



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03531/2011

THE IMMIGRATION ACTS

Heard at Field House
On 9 April 2014

Determination Promulgated
On 7th July 2014

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SM
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T. Melvin, Home Office Presenting Officer

For the Respondent: Mr P. Lewis, Counsel instructed by Lawrence Lupin Solicitors.

DETERMINATION AND REASONS

Introduction

1. The appellant in these proceedings is the Secretary of State. However, for convenience I refer to the parties as they were before the First-tier Tribunal.

2. Thus, the appellant is a citizen of Bulgaria, born on 14 August 1968. He is said to have arrived in the UK illegally using a false passport in July 1999. He married a British citizen, C, in August 2000, and the appellant returned to Bulgaria from where he applied to join his wife in the UK; which application was granted. On 20 August 2001 he was granted indefinite leave to remain.
3. On 18 June 2004 he was convicted of offences of conspiracy to import class A drugs (cocaine), possession of Class A drugs with intent to supply (cocaine), possession of Class A drugs with intent to supply (ecstasy), conspiracy to supply a Class A drug (cocaine) to a person outside the UK, and two counts of being knowingly concerned in the fraudulent evasion of the prohibition or restriction on the importation of goods. He received a total sentence of 18 years imprisonment, some of the sentences being concurrent but involving two sentences of 18 years.
4. In terms of the offences of which he was convicted, I do not have a copy of the indictment and the information as to the offences comes from the certificate of conviction from the Central Criminal Court.
5. On 19 January 2011 a decision was made to make a deportation order under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). His appeal against that decision was allowed by a Panel of the First-tier Tribunal consisting of Immigration Judge K. Henderson and non-legal member Mr D.R. Bremner, after a hearing on 10 May 2011.
6. At a hearing on 13 January 2012, a Panel of the Upper Tribunal consisting of Mr C.M.G. Ockelton, Vice President, and Upper Tribunal Judge Dawson, found that the First-tier Tribunal had erred in law and set the decision aside, to be re-made by the Upper Tribunal. The error of law decision is reproduced in an annex to this determination, with appropriate anonymisation.
7. At the hearing before me the appellant gave oral evidence which I have summarised.

Oral evidence

8. The appellant adopted his witness statements in examination-in-chief. He said that he understood that if he committed another offence deportation proceedings would be taken which would be likely to be successful, but he would not commit another offence. He had done everything to prove that he is not that kind of person anymore.
9. He had moved from Doncaster to London as he was staying with his parents-in-law. He is now aged 45 and wants to show that he can look after himself and his son, S. There are more opportunities to do this in London. He had tried to find work in Doncaster but that is difficult enough to do for people from there. He had had to explain that he had probation and immigration appointments. He was trying to help his brother-in-law who has a cleaning business in Doncaster. His brother-in-law would give him cash at the weekends. If he was going to work full

time for his brother-in-law that would be in the daytime until evening which would take away his time with his son. His brother-in-law knew that he could rely on him to do the cleaning jobs and then he would put S to bed.

10. His brother-in-law did not have sufficient work for him but he worked when there was work available. He works full time in London and continues to support his son with the money that he earns. He has a very, very close relationship with his son.
11. In cross-examination he said that he went to the USA from Bulgaria in 1990 and left there in about October or November 1998. He was married in the USA in 1994. It is true that when he met his wife he was dealing drugs in Los Angeles. He worked for two and a half years before he started dealing drugs. He began drug dealing in 1993 until he was arrested. It is also true that he absconded from bail in the USA to avoid being convicted, and he knows that absconding from bail is a criminal offence. He then returned to Bulgaria and then to the UK in 1999 on a false passport which he knew was also illegal. It is also true that he was dealing in drugs in the UK before he met his second wife.
12. In Bulgaria he has his parents and a sister. He is in regular contact with them and they have visited him in the UK. He accepted that he was part of the drug gang involved in the offences for which he received a sentence of 18 years, although he does not know if he was a full part of it. He had pleaded guilty to importation of a large quantity of cocaine.
13. He was arrested in January 2002 and first had leave to remain from September 2000. It is correct that he only had leave to remain in the UK for just over a year before he was arrested.
14. He does consider that he is integrated into life in the UK. He has family and friends here, loves the culture, the country and the people. He knows that he has done wrong but there are people here who love him and whom he loves. He has been in the UK a very long time with these people. He had however, taken a lot of things for granted. He does wish that he had integrated better in the beginning in the USA and here, and wishes that he had taken a different path.
15. He is now divorced from his wife, C. The divorce was about two years ago. The process started in 2011 when he was released. When he was released C and his son were living in Doncaster at his mother-in-law's address which was not his bail address. It is true, as his witness statement says, that if his mother-in-law was not receiving medical treatment they would be living together as a family in London. He and C have a very close relationship as friends and in terms of looking after S but they are not in the process of thinking that they would live together. However, he thought that by coming to London they could all have a better life and opportunities. The studio flat he lives in is in the same area as where he works. C was going to work there too, and eventually C and S would have had their own place.

