



**Upper Tribunal
(Immigration and Asylum Chamber)
DA/00096/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 23 February 2016

**Decision & Reasons
Promulgated
On 30 March 2016**

Before

**THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
DEPUTY UPPER TRIBUNAL JUDGE G A BLACK**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

**EDUARDO RUI MONTEIRO BARBUSA SEMENDO
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: In Person

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (whom we shall refer to as the respondent) against a decision of the First-tier Tribunal promulgated on 20 October 2015 allowing an appeal of the appellant against a decision to deport him under the Immigration (EEA) Regulations 2006 made on 13 March 2015.

2. The appellant is a national of Portugal born on 31 December 1991. He apparently arrived in the United Kingdom in 1994 with his mother who is an EEA national exercising treaty rights. The appellant has a number of siblings. On 31 March 2011 the appellant was convicted at Southwark Crown Court of rape and was sentenced to nine years imprisonment. He was placed on the sex offenders register for life. He later appealed against the conviction and sentence but those appeals were refused.
3. In the reasons for the decision of the respondent, it was accepted that deportation could only be made in the appellant's case on imperative grounds of public security since he had acquired a permanent right to reside in the United Kingdom (Regulation 21 the 2006 Regulations). It was also accepted that that Regulation required a decision to deport to comply with the principle of proportionality, be based exclusively on the personal conduct of the person concerned which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that the previous criminal convictions themselves could not justify a decision to deport.
5. The rape of which the appellant was convicted was committed when the appellant was 17 years of age. The victim was 16 years of age. She had been taken to a small park by the appellant and five other youths where she was repeatedly raped by four of them including the appellant. The sentencing judge considered this to be a very serious case marked by the imposition of a substantial sentence of detention.
6. An OASys assessment was prepared on the appellant and had been updated on a number of occasions after sentence was pronounced. He was found to pose a low but real risk of reoffending. The probability of reoffending within two years of release was assessed at 30% and the risk of serious harm which he posed in the community to members of the public was assessed at being high.
7. A major contributing factor to that assessment was the appellant's continuing denial of guilt. Due to that attitude, he was not able to participate in any programmes while detained which might address his offending behaviour and reduce the risk he posed. Similarly, problems in relation to his ability to attend courses post-release would be caused due to his persisting attitude towards the offence. On that basis, the respondent considered that the criteria contained within Regulation 21 of the 2006 Regulations were fulfilled and his deportation was justified.
8. In his appeal to the First-tier Tribunal the appellant represented himself. He gave evidence. He reiterated that he did not accept that he had committed rape but accepted that it was "possible he was making wrong decisions at that time in that environment". He still believed that there was a form of consent given by the victim. He stated that he had been in the United Kingdom since he was 2 years old and had lived here his whole life. His first language was English. He had three siblings and played an older brother role in respect of his younger siblings. His mother suffered

from depression. He stated that he would be seeking independent counselling to help him improve any behavioural issues he might need on release from prison.

9. The First-tier Tribunal Judge noted at paragraph 61 that it was difficult to understand why the appellant believed consent was implied and also pointed out that the appellant had been adamant that there was no physical penetration of the victim. That, of course, was wholly contrary to the jury's finding of guilt. Reference is also made in that paragraph to the continued denial of guilt causing difficulties in being able to undertake courses which might mitigate the risk he posed. At paragraph 62 the judge states that "he is still being denied the opportunity to take the courses he needs" despite making numerous attempts to undertake them. He was, however, able to attend a Project 507 course for six weeks between September and October 2011 in the young offenders institution. However, that course did not impact directly on mitigation of risk. At paragraph 64 the judge refers to the case of **LG (Italy) [2008] EWCA Civ 190**, which in turn referred to Home Office guidance relating to the definition of imperative grounds of public security.
10. We should note at this stage that the respondent's representative before the First-tier Tribunal sought to withdraw the concession made in the decision letter that the appellant enjoyed the enhanced level of protection acquired by continuous residence of at least ten years on the basis that the relevant period here had been interrupted by a prison sentence. Reference is made to **MG (prison - Article 28(3)(a) of Citizens Directive) Portugal [2014] UKUT 392 (IAC)**. The First-tier Tribunal Judge found that the appellant was entitled to rely on this concession and proceeded on the basis that he could only be deported on imperative grounds of public security. We do not consider that she can be said to have erred in that respect. In any event, the respondent made no criticism of that paragraph in the grounds of appeal to us. It is argued instead that the judge erred in finding this criteria was not met in the circumstances of this case.
11. The judge found as a matter of fact that, notwithstanding the index offence and the current period of imprisonment, the appellant was integrated within the United Kingdom. She accepted that this was a very hard case. Prior to this conviction the appellant had been of good character apart from one police remand three years prior to the offence. She acknowledged that the appellant held wholly unacceptable and abhorrent views in relation to his behaviour towards the victim. On the other hand, she noted that the OASys assessment placed the appellant as a low risk of reoffending despite the fact that he needed to complete programmes that addressed the issues and factors which originally led him to committing this crime. However, because, as a young man, he did not understand where his thinking was wrong and thus refused to accept guilt, he was thereby prevented from taking part in courses that would provide an insight into that behaviour in order to address it.

