



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00526/2019

**THE IMMIGRATION ACTS**

Heard at Field House *via Teams*  
On 27 July 2021

Decision & Reasons Promulgated  
On 01 September 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASPARUH KUNEV  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr. T Lindsay, Senior Presenting Officer

For the Respondent: Mr. J Collins, Counsel, instructed by OTS Solicitors.

**DECISION AND REASONS**

**Introduction**

1. The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.
2. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Dean ('the Judge') who allowed the claimant's appeal against a decision by the Secretary of State to deport him from the United Kingdom under the Immigration

(European Economic Area) Regulations 2016 ('the 2016 Regulations). The decision of the Judge was sent to the parties on 22 December 2020.

3. Judge of the First-tier Tribunal Grant granted the Secretary of State permission to appeal by a decision dated 6 January 2021.

### **Remote hearing**

4. The hearing before me was a Teams hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

### **Anonymity**

5. The First-tier Tribunal did not issue an anonymity order and neither party sought one before me.

### **Background**

6. The claimant is a national of Bulgaria and presently aged 39. He asserts that he entered the United Kingdom in 2014 and commenced working soon after.

### *Index offences*

7. In November 2015 the claimant attended the home of his former partner in the early hours of the morning determined to attack her. His former partner received a text message from her brother detailing that there was a man outside of her property. She opened a window and saw the claimant. Upon opening the front door, the claimant pushed past her and made his way inside the property. He stabbed his former partner in the stomach and then continued thrusting the knife towards her, resulting in defensive cuts to her hand. The injuries resulted in grave and long-lasting injuries, particularly to the stomach area.
8. The mother of the appellant's former partner intervened in a brave effort to protect her daughter and was also stabbed.
9. The women eventually managed to get the claimant out of the property and called the police. They were taken to hospital. The claimant later presented himself at hospital with a wound to his hand.
10. Following psychiatric assessment it was concluded that at the time of the attacks upon the victims the claimant was 'floridly psychotic' suffering an acute phase of experiencing hallucinations and/or delusions without interruption.

11. In September 2016 the claimant pleaded guilty to 2 counts of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861.
12. The claimant was sentenced at Wood Green Crown Court on 28 October 2016. HHJ Browne QC observed that the attack was premeditated and was intended to be directed 'on two women in their own home who were utterly defenceless and quite frankly at your mercy.'
13. HHJ Browne QC took care to recognise the enormous impact that the claimant's actions had on the lives of two innocent women. Their victim impact statements identified their continuing to fear for their own personal safety, their being nervous in public places and their being 'still absolutely frightened and terrified' of the claimant.
14. HHJ Browne QC identified this matter to be a 'disturbing case' and observed that in ordinary circumstances it would have been a category 1 case for the purposes of the relevant sentencing Guidelines attracting a starting point of 12 years imprisonment with a level of sentencing ranging between 9 and 16 years.
15. HHJ Browne QC had a full psychiatric report before him authored by Dr Reid, Consultant Forensic Psychiatrist, dated 10 September 2016, as well as an addendum dated 18 October 2016. He also considered a shorter report from Dr King, a Forensic Doctor at Chase Farm Hospital, dated 24 October 2016.
16. In addressing the appropriate sentence, HHJ Browne QC observed, *inter alia*:

'The tragedy of this case is at the time you committed these very serious offences you were very seriously mentally ill, suffering from a form of paranoid schizophrenia and I'm sure that Dr Reid is right when he tells me in evidence today that you've been ill for several years with delusional beliefs.'

'... You are of previous good character. Your life is not complicated as is so often the case before these courts, by other criminogenic lifestyle features such as drugs, alcohol, gambling and the like.

Having said all that these offences, as I have already indicated, are at the top end of s.18 cases, I am satisfied that the best course for me to take for the protection of the public and for your own long-term health benefit, is that the disposal I should make is under the provisions of the Mental Health Act 1982 (as amended).

I am satisfied that a bed is available for you where you are presently held and I am sure that for the protection of the public and to treat your very serious illness, it is overall in the interest of justice that this case is met by a s.37 order under the Mental Health Act 1983. I so make an order on count 2 and 3 to run concurrent.'
17. In addition to the hospital order made under section 37 of the Mental Health Act 1983 HHJ Browne QC subjected the claimant to identified restrictions under section 41 of the same Act, which provides at (1) and (2):

- '(1) Where a hospital order is made in respect of an offender by the Crown Court, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm so to do, the court may, subject to the provisions of this section, further order that the offender shall be subject to the special restrictions set out in this section; and an order under this section shall be known as "a restriction order".
- (2) A restriction order shall not be made in the case of any person unless at least one of the registered medical practitioners whose evidence is taken into account by the court under section 37(2)(a) above has given evidence orally before the court.'

