



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

Appeal Number: DA/01328/2012

THE IMMIGRATION ACTS

**Heard at Nottingham
on 18th June 2013**

**Determination
Promulgated
On 18th June 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MOHAMMED SAID YUSUF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Pipe instructed by Rashid & Co Solicitors.

For the Respondent: Mrs Heath Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel for the First-tier Tribunal composed of First-tier Tribunal Judge Pooler and Dr Okitiker (hereinafter referred to as 'the Panel') who dismissed the appellant's appeal against the decision to deport him from the United Kingdom made on the 12th December 2012. Permission to appeal was granted on 13th March 2013.

Discussion

2. The appellant is a Dutch national born on the 9th June 1984. On 30th June 2011 he was convicted of robbery and sentenced to 32 months imprisonment. The sentencing remarks of HHJ Thomas are set out at paragraph 15 of the determination. In addition he has three adjudications whilst in detention.

3. The appellant has acquired a permanent right of residence in the UK [14] and so it was accepted he could only be removed on serious grounds of public policy or public security. Guidance on the correct approach to be taken in cases of this nature is to be found in BF (Portugal) v Secretary of State for the Home Department [2009] EWCA Civ 923. In that case the appellant, a citizen of Portugal, had acquired permanent residence. He was convicted of battery against his partner and sentenced to 42 months imprisonment. He could only be removed on serious grounds of public policy or public security. The Tribunal first had to determine the claimant's relevant personal conduct; secondly whether the conduct represented a genuine present and sufficiently serious threat; thirdly whether that threat affected one of the fundamental interests of society; and fourthly whether deportation would be disproportionate in all the circumstances. The Tribunal noted the evidence that the claimant had a high propensity to re-offend against the same victim and any new partner, but went on to find that the Secretary of State for the Home Department had failed to prove that there were serious grounds of public policy or security which made deportation proportionate. In remitting the appeal, the Court of Appeal said the Tribunal should have reached a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the hearing. The Tribunal had to decide whether there was a present serious threat and if so the extent of that threat.
4. The Panel determined the appellant's personal conduct in relation to the offence and developments since. The first element of the test was undertaken and no error is proved in relation to the same. The second part of the test required the Panel to determine whether the appellant's conduct represented a genuine present and sufficiently serious threat at the date of the hearing. It is this element which is specifically challenged by the appellant through Mr Pipe. The claim the decision was 'not in accordance with the law' was formally withdrawn by Mr Pipe.
5. The appellant has been assessed as presenting a low risk of reoffending in the NOMS report [A's bundle pages 72 and 77]. The sentencing judge treated the appellant as a man of previous good character. The Panel were aware of these factors but when assessing this second element found that the risk of re-offending was greater by reason of the appellant's proposed return to his former address, bearing in mind that he was susceptible to gang pressure in relation to the index offence whilst living there before.
6. There is reference to gang pressures in his home area which it is said the appellant resisted until he committed the robbery. He has not discussed his offending with his Offender Manager in detail and this has been held against him by the Panel. In a letter dated 4th February

2013 the appellant's Probation Officer, Ms Yorke, notes concerns about the appellant returning to his mother's house due to its location, especially as the appellant was coerced into offending by the negative peers living in the same vicinity. Ms Yorke states: "Therefore, should he be released to this address, it would be his responsibility to avoid negative associations to avoid the risk of re-offending."

7. The Panel found this relevant to their finding that the risk of re-offending was greater than that assessed but with no analysis in the determination of whether this was a factor taken into account in the NOMS assessment or why the risk should be greater than that assessed by experienced professionals in this area of work. Ms Yorke highlights the issue but there is no indication the Probation Service have revised the risk upwards as a result of his returning to his mother's address.
8. Mr Pipe also submitted that the appellant's intention was originally not to return to his mother's but to his girlfriend's so they could live together. That address was not suitable as a bail address but if released and the appellant lives elsewhere this element may be addressed in any event.
9. The Panel also seem to have placed weight upon the fact the appellant will be released and monitored at Level 1 of the MAPPA Scheme which they find reflects the risk assessment on the part of those responsible for public protection [36]. In paragraph 38 they state:

".....The risk of re-offending, while assessed as low, appears to us to be a significant risk for all the reasons which we have listed above (the appellant's attitude to his offending, his unchanged flawed thinking processes, his susceptibility to gang pressure and the assessment that he presents a medium risk of serious harm and needs to be on MAPPA Level 1)."

10. The Panel do not record that all those convicted of robbery are automatically placed on MAPPA Level 1 which is the lowest of the levels. This is not as a result of the appellant's specific attributes but because of the offence he committed. The Panel do note that an EEA national cannot be deported on the basis of past conduct even though they seem to have focused on his previous offending. In MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal said that "where regulation 21(3) applies to an individual (because he is an EEA national with a permanent right of residence but not a minor or long term resident) he may be removed as previously on the grounds that there is a risk of his committing further offences, with the proviso that the risk of harm must constitute serious grounds of public policy for his removal."

11. I find the Panel have legally erred in the determination in failing to make proper findings on the higher "serious ground" and in failing to provide adequate reasons, supported by the evidence, to justify their conclusions in light of the assessment as to risk of future harm. I accept the offence was serious and involved violence and was connected to gang pressures but the evidence was that the appellant had been subjected to other pressures from the gang in the past to sell drugs but had resisted. The Panel fail to give reasons for why he will no longer resist if released when he has in the past on all but one occasion. I accept the fact he has adjudications whilst in detention may be indicative of an attitude to authority which may be relevant to a propensity to re-offend and that his lack of empathy and refusal to discuss his offending has been noted, although he claims this is as a result of his shame at what he did. The determinative factor in the Panel's mind appears to be that fact he is returning to his mother's house where he lived when he committed the offence. I accept this is relevant but the evidence does not show that he will re-offend if there, just that circumstances may exist which could increase the risk of him doing so if he associates with the gang members and fails to resist pressure from them. The Panel needed to be satisfied the appellant's conduct represented a genuine, present and sufficiently serious threat. The fact something may happen in the future does not mean it will. The weight of professional evidence shows there is such a possibility without the appellant himself resisting but the risk of such conduct is not shown on the evidence to be genuine or present, without more, especially in light of his ability to avoid criminal acts resulting in conviction in the past.
12. I therefore set the determination aside. Both advocates accepted that if this was the case the appeal must be allowed which I accept is the only logical conclusion. I find the respondent has not discharged the burden upon her to show on the facts there is a genuine present and sufficiently serious threat. As such the decision cannot be proportionate either.
13. It is now up to the appellant. He resisted the pressure from the gangs in the past but on one occasion when he offended. He has shown he has the ability to stand firm and if he wishes to remain in the United Kingdom he must do so in the future.

Decision

14. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

15. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Signed.....

Upper Tribunal Judge Hanson

Dated the 18th June 2013