



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00314/2019

THE IMMIGRATION ACTS

Heard at Field House
On 9 November 2021

Decision & Reasons Promulgated
On 22 November 2021

Before

THE HON. MR JUSTICE BOURNE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
and
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IOANNIS BALIS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the respondent: Ms E Doerr, counsel, instructed by Wilsons LLP

DECISION AND REASONS

1. This is an appeal from a decision of Judge of the First-tier Tribunal Beach ('the judge'). In her decision, promulgated on 26 June 2021, the judge allowed the appeal of Mr Balis ('the claimant') against a decision of the Secretary of State for

the Home Department (“SSHD”) dated 14 February 2019 to make a deportation order against him.

Background

2. We summarise the salient features of this appeal. The claimant, a national of Greece, was born on 11 September 1964. He has been residing in the United Kingdom (‘UK’) and exercising EEA Treaty rights for a continuous period of 5 years since at least April 2012, although he had previously resided in the UK for shorter periods of time. He married a British citizen in June 1989, although they are now divorced. He has two adult children from his marriage who reside in the UK and with whom the claimant has no current contact.
3. The claimant received a caution for assault occasioning actual bodily harm on 12 May 1996. This offence related to his then partner. On 12 May 2000 he received a caution for possessing a Class B drug. On 20 February 2002 the claimant was convicted of destroying or damaging property for which he received a fine of £100 and was ordered to pay compensation of £329. This offence also related to his then partner. The claimant was also convicted of driving a motor vehicle with excess alcohol and was disqualified from driving on 29 May 2018.
4. On 29 January 2018 the respondent was convicted of engaging in controlling/coercive behaviour in an intimate/family relationship, and assault occasioning actual bodily harm. These offences also related to his then partner. On 17 September 2018 he was sentenced to 16 months imprisonment and 5 months imprisonment to run concurrently in respect of both offences. He was also ordered to pay a £40 victim surcharge, and an indefinite restraining order was made against him.
5. On 5 November 2018 the claimant was issued with a notice of liability to deportation. After considering representations made on the claimant’s behalf the SSHD decided to make a deportation order. The claimant appealed this decision to the First-tier Tribunal pursuant to regulation 36 of the Immigration (European Economic Area) Regulations 2016 (‘the 2016 Regulations’).

The decision of the First-tier Tribunal

6. The judge considered a bundle of documents filed by the SSHD and a bundle of documents filed by the claimant’s solicitors. The SSHD’s bundle included the decision of 14 February 2019 and an OASys report relating to the claimant. The claimant’s bundle included, inter-alia, a statement from the claimant dated 7 May 2021, a Clinical Psychology report prepared by Dr Craig McNulty on 5 May 2021, two psychiatric reports prepared by Dr Nuwan Galappathie dated 21 September 2020 and 5 May 2021, a GP medical records summary, various Probation records, various certificates in respect of courses undertaken by the claimant during his time in prison and immigration detention, and documents relating to the

claimant's licence conditions following his release from custody. The judge heard oral evidence from the claimant.