12. She noted that criminal convictions alone do not constitute grounds for deportation and that the personal conduct of the individual concerned must represent “a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.” She also referred to the refusal letter which, she stated, suggested “the proposition that completion of the enhanced thinking skills, victim awareness course and sex offenders treatment programme could reduce the risk of reoffending in the future”.
13. Before us Mr Wilding for the respondent maintained that the First-tier Tribunal had erred in law. First there was a failure to recognise that the appellant will be on the sex offenders register for life and will remain on licence for a considerable period upon release. Those factors indicated that he is a present threat and thus the criterion in Regulation 21(5)(c) was plainly met. Further, that threat plainly affected a fundamental interest of society due to the serious nature of the crime committed and his continuing denial of responsibility. The appellant could not attend courses to address management of risk due to that denial and meant that he would not make positive progress with rehabilitation in the future. At paragraph 68 of the decision the reference to the appellant being a low risk of reoffending failed to take proper account of the appellant’s attitude in denying responsibility for the offence. That inevitably went to the issue of the level of threat he poses and is in effect ignored by the Tribunal.
14. Secondly it was submitted that the Tribunal had failed properly to deal with the issue as to whether there were imperative grounds of public security justifying deportation in this case. At paragraph 69 reference is made to the requirements of Regulation 21(5) but there is no analysis of imperative grounds of public security. In this case there was not only the commission of a very serious offence but the continuing denial of responsibility. This demonstrated that imperative grounds had been made out.
15. The appellant on his own behalf submitted a number of letters and testimonials from family and friends and a letter dated 15 February 2016 from his probation officer which appears to attest to the fact that the appellant has abided by the requirements of his licence since being released in December 2015. However, that material was not before the First-tier Tribunal and we cannot have regard to it. The appellant also stated that he maintained his innocence and, although he had applied for courses, he was unable to participate because of his denial. He had the support of his family in the United Kingdom.

Discussion and Decision

16. In relation to the First-tier Tribunal’s treatment of the issue as to whether the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, it is apparent that the Tribunal recognised that management of his risk both in prison and on release was rendered problematic because of his attitude to the offence which prevented him being accepted on courses

which might assist in the management of risk. However, the judge concluded at paragraph 68 that, because he “would remain on licence for a considerable period and remain on the sex offenders register, he will then have the support to access relevant programmes”. That appears to us to be simply an assertion. While he might have support to access programmes, there was no evidence before the Tribunal that he had been able to participate in any courses relating to risk or any real possibility that he would do so on release. His denial continued and with it the bar to acceptance into courses to address risk. Such a circumstance is central to the question of rehabilitation and goes to the heart of the question of the level of threat he poses. In circumstances where the appellant had failed to participate in treatment programmes, we consider that the Tribunal erred in law in failing properly to address the criteria in Regulation 21(5)(c) of the 2006 Regulations.

17. In relation to the respondent’s submission that the Tribunal failed to address the submission that imperative grounds of public security had been made out in this case, different considerations apply. This was a case in which it was accepted that the appellant had the benefit of the highest level of protection from deportation. Expulsion from the UK could not be carried out except on “imperative grounds of public security”. That presupposes not only the existence of a threat to public security but also that such a threat is of a particularly high degree of seriousness (see paragraph 20 of the opinion of the Grand Chamber in *P.I. v Oberbürgermeisterin der Stadt Remscheid* 2012 2 CMLR 13). At paragraph 33 the Grand Chamber emphasised that it is a matter for the national court to decide whether “particularly serious characteristics” are present justifying the conclusion that imperative grounds exist and that must involve the individual examination of the specific case before it. While the crime of which the appellant was convicted in the current case did not involve the aggravations present in *P.I.* (extreme sexual abuse of a child from the age of 8 over a period of year) or have any sort of organised criminal element, it remained one of considerable seriousness. As Mr Wilding pointed out, the judge did not give detailed reasons for the decision on this part of the case which demonstrates the sort of examination required was carried out (see paragraph 70).
18. Furthermore, while it is said there that all relevant factors were taken into account, the fact that the judge failed to have proper regard to the issue of rehabilitation, as set out in paragraph 16 above, means that we cannot conclude that there has been a balanced and complete appraisal of the specific circumstances of this appellant’s crime and his circumstances. We therefore cannot conclude that the Tribunal adequately addressed the question of imperative grounds. We find that there is a material error in law by the First-Tier Tribunal and we set aside that decision.

