



**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: DA/00241/2019  
(V)

**THE IMMIGRATION ACTS**

**Remote hearing  
On 2 February 2021**

**Decision & Reasons  
Promulgated  
On 3 March 2021**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR TOLULOPE EMAUEL ANTONIO TIWO  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant/Secretary of State: Mr C Howells, HOPO

For the Respondent: Mr G Lee, Counsel instructed by Vincent solicitors

**DECISION AND REASONS**

1. The Respondent is a citizen of Italy. His date of birth is 12 October 1993. I shall refer to him as the Appellant as he was before the First-tier Tribunal.
2. The Appellant came to the United Kingdom in 2006 with his mother and sisters. He has a history of committing criminal offences. He has 11 convictions for 21 offences. On 17 August 2019, the Appellant

was convicted of possession with intent to supply class A drugs ("index offence") and sentenced to four years imprisonment. As a result of his criminality the Secretary of State made a decision to deport him under Regulation 24 (6) (b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The Appellant appealed against the decision. His appeal was allowed by Judge of the First-tier Tribunal Taylor in a decision dated 8 July 2019, following a hearing at Hendon Magistrates' Court on 8 July 2019. The Secretary of State was granted permission to appeal by Upper Tribunal Judge Kekic on 10 March 2020. Thus, the matter came before me to determine whether the First-tier Tribunal judge erred.

3. It was accepted by the Secretary of State that the Appellant has permanent residence. The First-tier Tribunal rejected the Appellant's case, that he was entitled to the highest level of protection under the 2016 Regulations.
4. The judge said at [23] that the Appellant "has a poor and escalating criminal record.", noting that his criminal behaviour started in 2013 and that he continued to offend while subject to suspended sentence and that he had failed to comply with an unpaid work order. The Judge said that the escalating behaviour continued in 2016. He described the Appellant's record as "sorry and regrettable". He noted that that sentencing judge referred to the Appellant being a "street trader" and having a "significant role" in the supply of drugs and that the Appellant had "tried to lie his way out of his responsibility." The judge said that the offence committed "has a profound affect on United Kingdom society in particular to the lives of those who become addicted. He found that "the Appellant was significantly involved in supply and therefore his presence in the United Kingdom was clearly detrimental to United Kingdom society".
5. The judge directed himself at [24], that he must be satisfied that the Appellant represents a genuine, present and sufficiently serious threat to United Kingdom society, applying the serious grounds test. At [24] he recorded the Appellant's evidence that he had had time to reflect in prison and that he was now older and wiser and that he would not revert to his previous ways. The judge said at [24] "I note that the appellant was arrested in August 2016, some three years ago, and the appellant is now aged 25, having spent three years in prison". He noted that he was waiting to be released on licence pending confirmation of a suitable address. The judge had evidence that the Appellant had completed a number of educational courses while in prison and that he had been tested negative for drugs and attended alcohol and drug awareness courses. The judge found that, "the appellant has positively used his time to attend and complete courses while in custody"
6. There was a recent OASys report before the Tribunal which the judge said "confirms that the appellant now recognises the impact of his

offending on society and notes that there had been no issues while he has been serving his sentence. There has been no disruptive behaviour while in prison and he was not considered to be a risk to other prisoners". The judge found that the Appellant had been "compliant with the regime" when in prison.

7. When considering the OASys report the judge said that the Appellant "had a good network with his friends and family who were a positive influence." The judge said that the report "indicates that there was a low risk to children, adults and staff and a medium risk to the public, which is defined as a potential risk if there was a change of circumstance. In particular, the OASys report concludes that the appellant had one (sic) well in custody, he had worked hard on his rehabilitation of his own accord"
8. At [25] the judge turned to the evidence of the Appellant's mother and sisters. They attended the hearing and gave live evidence. They were of the view that the Appellant has "significantly changed" and had "realised the error of his previous ways and that they would advise and assist him in his rehabilitation if he was permitted to remain". The judge concluded that he was "satisfied that the appellant has a supportive family who would minimise the risk of him reverting to his previous ways if he was permitted to remain."
9. At [26] the judge concluded that as follows  
"... [A]pplying Regulation 27 (5) (c) to the higher test of serious grounds, I cannot be satisfied that the appellant represents a present and sufficiently serious threat to the fundamentals of society. The appellant has a number of previous convictions, applying 27 (5) (d) and (e) general prevention cannot justify deportation, and although the appellant has a significant criminal record, the most recent offence is almost three years old that (sic) the appellant has submitted significant evidence of rehabilitation. Applying the principle of proportionality, and Regulation 27 (6), the appellant is no aged 25, he has lived in the United Kingdom since the age of 13, he states that he has no family to return to in Italy, and I have accepted that he has a supportive family in the United Kingdom. Taking all of the factors into consideration I do not consider that the test of serious grounds of public policy or security is met with regard to this appellant"

