ASYLUM AND IMMIGRATION TRIBUNAL

Heard at: Field House (by video link with Sheldon Court)
On: 24th October 2008

Before:

Senior Immigration Judge McKee

Between:

VB

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr A. Mahmood of counsel, instructed by Tanfields

For the respondent: Mr N.Smart, Senior Presenting Officer

1. *The respondent's power to deport an EEA national is governed by the EEA Regulations 2006, and is much more restricted than in an 'ordinary' conducive case. Only if satisfied that deportation is required on grounds of public policy or public security should the Tribunal go on to consider whether deportation would contravene the Human Rights Convention.*
2. *When a deportation appeal is being considered under paragraph 364 of the Immigration Rules (as amended from 20th July 2006), the Tribunal should consider whether deportation would be contrary to the Refugee or the Human Rights Convention before considering whether there are any exceptional circumstances which outweigh the presumption in favour of deportation. But when the appellant is an EEA national, his human rights should not be the first thing to be considered.*

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DETERMINATION

1. This is the reconsideration of an appeal against the respondent's decision on 3rd June 2008 to make a deportation order against the appellant, a Lithuanian citizen, who was sentenced to three years' imprisonment for offences involving the trafficking of women for prostitution. The Notice of Decision states that the appellant's removal under regulation 19(3)(b) of the EEA Regulations 2006 is justified on the grounds of public policy or public security because the appellant meets the criterion laid down at reg 21(5)(c) that "*the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.*" The 'Reasons for Deportation' letter notes that the appellant has been assessed as requiring the minimum level of Multi-Agency Public Protection Arrangements, and that the National Offender Management Service considers her to pose a low risk of re-offending and a low risk of harm to the public. Nevertheless, the author of the letter considers the appellant to be "*easily led*", and fears that she might be tempted back into re-offending.

2. That was not the view of a panel of the Tribunal comprising Designated Immigration Judge Garratt and Mr M.E. Olszewski, who heard the appeal at Bennett House on 4th August 2008. In a very thorough and careful determination, they took account of the Crown Court judge's sentencing remarks (which included a recommendation for deportation). HH Judge Ensor found the appellant to have been "*acting under very real pressure*" and to have been "*corrupted by despicable men*." The panel went on to assess the likelihood of the appellant's re-offending, and taking account both of the OaSys Report, which gave her "*the highest favourable rating possible*", and of the very positive assessments by the prison staff, as well as of the appellant's own evidence that she intended to live a decent life in the United Kingdom with her partner and her son and to steer well clear of anything connected with prostitution, the panel were satisfied that she did not pose a risk to the public. In particular, they were satisfied that the appellant did not "*represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.*"

3. The appeal was allowed "*on human rights and deportation grounds*", and this decision was challenged by the respondent, a review being ordered by Senior Immigration Judge Waumsley on 4th September 2008. The greater part of the grounds is taken up with the panel's decision that deportation would breach the appellant's Article 8 rights. According to paragraph 68 of their determination, it was only in case they were wrong about the human rights claim that the panel went on to consider, in the alternative, whether deportation would infringe the 2006 Regulations.

4. With respect, that was the wrong way round. The panel appear to have been influenced by the guidance in *EO (Turkey)* [2007] UKAIT 62, in which

the Deputy President explained that under the new version of rule 364 it would first have to be decided whether deportation would be contrary to either the Refugee or the Human Rights Convention, before considering whether there were any exceptional circumstances to rebut the presumption in favour of deportation. But that is the pattern to be followed in 'ordinary' conducive deportation appeals, which are governed by paragraph 364 of the Immigration Rules. Where the appellant is a European citizen, it is the EEA Regulations 2006 which govern the exercise of the power to deport. These are much more restrictive than the power under the Immigration Rules, and should be looked at before rather than after any human rights claim put forward by the appellant.

5. In the instant case, the grounds (which were adopted and advanced by Mr Smart) criticize the panel's assessment of proportionality under Article 8, and assert that this has affected their scrutiny of reg 21(5)(a) of the 2006 Regulations, which lays down the principle that "*the decision must comply with the principle of proportionality*." There is nothing in this contention. What is crucial to this appeal is the principle at reg 21(5)(c), already referred to above. This makes the risk of re-offending the central element in deciding whether a "*relevant decision*" was rightly taken. (There is, of course, case law such as *Marchon* [1993] Imm AR 384 which holds that a European citizen can be deported even in the absence of a propensity to re-offend, if the offence which he committed was sufficiently serious. But the seriousness of the offence in the instant case clearly does not reach that threshold.)

6. In ordering reconsideration SIJ Waumsley drew attention to *OH (Serbia)* [2008] EWCA Civ 694, which was not cited in the grounds for seeking a review but upon which Mr Smart understandably placed reliance. In that appeal against deportation, the appellant was found not to pose a significant risk of re-offending, but the Court of Appeal held that the Tribunal was wrong to allow the appeal simply because of that. The panel should have paid attention to the guidance in *N (Kenya)* [2004] EWCA Civ 1094, which includes the proposition that, in the case of very serious crimes, the risk of re-offending is not the most important facet of the public interest. Other important facets include the need to deter foreign nationals from committing serious crimes, the expression of society's revulsion at serious crimes, and the building of public confidence in the treatment of those foreign citizens who have committed serious crimes.

7. Both *N (Kenya)* and *OH (Serbia)*, however, are concerned with 'ordinary' deportation appeals where the Tribunal has to apply paragraph 364 of the Immigration Rules. As Mr Mahmood for the appellant pointed out, the principles in reg 21(5) of the EEA Regulations are quite the opposite of those emphasized by the Court of Appeal. Far from warranting a decision to deport in order to build public confidence, reg 21(5)(b) states that "*the decision must be based exclusively on the personal conduct of the person concerned.*" Far from warranting a decision to deport in order to deter others, reg 21(5)(d) states that "*matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision.*"

8. It is not argued for the respondent that the panel were not justified in their assessment of the appellant as posing no present or future risk of re-offending. The seriousness of the crime committed by the appellant falls well below the crimes featuring in cases like *Marchon* and *Schmelz* [2003] EWCA Civ 29, where the Court of Appeal held that the deportation of European nationals was justified even in the absence of any propensity to re-offend, and which in any event pre-date the 2006 Regulations. In the instant case, the panel were fully entitled to find that the appellant does not "*represent a genuine, present and sufficiently serious threat*" such as to justify her deportation. There was in fact no need for the panel to find, as they did, that deportation would also be a disproportionate interference with the appellant's family life in the United Kingdom.

DECISION

The Tribunal's determination allowing the appeal is ordered to stand.

Richard McKee

26th October 2008