Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00506/2019
EA/04005/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 10 December 2020	**On 30 December 20210**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EG
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr R Parkin, counsel, instructed by Rashid & Rashid Solicitors

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal L K Gibbs ("the judge") who, in a decision promulgated on 29 January 2020, allowed the appeal of EG ("the respondent") against the decisions of the Secretary of State for the Home Department ("the appellant") dated 30 September 2019 (although served on 4 October 2019) to make a deportation order against the respondent in accordance with Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and to refuse the respondent's protection and human rights claim, and the decision dated 12 July 2019 to refuse his application for a permanent residence card pursuant to Regulation 24(1) of the 2016 Regulations.

Background

2. The respondent is a national of Albania born in 1979. He entered the UK on 23 July 2002 and made an asylum claim in a false identity claiming to be a Serbian national. His application was refused and an appeal dismissed in 2003. On 5 June 2009 the respondent married ML, a Lithuanian national exercising EEA Treaty rights in the UK. On 22 February 2010 the respondent was issued with an EEA residence card based on his marriage. On 20 February 2015 the respondent applied for a permanent residence card.

3. On 11 September 2015 the respondent was convicted on three counts of having concealed or disguised or converted or transferred or removed criminal property, and one count of possession of a class A controlled drug. He was sentenced on 25 September 2015. In respect of the first two counts he was sentenced to concurrent terms of 4 years imprisonment, and in respect of the third count a term of 7 years imprisonment, to be served concurrently. He received a concurrent sentence of one month for the drugs offence.

4. The respondent's application for a permanent residence card was refused on 10 December 2015 but was reconsidered following an appeal to the First-tier Tribunal in 2017. The refusal to issue the respondent with a permanent residence card was maintained in the decision dated 12 July 2019. On 3 June 2016 the respondent made an asylum and human rights claim. The asylum and the human rights claims were refused at the same time as the respondent's decision to make a deportation order and the details of the refusal are contained in a decision headed "Decision To Make A Deportation Order" dated 30 September 2019. The respondent exercised his right of appeal both in respect of the decision to make a deportation order/refusal of protection and human rights claim (pursuant to Regulation 36 of the 2016 Regulations and s.82 of the Nationality, Immigration and Asylum Act 2002), and in respect of the refusal to issue him with a permanent residence card (pursuant to Regulation 36 of the 2016 regulations).

The decision of the First-tier Tribunal

5. The judge heard both the deport/protection/human rights appeal and the appeal against the refusal to issue the permanent resident card together. The judge heard oral evidence from the respondent and his wife and considered a bundle of documents provided by the appellant and two bundles of documents provided by the respondent.

6. The judge noted the acceptance by the appellant that the respondent had acquired a right of permanent residence and that his deportation had to be justified on "serious grounds of public policy" (pursuant to Regulation 27(3) of the 2016 Regulations).

7. At [7] the judge set out at length the Sentencing Judge's sentencing remarks. The Sentencing Judge was satisfied that the respondent had a leading role in laundering the proceeds of the sale of drugs, that the respondent's activities were "relatively sophisticated" and included "cross-border activity", that "significant amounts of money were involved", and that the respondent allowed himself "to become involved in these events by reason of greed."

8. At [8] the judge summarised the appellant's concerns, as set out in her decisions dated 12 July 2019 and 30 September 2019, relating to the respondent's offending, noting in particular that the offences for which the respondent was convicted were "serious" and that the Sentencing Judge repeatedly commented on the seriousness. The judge stated:

> "Although the [appellant] has taken into account the fact that the [respondent] does not have an extensive criminal record and his risk of reconviction has been calculated as low, the [appellant] is satisfied that the serious harm which would be cause as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for the [respondent] to reoffend."

9. From [6] to [14] the judge sets out the appellant's position in detail. The appellant was not satisfied the respondent had attended any offence-related rehabilitation courses whilst in custody (at [9]) or that there was sufficient evidence that he had fully and permanently addressed all the reasons for his offending behaviour.

10. At [17] the judge found that the respondent had a genuine and subsisting relationship with his wife and children and that it was in the children's best interests for the family unit to remain intact. At [19] to [24] the judge considered and rejected the respondent's asylum claim. there has been no cross-appeal in respect of this finding.

11. At [25] it was noted that the respondent continued to deny his culpability for the offences of which he was convicted and that he blamed his previous legal

representatives, the court interpreter and the Sentencing Judge's conduct, although there was no evidence of any professional complaints and the respondent's appeal against conviction had been unsuccessful. At [26] the judge stated:

> "Further, given my above findings regarding the [respondent's] credibility I find that the [respondent] remains a man who cannot be trusted and who is willing to act dishonestly if he perceives his actions to be in his best interests…"

12. At [27] the judge stated:

> "However, balanced against these concerns is the OASys report. I am satisfied that this was prepared by a person expert in such matters, in the knowledge that the [respondent] continued to deny his culpability and yet it was found that he presents a low risk of reoffending. Further, with regards to rehabilitative courses whilst in prison I find that the reason that the [respondent] has not produced evidence is such is because [*sic*] he was not considered in need of such:
>
> > "Mr G's OASys does not provide any specific target in order to assess his offending. In light of this, he has been referred to education for the drug and alcohol awareness course (on waiting this) and employability (currently attending the business venture course)." (Review of Adult Male Categorisation, p.307 Appellant's Bundle)."

