Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00147/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21st August 2019	**On 17th September 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERT [G]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr D O'Connor, instructed by Birnberg Peirce Solicitors

DECISION AND REASONS

1. The Secretary of State made the application for permission to appeal but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr [G] as the appellant and the Secretary of State as the respondent.

2. The appellant is a citizen of Poland born on 7th October 1994 and he appealed the decision to make a deportation order against him on 14th December 2018 under the Immigration (European Economic Area) Regulations 2016.

3. The appellant was cautioned on 27th February 2013 for theft from a dwelling and cautioned in December 2015 for possession of a controlled Class B drug (cannabis) and Class A drug (cocaine)

4. Between 2nd October 2014 and 15th October 2018, the appellant amassed 16 convictions for 23 offences. He received 13 convictions for 17 offences of shoplifting, breach of conditional discharge, found on premises for unlawful purposes, failing to surrender to custody as soon as practicable after an appointed time, 4 counts of failing to attend for/remain for duration of initial assessment following test for Class A drugs, 2 counts for failing to surrender to custody at an appointed time, concealing/disguising/converting/transferring/removing criminal property and 2 counts of travelling on the railway without paying fares. For these offences he was ordered to pay fines, costs and victim surcharges.

5. He was convicted in September 2018 and again in October 2018 for theft or attempted theft by shop lifting.

6. The appellant then received a six-week custodial sentence for the index offence of shoplifting in October 2018. As the determination recorded "his intention had been to steal two bottles of wince (sic) and headphones to sell on for drugs".

7. The judge recorded in the oral evidence at the hearing that the appellant came to the UK when he was 16 and in 2014 started to take illicit drugs owing to peer pressure. He was working as a waiter and working to support his habit but was removed from the United Kingdom in February 2016 after receiving a caution. He returned lawfully to the United Kingdom but in 2017 was hospitalised owing to a drug overdose.

8. The appellant states he was in prison for the first time and this was a shock to him and he started on a methadone substitute and had been drug-free since and had moved back with his parents and was now working for a construction company.

9. First-tier Tribunal Judge S Lal made the following findings at paragraph 15 that the appellant came to the United Kingdom in July 2011 to join his parents and:

> *"On balance the Tribunal is prepared to accept that the appellant has been able to show that he has a permanent right of residence in the UK as he would have accrued such as the dependant of his father up to the age of 21 and the Tribunal accepted his account that he was working as a waiter or a labourer in the UK after this".*

10. The judge went on to set out the following:

> *"16. The Tribunal then wet (sic) on to consider the index conviction which was 6 weeks imprisonment at West London Magistrates for the offence of shoplifting. The Tribunal had regard to the previous matters which all resulted in community penalties and or fines and which were all disposed of at summary level.*

17. *The Tribunal considered the evidence thereafter and it accepted the account that it was only in prison for the first time that he received help with his addiction issues. It accepted that he was now drug free and this was because his oral evidence was consistent with that of his mother who had experience of him when on drugs. Secondly it was supported by the NHS i-access Referral dated 4 June 2019 which supported the Appellant's own account that he was drug free. The Tribunal noted that he was in full time employment and was living at home which were strong protective factors. He was no longer with his girlfriend. The Tribunal accepted the Appellant came across as candid and insightful into his past drug misuse and he demonstrated good insight into his recovery. The Tribunal accepted that he has been drug free since October 2018 and that his past offending was directly related to illicit substance misuse.*

18. *In the circumstances there was no credible evidence to suggest that the Appellant poses a risk either on serious grounds or that he poses a genuine, present and sufficiently serious threat to the public and following Arranz, the Tribunal notes that the burden is on the Respondent to justify deportation. The Respondent has failed to do so other than noting the effect of the offences committed in general terms only on UK society. There was no evidence to suggest a risk to anyone else at the present time or towards the public and wider community. There was no evidence to suggest a propensity to reoffend other than the fact of having convictions where the main aggravating feature was substance misuse which is now no longer an issue. The Tribunal could see no wider risk to public security or broader public policy by his presence in the UK. In summary, the Tribunal assessed the index offence as being confined to a particular context where the main contributory factor has already been addressed.*

19. *On the contrary, the evidence that the Tribunal did have before it was that the Appellant appeared genuinely remorseful that it had come to this and the Tribunal was satisfied that the Appellant had shown great insight into the circumstances which lead to his conviction. The Tribunal was satisfied that he has a good prospect to maintain work in the UK as before as well as remain in accommodation provided by his parents. These are both protective factors that would militate against any risk previously identified."*

Application for Permission to Appeal

11. The Secretary of State appealed on two grounds. First the Secretary of State noted that the judge accepted the appellant arrived in the UK in July 2011 which meant that he could qualify for the permanent residence in July 2016 providing he had resided continuously in accordance with the EEA Regulations. Prior to that time, however, the appellant had already been the subject of administrative removal on 18th January 2016 precisely for not residing in accordance with the EEA Regulations. The judge acknowledged this removal at [7] but failed to factor this into the continuity of residence assessment. If it had been done it was not possible for the appellant to have been lawfully in the UK long enough to acquire permanent residence and thus

the enhanced protection from removal under the EEA Regulations because of his status.

12. At the appeal before me Mr O'Connor conceded that the judge had erred in approach to the matter of permanent residence and indeed Regulation 3(3)(c) of the Immigration (EEA) Regulations 2016 confirms that as a person removed from the UK any continuity of residence would have been broken. As such the appellant could not qualify to have the right of permanent residence.