### **The grounds of appeal**

10. There is one ground of appeal which is entitled "Misdirection in law". It is asserted that the judge did not have regard to the factors in Schedule 1 of the 2016 Regs. The judge did not consider the seriousness of the consequences of reoffending in line with Kamki [2017] EWCA Civ 1715.

11. The judge “makes much “of the fact that the Appellant has not reoffended however, “at best this is a neutral a neutral consideration “. The Appellant has been in prison or immigration detention since 2016 and therefore his behaviour in the community is untested.
12. There is no finding that the Appellant has “cut ties with his former associates” and that this puts him in danger of relapsing into criminal behaviour. While the judge found that the Appellant has a supportive family, it has failed to prevent him offending in the past.
13. The Appellant is said to present a high risk of re-offending and a medium risk to the public. The judge failed to consider adequately the probation officer’s assessment, and this is an error. There is no reasoning as to how the courses that the Appellant undertook while in custody demonstrate that he is rehabilitated. No reasoning is given as to the Appellant’s remorse or whether he has taken responsibility for his offending since he and his co-defendants attempted to lie their way out of responsibility.
14. The Appellant remains a serious threat to the fundamental interests of society, particularly in respect of sections 7 (b), (c), (f), (g) and (h) of schedule 1, which the judge has failed to consider.
15. There was a skeleton argument prepared by Mr C Bates dated 21 October 2020. The submissions in summary are that the judge did not consider the credibility of the family members who gave evidence in the light of the fact that the Appellant’s sister Daniella, claimed not to be aware of the severity of the Appellant’s criminal activity which is not the same as not being aware of his criminality. The Appellant’s sister Mercy claimed to be unaware of the Appellant’s behaviour notwithstanding the shared family unit and his important role to her. The finding that the supportive family would minimise the risk of re-offending is inadequately reasoned. The judge did not make a finding about the pro-criminal peer group and whether the reference to the “good network with friends and family” represented a different group.
16. The OASys report risk assessment is based on the mitigating factors of being subject to various safeguards and being in a controlled environment.

### **Submissions**

17. In oral submissions Mr Howells said that the key findings are at [26]. The judge was swayed by the Appellant having remained out of trouble for three years, but during this time he was in custody. The reasoning for finding that the Appellant is rehabilitated is inadequate. The judge did not apply schedule 1 of the regulations. He accepted that the grounds did not take into account the recent OASys. The recent OASys assessed the Appellant as being at low risk of re-offending and at medium risk to the public. On this basis Mr Howells

accepted that the ground relating to the OASys was undermined to a certain extent. However, the Appellant's criminality is escalating, and he is assessed as posing a medium risk of harm should he reoffend. The judge erred in giving the Appellant credit for remaining out of trouble for three years. The judge did not take into account the history of re-offending. There is no finding that he has severed links with the negative peer group whom he blamed for his criminality. While the judge attached weight to the Appellant's supportive family as a rehabilitative factor, he failed to take into account that he had lived with them when offending and they failed to prevent this. The judge did not explain why the courses that the Appellant undertook in prison supported rehabilitation.