13. At [28] the judge asked herself whether the respondent was entitled to a permanent Residence Card or whether his deportation was justified on serious grounds of public policy, noting that the burden of proof was on the appellant and the standard was the balance of probabilities.

14. At [29] the judge stated:

> "I find that the [appellant] relies solely on the seriousness of the [respondent's] criminal convictions in reaching the decision that he presents an ongoing threat to the public because of the serious harm that would be caused were the [respondent] to re-offend. The [appellant] also relies on a lack of evidence of rehabilitation courses (which I have considered above) although at the same time accepting that even if the [respondent] had provided such it would not have persuaded him…."

15. At [30] the judge stated:

> "I find that the [respondent] is a man of previous good character. It appears that, purely for personal gain, he chose to involve himself in a serious and organised criminal operation without any regard to the consequences for his family or the harm that his conduct would cause to the general public. Further, I find that he is a man whose honesty has been found wanting in the Crown Court, and who continued, before me, to lie. However, I understand that he wants to be able to remain in the UK with his family, and that he does not want to be responsible for forcing his family to leave the UK. Although this does not excuse his conduct it

> does, in my view, mitigate his actions before me, in so far as I find them relevant to the risk that he currently presents to the public."

16. At [31] the judge found that the OASys report carried "very significant weight" in her assessment of the risk posed by the respondent to the public given that it was prepared by a professional expert in such work and that its conclusion that the respondent presented a low risk of reoffending took into account the respondent's refusal to accept responsibility for his actions. The judge noted that the respondent had not committed any offences since leaving prison in March 2019, that he had returned to his family and that his family's well-being was his "primary focus." The judge was also satisfied that both "the term of imprisonment" and the threat of deportation would have a deterrent effect on the respondent in the future.

17. At [32] the judge stated:

> "I find that Schedule 1(3) of the 2016 Regs is clear that a person who has committed numerous criminal offences is likely to present a greater threat to society, and I am satisfied that the appellant is not such a person. Further, deportation cannot be justified under European Union law for reasons of public revulsion at acts or crimes committed (SSHD v Straszewski [2015] EWCA Civ 1245)."

18. At [33] the judge concluded:

> "Based on these findings I am not satisfied that the [appellant] has persuaded me, to the civil standard, that the [respondent] represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (taking into account that the risk need not be imminent). I am therefore satisfied that the [respondent's] deportation is not justified on serious grounds of public policy and public security in accordance with Regulation 23(6)(b) and Regulation 27 of the EEA Regulations."

The challenge to the judge's decision

19. The Grounds of Appeal, amplified by Ms Isherwood during the remote hearing, take issue that the judge's conclusion that the respondent did not present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

20. The appellant contends, firstly, that the judge's decision was inadequately reasoned as she failed to take account of the harm that would be caused by the respondent if he did re-offend, citing in support **Kamki v SSHD** [2017] EWCA Civ 1715.

21. Secondly, the appellant contends that the respondent's inability to comprehend that he did anything wrong and the motivation of greed suggests he would not address his behaviour and would therefore remain a threat to society.

22. Thirdly, the judge's assertion that the respondent only relied on the seriousness of the respondent's convictions failed to take account of the respondent's conduct both during the commission of the offences and since, a point raised at paragraph 20 of the deportation decision dated 30 September 2019.

23. Fourthly, the judge only referred to part of Schedule 1(3) and failed to give reasons why the respondent did not fall within the terms of the provision.

24. Fifthly, in relation to the judge's finding that the respondent did not provide evidence of rehabilitation because none was required, reference was made to Schedule 1.5 which provided that the removal of a family member of an EEA national who was able to provide substantive evidence of not demonstrating a threat was less likely to be proportionate.

25. Ms Isherwood submitted that the aforementioned errors affected the determination as they went "to the heart of the matter."

Discussion

26. Regulation 27 of the 2016 Regulations provides, so far as material:

> **Decisions taken on grounds of public policy, public security and public health**
>
> (1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
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> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) **A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security**.
>
> (4) …
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;
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> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) **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**;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision;
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.
> …
> (8) A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.). **[Emphasis added}**

27. Schedule 1 of the 2016 Regulations reads, so far as material:

> **Considerations of public policy and public security**
>
> **1** The EU Treaties do not impose a uniform scale of public policy or public security values: member States enjoy considerable discretion, acting within the parameters set by the EU Treaties, applied where relevant by the EEA agreement, to define their own standards of public policy and public security, for purposes tailored to their individual contexts, from time to time.
>
> …
>
> **3** Where an EEA national or the family member of an EEA national has received a custodial sentence, or is a persistent offender, the longer the sentence, or the more numerous the convictions, the greater the likelihood that the individual's continued presence in the United Kingdom represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society.