13. At paragraph 18 the judge erred in relation to applying the test which was relevant to those with permanent residence.

14. Nevertheless, Mr O'Connor argued that at paragraph 18 the judge had, in the alternative, applied the lower test in accordance with Regulation 23 and Regulation 27.

15. Paragraph 23(6)(b), the Regulation which governs exclusion and removal from the United Kingdom under the 2016 Regulations, states as follows:

> *"23. -(6) Subject to paragraphs (7) and (8), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –*
>
> *(a) that person does not have or ceases to have a right to reside under these Regulations;*
>
> *(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 27; or*
>
> *(c) the Secretary of State has decided that the person's removal is justified on grounds of misuse of rights under regulation 26(3)."*

16. Regulation 27 is set out as follows:

> *"27. -(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.*
>
> *(2) A relevant decision may not be taken to serve economic ends.*
>
> *(3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.*
>
> *(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –*
>
> *(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or*
>
> *(b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.*

> *(5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent;*
>
> *(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;*
>
> *(f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person."*

17. I am not satisfied that the judge set out the correct test, understood that test or that he did apply the "lower" test. As can be seen from the references above the Secretary of State must decide that the person's removal is justified on grounds of "public policy, public security or public health" in accordance with Regulation 27(5) and Regulation 27 also refers to "the public policy and public security requirements of the United Kingdom".

18. The judge merely stated at paragraph 18, when he was said to have applied the alternative that there was no credible evidence to suggest that he "poses a genuine, present and sufficiently serious threat <u>to the public</u>". That, as can be seen from above, at Regulation 23(6)(b) and Regulation 27 is not the test. Nor did the judge make any reference to Article 7 of Schedule 1 of the EEA Regulations 2016 and the variety of factors with which the judge needed to engage.

19. I find there is an error of law which is material because it is not clear that the judge applied the correct test.

20. The second ground of appeal was that it was simply not correct that there was no evidence of a propensity to reoffend as found by the judge at paragraph 18. The second ground adumbrated that the appellant had numerous offences recorded on the PNC report which clearly contradicted this finding. The appellant may have stopped the use of drugs since late 2018 and there had been no further offending since, but the respondent did not consider this to be a sufficient period of time for the judge to find there was no longer any risk of threat. The PNC report showed periods of no offending only for it to resume later. The fact that since the end of October 2018

the appellant had been incarcerated and under the threat of deportation meant it likely he had remained on his best behaviour to avoid further action against him.

21. In summary it was contended that the judge had failed adequately to reason why the appellant was no longer a threat to one of the fundamental interests of society particularly with regard to Schedule 1 of the EEA Regulations 2016, namely Article 7(b)(c)(h) and (j).

22. As set out at Schedule 1:

> *"7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include –*
>
> *(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;*
>
> *(b) maintaining public order;*
>
> *(c) preventing social harm;*
>
> *(d) preventing the evasion of taxes and duties;*
>
> *(e) protecting public services;*
>
> *(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;*
>
> *(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);*
>
> *(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);*
>
> *(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;*
>
> *(j) protecting the public;*
>
> *(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);*
>
> *(l) countering terrorism and extremism and protecting shared values."*

23. At the hearing before me Mr O'Connor submitted that Schedule 1 Article 7 was not relevant and did not relate to whether the appellant represented a genuine threat. Bearing in mind the specific reference at Regulation 27(5) I cannot accept that submission. As Mr Tufan pointed out Regulation 27(8) obliges a court or Tribunal

considering whether the requirements of the Regulations are met to have regard to the considerations contained in Schedule 1. Those are considerations of public policy, public security and the fundamental interests of society.

24. Schedule 1 Article 7 sets out what is to be construed when considering the fundamental interests of society and nowhere did the judge address the considerations set out. Specifically 7(g) refers to offences where a victim might not be readily identifiable but where there is wider societal harm such as the misuse of drugs and indeed curiously the judge stated that 'there was no evidence to suggest a risk to anyone else at the present time'.

25. Further, 7(h) referred to combatting the effects of persisted offending. It is not the case that the respondent had simply failed to do other than note the effect of the offences committed in general terms only on UK society. There is a record of the appellant's persistent offending which the judge did not set out in his brief determination. To state there was no evidence to suggest a propensity to reoffend omitted the extensive record of offending and was reasoned on the basis that the main aggravating feature was substance misuse "which is now no longer an issue". There were no medical reports in relation to his substance misuse being reformed and as pointed out, the judge did not address the point that he had lapses of previous offending. The protective factors of living at home and working were factors which had been in evidence previously and contrary to the reasoning at paragraph 19.

26. To conclude that the main contributory factor, substance misuse, had already been addressed was inadequately reasoned and premature when considering the duration of the appellant's substance misuse (from the age of 16 years in 2014), the extent of his previous substance misuse as recorded in the decision, (he had been hospitalised in 2017) and the lack of firm medical evidence. The i-access referral from the NHS was dated 4th June 2019 and was just that, a referral. There was no medical evidence for his drug reformation save for the appellant's assertion and his mother's view that the appellant was drug free. The St Peter's Hospital discharge summary dated 30th December 2017 identified that the appellant was admitted to hospital for six days from 25th December 2017 and that he was living with his parents and the presenting complaint was 'cocaine/amphetamine overdose'.

27. I therefore consider for the reasons given that the findings are materially flawed, and the decision cannot stand.

28. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Signed *Helen Rimington* Date 11th September 2019
Upper Tribunal Judge Rimington