Upper Tribunal
(Immigration and Asylum Chamber)

RK (Deportation: basis of plea) Albania [2014] UKUT 00084 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **Determination given orally at hearing. Promulgated on**

On 17 December 2013

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Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

R K

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Ms A Smith, instructed by Turpin & Miller Solicitors (Oxford)

For the Respondent: Mr P Deller, Home Office Presenting Officer

Where a deportation decision is based solely on a conviction following a plea of guilty, it is not for a Tribunal to reach its own view of the facts underlying a conviction based on a basis of plea save perhaps in very exceptional circumstances.

DECISION AND REMITTAL

1.
The appellant is a person who is married to a British citizen and has two children, both of them resident in the United Kingdom. He himself has been granted indefinite leave to remain as a spouse.

2.
Following his arrest on a charge of conspiracy to supply a Class A drug, namely cocaine, he maintained his innocence until the beginning of his trial. He then pleaded guilty. A basis of plea was agreed between the Crown and the Defence, and in due course the appellant was sentenced to forty-three months imprisonment. There has been some doubt about the terms of the sentence because the

judge originally imposed a longer term but having identified the appellant's role as a lesser one, was persuaded very shortly after imposing the sentence to modify it to the term that we have indicated.

3.
The effect of the sentence of that length, that is to say forty-three months, was that he fell for consideration for deportation under the automatic deportation provisions of the UK Borders Act 2007 and because his sentence was more than one and less than four years, he fell within that category for consideration in relation to the provisions of paragraph 398(b) of the Statement of Changes in Immigration Rules , HC 395. The Secretary of State relied on the conviction and having taken into account the appellant's family circumstances decided that he should be deported in accordance with the provisions of the 2007 Act and made the appropriate order. Against that order the appellant appealed to the First-tier Tribunal constituted with a judge of that Tribunal and a lay member. The Tribunal dismissed his appeal. The appellant now has permission to appeal to this Tribunal. There are a number of grounds; we deal only with the first.

4.
The Tribunal heard evidence from the appellant which related in part to his role in the conspiracy which had formed the basis of his plea and conviction. The Tribunal notes in its determination as follows at paragraph 33:

"At an early stage in the appellant's oral evidence the panel indicated that it was unhappy about the level of information provided by the appellant about his involvement in conspiracy to supply Class A drugs".

5.
The result of that expressed concern does not appear to have been any application for an adjournment in order to obtain further evidence or instructions but the appellant's counsel, experienced in immigration matters, led evidence relating to the appellant's role in the conspiracy. The evidence was to all intents and purposes precisely that which had formed the basis of plea. Nevertheless the Tribunal considered that it ought to take a different view about the role of the appellant, taking into account what it had been told and also to an extent what it had not been told.

6.
The relevant ground of appeal to this Tribunal is that when a person had been sentenced based on a basis of plea it was wrong for the Tribunal to attempt to go behind the facts which had been agreed between the Crown and the defence on that occasion and instead reach a view of its own. In the Secretary of State's Rule 24 response to the grounds and the grant of permission it is pointed out that for the purposes of a deportation appeal the standard of proof is lower than would be required in a criminal court and it may be that a Tribunal considering a deportation appeal may find certain facts in addition to those which formed the basis of a sentence or indeed of a conviction by a jury.

7.
We are clearly of the view that it is not for a Tribunal to reach its own view of the facts underlying a conviction based on a basis of plea save perhaps in very exceptional circumstances, none of which arise here. The position was, as we have said, that the Secretary of State's decision to make a deportation order against the appellant was made on the basis of his conviction. No doubt it might have been open to the Secretary of State to rely on other matters as well, for example in a different case, continued association with known drug dealers. Nothing of the sort appears here. The basis for the deportation decision was the conviction. The conviction was on a plea of guilty on a basis agreed between the prosecution and the defence and approved by the judge.

8.
It is clear beyond any doubt that a basis of plea is not to be on a misleading or untrue set of facts and that a basis of plea does not bind the judge unless he decides to accept it and sentence on the basis of it. It is also clear that any doubts the judge may have about the basis of plea can be resolved by a Newton hearing: that is a reference to R v Newton [1982] 77 Cr. App. R 13 CA. Those principles were set out most recently in R v Cairns [2013] EWCA (Crim) 467 but there is no suggestion that that decision incorporates any new law. The position is that the judge must have accepted that the basis of plea was true and contained all he needed to know for the purposes of sentence. The position is underlined by the decision of Foskett J in Ngouh v SSHD [2010] EWHC 2218 (Admin) where the judge noted that in the case before him a version of facts had been adduced in evidence which was rather different from that in a previous basis of plea but he said that

"Whilst this is a matter of some concern, where a 'basis of plea' has been accepted and acted upon by a court, it would be unfair for a different version to be adopted for any other purpose".

Where a deportation decision is based solely on a conviction, the deportation hearing, if there is one, must accept the facts which were the basis of the sentence.

9.
It may be that there are circumstances in which other matters would fall for consideration. The starting point we would suggest is likely to be the reliance on other matters by the Secretary of State for the purposes of justifying the deportation decision. There may be other types of case which will fall for consideration if they arise but for present purposes we are entirely satisfied that the First-tier Tribunal was not entitled to proceed as it did. Its determination therefore discloses a clear error of law.

10.
In the circumstances the appeal will have to be reheard. The evidence as a whole is affected by the Tribunal's interest in what it regarded as the true facts behind the appellant's conviction. We have therefore decided in the light of Practice Statement 7.2 that this is an appropriate case for remittal to the First-tier Tribunal for a fresh hearing. Ms Smith who appears for the appellant before us does not suggest that any factual findings should be retained. She is right to take that line, the First-tier Tribunal must be at liberty to consider all the relevant evidence as it applies at the date of the new hearing.

11.
Because the matter is to be reheard, and to be reheard on the basis that the facts behind the appellant's conviction are those accepted by the judge, we do not express any view on the other grounds of appeal. They raise matters on which it might be said that the First-tier Tribunal was or would be entitled to reach the view it did. So far as the proceedings in this appeal are concerned, it is clear that a new judgement will have to be made which may or may not include any similar findings.

12.
As we have said, the appellant has children in this country. For the purposes of this appeal, that is to say the appeal to the Upper Tribunal, we order that no person shall disclose any information likely to lead to the identification of any member of the appellant's family. Whether such an order is made by the First-tier Tribunal in due course after its rehearing of the appeal, we leave to be decided by that Tribunal.

13.

For the reasons we have given, therefore, this appeal is remitted to be heard afresh by the First-tier Tribunal, constituted with neither of those who took part in the original appeal.

C M G OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 27 January 2014