IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02323/2013

THE IMMIGRATION ACTS

Heard at Field House	Decision & Reasons Promulgated
On 5 November 2014	On 13 November 2014

Before

THE HONOURABLE MRS JUSTICE ANDREWS DBE
UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DARIUSH FARHAND
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr B Hawkin, Counsel

DECISION AND REASONS

1. This is an appeal by the Secretary of State from a determination made by the First-tier Tribunal (First-tier Tribunal Judge Mark Eldridge and Ms VS Street JP) – referred to hereafter as "the Panel" - and promulgated on 27 June 2014. To avoid confusion we shall refer to the appellant as "the Secretary of State" and to the respondent to this appeal as "the appellant." The Panel allowed the appellant's appeal against the decision of the Secretary of State to deport him, following the

completion of the custodial element of his sentence of imprisonment for causing grievous bodily harm.

2. Permission to appeal was initially refused by a judge of the First-tier Tribunal (Judge Saffer) but after the Secretary of State had submitted renewed Grounds of Appeal it was granted by a judge of the Upper Tribunal (Judge Andrew Jordan) on 2 October 2014.

3. The appellant is a 32 year old Danish national who entered the UK from Denmark to join his grandparents in 1996 at the age of 14. The Panel found that by September 2001 he had acquired a right of permanent residence in the UK under Regulation 15 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). That issue was contested by the Secretary of State before the Panel, even though, as the Panel pointed out in paragraph 24 of the determination, she had taken no issue with whether he was exercising his EEA Treaty rights until 2001 in her refusal letter.

4. Mr Whitwell sought before us to maintain a challenge to the Panel's finding that the appellant had acquired a right of permanent residence, on the basis of allegedly inadequate reasoning (ground one of the Secretary of State's original Grounds of Appeal). He submitted that the reasons given in paragraphs 25-27 of the determination did not support that finding. He pointed out that the national insurance contributions in 2001-2002 referred to in paragraph 26 amounted to only half a year's worth in the space of two years, which he submitted cast some doubt on whether a five year period of study and work between 1996 and 2001 had been established.

5. However, in paragraph 28 of the determination the Panel also accepted the evidence before it that the appellant had lived in the UK continuously since 1996, and that "he initially lived with his grandparents whilst his father sought employment within the NHS (he is a hospital consultant)". As the appellant has pointed out in his Rule 24 response, the Panel could easily have reached the same conclusion as to his acquisition of a right of permanent residence by a different route, since the appellant's father was exercising his EEA Treaty rights to work on his arrival in the UK in October 1997.

6. Mr Hawkin submitted that if need be, he would apply to us for permission to adduce further documentary evidence confirming that the father was indeed working

within the NHS from 1997 onwards. We looked at the small bundle of additional documents concerning the father's employment *de bene esse* and Mr Whitwell was also given the opportunity to consider them. Although no formal concession was made, Mr Whitwell very fairly acknowledged that this evidence seemed conclusive of the issue.

7. We were not persuaded in any event that the finding of the right of permanent residence was not open to the Panel on the evidence before it or that its reasoning was inadequate or otherwise flawed.

8. The real focus of this appeal has been on the Panel's approach to the interpretation and application of Regulation 21 of the EEA Regulations.

9. Regulation 21(3) precludes a decision being taken by a Member State to remove a person with a permanent right of residence under Regulation 15 "except on serious grounds of public policy or public security." This was not a case about public security. Therefore the first question for the Panel to address was whether the appellant's removal was justified on "serious grounds of public policy." This required specific consideration of whether he posed a "… sufficiently serious threat affecting one of the fundamental interests of society" – Regulation 21(5)(c). It is only if that threat was made out on the evidence that the Panel would need to go on to address the way in which the Secretary of State had weighed in the balance the considerations set out under Regulation 21(6), and decide if the removal was proportionate.

10. The appellant's criminal history is set out in paragraphs 2-6 of the determination. It presents an unedifying portrait of a young man who is prepared to put the lives of others at risk by driving with excess alcohol in his bloodstream, and who in more recent years has been prone to violence whilst under its influence. It is particularly noteworthy that the index offence of causing grievous bodily harm, of which he was convicted after trial at Lewes Crown Court, was committed whilst he was serving a suspended sentence of imprisonment for an earlier offence of assault occasioning actual bodily harm. It was described by the sentencing judge as a "serious, senseless, unprovoked attack late at night." As the Panel observed in paragraph 36 of the determination:

"the Respondent was particularly and understandably concerned that the Appellant appeared to have

committed an escalating series of offences all related to problems with alcohol and without being deterred by previous punishments – fines, community orders and a suspended sentence of imprisonment – the latter for an assault occasioning actual bodily harm."

