed that if the same circumstances occurred again, he would react differently and would avoid conflict. He was asking for a second chance for a life in the United Kingdom; everyone deserved a chance at redemption. The appellant relied on evidence from his former probation officer, Mohammed Mansour Nassirudeen that he was no longer a risk to the community.
28. The appellant recognised that prison is a very controlled environment and that, having been removed to Bulgaria from prison, his behaviour had not been tested in the community here. The appellant said there had been plenty of provocation in the prison, which he had resisted. Other inmates, from all around the world, had intimidated or annoyed him many times in prison, but he had not reacted. He had received very positive comments from prison officers and educational staff.
29. The appellant said he had learned a lot, and had taught himself to be more patient and tolerant of different kinds of people, and different religions. If allowed to return, he would 'give all of my best efforts to stay tolerant and respectful to other people's opinions, avoiding needless arguments'. He would renew his construction certificates and go back to working in construction, or use some of the qualifications he had obtained in prison, for a different kind of job. He wanted to contribute to society. The appellant had been awarded Student of the Year by the local college while in prison: he was surprised, but he had been glad of the recognition.

30. In answer to supplementary questions from Mr Richardson, the appellant said that he had spent 9 months on bail before his conviction, during which time he had not offended again. He had never been in trouble in his entire life before. He wanted to 'fix my mistake' and recognised that he had committed a very serious crime. He realised now that his behaviour had been reckless and irresponsible, ridiculously silly and stupid, to hurt another human being in such a disgraceful way. The appellant bitterly regretted his actions.
31. In Bulgaria, the appellant was working now as a warehouse operative, in his home town, supporting himself and his family with the income. He did not want to just sit and do nothing: he wanted to 'fix my mistake', contribute to the community, and be useful, so as to push his case forward. He was lost for words to express his remorse for his reckless behaviour and silly actions. He would like to apologise to the victim and everyone, as his witness statement said, and for the pain he caused to his own family and that of the victim.
32. He had learned his lesson and definitely would not do this again. The appellant now knew that he needed to control his temper and in a similar situation, would walk away and swallow his pride. If he could stay, he would renew his construction licences, and as he had a plant operator licence, he hoped to get back to working in construction.
33. In cross-examination, the appellant was asked how often he hit the victim. His case had been that he hit him once, but the appellant now said he might be wrong, as he had been in such distress at the time that he could not think straight. He still could not explain his actions: he never reacted this way normally, he just was not that type of person. He accepted that he might have made a mistake as to how many times he hit the victim.
34. The appellant told me that the evidence from Mr Mansour was obtained after he had a video link meeting with the appellant and his offender supervisor in November 2016. Mr Mansour was pleased and happy with the appellant's development and rehabilitation, and with how much he had tried to change and 'fix my mistake'. The appellant had written Mr Mansour a letter later, asking for support for his First-tier Tribunal hearing, then they had a telephone conversation, in which Mr Mansour said he had no problem about stating his opinion of the appellant. The appellant considered that Mr Mansour had assessed the appellant through his offender supervisor: she was the connection between them.

Submissions

35. At the hearing, Mr Richardson who represented the appellant relied on the grounds of appeal and asked that the Tribunal go on to determine the appeal, if an error of law were found. He argued that *Secretary of State for the Home Department v Dumliauskas & Ors* [2015] EWCA Civ 145 was not relevant, as it dealt with the prospects of rehabilitation, whereas this appellant was already fully rehabilitated, on his own case. His behaviour, in and out of prison, demonstrated that. His prison records showed an exemplary prisoner. The burden was on the respondent to prove that the appellant presented a public policy or public order risk, but the respondent had not discharged that burden.

36. Much of the OASys report was positive, although it was prepared towards the beginning of his incarceration. The appellant had also produced testimonials and educational certificates, as well as a letter from his parents and sister. He had no incentive to commit further crimes and had now been well behaved for several years. The respondent had not demonstrated a genuine, present and sufficiently serious risk as Regulation 21(5)(e) of the 2006 Regulations required.
37. Mr Richardson asked me to allow the appeal.
38. In submissions for the respondent, Mr Tufan reminded the Tribunal that the appellant was entitled only to the lowest level of protection as he had not been in the United Kingdom in accordance with the Regulations for 5 years. The mid-sentence OASys report recorded some continuing problems and assessed him as a medium risk to the public, in and out of prison. The report from the probation officer was based on a video link conference in October 2017, 7 months after the probation officer had last dealt with the appellant.
39. The respondent accepted that the appellant had shown remorse but would rely on *Dumliauskas* as authority for the proposition that no substantial weight was to be given to rehabilitation for EEA nationals who had not yet achieved a permanent right of residence. The crime was a grave one and the suggested rehabilitation really took matters no further.
40. The OASys report, early in the appellant's sentence, considered him to be a medium risk. The appellant would rely on *Dumliauskas* and on *Secretary of State for the Home Department v Robinson (Jamaica)* [2018] EWCA Civ 85 at [85]: this appellant's offence, while grave, was not such as to create the type of public revulsion contemplated by the Court of Justice of the European Union in *Regina v Pierre Bouchereau* [1977] EUECJ R-30/77.
41. The appellant relied on the favourable evidence from the probation officer and argued that this was now a stale offence, committed in September 2014, for which the appellant had been sentenced in July 2015. There were no further offences. The appellant had demonstrated rehabilitation, both in and out of prison.