16. He supports S financially and agrees to pay a certain amount from his wages. There is a direct transfer of £200 every two weeks, and on top of that he pays for things like travel, clothes and sporting activities and when he comes to stay with him for the holidays. C works in Doncaster.
17. S is 11½ and will be 12 at the end of August. They had not asked him to write a letter in connection with the appeal. He is very sensitive and they had not explained to S where he had been. He would think that he had done something wrong, but it is all his fault and his own wrongdoing. He does know that the intention of the government is to send him to Bulgaria. His lawyers have advised him that it could be beneficial to ask S to write in support of the appeal but he does not want him to become involved in any of this. He and C both feel strongly that he does not want him interviewed concerning their relationship.
18. C and S come to visit him every second Friday. They go back at 6.00pm on Sunday. The following weekend he goes there; twice a month. Sometimes he goes in the middle of the week but he has to “sign” on a Tuesday and report to immigration on Wednesday. On Monday and Thursday he works a double shift and Friday and Saturday night are the busiest shifts. He goes Sunday morning and comes back Sunday night or early Monday morning. S stays with him during the school holidays.
19. In answer to my questions he said that his relationship with C is just as a friend. She does not have another partner. There were extradition proceedings in relation to the USA offences but he was not extradited. This is because he had pleaded guilty here and part of the conspiracy was in the UK, so the Americans dropped the extradition proceedings.

Submissions

20. Both parties provided detailed and helpful skeleton arguments which I have considered in full.
21. On behalf of the respondent Mr Melvin relied on the skeleton argument and the reasons for deportation letter. Reference was made to the appellant's evidence in relation to his drug offending both in the USA and in the UK. The appellant is only entitled to the most basic level of protection against deportation and would have to show that prior to his arrest and offending he had integrated into life in the UK. The nine years that he had spent in prison does not count towards integration. It was only in the last three years, since May 3013, whilst fighting removal, that he obtained employment. There is a letter from his employer but no one had attended the hearing to give evidence. There was no oral evidence from anyone in terms of his integration and in terms of his private life.
22. Having regard to the decisions in MG [2014] EUECJ C-400/12 and Onukwere [2014] EUECJ C-378/12 the time spent in prison cannot be counted in terms of his residence. His conduct clearly shows that he has no desire to integrate. The decision in Tsakouridis [2010] EUECJ C-145/09 was also relied on.

23. There was a risk of reoffending. The 'NOMS' report refers to a medium risk. The propensity to offend is linked to the lack of integration.
24. There was very little evidence to support the claimed contact between the appellant and his son, and little evidence of money transferred for his upkeep. The whole appeal is based on family life with his son, but there is no evidence from him. It is accepted that his son is a British citizen but there has been limited contact with him in the time before his release and since. His ex-wife and son live in Doncaster and he lives in London.
25. On behalf of the appellant it was submitted that the seriousness of the offence is not sufficient to justify removal. There must be a risk of reoffending. In the case of this appellant the expert evidence is that there is a very low risk. His conduct since release and when detained at Ford open prison is relevant.
26. He has continuing contact with his son. I was referred to the appellant's witness statement in terms of why there is no letter from his son or independent social work report. There was however, other evidence in terms of his relationship with S. The appellant's explanation for why he did not want to involve his son puts his son at the heart of the proceedings. There is nothing to suggest that the low risk assessments cannot be accepted. The appellant is aware that any offence would make him liable to deportation.

My assessment

27. Directive 2004/38/EC ("the Directive" or "Citizens' Directive") is transposed into UK domestic law by the EEA Regulations. The EEA Regulations concerning exclusion and removal from the UK provide as follows:

"Exclusion and removal from the United Kingdom

19.- ...

(3) Subject to paragraphs (4) and (5), 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; or

(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 21.

(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.

(5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his

removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

...

Decisions taken on public policy, public security and public health grounds

21. –(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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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(11).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.”

28. In order to set my conclusions in context, I set out in summary the brief circumstances of the offences for which the appellant was sentenced, on the basis of the information put before me, and which led to the decision to deport him to Bulgaria.
29. I have not been provided with the sentencing remarks given at the time of the sentence of 18 years imprisonment. However, it is clear enough from the extracts of the sentencing remarks in the NOMS report that the offences involved involvement in a sophisticated gang of international drug dealers, with the appellant operating the UK end of a “drugs ring” to make a “huge profit in an enterprise that causes misery to many lives”. The report continues that on two occasions deals involved 20 Kg of cocaine at 100% purity with a street value of just short of “#1,000,000” (sic). Notwithstanding whatever encouragement he received from an informant, the judge concluded that he willingly took part. He was given credit for his guilty pleas although the judge said that it would not be much credit as he knew all along that he was guilty. The judge assessed his role as a “significant participant”.
30. The appellant arrived in the UK in 1999 and has therefore been in the UK for some 15 years. However, the decision of the Court of Justice of the European Union (“CJEU”) in Case C-400/12 MG states as follows:

“31 ...when interpreting Article 16(2) of Directive 2004/38,...the fact that a national court has imposed a custodial sentence is an indication that the person concerned has not respected the values of the society of the host Member State, as reflected in its criminal law, and that, in consequence, the taking into consideration of periods of imprisonment for the purposes of the acquisition, by members of the family of a Union citizen who are not nationals of a Member State, of the right of permanent residence as referred to in Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence (Case C-378/12 *Onuekwere* [2014] ECR I-0000, paragraph 26).