7. Having set out the relevant provisions of the 2016 Regulations and having properly directed herself in respect of the burden and standard of proof, the judge's decision summarised the evidence given by the claimant during the hearing.
8. The judge engaged in a detailed assessment of the evidence. She found that the claimant downplayed his behaviour in relation to his previous offences ([65], [67]), and she noted, with reference to the OASys report, that the claimant had been assessed as posing a medium risk of serious harm to intimate partners (although he was assessed as being of low risk of harm to the general public) [67]. At [68] the judge set out matters identified in the OASys report that increased or decreased risk. The judge noted the absence of evidence that the claimant undertook a domestic violence course, but that he had completed an anger management course and obtained a certificate confirming that he demonstrated competency at a victim awareness workshop [68].
9. The judge considered the report from Dr McNulty ([69] to [75]) and noted the Doctor's assessment that the claimant required psychological intervention in order to address the issues that led to his offending behaviour [73]. The judge noted the claimant's evidence that he attempted to find counselling treatment, but this had been difficult due to the advent of the Covid-19 pandemic. The fact that the claimant accessed an organisation called Healthy Minds himself when faced with a long waiting list for counselling suggested to the judge that the claimant was willing and able to engage with counselling services. The judge noted however that there was little evidence of what the claimant had done to seek to be referred for the treatment suggested by Dr McNulty [74]. The judge found that the explanation given by the claimant in his witness statement, relating to the courses he had undertaken when in detention, indicated an understanding of how and why he needed to control his anger, and that whilst the claimant still appeared to avoid taking full responsibility, he recognised that his anger had caused problems for him and that he needed to manage it. The judge found that the claimant had undertaken a positive step by participating in anger management courses even when he was not obliged to do so. This suggested to the judge that the claimant was at least gaining some insight into the reasons for his offending behaviour [74]. The judge found that until the claimant undertook the suggested programmes or until he addressed all the underlying issues that gave rise to his offending behaviour, it was unlikely that he would fully understand the effects of behaving in a coercive control manner towards a partner [75].
10. The judge noted from the psychiatric reports of Dr Galappathie that the claimant had engaged well with an emotional support group and other groups that he attended, and that the claimant expressed a wish to take part in psychological

therapy. Dr Galappathie noted that the claimant had started to engage with Healthy Minds, and he informed the psychiatrist that if he thought a future partner was cheating on him he would walk away and would not call them up like he had done in the past [76]. At [77] the judge set out the evidence relating to the claimant's engagement with mental health services and found that he had sought to access mental health provision although there had been some miscommunication as how this was to be accessed. The judge noted that, at present, the claimant was not receiving the psychological help recommended within the expert reports.

11. At [78] the judge stated,

"The risk to the public is a low risk. It is only in the context of future partners that the [claimant] is considered to be a medium risk. This is not to minimise the immense impact that domestic violence has upon individuals who are subjected to it. The use of domestic violence; both physical and otherwise, carries a wide-ranging impact on victims which also impacts on society as a whole. Victims are likely to suffer psychological harm as a result of domestic violence and will suffer effects such as low self-esteem and a feeling of fear and insecurity. The [claimant] has not yet undertaken the psychological intervention recommended by the experts but he has sought assistance from the Mental Health Team and referrals for counselling. In Dr McNulty's opinion, it is likely that the [claimant] will seek further psychological treatment in the future given his willingness to seek assistance in the past and his willingness to attend the emotional support group whilst in immigration detention. But the [claimant] has undertaken some courses in complied with his licence conditions. He has not breached the restraining order to which he is subject. The OASys assessment records that the risk of the [claimant] reoffending will diminish where he completes courses and complies with licence conditions. These do not seem to be factors which have been addressed in Dr McNulty's report when assessing the [claimant's] risk. The [claimant] has a tendency to view himself as a victim and to an extent, course, he has been a victim in the past in respect of his childhood traumas. However, he does not appear to have accepted full responsibility for his offending behaviour or at the very least, vacillates between accepting some responsibility and then seeking to place blame on others. This, along with other issues identified by the expert, will need to be addressed by the [claimant] as part of any psychological intervention. The [claimant] is not in a relationship at present and has been active, to some extent, in seeking psychological intervention. He has been proactive in engaging with psychological support in the past and spoke of his wish to do so in the future. The [claimant] has engaged with victim awareness and anger management programs and complied with his licence conditions including engaging with Probation; all factors which the OASys assessment noted would decrease the risk posed by the [claimant]. The [claimant] is aware that he must seek psychological intervention and has expressed his wish and intention to do so. It was not suggested by the [SSH] that this expressed intention was not genuine and it is clear from the [claimant's] own history that he has engaged with psychological services both in the community and whilst in detention. All of this will reduce the risk posed by the [claimant] to future partners."

12. The judge then found, at [79], that whilst there remained some threat, the evidence did not show that the claimant was a present, genuine and sufficiently serious threat on serious grounds of public policy. The judge consequently found, at [84], that the SSHD had not shown that the claimant's removal was justified and necessary under the 2016 Regulations. The judge indicated that she took account of all the relevant factors including the factors in Schedule 1 of the 2016 Regulations and concluded, in light of her findings, that it would not be proportionate to remove the claimant from the UK. The judge therefore allowed the appeal under the 2016 Regulations.

