Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01541/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 25 February 2019	**On 10 April 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R B R
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Ms S Saifolahi, Counsel, instructed by Gulbenkian Andonian Solicitors

DECISION AND REASONS

1. The First-tier Tribunal made an anonymity order protecting the identity of the appellant's children and stepdaughter. It is not clear to me that they are a major part of the reasoning in the decision but neither do I see any public interest in their identities and I repeat the anonymity order made pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 but I emphasise it is only restricting anything that discloses the identity of the appellant's children and stepdaughter. The

appellant is not anonymised. Breach of this order can be punished as a contempt of court. I make this order to protect the privacy of children.

2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant" against the decision of the Secretary of State on 3 February 2017 to refuse him a registration certificate as confirmation of a right to reside in the United Kingdom.

3. The claimant is subject to a deportation order made on 11 January 2016 and served in August 2016. The claimant is an EEA national. He is a citizen of Portugal. At the risk of stating the obvious, the law concerning the deportation of EEA nationals is very different from that concerning foreign criminals and there are many hurdles that the Secretary of State must negotiate before an EEA national can be deported lawfully. The provisions derive from an EEA Directive but are put into English law by the Immigration (European Economic Area) Regulations 2006 and their successors the Immigration (European Economic Area) Regulations 2016. Both have played a part in this case but I am not aware of any material difference between their provisions in this case.

4. The claimant has been in trouble on many occasions. The First-tier Tribunal Judge referred, appropriately, to the claimant appellant having "an appalling criminal record". He first got into trouble in May 2002 for an offence of dishonesty. He then made court appearances at least once a year until 2009 when he was sent to prison for fifteen months. There was then a short interlude of apparently acceptable behaviour but he appeared before the Crown Court on three occasions in 2013 for different matters and was in trouble again in February 2015.

5. The First-tier Tribunal Judge allowed the appeal essentially for two reasons. First he decided that the claimant was entitled to the protection appropriate to someone who had resided in the United Kingdom for a continuous period of ten years, that is to say the decision could only be taken on "imperative grounds of public security" and additionally the judge decided that the claimant was not someone who "represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent." (Paragraph 83).

6. The Secretary of State must show that both findings were for some reason wrong before the decision can be shown to be materially in error.

7. I begin first with the finding that the decision could only be taken on "imperative grounds".

8. The judge's reasoning to justify this is skimpy. He says, simply, at paragraph 37 that:

> "the appellant falls under the category of 'imperative grounds of public security' because he has lived continuously in the United Kingdom for more than ten years."

This is clearly a gross simplification of the law. I was referred, for example, to the decision of the Court of Justice to the European Communities in **Franco Vomero (C-424/16)** which is reported at **[2018] 3 WLR 1035**. This confirms that the ten years'

residence must be lawful which will usually mean spent exercising treaty rights and that a period of imprisonment is likely to, but may not, interrupt the integrated process with the consequence that the protection is lost.

9. Ordinarily I would expect a First-tier Tribunal Judge to have gone to some length to explain a finding that a person was entitled to "imperative grounds" protection. On the facts of this case I do not criticise the judge for what might at first seem a rather casual approach. As is explained in some detail in the Rule 24 response, which was served very promptly by the claimant's solicitors, it was never argued before the First-tier Tribunal that the claimant had other than "imperative grounds" protection and it was very reasonable to assume that he did because that had been found in other cases and no reason had been given to suggest that it was still the case.

10. I also note with some surprise, not to say concern, that the Reasons for Refusal does not state clearly what degree of protection the Secretary of State considers the EEA national to have acquired. I find this a troubling omission because I cannot see how a decision can be reasoned properly without clear reference to the degree of protection that is appropriate. Generic quotations from large sections of the Rules are not an acceptable alternative to an unequivocal statement about which Rules are said to apply. Nevertheless the obligation on the judge was to make clear findings of fact which must be either reasoned or based on an identified express concession. There was no such concession here and there is no reasoning. I can sympathise with the claimant to some extent because he now finds the Secretary of State raising something rather emphatically that was not raised in the refusal letter or in the hearing and so it is a challenge that was with some justification unexpected. Nevertheless the First-tier Tribunal erred. There was no express concession and the skimpy reasoning that was given was inadequate to show proper consideration of the issues.

11. I agree with Mr Jarvis that the fact of further offending after earlier Tribunal decisions that the person is entitled to "imperative grounds" protection is sufficient reason to dislodge any presumption that the protection continues to apply.

12. However this does not dispose of the appeal. Whatever level of protection is appropriate the claimant cannot be refused a card unless the conditions of paragraph 27(5)(c) are satisfied, namely that "the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent".

13. The judge's finding that the claimant does not represent a present threat is based on several strands of evidence. First is the claimant's own evidence. A person can decide to stop committing offences and can resolve to live industriously and can be believed, although it would be bold, if not perverse, to believe an appellant who made such a claim, however sincerely expressed, if it is not supported by other strands of evidence.

14. The judge notices as well the claimant has been out of trouble since his release from prison in 2015. Whilst that is not an impressively long period of time it represents

quite an achievement for the claimant given his history. Obviously he knows that any further trouble at this stage of his dealings with the Secretary of State would impact very severely but given that he is characterised as being weak and easily influenced this period of good behaviour it is worth something and the judge has given it some weight.

15. Perhaps more importantly the judge gave weight to written evidence from two directors of the company that has employed the appellant knowing that he has a criminal record. The fact that he has thrown himself into a job and achieved sufficient respect to be given some modest responsibility is relevant. The judge noted at page 69 that "taking the evidence in the round, I find the [claimant's] steady employment and work commitment is a material change in his circumstances."

16. The judge also had regard to evidence from the claimant's mother and mother-in-law. The judge noted that neither of them were independent witnesses, although the mother-in-law could draw on experience from her experience as a foster mother of difficult children and the judge felt that her opinion in particular was worthy of some weight notwithstanding its lack of obvious objectivity.

17. There was also some support from a consultant clinical psychologist. The judge found that less than entirely satisfactory evidence but worthy of some weight because of the way it fitted in with everything else.

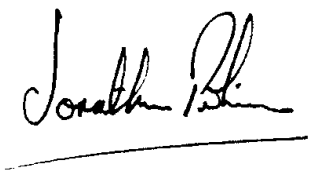
18. In short, the judge found that the claimant is not a present threat because he has undergone a change of heart which he has evidenced by his own conduct and which claim is supported by people who know the claimant. Anyone with any experience of the criminal justice system learns to be exceedingly cynical about claims of a new beginning but that is true sometimes. Most criminals eventually give up and start behaving properly.

19. Whilst the Secretary of State's grounds challenging the finding that the claimant was entitled to "imperative grounds" protection are made out, I do not accept the second ground which is characterised as "failing to provide adequate findings and/or resolve material issues" are justified. They are no more than a complaint about findings. It follows that the error is not material because the "other reason" for allowing the appeal has not been challenged successfully.

Notice of Decision

20. It follows therefore that I dismiss the Secretary of State's appeal.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 8 April 2019