32 Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.

33 It follows that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision.”

31. The effect of that decision in the case of this appellant is that he has not acquired protection against expulsion at a level other than the lowest, or most basic level,

that is to say on grounds of public policy, public security or public health. He received his sentence of imprisonment on 18 June 2004 by which time he had not been in the UK for five years. His period of imprisonment could not be counted as qualifying residence, and in any event his imprisonment broke the continuity of residence.

32. Mr Lewis attempted to suggest, if I understood the argument correctly, that the appellant's indefinite leave to remain had not been curtailed and thus he has permanent residence within the meaning of the Directive. However, I am satisfied that the combined effect of Regulation 24(3) of the EEA Regulations and section 5(1) of the Immigration Act 1971 is that his indefinite leave to remain was revoked with the decision to remove him. Mr Lewis' fall back position in this regard was that in any event the fact that the appellant had indefinite leave to remain was relevant to the issue of proportionality.
33. Plainly a relevant, indeed vital, consideration is the extent to which the appellant could be said to present a risk of reoffending. This is because, as set out in the EEA Regulations, under regulation 21(5)(c) "the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society".
34. In addition, regulation 21(5)(d) provides that "matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision".
35. In relation to risk of reoffending, the National Offender Management Service report ("NOMS") which appears to have been prepared in 2010, stated that there was a medium risk of reconviction and a medium risk of harm to others. A report by a probation officer, Peter Brown, dated 3 May 2011, assessed the appellant as at that time a low risk of serious harm to the public and to known adults. The further report from Peter Brown dated 14 May 2012 in the appellant's supplemental bundle gives the same assessment. A letter from Helen Thompson from the London Probation Trust, dated 18 March 2014, also assessed the appellant as presenting a low risk of serious harm and a low risk of reoffending.
36. There are two reports from Lisa Davies, a Consultant Forensic Psychologist. The first is dated 6 September 2012. In that report the assessment is that the appellant was at low risk of general reoffending, which I take to be equivalent to the same level of risk in terms of 'reconviction' (see 1.2 and 1.3 of the report). The second report dated 28 March 2014 makes the assessments of "very low risk of general reoffending" and "very low risk range for reconviction for general (non-violent) offences". At 12.10 it also states that there was then a "very low risk of harm to others".
37. It is evident from all the reports which consider the risk of reoffending that the appellant has fully complied with the terms of his licence and has demonstrated a positive attitude towards attending appointments with his probation officer,

including engaging well during supervision sessions. He has evidently demonstrated a good understanding of the effects of his offending on society in general and on him and his family. He does not display any inclination towards further offending and appears to be focused on legitimate employment. He has given an account to Lisa Davies which indicates a responsible attitude to society and to his plans for the future.

38. I note however, what is written in the earlier report at paragraphs 5.1.2-5.1.4 in that on the Paulhus Deception Scale ('PDS') he is said to have scored a "clinically significant" figure for 'Self Deceptive Enhancement' which indicates "an unconscious favourability bias closely related to narcissism". High scores on that scale are said to indicate "a rigid over confidence". The report goes on to state that a high score in that respect does not imply deliberate intent to deceive others and is likely to be a result of a need for approval of self esteem. I assume however, that the score in this respect has been taken into account in Ms Davies assessment of the risk of reoffending.
39. Ms Davies refers to a wide range of factors that she considered in making her assessment as to the risk of reoffending, which is now said to be very low. These include, but are not limited to, past behaviour, employment, his attitude of his offences, lack of criminal associations, and identification with pro-social and non-criminal models. A further significant factor in this respect is said to be his relationship with his son which at 6.1.17 of the September 2012 report is described as "an important and relevant motivational factor" for his avoiding future offending.
40. I have considered all of the witness statements, in particular those of the appellant and what he says about his determination not to re-offend. In this connection the appellant particularly refers to his relationship with his son. I accept that they have a very close relationship and that the appellant wants to maintain and develop their relationship.
41. However, I do not accept that the appellant's risk of reoffending is low. At 6.1.1 of the first of her reports, Ms Davies states that past behaviour is invariably the best predictor of future behaviour, and that "This is very true of criminal behaviour, where almost every research study in this country and abroad has demonstrated that criminal history is a very good predictor of future reconviction". Whilst I accept that Ms Davies refers to the appellant's history of drug related offences (paragraph 6.1.3 of the September 2012 report), and sets out the appellant's history, including in the USA, I am not satisfied that her assessment takes that history fully into account or gives it sufficient weight.
42. The appellant's evidence before me was that he went to the USA in 1990 from Bulgaria and married in 1994. He said that when he met his wife he was already dealing in drugs in Los Angeles, having started drug dealing in 1993. He was arrested in the USA in 1998. He was arrested for the offences in the UK in January 2002. His involvement in serious drugs offending has therefore spanned a period