11. The activation of part of the suspended sentence and the sentence of imprisonment for the index offence led to a total sentence of 30 months' imprisonment.

12. The Panel considered the seriousness of the offences and the assessments made of the risk of re-offending. They also considered, in paragraph 41, whether the appellant had shown progress in rehabilitating himself. In paragraph 42 they contrasted his achievements in the controlled environment of prison with the remarks of the sentencing judge concerning his lack of remorse, and the remarks made by his offender manager about his problems with impulsivity and in controlling his behaviour. Their conclusion was that: "he continues to present a real risk of re-offending in a similar manner but that it [i.e. the risk] is reduced by the work he has undertaken and the fact that since release 7 or 8 months ago he has not re-offended."

13. Thus far, the approach of the Panel was impeccable. The difficulties emanate from the way in which they expressed themselves in the next paragraph, Paragraph 44, which is worth quoting in full:

    "We have some doubts, however, whether the risk presented is a "sufficiently serious threat affecting one of the fundamental interests of society". The nature of his offending has been anti-social and serious for those affected but in our judgment the phrase "fundamental interests of society" do not [sic] encompass prevention of all offences of violence."

14. Mr Whitwell submitted that that paragraph, particularly the second sentence, indicated that the Panel had not adopted the correct interpretation of Regulation 25(1)(c) as set out in **GW (Netherlands)** [2009] UKAIT 00050 at [15]-[19] : a "threat affecting one of the fundamental interests of society" simply means a threat to do something prohibited by law.

15. Whether the threat is "sufficiently serious" depends on the assessment of how likely it is that the offender will re-offend and on the nature and seriousness of the offences he is likely to commit. As a panel of the Asylum and Immigration Tribunal comprising Carnwath LJ (as

Senior President) and two Senior Immigration Judges made clear in the case of **LG and CC** [2009] UKAIT 00024, at [106], the threat in the "serious grounds" category (level 2) into which this appellant falls, requires to be differentiated from that posed in the lowest level of case, level 1, bearing in mind that a level 2 person has acquired a permanent right of residence in the UK. The offence must properly represent a higher level of seriousness:

"one can imagine, for example, a serial shoplifter being properly removable under level 1 but being unlikely to represent the level of risk that is required to be posed in the case of a person with a right of permanent residence".

16. Mr Whitwell also submitted that it was wholly unclear what the Panel meant when they appeared to be seeking to differentiate between the impact of the appellant's offending on his victims, on the one hand, and society on the other. We agree. For whatever reason, the Panel appears to have departed from consideration of the question whether there was a sufficiently serious risk that the appellant would commit further offences of serious violence in the future, which they addressed in paragraphs 41-43, into the irrelevant consideration of how such further offending, if it occurred, might be seen to impact upon society as a whole.

17. Despite Mr Hawkin's attempt to persuade us that the second sentence of Paragraph 44 was simply a rather unclear way of expressing the Panel's view that the risk of the appellant committing further offences of serious violence was too low to cross the threshold, we accept Mr Whitwell's submissions. Unlike the rest of the determination, the reasoning in Paragraph 44 is plainly flawed.

18. A sufficiently serious threat would not have been made out if the Panel had reached the conclusion that the appellant was sufficiently rehabilitated as to pose little or no risk of violent re-offending - but it did not do so. On the contrary, paragraph 42 of the determination indicates that the Panel was satisfied that a real risk of further violent offending still exists, particularly in conditions where access to alcohol is not controlled, although that risk was perceived to have diminished to some extent in consequence of the work he had done to address his offending behaviour in prison and his lack of re-offending since release.

19. Moreover this was not a case in which there was a finding that if he did re-offend, his offending behaviour was unlikely to involve serious violence. In paragraph 43 the Panel stated in terms that the consequences of any such re-offending remained serious, and referred to the fact that the trigger offence was a serious unprovoked attack when the appellant had apparently intervened in a disagreement that had nothing to do with him. It had already referred to the pattern of escalating violence in his offending.

20. Where the Panel fell into error in paragraph 44 was in the expression of doubt that the risk that it had identified – namely, a real and continuing risk of the commission of further violent offences which might cause serious injury to the victim or victims, would meet the test in Regulation 21(5)(c). The Panel may have been trying to make the valid observation that not all offences of violence would necessarily pose a "sufficiently serious threat to the fundamental interests of society" so as to justify making the decision in principle to remove a level 2 offender. However, there is a world of difference between minor offences of violence and causing grievous bodily harm. If members of the public are unable to go about their lawful business without a serious risk of being subjected to violent and unprovoked attacks by someone under the influence of alcohol – particularly at night – then in our judgment the threshold in Regulation 21(5)(c) has plainly been crossed.

