



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00752/2018

**THE IMMIGRATION ACTS**

Heard at Birmingham Civil Justice Centre  
On 31 May 2019

Decision & Reasons Promulgated  
On 1 August 2019

Before

UPPER TRIBUNAL JUDGE PERKINS  
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KRYSTYN [C]  
(anonymity direction not made)

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr A Rizvi, legal representative from Salam & Co Solicitors

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter “the claimant”, against the decision of the Secretary of State to deport him. In outline summary, and by way of introduction, it is the Secretary of State’s case that the First-tier Tribunal’s decision was reasoned inadequately. Having heard the submissions we agreed with the Secretary of State. We set aside the decision of the First-tier Tribunal and we heard evidence at the hearing so that we could remake the decision. Although we have

allowed the Secretary of State's appeal when we remade the decision we have allowed the claimant's appeal against the decision of the Secretary of State.

2. We begin by considering the decision of the First-tier Tribunal.
3. This notes, correctly, that the Secretary of State decided to deport the claimant on 14 November 2018 following his being sent to prison for a total of 33 months on 4 December 2017 for offences concerning the misuse of drugs. However the First-tier Tribunal's summary of the offences is not consistent with the Trial Record Sheet provided to us. This shows that the claimant was convicted of possessing a controlled drug of class A (cocaine) with intent to supply, of possessing a controlled drug of class A (MDMA), of possessing a controlled drug of class B (amphetamine) with intent to supply and possessing a controlled drug of class B (cannabis or cannabis resin). We doubt if anything turns on this error. The sentence of imprisonment for possessing class A drugs with intent to supply attracted a sentence of 33 months imprisonment. The other sentences were concurrent with that. However some of the other convictions recorded on the Trial Record Sheet are less serious than the First-tier Tribunal stated as they are offences of possession without the aggravating feature of intent to supply and we have corrected the error.
4. The First-tier Tribunal Judge began the material part of her decision by asking herself if the claimant could only be removed on imperative grounds of public security. At paragraph 3 she said:
 

"The [claimant's] position was that he had acquired ten years' lawful residence from 2006 when he entered the UK, but the date runs backwards from the date of decision and therefore the period from 2006 cannot help the [claimant]. He does not succeed as although I accept he was working from 14 November 2008, as he has produced evidence of employment from that time, lawful residence had ceased at least by 1 December 2017 when he was sentenced."
5. Whilst the judge's use of the phrase "lawful residence" is questionable we understand the point that she was making. Prison, she found, disrupted the integrative links with society.
6. The judge then reminded herself of the terms of Regulation 21(5) of the Immigration (European Economic Area) Regulations 2016 and then outlined the claimant's domestic circumstances. The judge said at paragraph 6 that the claimant:
 

"Lives with his wife and three children, A, who was born in Poland on [January] 2002 and who is now 17, G, born on [August] 2009 in the UK who is 9 and N, born in the UK on 1 January 2016, who is 3."
7. The judge then noted an OASys assessment dated 20 September 2018. This showed that the claimant's home was visited by police after his arrest and a large quantity of drugs and drug paraphernalia with a value of £850 were found at the home and the claimant tested positive for the use of cocaine and cannabis.
8. The claimant and his partner use different surnames and refer to each other as partners. We doubt that they are married or hold themselves out as married but there is no doubt that they have been living in a relationship akin to marriage for many years.