of about nine years. Against that background, I do not consider that the fact that he has not committed any offences since his release from prison (in January or February 2011) to be of very much significance, particularly considering the fact that he is, and was, aware that he is facing deportation.

43. In addition, notwithstanding that he was arrested in the USA in 1998, he absconded from bail and returned to Bulgaria. It appears that apart from absconding from bail in the USA he left the country without a passport (4.6.6 of Ms Davies first report). In evidence before me he accepted that he then came to the UK illegally, using a false passport. Notwithstanding that there were matters outstanding against him in the USA, and having entered the UK illegally, he became involved in the offences which resulted in the total sentence of 18 years imprisonment. The NOMS report on page 7 states that the offences took place between 1 December 1999 and 25 January 2002. It would appear therefore, that he committed those offences not long after he had arrived in the UK illegally.
44. Although I accept what is said about reoffending being, in part, related to employment, the fact is that the appellant was in employment in the USA when he started his offending. He explained to Ms Davies that he had a stable upbringing in Bulgaria and a close relationship with his parents. That was his background before he went to the USA and committed drugs offences. When he married in the UK he was involved in the offences which resulted in the decision to make a deportation order.
45. Whilst I accept that he has not previously had children, and in that sense his family circumstances are now very different, the fact is that in the past neither employment, marriage nor stable family circumstances prevented him from offending and continuing to offend. I do not consider that the conclusion that he presents a very low or even low risk of reoffending has sufficient regard to those matters. I also bear in mind that both in the NOMS report at [11] and in Ms Davies first report at 4.6.4, the appellant explained that he enjoyed the lifestyle that his involvement with illicit drugs afforded him.
46. I have no doubt that the appellant well understands the harm posed to society, and to his family, by the sort of offences he committed which resulted in the decision to make the deportation order. I also have no doubt that he has engaged well with supervision and does not *display* any inclination to reoffend, and that he does not associate with those with whom he was involved in the offences which resulted in his 18 year prison sentence. However, for the reasons I have given I do not accept the assessment of the risk of offending as low or very low.
47. In relation to whether he presents a risk of 'serious harm' the reports from Mr Brown, Ms Thompson and that from Ms Davies use a definition of serious harm which is described at 6.3.7 of Ms Davies' first report as the standard definition of the phrase. To quote from the report of Ms Thompson dated 18 March 2014, serious harm is defined as "the likelihood of an event which is life threatening and/or traumatic, and from which recovery, whether physical or psychological,

can be expected to be difficult or impossible". All of the authors of the reports note the seriousness of the offences for which the appellant was convicted and the impact of serious drugs offending on the community. However, whilst that definition of serious harm may have its uses in some contexts, it does not adequately represent the very serious harm to individuals, families and to society generally, from the introduction and subsequent distribution and use of Class A drugs.

48. I have considered all the matters that are advanced on his behalf as indicating a low or very low risk of reoffending. Relevant factors include his stable employment, his relationship with his son, his son's mother, and other family members in the UK, the lack of further offences, the courses he has undertaken, his positive response to supervision and his positive prison record in terms of adjudications or offences.
49. However, in my judgment the risk of reoffending is more appropriately to be considered as a medium risk, as it was found to be in the NOMS report in 2010, notwithstanding that the appellant has not committed any offences since then and notwithstanding his good behaviour whilst serving his sentence.
50. I am satisfied that the appellant's conduct does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. This conclusion follows from the risk of his reoffending, and from the fact that reoffending is likely to take in terms of involvement in the supply or distribution of Class A drugs.
51. The importation and distribution of Class A drugs undoubtedly represents a serious threat affecting one of the fundamental interests of society, having regard to the almost incalculable social and personal cost of the use of Class A drugs.
52. Matters of general deterrence have no part to play in my assessment of the decision to remove the appellant, and I have no regard to such considerations. I bear in mind the other principles set out in regulation 21(5), including that the decision must comply with the principle of proportionality, and the matters set out in regulation 21(6).
53. A particularly relevant factor in proportionality terms is the appellant's relationship with his son. As I have already indicated, I am satisfied that he has a close relationship with his son and plays a significant part in his life, as the witness statements and oral evidence demonstrate. Notwithstanding my assessment of the appellant's propensity to reoffend, I am satisfied that it is in his son's best interests for the appellant to remain in the UK. For many obvious reasons it would not be reasonable to expect his son to go to Bulgaria to be with the appellant, however that may be achieved.
54. I note that no evidence has been served in response to the Directions I made as long ago as 18 May 2012 in terms of 'third party' evidence in relation to the best interests of the appellant's son. I make that observation only to highlight the fact

that no such evidence was put before me. I also note however, the appellant's evidence of his not having wanted to involve his son in these proceedings.

