Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00366/2019

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 17th February 2020	**On 09th March 2020**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

S S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Jackson, instructed by BID
For the Respondent: Ms S Cunha, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Latvia born in 1971. She appeals against the decision of First-tier Tribunal Judge Bristow, promulgated on 6 November 2019, dismissing her appeal against deportation under the Immigration (EEA) Regulations 2016 [2016 Regulations].

2. Permission to appeal was sought on the ground that the judge made the following errors of law:-

   (1) Failing to apply the correct burden of proof under the 2016 Regulations;

(2) Making irrational findings in relation to risk of re-offending;

(3) Failing to properly approach the proportionality test;

(4) The Appellant was entitled to permanent residence, relying on further evidence submitted after the appeal before the First-tier Tribunal, requiring the higher level of protection under Regulation 27.

3. Permission to appeal was granted by Upper Tribunal Judge O'Callaghan on all grounds on 24 December 2019. He states:

> "It is arguable that by referring to the automatic deportation process and section 117C of the Nationality, Immigration and Asylum Act 2002 at [32] of the decision that judge has erred in his proportionality consideration."

Appellant's conviction

4. On 22 June 2018, the Appellant was convicted after a trial of wounding with intent to do grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 and sentenced to four years imprisonment. The Appellant stabbed her partner in the left shoulder after an argument when both were drunk. The Appellant made no attempt to call the emergency services. The sentencing judge accepted "he laid hands on her" but there was no suggestion that the Appellant acted in self-defence.

Appellant's submissions

5. Ms Jackson relied on her skeleton argument in which she set out her submissions in relation to the admission of the new evidence from HMRC, Ground 4. She made the following submissions in respect of grounds 1 to 3:

Ground 1: Failure to apply correct burden of proof

6. Although the judge, acknowledged the correct burden at [20] he did not apply it. At [18] the judge set out the issues in dispute and stated at [18.c]: "whether the Appellant is able to provide substantive evidence of not demonstrating a threat through demonstrating that she had successfully reformed or rehabilitated." Further at [38] the judge found that the Appellant had not provided substantive evidence that she had successfully reformed or rehabilitated. Ms Jackson accepted that rehabilitation was an issue, but it was not for the Appellant to prove it. The judge was focusing on the Appellant and not on what the Respondent had to prove.

Ground 2: The findings on the Appellant's evidence were irrational

7. The judge correctly quoted the OASYS report that the Appellant was at low

risk of re-offending, but his conclusion that she was a genuine, present and sufficiently serious threat was not sustainable. On the evidence in the OASYS report the judge was not entitled to find she was a threat under the 2016 Regulations

8. The judge relied on the sentencing remarks but failed to consider the Appellant's desire to address her binge drinking. The judge failed to engage with the Appellant's evidence and gave no reason for disagreeing with it. His finding that alcohol misuse was a risk factor for reoffending failed to take into account the current situation. Further, the judge failed to properly consider the Appellant's evidence that she was a victim of domestic violence. His finding that domestic abuse played no part in the offence was irrational.

Ground 3: proportionality

9. The judge's approach to future prospects of rehabilitation was contrary to MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC). There was evidence of the Appellant's attempts to rehabilitate and of family support. The judge concluded the Appellant was not rehabilitated and failed to apply his mind to future rehabilitation.

10. The independent social worker's [ISW] report was clear on the best interests of the Appellant's daughter [HE], namely for the Appellant to remain in the UK. There was no evidence to go behind that conclusion and no evidential basis for the judge's finding at [43] which was contrary to the opinion of the ISW.

11. Ms Jackson did not make submissions on the judge's Article 8 assessment nor did she refer to paragraph 15 of her skeleton argument, which submitted the judge erred in considering section 117C.

Respondent's submissions

12. Ms Cunha submitted the judge considered the best interests of HE (at [41] onwards) as a primary not paramount consideration. The emphasis in the ISW's report was different. The judge was entitled to look at Article 8 as a ground of appeal and it was clear that the Appellant's deportation would not be unduly harsh on HE. The judge was entitled to attach weight to the public interest and his findings were safe and sustainable.

13. The judge did not attach undue weight to the issue of rehabilitation. The Respondent had shown that the Appellant was a threat by virtue of her conviction and criminal behaviour. The judge considered the aggravating factors and the Appellant's 'not guilty' plea. Although the OASYS report referred to a low risk of reoffending, the judge was entitled to consider whether aggravating factors could give rise to a future risk. There was no evidence the Appellant had rehabilitated because she was still in prison.

14. The judge looked at the case holistically and applied the correct burden of

proof. He properly considered and applied the 2016 Regulations. The judge's findings were open to him. The Appellant had committed a serious offence and had been sentenced to four years' imprisonment. Her behaviour met the threshold under the 2016 Regulations.