28. In **Mukarkar v SSHD** [2006] EWCA Civ 1045 (at [40]), and more recently in **AA (Nigeria) v SSHD [**2020] EWCA Civ 1296 at [41]), the Court of Appeal emphasised that it is not permissible for a Tribunal to interfere with a decision merely because it would have reached a different conclusion.

29. I am not persuaded that the first ground is made out. To the extent that the appellant contends that the OASys report failed to take account of the harm that would be caused by the respondent if he does re-offend, this is inaccurate. At

page 26 of 32 the author of the OASys report found that the respondent's offence was not indicative of a risk of serious harm. This sits in stark contrast to the situation in **Kazmi** where the OASys report found that, although Mr Kazmi's risk of re-offending was low, the harm that would be cause if he did re-offend "would be very serious" so that there was overall "a high risk of harm to vulnerable females". To the extent that the grounds contend that the judge failed to take account of the harm that may be caused should the respondent's re-offend, this is not supported by reference to the decision itself. The judge was demonstrably aware of the appellant's concerns relating to the possibility that, if the respondent did re-offend, his offending may cause serious harm (e.g. [8], [29]). Moreover, the extensive citation of the Sentencing Judge's remarks indicate that the judge was acutely aware of the seriousness of the respondent's offending and the effect this would have on the public. Given the conclusions of the OASys report the decision does not disclose a failure by the judge to consider the seriousness of the consequences if the respondent did re-offend.

30. The second ground amounts to a disagreement with the judge's assessment of whether the respondent's conduct represent a genuine, present and sufficiently serious threat affecting the fundamental interests of society. Neither the written ground nor Ms Isherwood in her submissions suggested that the judge's decision was irrational in a **Wednesbury** sense. The judge was clearly aware that the respondent continued to deny his culpability, that his motivation for his offending was greed, and that he had lied about his asylum claim, but she was entitled to rely on the conclusions of the OASys report, which was prepared by a professional Offender Supervisor, that the respondent was at low risk of re-offending, and that the term of imprisonment and the threat of deportation had a sufficient deterrent effect on him such that he did not present a genuine, present and sufficiently serious threat. The respondent disagrees with this finding, but it was not one outside the range of findings rationally open to the judge and she supported her conclusion with adequate reasons.

31. The third ground is difficult to comprehend. It claims that the judge failed to take account of the respondent's conduct during and since the commission of his offences and relies on paragraph 20 of the Decision to Make Deportation Order in support. This paragraph however sets out the general principles contained in Regulation 27 of the 2016 Regulations (set out above at paragraph 26 of this decision) but does not identify aspects of the respondent's conduct that the judge allegedly failed to take into account. The appellant has failed to identify, both in the grounds and in the Presenting Officer's oral submissions, what factors the judge failed to take into account. This ground is not made out.

32. In respect of the fourth ground, I accept that the judge only referred to part of Schedule 1(3) of the 2016 Regulations. This Schedule relates both to persistent offenders and to those who have received custodial sentences. At [32] the judge only refers to persons who have committed "numerous criminal offences". She fails to note the respondent's position that the longer a sentence the greater the

likelihood that the person's continued presence represents a genuine, present and sufficiently serious threat affecting of the fundamental interests of society. I am not however satisfied that this error is material. This is because the judge was clearly aware of the length of the respondent's sentences [[6], [17], [18]), and she expressly factored this into her assessment (at [31] the judge refers to the respondent's "term of imprisonment" and takes that into account when assessing the threat he poses to society). It was ultimately a matter for the judge to determine the nature and seriousness of any threat posed by the respondent and she had to be satisfied that there were serious grounds of public policy and public security requiring the respondent's deportation. She took into account the length of the respondent's sentence and she gave legally sustainable reasons for concluding that the respondent's primary focus was now the wellbeing of his family [31] and that, by reference to both the OASys report and his term of imprisonment, the respondent was sufficiently deterred from committing further offences such that his conduct did not represent a genuine, present and sufficiently serious threat [supra]. The judge therefore took account of the consequences flowing from the length of the respondent's sentence in her overall decision.

33. The fifth ground relates to the judge's approach to the issue of rehabilitation. Schedule 1(5) of the 2016 Regulation relates to the assessment of proportionality of a proposed removal in the context of EEA decisions, not with whether the person who is the subject of the removal decision constitutes a present, genuine and sufficiently serious threat. But in any event, the judge properly noted, at [27], and with reference to the OASys report, that the respondent was not considered in need of rehabilitative courses. Moreover, the judge properly noted and was properly entitled to place weight on the conclusions of the OASys report which took into account the respondent's continued denial of culpability but which nevertheless found that he was at low risk of re-offending. I find this ground is not made out.

34. I can only interfere with the judge's decision if the decision discloses an error of law that requires the decision to be set aside (i.e. is material). I cannot overturn the decision simply because I may disagree with it. Whilst another judge may have reached a different conclusion, I am not satisfied that this judge's conclusions were marred by legal error.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law requiring it to be set aside.

The Secretary of State for the Home Department's 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 in this appeal (EG) is granted anonymity. No report of these proceedings shall directly or indirectly identify EG or any member of EG's 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: *D.Blum* date: 11 December 2020

Upper Tribunal Judge Blum

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email