



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/44379/2014

THE IMMIGRATION ACTS

Heard at Bradford

On 2 February 2016

**Decision &
Promulgated**

On 27 April 2016

Reasons

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

**AD
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Khan, instructed by Howells, Solicitors

For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, AD, was born in 1982 and is a male citizen of Poland. On 27 September 2013 at Leeds Crown Court the appellant was sentenced to 40 months on account of his conviction for dangerous driving, causing

grievous bodily harm to those injured in a collision, and driving whilst over the prescribed alcohol limit. He was disqualified from driving or obtaining a driving licence for a period of five years. On 29 October 2015, a decision was made to remove the appellant from the United Kingdom under Regulation 9 of the Immigration (European Economic Area) Regulations 2006. The appellant appealed to the First-tier Tribunal (Judge Kelly) which, in a decision promulgated on 12 June 2015, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are two grounds of appeal, supplemented by a third ground on renewal to the Upper Tribunal.

3. Ground 1:

The appellant asserts that the judge erred in law by finding that he represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society (Regulation 21 of the EEA Regulations). At [22], Judge Kelly found that the appellant was assessed by the Probation Service as “low risk of proven reoffending of any kind (violent or otherwise) within the next two years”. He went on, however, to find that

“If the possibility of the appellant being proved to have committed (that is to say been convicted of) the criminal offence is taken out of the equation, ‘full risk’ of him causing serious harm to the public rises to the level of high [page 43 of the OASys Report].”

The appellant also notes that Judge Kelly recorded the appellant’s “genuine remorse” for his offending and noted also that he had not had the opportunity to undertake a course to address “substance misuse”.

4. I find the text of Judge Kelly’s decision to be a little obscure in places but his reasoning is sound. As regards the OASys Report, the judge has looked carefully at this document and noted that, whilst the overall risk of reoffending or causing serious harm, may remain low such reports generally also consider the so-called “full risk” of harm; rates of conviction remain low and the OASys Report has considered the risk of harm to the public of the appellant reoffending rather than necessarily being convicted following such reoffending. I consider it was legitimate for Judge Kelly to make that assessment. Moreover, the assessment has been based upon the personal conduct of the appellant as Regulation 21(b) provides must be the case.

5. Secondly, the judge does indeed record the fact that the appellant was “very motivated” to address his offending behaviour [22] and also accepted the appellant had not had the opportunity to undertake a course to address his substance misuse. However, the grounds are misguided in suggesting that this was in some way a positive finding in the appellant’s favour in the judge’s consideration as to whether the appellant represents a genuine, present and sufficiently serious threat. Put bluntly, the appellant may well wish to address his substance misuse and it may not

be his fault that he has not had the opportunity to do so, but the fact remains that he has not addressed it. That is a fact going to his conduct and character which the judge was entitled to consider. It is also a “present” fact in the sense that, whilst he may in the future address his substance abuse, he has not yet done so and the level of the threat which he poses now is, as a consequence, greater.

6. Ground 2:

This ground asserts the judge has failed to give proper reasons for his decision. At [25], the judge wrote,

“Given my findings at paragraph 22 above, I am satisfied that the personal conduct of the appellant represents a genuine, present and sufficiently threat affecting the fundamental interest of society in maintaining law and order by removing foreign criminals.”

The findings at [22] were those just referred to above, namely the high “full risk” of the appellant causing serious harm to the public and the appellant’s failure (for whatever reason) to address his substance misuse. The grounds ask how Judge Kelly, having assessed the appellant as being at low risk of reoffending and being remorseful and generally motivated to seek to address his offending can possibly be a genuine, present and sufficiently serious threat. However, as I have noted above, the grounds here fall into the trap (possibly assisted by the manner in which Judge Kelly has chosen to express himself) of equating the appellant’s acceptance of problems and the need to address them with the purely objective assessment of the level of present threat posed by the appellant which Judge Kelly was required to undertake by Regulation 21.

7. The appellant also draws attention to Judge Kelly’s conclusion [28]:

“Albeit due to somewhat wider ranging considerations, I have thus ultimately come to precisely the same conclusion under Regulation 21 of the [EEA Regulations] as I did when considering the appellant’s case under Article 8 [ECHR]. My conclusion is that, in the particular circumstances of this appeal, the public interest in removing foreign criminals prevails over the rights and interests of the appellant and his family members.”

8. Judge Kelly has dealt with Article 8 first at [23] and has then moved on to deal with Regulation 21 at [24]. The last sentence of [28] which I have quoted above appears to be relevant to the assessment of proportionality under Article 8 rather than the factors which the Tribunal was obliged to consider under Regulation 21. Ms Khan referred me to the decision of the Court of Appeal in *Straszewski* [2015] EWCA Civ 1245 at [14]. Moore-Bick LJ held at [14] that “on the face of it, therefore, deterrence in the sense of measures designed to deter others from committing similar offences has of itself no part to play in the decision to remove the individual offender [under Regulation 21]”. In the light of that statement of the law, the last sentence of Judge Kelly’s decision is problematic. However, having read the determination as a whole, I find that Judge Kelly is either referring to

Article 8 in the last sentence of his decision or he is referring very generally to the law concerning the deportation of foreigners, either from other countries within the European Union or beyond, which he considers generally seeks to strike a balance between individual rights and the wider right of United Kingdom citizens in this country to be protected from criminality. I am not satisfied, as the appellant asserts, that the judge has departed from a proper consideration of the factors under the EEA Regulations at [28] notwithstanding the last sentence of that paragraph. I find that the judge has given adequate reasons for reaching his findings and I find that those findings are not perverse in the sense that they were open to him on the basis of the factual matrix in this appeal.

Notice of Decision

This appeal is dismissed.

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

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

Signed

Date 20 March 2016

Upper Tribunal Judge Clive Lane

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

Signed

Date 20 March 2016

Upper Tribunal Judge Clive Lane