Re making the decision

19. We now consider the issue of disposal of the appeal. We propose to remake the decision flawed by error in the light of the facts found by the First tier Tribunal that were not affected by the error and any up dating evidence that the appellant had asked us to take into account that was not available to the Tribunal below. We consider that we can remake the decision without the need for further hearing. In our view, while the appellant's continued denial of guilt impacts adversely upon the risk he poses in the community, we have regard to the fact that he has remained out of trouble since his release, to the letters of support lodged on his behalf and in particular to the letter dated 15.2.2016 from his Probation officer and the letter dated 22.2.2016 from his former teacher with whom he has maintained contact and who supported him at the First tier Tribunal, all of which are positive and show reasonable prospects of rehabilitation. His probation officer confirmed that his conduct in prison was good, he had resided in Probation managed premises and engaged with his police offender manager and presented as "motivated to move forward with his life" and was trying hard to "get himself into the best possible position he can as regards to future education, training and employment." This is his only conviction and was imposed for an offence committed when he was a teenager. He is integrated into society in the UK. He has lived here since he was 2 years old. His first language is English. He has only visited Portugal three or four times. We have due regard to the seriousness of the crime for which he was sentenced as discussed below. There was no issue taken by the respondent as to integration.

20. We consider the issue of rehabilitation (C-145/09 **Land Baden-Wurtemberg v Tsakouridis** CJEU (Grand Chamber) 2010 and (MC (Essa principles recast) Portugal [2015] UKUT 00520 (IAC)) in terms of the relationship between present threat and factors relevant to rehabilitation. Whilst it is correct that the appellant has not attended rehabilitative courses we find that there is sufficient evidence before us to conclude that he has made progress in rehabilitation including during his imprisonment and on licence. The appellant did not fail to engage with rehabilitation courses. He applied for offence related courses but was not accepted on them. He completed one course Project 507 which involved some reflection on peer associations. There was a letter from the project leader which was quoted in by the Tribunal at [62], in particular .."I don't have any concerns about him being released ...I believe that he has learnt from past mistakes and has distanced himself from the negative people he once had around and is ready to start the rest of his life. I will also be around to offer support." We have evidence that he has completed various educational courses. We further find that this process will continue with the strong family and other support networks available to him, and which would not be present in Portugal. The appellant has complied with his conditions on release including a curfew, a restriction on contacting his co defendants and maintained contact with his probation officer. He has been restricted from taking up employment by his immigration conditions. The OYAS report was prepared in 2014 and whilst there has been no update since then, we place weight on the evidence from his probation officer as relevant to risk

of re offending. The appellant has made considerable efforts to rehabilitate and his removal to Portugal where he has no support, would be counterproductive. We apply the principles set out in regulation 21(5) of the 2006 Regulations. Looking at the appellant's personal conduct and our view that the conviction alone cannot justify the decision to expel him, his conduct does not in our view represent a sufficiently serious threat affecting a fundamental interest of society to justify his expulsion from the UK.

21. Further, the crime of rape of which he was convicted does not, in our view, meet the very high threshold required by regulation 21(4). We have rejected Mr Wilding's submission that the crime is so serious that it merits the severity criteria on its own. There are no imperative grounds of public security involved in this case. The offence itself was in respect of gang rape against a 16 year old girl by a group of youths of which the appellant was a member. It did not contain exacerbating circumstances beyond that. It was not carried out as part of any wider network of abuse or exploitation. It cannot be placed into the same category of offences as drug dealing as part of an organised group as used in the illustrations given at paragraph AG26 of the Advocate General's Opinion in *P.I* cited above and by the court at paragraph 15. It did not have the "particularly serious characteristics" required to fall within the concept of imperative grounds. We are satisfied that there was no evidence of exceptional seriousness of threat to the public that necessitated expulsion to protect the public interest. That objective can be attained by the appellant remaining in the UK where he is genuinely integrated and can reasonably be rehabilitated. The severity of the offence and the appellant's attitude do not make removal "imperative" in terms of public security.

22. We shall therefore remake the decision of the First-tier Tribunal and allow the appellant's appeal against the deportation order of 13 March 2015.

Notice of Decision

The appellant's appeal against the decision of the respondent dated 13 March 2014 is allowed.

No anonymity direction is made.

Signed

Date

The Hon. Lord Burns
Sitting as a Judge of the Upper Tribunal

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

Signed

Date

Lord Burns
Sitting as a Judge of the Upper Tribunal