18. Mr Lee relied on his reply to the Respondent's skeleton argument. There is no error of law. The grounds are unmeritorious. He relied on VHR (Unmeritorious grounds) Jamaica [2014] UKUT 00367. The decision was open to the judge on the evidence. He took into account a number of factors including the more recent OASys report.
19. The Home Office Presenting Officer accepted that the evidence of the family members was genuine. The findings were open to the judge. The evidence before the judge was that the Appellant was addicted to drugs at the time of the offending behaviour and that it was his addiction that fuelled his criminality. There was no positive evidence of a "pro- criminal peer group".
20. The judge was aware that the Appellant had been in custody for three years. The judge was entitled to attach weight to the evidence of progress that the Appellant had made when in custody.
21. The starting point is reg 27 (5) (d) of the 2016 Regs which mirrors the language of Article 27 (2) of the Directive.<sup>1</sup> The extent to which "public offence" and public confidence" are relevant to an expulsion decision under the Directive was considered in Straszewski and Kerys v SSHD [2016] 1 WLR 1173.
22. Kamki is not authority for any particular proposition.
23. The judge had in mind the seriousness of any potential offending and took into account the OASys assessment.

### **The legal framework**

24. The decision was made under the Immigration (Economic European Area) Regulation 2016 ("the 2016 Regulations"). The relevant part of which read as follows-  
**"Decisions taken on grounds of public policy, public security and public health**

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<sup>1</sup> Directive 2004/38/EC

27. (1) In this regulation, a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.
- (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) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who –
- (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
  - (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.
- (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;
  - (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.
- (7) ....

- (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.)<sup>2</sup>.

## **Conclusions**

25. I acknowledge what Baroness Hale said in AH (Sudan) and Secretary of State for the Home Department at [30]:

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### **<sup>2</sup> SCHEDULE 1 - CONSIDERATIONS OF PUBLIC POLICY, PUBLIC SECURITY AND THE FUNDAMENTAL INTERESTS OF SOCIETY ETC.**

#### **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.

#### **Application of paragraph 1 to the United Kingdom**

2. An EEA national or the family member of an EEA national having extensive familial and societal links with persons of the same nationality or language does not amount to integration in the United Kingdom; a significant degree of wider cultural and societal integration must be present before a person may be regarded as integrated in the United Kingdom.

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.

4. Little weight is to be attached to the integration of an EEA national or the family member of an EEA national within the United Kingdom if the alleged integrating links were formed at or around the same time as—

- (a) the commission of a criminal offence;
- (b) an act otherwise affecting the fundamental interests of society;
- (c) the EEA national or family member of an EEA national was in custody.

5. The removal from the United Kingdom of an EEA national or the family member of an EEA national who is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national or the family member of an EEA national has successfully reformed or rehabilitated) is less likely to be proportionate.

6. It is consistent with public policy and public security requirements in the United Kingdom that EEA decisions may be taken in order to refuse, terminate or withdraw any right otherwise conferred by these Regulations in the case of abuse of rights or fraud, including—

- (a) entering, attempting to enter or assisting another person to enter or to attempt to enter, a marriage, civil partnership or durable partnership of convenience; or
- (b) fraudulently obtaining or attempting to obtain, or assisting another to obtain or to attempt to obtain, a right to reside under these Regulations.

#### **The fundamental interests of society**

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

- (a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;
- (b) maintaining public order;
- (c) preventing social harm;

“Appellate courts should not rush to find such misdirections simply because they may have reached a different conclusion on the facts or expressed themselves differently”;

26. I take into account what the Court of Appeal said in Lowe v SSHD [2021] EWCA Civ 62, specifically at [28] and [29].<sup>3</sup>

27. The grounds of appeal were drafted without acknowledgement that there was before the First-tier Tribunal a very recent OASys assessment. The Appellant had been assessed as presenting a low risk of re-offending and medium risk of harm. There had been a

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- (d) preventing the evasion of taxes and duties;
  - (e) protecting public services;
  - (f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;
  - (g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);
  - (h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);
  - (i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;
  - (j) protecting the public;
  - (k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);
  - (l) countering terrorism and extremism and protecting shared values.