Discussion

42. I am satisfied that in her self-direction that the appellant had not responded and had not supplied his address in Bulgaria, following the directions order emailed to him on 13 April 2017, the First-tier Judge fell into error of fact. There was a response, which had been received on 17 April 2017, albeit it may not have been linked to the file. That is a procedural error.
43. The question for me is whether the appellant's oral evidence today was such that, had the First-tier Judge had the benefit of hearing him give that evidence, the outcome of the appeal would have been different. If it would not have been, then the procedural error is immaterial.

44. I begin by considering the guidance given in *Dumliauskas*. It is common ground that this appellant is not entitled to any enhanced protection as he has not been in the United Kingdom for 5 years before his removal to Bulgaria. The appellant's case is that he is not a person in the process of rehabilitation: rather, he says he is fully rehabilitated. At [53]-[55] in the judgment of Sir Stanley Burnton in *Dumliauskas*, with whom Lord Justice Jackson and Lord Justice Floyd agreed, he said this:

"53. 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. However, in my judgment, 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. This is not the occasion to conduct a comparative survey, but it is appropriate to mention, by way of example, that medical services in France are said to be excellent, and that Portugal has been innovative in relation to treating drug addiction.

54. Lastly, in agreement with what was said by the Upper Tribunal in *Vasconcelos*, I do not consider that in the case of an offender with no permanent right of residence substantial weight should be given to rehabilitation. I appreciate that all Member States have an interest in reducing criminality, and that deportation merely exports the offender, leaving him free to offend elsewhere. However, 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 interfere with the right of residence. Article 28.3 requires the most serious risk, i.e. "imperative grounds of public security", if a Union citizen has resided in the host Member State for the previous 10 years. Such grounds will normally indicate a greater risk of offending in the country of nationality or elsewhere in the Union. In other words, the greater the risk of reoffending, the greater the right to deport.

57. Furthermore, as I mentioned above, a deported offender will not normally have committed an offence within the State of his nationality. There is a real risk of his reoffending, since otherwise the power to deport does not arise. Nonetheless, he will not normally have access to a probation officer or the equivalent. That must have been obvious to the European Parliament and to the Commission when they adopted the Directive. For the lack of such support to preclude deportation is difficult to reconcile with the express power to deport. In my judgment, it should not, in general, do so."

45. On that basis, the weight to be given to the appellant's claim to be rehabilitated, or to be in the process of rehabilitation, is limited, if any. Stripped of that, his oral evidence before the Upper Tribunal consists of this: he came to the United Kingdom to work, and send money home to his family. He now works in Bulgaria (despite his family's assertion in their 2016 statement that he would not be able to find work there) and he continues to support his parents and his sister in that way.

46. The appellant recognised in his OASys self-assessment that he has a temper problem. He speaks of working to control it, even now, and describes his behaviour towards his co-worker as 'silly'. It was much more than that: the appellant committed a serious offence, which he has sought to minimise throughout, and it is extremely fortunate that

the victim was wearing a hard hat, otherwise the consequences might have been yet more serious.

47. There is really nothing, except the assertion of rehabilitation, in the appellant's oral or written evidence, which would have changed the outcome of this appeal. The respondent and the First-tier Judge were entitled to conclude, on the evidence before them, that this appellant continued to present a genuine and sufficiently serious risk to the public, as set out in the OASys report, taken half way through his sentence, which recorded that he was a medium risk to the public, in and out of prison.
48. The procedural error by the First-tier Tribunal in not linking the 17 April 2017 email to the file is not, on these facts, material.
49. As regards the evidence of integration in the United Kingdom, it is slight. The appellant has some work acquaintances who like him, but no wife, girlfriend or child here. The base of his life remained throughout his parents and sister in Bulgaria, whom he was supporting. Since returning to Bulgaria, he has continued to do so. The respondent was entitled to apply both a Regulation 24AA and section 94B certificate on that evidence and the appellant's challenge to the certificates was properly dismissed by the First-tier Judge.
50. There is no material error of law in the decision of the First-tier Tribunal and I dismiss this appeal.

DECISION

51. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Date: 11 September 2018

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson