IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01846/2014

THE IMMIGRATION ACTS

Heard at Belfast	**Decision & Reasons Promulgated**
On 12 June 2015	**10 July 2015**
Ex tempore judgment	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

IVAN OVSAK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Unrepresented
For the Respondent: Mr M Diwnyez, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Slovakia, born on 5 October 1987. He comes before the Upper Tribunal following a hearing before the First-tier Tribunal involving his appeal against the respondent's decision dated 15 July 2014 to make a deportation order against him.

2. That decision was a response to criminal offences committed by the appellant, in particular offences of theft, interference with motor vehicles and fraud by false representations which, including implementation of a

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suspended sentence, resulted in a total sentence 13 months' imprisonment on 6 March 2014 at Ballymena Magistrates' Court.

3. The appeal was heard by First-tier Tribunal Judge S. T. Fox on 20 November 2014 whereby he dismissed the appeal under the EEA Regulations and under Article 8 of the ECHR. The decision to make a deportation order was subject to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") because the appellant is a citizen of Slovakia. The First-tier Tribunal made a number of findings. I summarise them as follows.

4. They were that the appellant's criminal record is not in dispute and that it was conceded by the appellant that when he entered the UK in 2006 he already had a drug problem. It seemed to have been an established fact or an agreement between the parties (the appellant having been represented before the First-tier Tribunal) that he had not established permanent residency because, so the First-tier judge put it, he had not been in the UK for 10 years. There was consideration by the judge of an apparent waiver by the appellant of the wish to remain in the UK, he having apparently communicated to the respondent an intention to return to Slovakia.

5. Judge Fox concluded that the appellant was motivated to commit crimes without any fear or conscience. It was also concluded that he had not engaged in any rehabilitation programmes whilst in prison or since his release. It was also found at [26] that he does not give any indication that he intends to engage with any rehabilitation services as he feels they would be of no use to him. The judge found that that was significant. He concluded that although the appellant had resided in the UK for approximately eight years, "his offending mitigates against any reasonable degree of integration that might apply to him."

6. At [27] it was accepted that the appellant had worked for some employers but he had also been unemployed for considerable periods of time. The appellant apparently had a history of not turning up for work "when the mood struck him". Judge Fox felt that that may have had something to do with his drug-related problems. He concluded that the appellant will not, and could not, fully integrate into UK society. He found that there were rehabilitation services available in Slovakia but it was his conclusion that the appellant did not want to be rehabilitated.

7. There is reference at [30] to the absence of the appellant's stepfather from the bail hearing. This was found to be significant because he referred to the opportunities that the appellant has had through his family to assist him, preventing him from re-offending. He concluded that the appellant had no realistic proposal of family support to assist in his rehabilitation. He further found at [32] that the appellant had failed to demonstrate that he would be influenced to any degree at all by his family. Although the appellant had said that he would shortly be obtaining employment, Judge Fox concluded that there was no evidence before him that that assertion

had any weight. At [35] is a finding that the prospects of rehabilitation could not constitute a significant factor in the balancing exercise.

8. He went on to refer to links that the appellant has with Slovakia and at [36] said that he accepted that the appellant's present links do not appear to be strong apart from his nationality and ability to speak the language. That single factor did not suffice to outweigh the other ones to which he had referred.

9. In relation to the risk of re-offending the judge stated at [45] that the probation report is indicative of a moderate risk of re-offending and that the appellant displayed no willingness to submit to family or state control. In the same paragraph it was found that the appellant had not established that he is a “reformed character”. In the light of those findings the appeal was dismissed.

10. The grounds of appeal are wide-ranging and make a number of points. I can say at the outset, as I indicated to the parties at the hearing, that it seems to me that there is considerable force in a number of the points made in the grounds. I will deal with some but not all of them.