9. There was concern about the children living in the house where drugs were stored for the purposes of dealing but a social work assessment found no evidence to suggest the children were aware of the drugs or affected by their presence. The children were looked after properly by safe adults including their mother and there was no concern for their well-being.
10. The claimant has been in trouble on an earlier occasion. He had been convicted of driving with excess alcohol in 2008 and also for three counts of driving when a specified controlled drug in his body was above the specified limit in November 2016. However the claimant explained to us that that conviction arose out of the same incident that led to his going to prison. Certainly papers before us show that the offences in the motor car and the possession offences were committed on 18 June 2016. The Crown Court would not normally have power to deal with motoring offences and it is a well understood feature of the criminal justice system that on occasions one episode of criminality has to be dealt with both in Magistrates' Court and in the Crown Court probably on different occasions. We do not think it has made any difference in this case but it is regrettable that the Secretary of State's explanation for the decision to make a deportation order did not recognise that the incidents outlined at paragraphs 7 and 8 of that letter under the heading "criminal history" were essentially relating to the same occasion.
11. We set out below paragraphs 15 to 17 of the judge's decision. She said:
  15. There was no evidence before me to show the likely risk of the [claimant] reoffending. It has to be shown that the [claimant] represents a threat to one of the fundamental interests of society, in this case the prevention of disorder and crime arising from those who would use the drugs supplied by the [claimant] and of the supply itself.
  16. The [claimant] was convicted of four counts of possession with intent to supply. There is no evidence to show how long he had been dealing for or the extent of his dealings save with reference to the drugs in his possession. Crucially there is nothing to suggest that he intends to continue his behaviour. I attach little weight to the OASys Report as it provides no information about the risk of reoffending. The mere possession of drugs on one occasion and the quantities found is not of itself evidence that the [claimant] is likely to supply drugs in future. Arresting a known dealer with numerous previous convictions would not be sufficient as the Regulations are designed to cover those who wish to continue their activities; that is with a view to prevention not merely to punish a supplier.
  17. In this appeal I could find nothing to suggest that the [claimant] is likely to reoffend. There is nothing to show that he is part of a gang who might encourage him to continue or threaten him if he does not. There is nothing to show he is desperate in need (sic) of the proceeds of dealing as it appears his family have supported themselves in the UK for a number of years. Whilst I accept the [claimant's] actions are greatly to be deprecated I was not satisfied that there has been shown to be a risk of further drug supply in the future."
12. The Secretary of State's grounds are a mixture of pertinent and erroneous points.
13. They point out that there was an OASys Report of sorts and that the general risk of reoffending within a year was 14% and within two years was 25%. The Secretary of State contended that this was too great a risk to be dealt with in the way it was dealt with by the First-tier Tribunal Judge.

14. The grounds then criticise the First-tier Tribunal Judge for not having proper regard to the previous convictions including the 2016 convictions in the Magistrates' Courts which we are satisfied were all part of the conduct complained of. Rather than identifying an error by the judge this criticism reveals a potentially serious error made by the Secretary of State in understanding the criminality involved. However, as is explained above, it is the sentence of 33 months imprisonment for possessing cocaine with intent to supply that is important in this appeal.
15. The grounds then criticised the judge for not explaining why the claimant was not going to commit further offences. It had never been anybody's case that he was part of a gang but he still committed offences.
16. There was then the contention that the drug paraphernalia found in the claimant's property suggested dealing rather than a one-off event and the evidence that this has been put behind him was insufficient to support the conclusion that the protestations of reform were sincere or well founded.
17. The judge is also criticised for not making a proportionality finding although that is only relevant if the judge was wrong in concluding as she did that the claimant was not a genuine, present and sufficiently serious threat.
18. It is regrettable that the Secretary of State's grounds refer to the claimant having spent his formative years in Latvia and there being no reasons why he could not re-establish himself there. This must be a mistake. The claimant is a national of Poland.
19. At the start of the hearing we asked the parties to address us on the relevance of the conviction for the offence of driving a motor vehicle with excess alcohol. The conviction was on 26 June 2008 and the sentence was a fine and disqualification from driving. The Rehabilitation of Offenders Act 1974 provides that an offence punished by a fine is spent after a period of five years and so that conviction is spent in June 2013. We did not understand why it was considered at all by the Secretary of State or indeed the First-tier Tribunal. In **AA (spent convictions) Pakistan [2008] UKAIT 00027** the Tribunal (Mr C M G Ockleton, Deputy President and Senior Immigration Judge Freeman) determined that convictions spent for the purposes of the Rehabilitation Offenders Act 1974 should not normally be mentioned in appeals before the Tribunal. Section 7(3) of the Act provides for such convictions to be considered if the interest of justice requires it but that is something for the respondent to prove and that was not addressed in this case. Clearly driving a motor vehicle after having consumed an excess of a lawfully available drug might be relevant when a person is later convicted of a similar offence involving a prohibited drug but there is a significant gap between the two episodes of offending and the Rehabilitation of Offenders Act is intended to permit people to put behind them some of their criminal acts.
20. Far from criticising the First-tier Tribunal Judge for not having more regard for the previous convictions, which is something the grounds suggest, we find that the Secretary of State had neglected to prove the relevance of the 2008 conviction and we are satisfied (although it was not apparent until the hearing before us) that the 2016 conviction was all part of the same offending that led to the claimant's imprisonment.