21. Mr Hawkin submitted that paragraph 44 had to be read in the context of the determination as a whole, and in particular by reference to the conclusion reached in paragraph 50:

    "In summary, we have found the Appellant acquired permanent residence in this country and has not lost the right to it. We have the doubts we have expressed as to the nature and extent of the claimed serious threat to public policy or public security. When we factor in the considerations we have mentioned concerning the Appellant's circumstances and the interests of the Union as a whole, we do not find the decision taken to be proportionate".

22. Mr Hawkin referred to the way in which the Panel had approached the considerations in Regulation 21(6) in paragraphs 45-49 of the determination. The Panel had reached conclusions on the evidence before it that the appellant was well settled in this country, that his home had been in the UK since his early teens, that his ties to

Denmark were remote, his economic base is here although it is likely that his parents will continue to give him financial support, all his immediate family members are living here, and his continued rehabilitation could not be enhanced by his enforced return to Denmark and indeed was likely to be hindered by it.

23. Although the Secretary of State sought to challenge those conclusions in the original grounds of appeal, in our judgment they are adequately reasoned and cannot be described as irrational.

24. Mr Hawkin submitted that Regulation 21(6) considerations would only arise if the conditions in Regulation 21(5)(c) were fulfilled, and therefore Paragraph 44 had to be interpreted as meaning that although the Panel had their doubts as to whether those requirements had been met, they were going to assume that they had, and proceed to consider Regulation 21(6) on that assumption. Thus, even if there was a misdirection in paragraph 44, it was a minor error which made no difference to the outcome.

25. In the light of the findings that the Panel went on to make in respect of the considerations under Regulation 21(6), Mr Hawkin submitted that even if an express finding had been made that there was a real and immediate risk of the appellant re-offending in a similar manner, the decision that his removal would be disproportionate would still be unimpeachable. He relied in support of that submission on the case of **LG and CC** to which reference has already been made.

26. LG, like the appellant, was an EEA national who had acquired permanent rights of residence in the UK. He had been convicted of robbery and grievous bodily harm with intent and received a lengthy sentence of imprisonment (12 years reduced to 9 on appeal). He had attacked the elderly victim from behind in order to steal his wallet, inflicting serious head and facial injuries, including a fracture of the skull in the process. He had previously served a sentence of just over three years for theft and robbery. He had been assessed as “dangerous” by the trial judge and a probation report had stated that “in respect of controlling anger and aggression, [LG] does not seem to have made any further progress in reducing the unacceptable risk of re-offending which was identified.”

27. Despite all these high risk factors the Tribunal concluded that expulsion was not a proportionate response for

someone who came to the UK as a child, acquired a permanent right of residence in this country, had lived here for some 15 years before the crime was committed, and had no significant links with the country of which he was a national, in that case, Italy.

28. In our judgment, there are obvious parallels between the appellant's situation and that of LG in terms of the considerations under Regulation 21(6) and the balancing exercise to be carried out. Although the appellant's offending was serious, it was less serious than that of LG (as reflected in the much longer sentence of imprisonment that LG received) and it would also appear that LG posed a far higher risk of re-offending, with none of the positive features reducing the risk that the Panel identified in the present case.

29. Thus we agree that the outcome of the determination by the Panel, namely, that the appellant's removal would be disproportionate, would have been the same even if they had correctly directed themselves as to the meaning of Regulation 21(5)(c), and even if they had decided, as they should have done, that there was a sufficiently serious threat of the commission of further offences of violence to meet the requirements of that sub-paragraph.

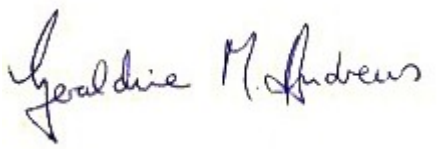
30. In any event, on the authority of **LG** that conclusion seems to us to be inevitable on the fact-findings made by the Panel in this case.

Notice of Decision

31. For those reasons, although we find that the Panel did misdirect itself in paragraph 44, there was no material error of law in the determination such that it should be set aside.

32. Therefore the appeal is dismissed.

No anonymity direction is made.



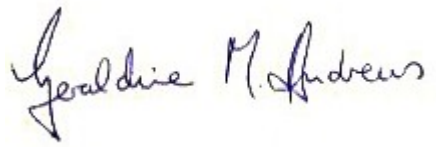
Signed

Date 11 November 2014

Mrs Justice Andrews

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.



Signed

Date: 11 November 2014

Mrs Justice Andrews