The challenge to the judge's decision

13. The grounds of appeal, amplified in both a skeleton argument prepared by the SSHD and in Mr Tufan's oral submissions, focus on the fact that the claimant had not, at the date of the First-tier Tribunal hearing, undertaken the recommended therapy, and that given the judge's observations concerning the claimant's failure to take full responsibility for his behaviour, he continued to pose a medium risk of harm to any close partner with whom he may form a relationship. Mr Tufan clarified that the SSHD was essentially mounting a perversity challenge to the judge's decision, an assertion that had been expressly levelled against the judge in the SSHD's skeleton argument. The judge could not know that the claimant would actually seek to undergo the recommended therapy and her findings were "in direct contradiction with the evidence" (skeleton argument). In her skeleton argument the SSHD further asserted that the claimant was clearly unwilling and had no interest in taking any positive steps on his path to rehabilitation.
14. In granting permission to appeal to the Upper Tribunal, Judge of the First-tier Tribunal Parkes found it arguable that the judge erred in her approach to the claimant's evidence on the basis that the fact that the claimant had not undertaken or commenced a course to address his behaviour was a relevant factor not considered.
15. On behalf of the claimant Ms Doerr submitted that the SSHD could not succeed in her challenge to the rationality of the judge's findings in relation to future risk of harm. There had been no challenge to the genuineness of the respondent's claim relating to his expressed intention to engage with psychological services and it was not open to the SSHD to raise this issue for the first time at an 'error of law' hearing. Nor had this been pleaded in the grounds. The judge was the fact finder and was uniquely placed to assess the claimant's credibility, including his intention to undertake future therapy. The judge's finding was, in any event, supported by the evidence before her including the expert reports of Dr McNulty and Dr Galappathie. The claimant's intention to undergo treatment was only one of many factors that the judge holistically considered when assessing future risk. Other factors considered by the judge included the gap in the offending history, the claimant's compliance with conditions of his licence and his engagement with

Probation, his voluntary completion of an anger management course and the issue of a certificate demonstrating competency from a victim awareness workshop.

16. At the close of the 'error of law' hearing we indicated that we were not satisfied that the SSHD's challenge to the lawfulness of the judge's decision had been made out and that we would dismiss the SSHD's appeal.

Discussion

17. Mukarkar v SSHD [2006] EWCA Civ 1045 (at [40]), UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 (at [19], [26] and [27]), AA (Nigeria) v SSHD [2020] EWCA Civ 1296 (at [9], [32] & [38]), and KB (Jamaica) v SSHD [2020] EWCA Civ 1385 (at [16]) reiterate the propositions that different tribunals might reasonably reach different conclusions in respect of the same evidence, that the Upper Tribunal is not entitled to remake a decision of the First-tier Tribunal simply because it does not agree with it or because it is not as well structured or expressed as it might be, and that the basis for the First-tier Tribunal's decision may be set out directly or by inference. Moreover, there is a high threshold test in a challenge to a judge's decision on the basis that it was perverse (SSHD v Straszewski [2015] EWCA Civ 1245). We bear these principles at the forefront of our minds when assessing the judge's decision.
18. The judge found that the claimant was entitled to the intermediate level of protection on the basis that he had acquired permanent residence in April 2017 (at [59]). There has been no challenge to this aspect of the judge's decision.
19. The judge properly identified the relevant provisions of the 2016 Regulations relating to decisions taken on the basis of public policy and public security. The judge noted in particular that a relevant decision may not be taken in respect of a person with a permanent right of residence except "on serious grounds of public policy or public security" (regulation 27(2) of the 2016 Regulations), and that where a relevant decision is taken on such grounds, it must be taken, inter-alia, in accordance with the principle that the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (regulation 27(5) of the 2016 Regulations). At [61] judge noted that the relevant test to be applied was whether there were serious grounds of public policy for removing the claimant from the UK. The judge additionally directed herself in respect of the provisions relating to public policy and public security in Schedule 1 of the 2016 Regulations. No issue has been raised in respect of the accuracy or appropriateness of the judge's self-directions.
20. There has been no suggestion either in the written grounds of appeal or in Mr Tufan's oral submissions that the judge failed to take into account any relevant consideration. Contrary to the observation of the First-tier Tribunal Judge who granted permission to appeal, the decision shows that the judge was acutely

aware that the claimant had not completed a domestic violence course (e.g. [68], [69], [75], [78]).