21. Mr Mills did not concede that the appeal could not succeed on “imperative grounds” but he emphasised that it was the Secretary of State’s case that it was the 2017 convictions that mattered.
22. Mr Mills produced a copy of **MA (Pakistan) v SSHD [2014] EWCA Civ 163** where the Court of Appeal refused permission to appeal a decision of the Upper Tribunal dismissing an appeal against deportation. Mr Mills was particularly interested in the observations of Elias LJ at paragraph 19 where he considered evidence from an OASys Report and said that a  
“risk of 17% reoffending over a two year period is not, in my judgment, in the context of a deportation case a matter which can be treated as insignificant.”
23. That case was not an EEA appeal and so the observations are of limited relevance here but we agree with Mr Mills that the First-tier Tribunal appeared to be asking itself if there was a probability of re-conviction which had to be proved. The disregarding of the risk of reoffending adds some weight to this. We were also impressed by Mr Mills’ succinct submission that “it cannot be the law that deportation is impossible after only one offence”.
24. It is not the law. As indicated there was evidence in the form of an OASys assessment (E6 in the bundle) that there was a 14% risk of general offending within the community within one year of the sentence and a 25% of general offending within two years. This is a prediction that it is improbable that the claimant will reoffend but although improbable the chance of reoffending is quite high and some explanation should have been offered as part of the overall evaluative exercise to justify the conclusion that there would be no further offending.
25. Of particular interest to the Tribunal is the evidence of drug paraphernalia being kept in the house. This is clearly indicative of habitual dealing and it seems to be the claimant’s confession, based on the OASys assessment at page E7, that he dealt to fund his own drug use.
26. However, the First-tier Tribunal Judge was impressed with the social work assessment which pointed to happy children and supportive parents. The social worker’s conclusion that there were “no concerns identified throughout the assessment in respect of the care afforded to the children or the children’s daily lived experiences” is not illuminating about the future behaviour of the claimant but it does indicate an ability to confine his illegal activities in a way that indicates that he was in control and therefore gives hope for the possibility of his giving them up completely.
27. We have considered the skeleton argument and oral submissions. We do not agree that this is a case where the imperative grounds are made out. We have reminded ourselves of the decision of the Court of Justice of the European Union in **Franko Vomero (C-424/16)** reported on 17 April 2018 and in **SSHD v MG C-400/12** and the decision of this Tribunal in **MG (prison - Article 28(3)(a) of Citizens Directive (Portugal) [2014] UKUT 392 (IAC)**. There is no simple answer but we work with the proposition that a period of imprisonment will generally interrupt integrative links but the shorter the period of imprisonment the more likely it is that the integrative links will not have been broken. Nevertheless, it is clearly the position that a prison

sentence will usually break integrative links and we are entirely satisfied that that is what has happened here. We recognise, as is plainly the case, that the claimant is settled in the United Kingdom and his family is settled in the United Kingdom but a prison sentence by its very nature disrupts that settlement and its disruptive effect will rarely be capable of being set aside and it is not capable here. For the duration of the sentence the claimant was without the rhythms of ordinary society. That is nature of imprisonment. He lost his job. He was able to preserve his family life but that is not sufficient for him to say that he remained within ordinary society in the United Kingdom.

28. The First-tier Tribunal was right to find that this is a case where the claimant has established permanent residence and so can only be removed on “serious grounds” but this is not an “imperative grounds” case.
29. Nevertheless, we are satisfied that the First-tier Tribunal erred in law. The concluding paragraphs are sound substantially as far as they go but they do not deal properly with the reasons leading to the conclusions. It is clear the judge took a favourable view of the claimant but we find that the judge has put too heavy a burden on the Secretary of State. He does not have to prove that the offender will reoffend in order to show that the “personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society”. That has to be established by overall evaluative exercise in which the propensity to reoffend is an important but not decisive element. Further the reasons for the judge’s conclusion that the claimant will not reoffend are inadequate and wrong where they suggest that the OASys report provided no information about the risk of reoffending.
30. We announced there was an error of law at the hearing and we indicated we would hear further evidence and submissions with a view to determining the appeal.
31. There was further evidence produced before us mainly in the form of payslips and a reference relating to the claimant’s present employment.
32. The claimant gave evidence before us and confirmed that he was an employee of a firm of fertiliser and animal feed suppliers. He had worked there since January 2019. The reference is in appreciative terms describing the claimant as a “tremendous asset” to the company and comments on his willingness to get new skills and his making a sufficient impression for the company to invest money in his development by way of further training.
33. The letter’s evidential value is diminished slightly from appearing to be a copy rather than a document on official paper but the style is persuasive and the copies of the payslips are very persuasive.
34. The claimant was cross-examined by Mr Mills.
35. He accepted, as is plainly the case, that he is still on licence. Clearly this is likely to encourage good behaviour.
36. He explained that he had not got any directly supporting evidence from his Probation Officer because he did not need to see his Probation Officer very often

because he had obtained work immediately on leaving prison. He had only been out of prison for six months or thereabouts.