55. S is now only 11 years of age, nearly 12. Self evidently a child of that age would need or benefit from the close contact and support of both parents. Furthermore, I have no doubt that the appellant's removal to Bulgaria will have a significant emotional impact on his son. If support were needed for that view, it is contained in the letter dated 3 April 2014, from the appellant's former mother-in-law, Mrs LS. She refers to the devastating effect on S of the appellant's removal.
56. The contact that the appellant and his son would be able to maintain from Bulgaria, by means of phone calls, letters, Skype, or visits to Bulgaria, would be no substitute for the close contact that they both presently enjoy.
57. I also accept that even though the appellant and his son's mother, C, are no longer in a relationship, they both share a mutual interest in securing what is best for their son. The removal of the appellant would affect C in that respect. On the appellant's evidence she and he maintain a close relationship. Although her most recent witness statement dated 6 April 2014 does not refer to the affect on her directly of the appellant's removal, I accept that it is likely that his removal would also affect her emotionally in addition to in the way just described.
58. I take into account what is said in Essa (EEA: rehabilitation/integration) [2013] UKUT 00316 (IAC) in relation to integration and rehabilitation. The appellant initially arrived in the UK in 1999, returned to Bulgaria and then married in the UK in 2000. He was however, arrested in January 2002 but had been committing the offences for which he was arrested well before that. It seems that he was in prison from the time of his arrest until his release in January 2011. Although he has not committed offences since his release, has been and is in employment, and has developed his relationship with his son and others, this is not much evidence of integration into UK society in the light of his offending and lengthy prison sentence. His offences demonstrate a significant lack of integration. Furthermore, I do not consider that there are short or medium term prospects for rehabilitation, taking into account my conclusion as to the risk of reoffending and the reasons for that conclusion.
59. Many of the matters to which I have already referred relate to the factors that must also be considered under regulation 21(6), for example the extent of his social and cultural integration into the UK. I bear in mind that he was granted indefinite leave to remain in August 2001. As against that, he did not show much respect for that status that was afforded to him. He is aged 45, almost 46. He appears to be in good health. He has his parents and a sister in Bulgaria and he said that he is in regular contact with them. Clearly he still has links with Bulgaria therefore. He has family in the UK in terms of his Son, his ex-wife, C, and her parents. No doubt he also has friends in the UK.

60. Having taken all relevant matters into consideration, I am satisfied that the appellant's deportation is warranted on the grounds of public policy, as well as public security, but the former is sufficient. The element of public security is involved in terms of the appellant's propensity to offend in relation to Class A drugs, a matter considered in Tsakouridis [2010] EUECJ C-145/09.
61. His removal does comply with the principle of proportionality and is based exclusively on his personal conduct. The appellant does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, and I have taken into account the factors required to be considered under regulation 21(6).
62. In the light of those conclusions, I do not consider that separate consideration under Article 8 of the ECHR would yield any different result, notwithstanding the detailed submissions in relation to Article 8 in the appellant's skeleton argument.

Decision

63. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision of the First-tier Tribunal is set aside and the decision re-made dismissing the appeal under the EEA Regulations and under Article 8 of the ECHR.

Anonymity

Given that these proceedings include consideration of matters related to a child, I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Consequently, this determination identifies the appellant's child and the adults associated with him, including the appellant, by initials only in order to preserve the anonymity of that child. No report of these proceedings may, directly or indirectly, lead to the identification of that child. Failure to observe the terms of this Order may result in proceedings for contempt of court.

Upper Tribunal Judge Kopieczek

2/07/14

ANNEX



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/03531/2011

THE IMMIGRATION ACTS

Heard at North Shields
On 13 January 2012

Determination given orally at
hearing. Sent out on

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Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Dawson

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[SM]

Respondent

Representation:

For the Appellant: Ms H Rackstraw, Home Office Presenting Officer
For the Respondent: Mr C Yeo, instructed by Kidd Rapinet Solicitors