21. In a detailed decision the judge meaningfully engaged with all the evidence before her, including that which supported the SSHD's decision. The judge was demonstrably aware that there were three separate periods of offending which related to the claimant's relationships, and the details of the nature and seriousness of those offences, having expressly set out the Sentencing Judge's remarks ([62], [63]). She took full account of the SSHD's submissions on whether the claimant's removal was justified on serious grounds of public policy, including the fact that the therapy recommended for the claimant had not taken place (at [30] and [31]).
22. The judge was clearly concerned by the claimant's attempt to downplay his earlier behaviour towards women, and by the fact that the applicant had not yet undertaken the recommended psychological intervention. She considered with some care the content of the OAYys report and the report from Dr McNulty, including the expert's opinion that, without counselling or therapy to address the claimant's mental health needs, he was likely to pose a medium risk of harm to an intimate partner. The judge noted however that Dr McNulty's report did not address the OASys assessment that the risk of the claimant reoffending would diminish when he completed courses and with his compliance with licence conditions. Dr McNulty had not commented on whether the anger management courses undertaken by the claimant would reduce that risk, and the judge found that it was more likely than not that if the claimant had learned to manage his anger that could only have a positive impact in any future relationships [75]. This was a finding rationally open to the judge.
23. The judge was also rationally entitled to take into account, when assessing whether there were serious grounds of public policy to deport the claimant, the factors identified in the OASys report as decreasing risk, including the fact that the claimant had complied with all his licence conditions, that he had engaged with Probation, and that he had issued with a competency certificate after attending a victim awareness workshop course whilst in detention. It was open to the judge to find that the claimant had taken a positive step when he participated in anger management courses and that he gained some insight into the reasons for his offending behaviour [74]. The judge additionally referred to the Probation records which indicated that the claimant had engaged well and "showed a good understanding of both healthy and negative thinking" ([69] to [72]).
24. The judge found, based on the fact that the claimant had previously accessed counselling for himself, that he was an individual who was willing and able to engage with counselling services [73]. This too was a finding rationally open to the judge on the evidence before her, and a relevant factor that she was entitled to take into account when assessing whether there were serious grounds that the claimant posed a genuine, present and sufficiently serious threat. This finding

must also be considered in light of the absence of any suggestion by the SSHD at the First-tier Tribunal hearing that the claimant's expressed wish and intention to undertake the relevant course was not genuine. We acknowledge Ms Doerr's submission that any suggestion to the contrary was not pleaded in the grounds of appeal and we agree with her that it is inappropriate for the SSHD to raise this for the first time at the 'error of law' stage. The judge's finding on this particular point was, in any event, supported by the otherwise unchallenged evidence detailed in the expert medical reports.

25. In our judgement the First-tier Tribunal judge engaged with and evaluated the evidence, both for and against, concerning whether there were serious grounds to consider that the claimant constituted a genuine, present and sufficiently serious threat. Having weighed up the competing factors the judge concluded that there were no serious grounds to support the SSHD's contention. The judge gave reasons for her conclusion that were firmly fixed on the evidence before her. We cannot interfere with the judge's decision simply because we may have reached a different overall conclusion. As was pointed out by Carnwath LJ (as he then was) in Mukarkar v SSHD [2006] EWCA Civ 1045 (at [40]), "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law ..." As we can detect no mistake on a point of law that would require the decision to be set aside, we dismiss the SSHD's appeal.

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.

The Secretary of State for the Home Department's appeal is dismissed.

D. Blum 11 November 2021

Signed Date:

Upper Tribunal Judge Blum