



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00105/2018

THE IMMIGRATION ACTS

Heard at Field House
On 1 August 2018

Decision & Reasons Promulgated
On 9 August 2018

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUNTAZIR SHERMAHOMED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr D Sellwood, Counsel instructed by Birnberg Peirce & Partners

ERROR OF LAW DECISION

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Anstis issued on 19 March 2018 which allowed the appeal of Mr Shermahomed against deportation under the EEA Regulations 2016.
2. The background to this matter is that the appellant, a Portuguese national, came to the UK in 2002 at the age of 3 years old. He was convicted on 17 August 2013 for going equipped for theft. On 3 August 2015 he was convicted of possession of an offensive weapon. Both of those matters were dealt with by way of non-custodial sentences. On 27 January 2017 the appellant was convicted of possession with intent to supply class A drugs (cocaine and heroin) along with associated criminal property offences and a conviction for possession of class B drugs (cannabis and cannabis resin). He received

a sentence of 28 months. On 18 December 2017 the Secretary of State issued a decision seeking to deport him under Regulation 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

3. First-tier Tribunal Judge Anstis found that the appellant, undisputably continuously resident in the UK from 2002, had remained integrated even after his sentence of 28 months. He therefore qualified for the highest level of protection provided under the EEA Regulations, that is the Secretary of State had to show that there were “imperative” grounds to justify his deportation. Judge Anstis’ reasoning on that matter is contained in paragraphs 50 to 56.
4. In paragraphs 44 to 49, in the alternative, the First-tier Tribunal found that the appellant qualified for permanent residence and therefore for the “serious” level of protection under the EEA Regulations. That conclusion was not disputed by the respondent.
5. The First-tier Tribunal went on in paragraphs 57 to 70 to find that the appellant could not be said to show the requisite level of threat to public policy or public security. Key to that conclusion was the finding of a low risk of reoffending. The sentencing remarks indicated that the appellant had shown remorse and that he had been under notable pressure from others when committing the offence. Further, the First-Tier Tribunal had evidence from the appellant, his father and his father’s partner that he would move away from his previous connections in London on release from detention and relocate to Norwich to live with his father and his partner. As part of his sentence, he had been transferred to Norwich and been able to re-build his relationship with his father who lived there. They had formed a plan for him to relocate on release in order to avoid his criminal associates and for him become a reformed character with this fresh start.
6. Judge Anstis’ conclusion at paragraph 70 was as follows:

“Bearing that in mind (and I have also born in mind the other factors in Schedule 1) I find that the Respondent’s decision was not proportionate and is not in accordance with regulation 27. That is so even without the additional requirements that the grounds should be “serious” and “imperative”, which I have found apply in this case. I do not consider that the Appellant’s situation comes close to meeting the requirements of “serious” or “imperative” grounds that apply to this case. His appeal must succeed.”
7. The Secretary of State raised a number of grounds of challenging the decision of the First-Tier Tribunal. Permission was granted on all grounds in a decision of the Upper Tribunal dated 14 June 2018. By the time of the hearing before me, Mr Walker conceded for the Secretary of State that she no longer sought to rely on grounds concerning the First-tier Tribunal Judge’s decision on integration and the appellant having been correctly assessed as benefiting from the “imperative” level of protection.
8. Mr Walker set out that the Secretary of State’s only remaining ground was that the First-tier Tribunal erred in the proportionality assessment in finding a low risk of reoffending and that therefore neither the “serious” or “imperative” levels of threat to public policy could be met. In particular, the weight placed on what was stated to be

a “speculative” plan for him to move to live with his father in Norwich was not appropriate.

9. I can deal with this ground relatively briefly. This aspect of the Secretary of State’s challenge to the proportionality assessment is, put in formal error of law terms, one of irrationality. The Secretary of State seeks to argue that it was not open to a reasonable decision maker to place the weight that Judge Anstis did on the evidence from the appellant, his father and his father’s partner as to the plan for him to relocate and rehabilitate in Norwich. Where the judge had evidence from those three witnesses, heard oral evidence from two of them, and it was undisputed that the appellant had formed a new bond with his father, it appears to me wholly unarguable that there was any issue of irrationality in the weight that the First-tier Tribunal chose to place on this factor in the proportionality assessment. The evidence was capable of bearing the weight the attributed to it by the judge. It is therefore my view that the grounds do not show an arguable error of law in the proportionality assessment and the decision must therefore stand.
10. I should also indicate that where it was conceded for the Secretary of State that this appellant benefits from the “imperative” level of protection, it did not appear to me that his sentence of 28 months, even taken into account with his two previous convictions, could be said to amount to “imperative” grounds amounting to a threat to public policy or public security. The parties indicated that there did not appear to be currently policy or guidance from the Secretary of State as to what she viewed as “imperative” grounds that is the level of offending that could come within that category such that an assessment of the proportionality of deportation was required. I noted, however, the comments of the Court of Appeal in **LG and CC v SSHD [2008] EWCA Civ 190** (approved in **SSHD v FV (Italy) [2012] EWCA Civ 119**, at 32) on the view of what was required for an “imperative” threat. The Court of Appeal said this:

“32. The following points should be taken into account:


...

- 3) The word "imperative", as a distinguishing feature of the third level, seems to me to connote a very high threshold. The earlier version of the manual treats it as equivalent to "particularly serious". In the latest version, the expression "particularly serious risk" is used for the second level. The difference between the two levels, that is, between "serious" and "imperative", is said to be "one of severity", but there is no indication why the severity of the offence in itself is enough to make removal "imperative".
- 4) The same thinking is reflected in the examples of offences given in the manual. Both levels require a serious offence linked to a propensity to re-offend. The second "serious" level encompasses "a violent offence carrying a maximum penalty of 10 years"; the third "imperative" level requires not only a maximum penalty of 10 years but also an actual sentence of at least five years. It is not clear why the mere fact that a five year sentence has been imposed should make removal "imperative".

- 5) Neither version of the Manual seems to me to give adequate weight to the distinction between levels two and three, or to the force of the word "imperative". To my mind there is not simply a difference of degree, but a qualitative difference: in other words, level three requires, not simply a serious matter of public policy, but an actual risk to public security, so compelling that it justifies the exceptional course of removing someone who (in the language of the Preamble to the Directive) has become "integrated" by "many years" residence in the host state."
11. Considered in light of those comments, the appellant's sentence of 28 months does not come close to posing an "imperative" threat to public policy. Where the respondent conceded that the findings of Judge Anstis on the appellant having remained integrated after 10 years' continuous residence were correct in law, there could be no material error in the proportionality assessment where this was no need for this to be conducted as the requisite level of threat to public policy was not made out.
12. The appellant should be in no doubt, however, that any further offending will inevitably lead to close scrutiny of his circumstances, possible further deportation action and, potentially, a different outcome.

Decision

The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: 
Upper Tribunal Judge Pitt

Date: 7 August 2018