DETERMINATION AND REASONS

Introduction and background

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal constituted by Judge Henderson and a non-legal member, allowing the appeal of the appellant before them (to whom we shall refer as the 'claimant') against the Secretary of State's decision to make a deportation order against him.
2. The claimant is a national of Bulgaria. He was born in 1968; he came to the United Kingdom in July 1999; he married a British citizen; he left the United Kingdom then, apparently voluntarily; he re-entered with entry clearance and leave to enter as the spouse of a British citizen. He was subsequently granted indefinite leave to remain.
3. It appears that at the time of his entry to the United Kingdom, he was in breach of conditions of bail imposed by a court in the United States of America in relation to charges of drug offences. He was arrested on 25 January 2002 in relation to those charges, that is to say the American charges, and there were subsequently charges in relation to drug offences in this country. He eventually pleaded guilty to a number of counts, six in all, and was sentenced to a total of 18 years imprisonment by His Honour Judge Stephens QC, at the Central Criminal Court in 2004.
4. In imposing that sentence, the judge indicated that the charges on which the longest sentences were imposed were in respect of the claimant's part in a sophisticated gang of international drug dealers. He was operating part of the United Kingdom end of a drugs ring, making very substantial profits. There were two deals involving 20 kilograms of cocaine of 100% purity with a street value just short of £1 million; there were other attempts to arrange deals on his own behalf. Although the claimant had in the end, pleaded guilty, he had undergone a considerable series of hearings at which he had claimed to be able to meet the charges put to him. The Judge gave very little credit to the eventual guilty pleas on the basis that the claimant knew all along that he was guilty. The sentences were concurrent. There were two of 18 years, one of 10 years, one of 8 years and one of 4 years. There was also a confiscation order.
5. By the time the claimant was arrested in January 2002, his wife was pregnant and she subsequently gave birth to a son. The birth took place whilst the claimant was in prison. The claimant remained in prison from his arrest in 2002 until he had finished serving his sentence, which was on the usual basis, about nine years later, that is to say half of the eighteen years to which he was sentenced. He was released on bail following a short period of immigration detention on 3 February 2011. So far as we are aware he remains subject to the terms of a licence on his release at the end of the criminal sentence.
6. The basis of the claimant's appeal to the First-tier Tribunal was that he is married to a British citizen and that he has a son who was born in this country and with whom he

maintains a strong and close relationship. It was said that he poses a low risk of reoffending and that his removal would be disproportionate, bearing in mind the protection from removal that citizens of the European Union enjoy in other countries of the European Union.

7. The First-tier Tribunal, as we have said, allowed his appeal. They dealt with the matters before them under two heads, dealing first with the proportionality of the claimant's removal (apparently without taking into account his family life) and secondly Article 8 issues, dealing with family and private life. The Tribunal's conclusion was that each of those grounds, separately and individually, merited the appeals being allowed.
8. The Secretary of State appeals to this Tribunal on the grounds that, in making its decision, the First-tier Tribunal made errors of law.

Decision

9. We are persuaded that the First-tier Tribunal's decision is marred by error of law and we shall set the determination aside. We propose to give reasons for that conclusion, then make some general marks and give further directions. Because the appeal will need to be re-heard we will attempt to avoid making comments in the course of this determination that may have any effect on any future findings of fact or credibility; and nothing we say in the course of this determination should be taken as an indication of what we consider should be the proper outcome of the appeal when it is re-heard.

Reasons

10. First then, the reasons why we set aside the First-tier Tribunal's determination. The determination, signed by both of the members of the panel is 32 pages long; it consists of 93 paragraphs and, as has been pointed out, that is sufficient to show that a substantial number of matters were taken into account in producing it. It sets out the respective cases of the claimant and the respondent, and the law and then there is a section entitled 'The Hearing'. 'Findings of Fact' is the final section; it consists of paragraphs 58 to 93. And the Findings of Fact include as we have said, separate determinations that the claimant's deportation would not satisfy the requirement of proportionality imposed by reg 21 of the Immigration (European Economic Area) Regulations 2006, and that taking account of his family circumstances his deportation would cause the United Kingdom to be in breach of Article 8 of the European Convention on Human Rights.
11. The Secretary of State's grounds of appeal as addressed by Ms Rackstraw before us raise a number of issues. The first, and it is probably right to characterise it as the overarching, ground is that the panel failed to take into account the seriousness of the offences of which the claimant had been convicted and the public interest in deportation. In her submissions, Ms Rackstraw described that failure as having

skewed the panel's approach to the rest of the issues before it. Secondly, Ms Rackstraw says that the panel failed properly to assess the risk of the claimant's re-offending. Thirdly, the panel failed to assess properly the credibility of the evidence before it, in particular as regards the relationships between family members. Fourthly, if the interests of the claimant's child were found to lie with the claimant being allowed to remain the panel failed to explain why those interests were not displaced on a proper balancing exercise by the public interest in having him deported.