18. The Mental Health Tribunal conditionally discharged the claimant in August 2019. He remains subject to section 41 restrictions. Since his discharge the claimant has been taking medication and has secured employment.

*Deportation decision*

19. The Secretary of State wrote to the claimant on 22 July 2019 and informed him that she intended to make a deportation order on grounds of public policy in accordance with regulation 23(6)(b) and regulation 27 of the 2016 Regulations. The claimant responded by letter dated 19 August 2019 setting out reasons as to why he should not be deported.
20. By means of a decision dated 18 October 2019 the respondent confirmed her decision to make a deportation order.

**The Decision of the First-tier Tribunal**

21. The hearing of the claimant's appeal was held at Taylor House on 14 December 2020. Both parties were represented. The Judge had before her the following medical evidence:
- i) Psychiatric report of Dr Reid, dated 14 September 2016
  - ii) Dr Reid's addendum to his report, dated 18 October 2016
  - iii) Report of Dr King, dated 24 October 2016
  - iv) Psychiatric report of Dr Hewitt, Consultant Forensic Psychiatrist, dated 31 July 2019
22. Filed with the Tribunal was a witness statement from Dr Bartlett, a Consultant Forensic Psychiatrist, dated 28 January 2019. Dr Hewitt was the claimant's Responsible Clinician, a role subsequently undertaken by Dr Bartlett.
23. The Judge observed at §16 of her decision that the psychiatric evidence provided a detailed narrative which followed the claimant's mental illness from first diagnosis

to the present day. She further observed that although it was accepted that at the time of the index offences the claimant was very seriously mentally unwell, suffering from paranoid schizophrenia, he was not diagnosed with that condition until four months after being placed on remand.

24. Dr Bartlett attended the hearing and addressed the claimant's current risk. The Judge concluded at §22 that Dr Bartlett's written and oral evidence was to be given full evidential weight.
25. In respect of future risk, the Judge noted Dr Hewitt's evidence that the claimant has always been compliant with his oral medication and the clinical risk assessment completed by the multidisciplinary team indicated that he is at 'very low risk of repeat offending' and that the index offences occurred solely as a result of his untreated mental illness.
26. The Judge found that the claimant did not qualify for the enhanced protection provided by regulation 27(3) and (4) of the 2016 Regulations because he had not acquired a permanent right of residence at the date of decision. Consequently, he was only entitled to the basic level of protection provided by regulation 27(1): §8.
27. The Judge correctly noted that the burden of proof was born by the Secretary of State. Consequent to considering the evidence before her the Judge concluded, at §§32-25:

'32. Having examined the totality of the evidence before me, I find that the [claimant] committed the index offences solely as a result of his untreated mental illness. I find that he has subsequently received treatment which has led to him being assessed by two Consultant Psychiatrists as posing a very low or low risk of harm to others. I find that neither Dr Hewitt nor Dr Bartlett have expressed any concern about the [claimant's] current or continuing mental health. The evidence demonstrates that the [claimant] is taking his medication and has integrated into his community and is in employment. I find that this was a man who was very seriously mentally unwell but who, over the course of four years, has rehabilitated himself through treatment and, more recently, education and employment. I also find that since the [claimant's] discharge from hospital no concerns have been expressed about any adverse behaviour or actions. Based upon the totality of the evidence before me I find that the [claimant] has now recovered from this tragic episode in his life and is able to lead a normal life.

33. The [Secretary of State] relied heavily upon the JSR [Judge's sentencing remarks], which in turn were informed by the reports of Dr Reid, all of which date from 2016, to frame her conclusion about whether or not the [claimant] poses a genuine, present and sufficiently serious threat. Although there is a brief mention of Dr Hewitt's report in 2019, this is limited to her observation that the [claimant] had had no contact with psychiatric services before the index offences, has no history of substance abuse and no criminal convictions ... In short, the [Secretary of State] did not engage with the detailed substance of Dr Hewitt's report and, in particular, Dr Hewitt's risk assessment and evaluation of the [claimant's] more recent mental health. Instead, heavy reliance is placed on the historical situation as it stood in 2016

which I find does not advance the claim that the [claimant] poses a genuine and present threat.