37. He said that his older son from another relationship visits Poland every year. That is required in the terms of the family arrangements following his divorce. The children from the present relationship are in a different position. The oldest has visited Poland. The youngest has never visited Poland. Nevertheless, he accepted that he had family in Poland who would help him re-establish himself if he had to return there. He said that the children speak Polish at home although the older child also speaks English fluently because of his contacts at school. He speculated that it would be hard to get a job in Poland but he did not suggest that he could not get work.
38. I asked the claimant if he was going to reoffend. Unremarkably he replied in the negative. I asked him how we could believe that and he replied:  
“I have broken my habit, I have not been back, not going to do it again.”
39. He then elaborated his answer to say he had been addicted to amphetamine and cannabis. He could not obtain the drugs in prison nor did he wish to. He had used prison as an opportunity to break the habit and he did not wish to resume it. He said he had drugs tests as part of his probation and he had passed them satisfactorily.
40. His partner gave evidence. She confirmed that the claimant had obtained work shortly after release from prison and he had obtained that work himself.
41. She said that he was supporting his family and she knew she could rely on him now. She knew that he had smoked cannabis but she did not know about the amphetamine and cocaine use. She clearly did not approve. She was cross-examined and confirmed that she had family in Poland. She said the older child was studying to be a welding fabricator and he had got a part-time job for pocket money.
42. We found the claimant and his partner to be very persuasive witnesses. We found it particularly impressive that they were each willing to make concessions where a less truthful person could have exaggerated the case. For example, there was no suggestion from the claimant that his oldest son could not live without him in the United Kingdom. He is a young person close to adulthood and we were told that arrangements had been made for him to stay with a relative if they had to leave. The young man’s home is in the United Kingdom and he is learning a trade there. There was no suggestion that he could not manage without his father and step-mother.
43. With similar candour it was accepted that the youngest children would remove with their mother and father. That was not what they hoped for their children but the children knew Polish and they would settle in Poland if that is what they had to do.
44. It was somewhat refreshing to be addressed by people in a deportation appeal who had seriously faced up to the possibility of being removed and had considered their options. It is this sort of responsibility and disinclination to exaggerate points that could easily have been exaggerated without overt untruthfulness that makes us more inclined to believe the claimant when he says that he has given up the drug use that got him into trouble.

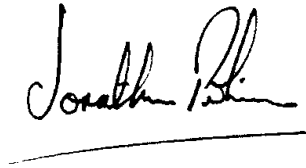
45. We also find the social work report about conditions in the home before the prison sentence to be revealing. It is significant that the children were not directly affected by the drugs. The drug use was controlled. This is not to imply that illicit drug use is somehow acceptable but it does make it easier to believe that the claimant is a person who has stopped taking unlawful drugs. He was not so involved that drug abuse controlled his life.
46. Comment has been made about there not being a full OASys assessment but there is a letter from the Probation Service dated 3 October 2018 that explains that. It says:  
“You have been identified as an individual who does not require a full OASYS assessment due to the nature of your offending. This is positive news and this letter is confirmation that you have been assessed as posing a low risk of harm to all sectors of the community.”
47. There is also a letter from the offender supervisor to the claimant dated 12 September 2018 congratulating him for completing the ““stop supplying” in cell worksheet” and notes that the claimant had outlined what he needed to do to reduce offending in the future. There is a certificate confirming that.
48. Although we hope we have explained our conclusions in more detail we agree with the First-tier Tribunal Judge that the Secretary of State has not shown that there is the required risk in this case.
49. The claimant presented to us as a man who had used drugs for his own purposes and dealt to support his habit as he explained. He presented as a man who was not broken by drug addiction but who was able to control his addiction and then give up using drugs. He had a sense of pride about maintaining his family and being in work. Prison was a chastening experience and we believe him when he said that he has put that part of his life behind him. If he has then his personal conduct does not represent a genuine, present and sufficiently serious risk. We cannot not know if we are right. Time will tell. We can only say that the evidence before us points clearly to the conclusion that this man had a significant but controlled drug habit that led him into serious trouble with the law and the consequence of that caused him to abandon his drug use.
50. For the sake of completeness, we make it plain that we would have found the decision to deport proportionate in this case. The claimant’s partner could decide if she remained in the United Kingdom with the children or returned to Poland. Either route would be unwelcome but criminal behaviour disrupts family life. We find that such disruption would have been proportionate if we had not concluded for the reasons given that the claimant does not present a risk.
51. Having set aside the decision of the First-tier Tribunal and having heard further evidence and submissions we are satisfied that the one important thing that has to be proved in this case has not been proved to our satisfaction.

### **Notice of Decision**

52. The Secretary of State’s appeal against the First-tier Tribunal’s decision is allowed.



53. Nevertheless, we substitute a decision allowing on EEA law grounds the claimant's appeal against the Secretary of State's decision.

A handwritten signature in black ink, appearing to read "Jonathan Perkins", is written above a horizontal line.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal

Dated 29 July 2019