15. The fresh evidence could have been obtained before the First-tier Tribunal and did not change the position. It should not be admitted. It was clear from the judge's findings that his Article 8 assessment had not infected his analysis under the 2016 Regulations. He made clear and separate findings on each issue. His findings were not irrational. The Appellant had not demonstrated why her deportation would be unduly harsh given the ISW report.

16. In response, Ms Jackson submitted the judge's Article 8 findings had infected his earlier findings. In anticipating his conclusions under section 117C, he applied a stricter test under the 2016 Regulations. The judge's findings at [42] onwards were not open to him on the evidence before him. There was no reason to go behind the opinion of the ISW. The judge's findings on the best interests of the child were flawed and therefore his proportionality assessment was flawed. He should have considered future rehabilitation.

Conclusions and reasons

Fresh evidence

17. I find that the fresh evidence does not meet the Ladd v Marshall test. The letter from HMRC could have been obtained with reasonable diligence prior to the hearing before the First-tier Tribunal. The letter was incapable of showing that the Appellant was engaged in genuine and effective employment such that she could arguably establish she had been exercising Treaty rights for five years. It would not have an important influence on the result and there were no exceptional circumstances where the interests of justice required its admission.

Ground 1

18. The judge quoted from paragraph 5 of Schedule 1 of the 2016 Regulations at [34]. The wording of [18c] and his finding at [38] reflect his application of that paragraph. The judge properly directed himself on the burden of proof at [20]. Further, he properly directed himself on the test to be applied under the 2016 Regulations at [26] to [31]. There was no misapplication of the burden of proof.

Ground 2

19. The judge considered the Appellant's claim to have been a victim of domestic violence and gave adequate reasons for rejecting it at [35]. The judge attached weight to the OASYS report, but given the contrary evidence in the sentencing judge's remarks and the witnesses' evidence,

it was open to him to conclude that domestic violence was not part of the background to the offence.

20. The judge considered the Appellant's GP records, what the Appellant told her support worker, the Appellant's statement and her current situation. He acknowledged that the Appellant now accepts that alcohol is an issue and she intends to access support on her release at [36]. The judge's conclusion that alcohol misuse continued to be a factor was open to him on the evidence before him.

21. The judge clearly considered the OASYS report at [37] and took this into account in addition to his assessment of risk factors. The OASYS report was only one element of the judge's consideration. It was not determinative. The judge found the Appellant's conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It could not be said that this conclusion was not one which no reasonable tribunal, properly directed, could have come to.

Ground 3

22. It is evident from [35], [36] and [42] that the judge took into account the Appellant's intention to seek help on release from prison and the support of her family. He considered the reasonable prospects of the Appellant ceasing to commit crime, not the mere possibility of rehabilitation, which was only one of the factors to be taken into account. The judge adopted a holistic approach to his assessment of proportionality. There was no misdirection following MC Portugal.

23. The judge set out the conclusions of the ISW at [42] and took into account all relevant matters in assessing the best interests of HE. Contrary to Ms Jackson's submission, the ISW's opinion that the Appellant should not be deported was not determinative. HE did not live with the Appellant from 2010 to 2015 and from June 2018 to date. The ISW recommended HE continue to live with EE and her family and to continue her education. That position would not change if the Appellant is deported. The judge stated at [44]: The absence of the Appellant would affect the prospects of reparative work [between HE and the Appellant] but in the circumstances I do not find this renders the decision disproportionate."

24. The judge took into account HE's best interests as identified by the ISW at [42]. His conclusion at [43] was not contrary to that opinion. Whether the Appellant should be deported was a matter for the judge. There was no arguable error of law, irrationality or lack of reasons in the judge's findings on the best interests of HE. On the evidence before the judge, the Appellant's deportation was proportionate.

25. The Appellant was served with a one stop notice under section 120 and was therefore able to raise Article 8 issues on appeal. The Appellant relied on Article 8 in her grounds of appeal to the First-tier Tribunal and therefore the judge was obliged to deal with it. The judge's findings on Article 8 were entirely separate to his assessment under the 2016 Regulations. The judge

found that the Respondent's decision to deport the Appellant was justified in accordance with the 2016 Regulations [46]. He then went on to consider Article 8 and properly applied section 117C. There was no error of law in the judge's approach.

Ground 4

26. It was agreed that the Appellant did not have permanent residence at the hearing before the First-tier Tribunal. The judge applied the correct threshold test. The fresh evidence is not admitted for the reasons given at paragraph 17 above. This evidence was insufficient to establish a right to permanent residence in any event.

27. Accordingly, I find that there was no material error of law in the judge's decision and I dismiss the appeal.

Notice of decision

Appeal dismissed

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

J Frances

Signed Date: 24 February 2020
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 24 February 2020
Upper Tribunal Judge Frances