11. In the grounds it is said that the judge misdirected himself whereby he stated that the burden of proof lies on the appellant to show that returning to Slovakia would expose him to a risk of persecution for one of the five Refugee Convention grounds or to a breach of his protected human rights or rights under the Immigration Rules. It is said that the judge ought to have had regard to regulation 21 of the EEA Regulations and in particular reg.21(5)(c). There was no reference in the determination to reg.21 at all. I agree; there is no such reference.

12. Significantly it is said in the grounds that the burden lies on the respondent to prove that the appellant constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that it was necessary for the respondent to justify interference with the appellant’s EU rights. It is asserted, and again I agree, that the judge did not grapple with that feature of the EEA Regulations, or the standard or burden of proof.

13. During the course of the determination it is to be noted that the judge at [5] referred to the Refugee Convention which plainly has no part to play in this appeal. At [19] it is stated that

> “The Respondent denies that removal of the Appellant, in accordance with any subsequently issued removal directions, would be in breach of the United Kingdom’s obligations either under the 1951 Convention, the 1950 Convention, or the Immigration Rules”.

14. Again the reference to the Refugee Convention is misplaced, although at [40] it is noted that the appellant does not advance a claim under the 1951 Convention.

15. The grounds refer to alleged mistakes in relation to material facts as to the appellant's family in the UK. Mistakes of fact sometimes can give rise to an error of law but not always. However, in this case a significant feature of the determination is what appears at [13] whereby it is stated that the appellant was subject to a total sentence of 30 months' imprisonment for his latest offences, whereas in fact the sentence was 13 months' imprisonment. That is significant because at [35] one sees that in the last sentence the judge stated that his offences are properly deemed serious. Whilst not doubting that his offences are to be regarded as serious, it is difficult to have confidence that the judge was aware of the fact that the latest sentence of imprisonment was one of 13 months' imprisonment and not 30 months.

16. Similarly, at [47] it is stated that "the offences have escalated in nature and it is reasonable to assume that they would continue to do so." Again if the judge was right that a sentence of 30 months' imprisonment had been imposed it would probably be correct to say that the offences had escalated in nature. However, it is not apparent that the judge made that assessment in the light of a correct appreciation of the sentence imposed on the appellant for his latest offences. This potentially affects the assessment not only of the risk of re-offending but the application of the EEA Regulations as a whole. The grounds of appeal at ground 3 raise the issue of the judge's conclusion that the offences had escalated in nature.

17. At [19] of the grounds it is said that the ACE Report is insufficient evidence on which to base a finding that the appellant is a genuine, present and sufficiently serious threat and that the judge failed adequately to deal with the contents and context of that report. Various features of the report are referred to, it being suggested that the judge did not refer to those positive features of the report in the appellant's favour. Again, in my judgement, there is merit in that argument.

18. Various other issues are raised in the grounds but it does not seem to me to be necessary to deal with each of them because I am satisfied that the judge's analysis is legally erroneous.

19. Additionally, it is to be observed that there is a conflation of issues in the judge's reasons, for example in relation to Article 8 of the ECHR. Thus one sees at [47], ostensibly under a heading that is expressed to relate to Article 8, the conclusion that the appellant's offences were a sufficiently serious threat to the public and deportation is justified on the grounds of public policy and public security; the latter phrase relating to the EEA Regulations which require an individual to represent a genuine, present and sufficiently serious threat etc.

20. There is no structured assessment of the EEA Regulations and their application in a deportation case of an EEA national. Such a structured approach is necessary, to avoid a lack of focus on the issues that need to be determined. The defect in the determination in this respect is one of substance not mere form.

21. In all these circumstances, I am satisfied that the First-tier Judge did err in law in his conclusions and that the errors of law are such as to require the decision to be set aside.

22. I have also concluded, having canvassed the views of the parties, and considering the Senior President's Practice Statement at 7.2, that the appeal should be remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge S.T. Fox. Further Case Management Directions can be left to the First-tier Tribunal.

23. Except as agreed between the parties, no findings of fact are preserved.

Decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside and the appeal remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge S.T. Fox

Upper Tribunal Judge Kopieczek 8/07/15