12. In response, Mr Yeo reminds us that the Reasons for Decision letter issued by the Secretary of State dealt in a summary way with the offence itself and extensively with the liability to re-offend. He points out that at a number of points in the determination, the panel refer to the offences being serious ones. He indicates, if we have understood him correctly, that it was wrong to separate the issue of proportionality under the European Economic Area Regulations 2006 from the issue of proportionality under Article 8, because it was necessary in dealing with the first issue to deal with family matters in order to ensure that the question of proportionality was properly and fully considered, but he says that that error, if it be one, is not material because the panel in any event came to a conclusion in favour of the claimant on each of those issues. He reminds us of the words of Baroness Hale in particular, in the decision of the Supreme Court in ZH Tanzania [2011] UKSC 4. He opposes Ms Rackstraw's suggestion that the facts of the present case are materially different from ZH. He reminds us that it is the principle that is of importance: the principle is that derived not only from s 55 of the 2009 Act but also from the United Nations Convention on the Rights of the Child. It is that the best interests of the child are a primary consideration. Insofar as he has to meet the points made by the Secretary of State that the panel failed to deal properly with credibility matters, he asks us to say that it is apparent that the panel accepted all the evidence that was before them on the claimant's behalf.
13. Mr Yeo did his very best to save this determination and we are confident that little more than he said could conceivably have been said in its favour. He indicated that it would be unfortunate if the matter had to be gone through again at a fresh hearing. We agree with that last submission, but, as we have indicated, we find ourselves unable to accept his other submissions.
14. It seems to us that all of the Secretary of State's grounds are made out. This was evidently a serious case requiring the most careful consideration of any factors raised against deportation. The determination itself has a number of features suggesting that the matter did not have the care it deserved. There are many misprints in the determination. Paragraph 16 of the determination reads as follows:-

"16. The appellant's son [S] was told that the appellant was working away from home and could not come home because of this. The appellant saved is monitored by [S] presents. [S] would not open the presents in prison waited until he got home to show everybody what his father had given him"

We can make no sense at all of the middle sentence. At paragraph 31 the panel writes as follows:

“31. In completing the appellant’s assessment the offender manager found the appellant poster medium risk of reoffending. In assessing the appellant as a medium risk it was acknowledge that there were identifiable indicators that would seek him to reoffend.”

We can understand those sentences as we can understand the last sentence of the determination which we set out later: but it is clear that the panel did not properly review what was being written. The same perhaps applies to the passage between paragraph 79 and 83 in which the panel departs from using the first person plural in indicating its conclusions and moves to the first person singular: whether or not that was because the judge used a passage which she had drafted for occasions when she was sitting alone, we do not know. These are not of themselves important matters, but they do show that the determination was not properly read and checked and they count against any suggestion that one should have confidence in the Tribunal’s doing its task properly.

15. Another feature of the determination which is marked by the Secretary of State in her grounds is that the determination fails to indicate in terms what evidence was given at the hearing. The part of the determination headed ‘The Hearing’ runs from paragraph 44 to paragraph 57; it sets out questions asked of each of the witnesses. We think it is right to say that in not one case does it record an answer to any of the questions. The result is that the evidence taken at the hearing is not recorded as such in the determination at all. We do not of course say that it is the function of a determination or a judgement to record evidence, but it is the function of a determination to explain what findings of fact and assessment of credibility are made and why. As we have said Mr Yeo’s submission was that the concluding parts of the determination show that the panel found all the evidence to be credible: but there is no indication in the determination as to how it came to be the case that all the challenges to the evidence, apparently made in questions in cross-examination, as well as the challenges made to various factors in the letter of refusal, were regarded as being without merit. Nor is there any indication in the determination of how it came to be that differences between the official documents and the other evidence relating to re-offending was dealt with. Nor is it clear how the panel took into account a matter which we have already mentioned: the judge in his sentencing remarks appears to have taken a very clear view about the claimant’s honesty in maintaining an account that he was not guilty when he knew that he was.
16. There are other factors in the assessment of important issues in which the panel appear to us to err. One factor which we mentioned at the hearing was that one of the few clear pieces of evidence which the panel do mention is that the claimant had been free of drugs for 36 months in prison. That is of course something which is very far from being to his discredit, but nobody has suggested that he is a drug-user who is reformed. He is a person who has been involved in the supply of drugs to others, not so far as we are aware, a user himself. The panel’s citation of that particular piece of evidence suggests that they regarded it as of some importance. Mr Yeo is of course

right to point out that the panel did refer to the offences as being serious, but reading the determination as we do, we are very far from confident that the panel took into account properly either the very great seriousness of these offences or the public interest which is particularly high in responding to the most serious offences by deportation. The latter factor is hardly mentioned in the determination, if at all. So far as the former factor is concerned it seems to us that paying lip service to the characterisation of offences of this sort as serious is simply not enough. A few of the factors pointing to the seriousness of the offences were mentioned, but the panel's actual view of them is perhaps most clearly indicated by their description of these offences in their final conclusion as "moral failures". That does not seem to us to be a remotely adequate way of describing a clearly calculated series of offences involving the international importation of the most serious drugs with a very high street value and to which the response of the criminal justice system was a very long prison sentence.