<sup>3</sup> 28. Importantly, as *Kamara* shows, decisions of the present character made by the fact-finding tribunal are "broad evaluative decisions". In his skeleton argument, Mr Pilgerstorfer submitted (in para. 24) that the appellate Court is in as good a position as the first instance judge to appraise whether the facts found and relied upon meet the legal standard. In my judgment, that submission was contrary to authority, and, with respect to Mr Pilgerstorfer, when confronted by the court with the possibility that the submission was incorrect, he qualified the submission in a manner to which I will return. Yet again, the well-known judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5* at [114] is relevant.

29. At [114] - [115], Lewison LJ explained the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges. Para. [114] is particularly well known, but para. [115] is also of relevance to the present case. The Lord Justice said this:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc [1997] RPC 1* ; *Piglowska v Piglowski [1999] 1 WLR 1360* ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23*; *[2007] 1 WLR 1325* ; *Re B (A Child) (Care Proceedings) [2013] UKSC 33*; *[2013] 1 WLR 1911* and most recently and comprehensively *McGraddie v McGraddie [2013] UKSC 58*; *[2013] 1 WLR 2477* . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

- i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.



change in the assessment of risk of re-offending from high to low. The author if the grounds does not seem to have been aware of this. The judge was wholly entitled to attach weight to the assessment made that the Appellant was at low risk of re-offending. He acknowledged that there was a medium risk of harm at [24]. Taking into account the obiter comments made in Kamki, even if they had formed part of the ratio of the decision, the judge would not have erred. He clearly had in mind the risk of reoffending and the risk of serious harm.

28. The judge was mindful of the Appellant's criminality and the extent of it. He was mindful of the seriousness of the offences. This is made clear at [23]. The judge however, did not find that deportation was justified. He was entitled to attach weight to the OASys assessment. There was no meaningful challenge to this evidence. The judge did not set out all the assessment. Mr Lee has referred to it; however, the judge attached weight to what he perceives as the Appellant recognising the impact of his crimes and his good behaviour during imprisonment. A proper reading of the report discloses that the Appellant had a drug problem when offending and that he had addressed this. Drug taking was identified as a risk factor. The report also stated that the Appellant has a network of friends and family who were a positive influence. The judge was entitled to attach weight to the evidence of the Appellant's family whose evidence was not challenged on credibility grounds by the presenting officer. Their evidence must be considered in the context of the link between the Appellant's offending and drug taking. The judge was entitled to conclude that the Appellant was credible and had made genuine progress. The judge was entitled to attach weight to the conclusions

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- ii. The trial is not a dress rehearsal. It is the first and last night of the show.
  - iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.
  - iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
  - v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
  - vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] 2 WLR 210; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135"

in the OASys assessment in respect of the Appellant having a “good social network of friend and family. The absence of a finding in respect of a pro-criminal peer group is not material.

29. The judge was unarguably mindful that the Appellant had been in custody for the last three years. His focus was on his behaviour in prison and the assessment of risk in the OASys report. The suggestion that the judge erroneously attached weight to the lack of re-offending while not acknowledging that he was in detention during the relevant period misrepresents the findings of the judge.
30. The skeleton argument raises an issue in respect of the bail address; however, this is not raised in the ground before me and it was not raised at the hearing before the First-tier Tribunal.
31. In respect of the schedule 1 factors, there is no substance in the assertion that the judge did not have regard to them. They have to be considered in the context of Regulation 27 (5) and relevant case law. It was not the Secretary of State’s case this was a “most exceptional case<sup>4</sup>” where public revulsion may have a part to play. Public revulsion has no part to play in the Appellant’s appeal.
32. The grounds seek to re-argue the decision of the judge whose findings are grounded in the evidence and adequately reasoned. The judge had to make an assessment of the risk posed by the Appellant. It may be that a different judge would have reached a different conclusion. The grounds do not challenge the decision on rationality grounds. The decision is unarguably rational. The judge made an evaluative judgement of risk which was open to him.

### **Notice of Decision**

33. The Secretary of State’s application is refused. The decision of the First-tier Tribunal to allow the Appellant’s appeal is maintained.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her 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 Joanna McWilliam

Date 24 February 2021

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<sup>4</sup> Straszewski and Kerys v SSHD [2016] 1 WLR 1175, para 30.

Upper Tribunal Judge McWilliam