17. It does not appear that the Tribunal was referred to the decision of the CJEU in case C-145/09 Land Baden-Württemberg v Tsakourides. That decision might with advantage be considered when this appeal is re-heard.
18. Finally, in dealing with defects in the determination, we must look at the way in which the best interests of the child were assessed. The position is that the panel were persuaded that the relationship between the claimant and his child, despite the difficulties posed by the claimant's incarceration for a considerable period since the child's birth, was nevertheless strong. That was their finding of fact. The question whether the case nevertheless demanded deportation despite the best interest of the child was a question which the panel needed to answer. Although Mr Yeo did his very best to show us the answer, we cannot see it. The panel identified the best interests of the child and stopped there. The last sentence of the determination is as follows:

"We consider that the interests of the child in this appeal are of primary importance and that it is not in the interest of this child are not best served [sic] by the removal of his father with whom he has built up very close bonds."
19. That may well be the case; having reached that conclusion, the panel needed to determine whether the seriousness of these offences and the public interest in deportation was sufficient to outweigh the best interests of the child in this particular case.
20. For those reasons, we have concluded that the determination errs in law. The matters are not matters which can be dealt with on the basis of any simple corrections and we shall set aside the determination.

General Comments

21. We take this opportunity to make some general comments about cases of this nature. We emphasise that we do not intend to influence the outcome of this particular appeal at all.
22. We are aware that cases in which the Tribunal allows a deportation appeal in respect of a person who has committed serious offences cause attention outside the Tribunal and more generally in the media. These comments are not intended as a response to any such interest but merely to indicate the principles which the Upper Tribunal will attempt to apply in making a decision such as that which we make today.
23. Comments made outside Tribunal hearings are nearly always made without any proper knowledge of the facts of the case. In a democracy it is for the judiciary to make decisions on appeals, taking all relevant facts into account. In that statement the word 'all' is crucial. In a case such as this, the starting point will nearly always be the sentencing remarks of the trial judge. Those remarks are an authoritative statement both of the nature of the offence, and its seriousness, and society's response to it through the criminal justice system. All of those factors are important. Criminal judges are able to see offences in the context of the system which they administer every day. When it is right to describe an offence as serious, they do so and impose a commensurate sentence. When, on the other hand, an offence that may have had very serious consequences is not one which (taking everything into account) demands a serious penalty, they indicate that by the penalty that they impose. It is not for anybody outside the process of criminal appeals to revisit that assessment.
24. Then, in an appeal against deportation, the panel will be taking a large number of factors into account, not all of which can be made wholly public; some of the factors to be taken into account are matters of particularly personal intimate relevance, other matters may relate to the welfare of children, or other people under a disability. It is not in the public interest for every such factor to be disclosed in detail. In such a case, those not involved in it can never have all the material the Tribunal considered.
25. A particular factor which may have to be taken into account is the way in which the Secretary of State has dealt with the appellant in the past. For many of the last fifteen years it has been the case that the Secretary of State has often done little or nothing to enforce immigration decisions. Whether that was the result of large scale inefficiency or an undisclosed policy, or something else, we do not know. But if time has passed after the offence, after completion of the sentence, and after the exhaustion of any appeal, in which the Secretary of State could deport a person but has not done so, it may be difficult at a later date for the Secretary of State to say that the public interest now requires his removal. If it did not require removal then, why does it now?
26. The Tribunal in hearing an appeal will take account of all such matters. It is the Tribunal's job to do so. The issue is not one of discretion; it is not one of penalty; it is not one of whether to exercise leniency or severity. It is a matter of assessment of

evidence and the balancing of interests. The interests are often competing, but when rights are identified they demand respect; and it must be remembered that the purpose of the evolution of the Human Rights jurisdiction is to ensure that the rights of individuals are properly recognised in individual decisions, and are not subsumed within general impressions, or left to the mercy of uninformed condemnation.

27. For these reasons the proper response in a democratic society is to accept the role of the judiciary in making judgements of this sort: but that acceptance must depend on evidence that judgments of this nature are being made properly, taking all the factors including such things as the seriousness of the offence and the public interest into account, as well as the individual matters raised by an appellant.
28. Tribunals dealing with these issues need to be aware that their decisions are in the public eye. There may often be decisions that raise questions in the public mind. There may be public disagreement expressed: but the aim is that judicial process should result in acceptance of the result, even from those who may disagree with it, and that can only follow from confidence in the care and attention given by the Tribunal making the decision. It must be seen to make clear and justifiable findings of fact, to direct itself correctly on the law, and in a properly structured decision apply the law to the facts.
29. We make these comments because of the features in this determination that we have identified. This was an example, a rare example we hope, of a determination which on its face gives reason to doubt the system. It is right that it should be set aside so that a new decision can be made, one which will show that all factors have been taken into account, and in which confidence can therefore properly be placed.

Directions

30. We make the following directions.
31. The appeal is to be re-heard in full in the Upper Tribunal. Time estimate one day. The hearing is to be on the first available date after two months from today. The Tribunal hearing the appeal is to consist of two judges, at least one of whom is to be a full time judge of the upper Tribunal

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 January 2012