34. The evaluation of the current situation is to be found in the substance of Dr Hewitt's reports, together with Dr Bartlett's written and oral evidence, as well as the supporting evidence of Mr. Gutu, Mr. Ergul and the Hostel Assistant Manager. None of this was challenged or undermined by the [Secretary of State] at the Hearing. I give this body of evidence full weight because it provides a recent and wide-ranging account of the [claimant's] current circumstances. More particularly there is no evidence before me which expresses concern about any adverse behaviour or actions by the [claimant] which, when taken with the assessment of him posing a low risk, I find goes against finding that the [claimant] poses a genuine, present and sufficiently serious threat.

35. The burden of proving to the required standard that the [claimant] represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society is an exacting test for the [Secretary of State] to discharge. As set out in paragraph 33 above, the evidence she relied upon is from 2016. However, I find that the more recent body of expert medical evidence submitted by the [claimant] demonstrates that his mental health has substantially changed and is now materially different such that it undermines the [Secretary of State's] conclusion. Accordingly, looking at the totality of the evidence before me, together with my findings ... above, I find that the [Secretary of State] has failed to discharge the burden of establishing on the balance of probabilities that the [claimant] represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of United Kingdom society. Because the [Secretary of State] has not discharged that burden ... there is no need for me to consider the issue of proportionality. I therefore allow this appeal.'

### **Grounds of Appeal**

28. The Secretary of State's grounds of appeal can properly be identified as follows:

- i. The Judge erred in concluding that the Secretary of State had not discharged the burden placed upon her.
- ii. The Judge erred in failing to have regard to the considerations established in Schedule 1 of the 2016 Regulations in respect of public policy, public security and the fundamental interests of society.

29. The claimant filed a rule 24 response authored by Mr. Collins. The Secretary of State relied upon a skeleton argument authored by Mr. Bates, a Senior Presenting Officer, dated 10 May 2021.

### **Decision on Error of Law**

30. From the outset I express my sympathy for the victims in this matter, who suffered a violent and life-changing attack upon them. However, it is trite that an appellate

Tribunal is to consider the lawfulness of a decision reached by a first instance judge and not impermissibly substitute its own views. Appellate courts are to exercise caution when interfering with evaluative decisions of first instance judges: *Biogen Inc. v. Medeva plc* [1997] RPC 1; *Piglowska v. Piglowski* [1999] 1 W.L.R. 1360; *McGraddie v. McGraddie* [2013] UKSC 58, [2013] 1 W.L.R. 2477; *Fage UK Ltd v. Chobani UK Ltd* [2014] EWCA Civ 5; and *Lowe v. Secretary of State for the Home Department* [2021] EWCA Civ 62.

31. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of their case. Her function is to reach conclusions and give reasons to support her view, not to spell out every matter as if summing up to a jury. Nor need she deal at any length with matters that are not disputed. It is sufficient if what she says shows the basis on which she has acted: *Customs and Excise Commissioners v. A* [2002] EWCA Civ 1039; [2003] 2 W.L.R. 210; *Bekoe v. Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318.
32. Mr. Lindsay clarified at the outset of the hearing that the Secretary of State pursued her appeal on one ground alone, identified as a challenge to the Judge's consideration as to whether the claimant is 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of United Kingdom society': regulation 27(5)(c) of the 2016 Regulations.
33. Reliance was placed upon para. 5 of the Secretary of State's skeleton argument as detailing the substance of the challenge:
  - '5. It is contended that the FTTJ clearly misunderstand [sic] that the SSHD's reasons for deportation. Para 32-35 did consider the latest evidence then available (see para 3) pointing to the appellant being viewed as a very low risk of repeat offending and low risk of harm; but considered the risk in the event of relapse to be unacceptable when considered against the fundamental interests of society (see also para 73). The risk not needing to be imminent and the decision being therefore taken on preventative grounds (para 33/34). Such a conclusion was hardly irrational or perverse in light of the evidence of Dr Bartlett ... that 'if he becomes unwell he will present a danger to others. His index offence was very serious' (emphasis added).'
34. Mr. Lindsay candidly accepted that the Tribunal would be required to 'wrangle' with the grounds of appeal as drafted to identify the challenge, but he submitted that the grounds consist of 'broad brush strokes' and are sufficiently 'broadly drawn' to permit the challenge now advanced.
35. The thrust of the Secretary of State's case, as now formulated, is that, in Mr. Lindsay's words, the 'biggest problem' with the determination is that it is entirely silent as to the appellant being subject to a restriction order because of the threat he poses to the public. The Judge was required to look at the conditions imposed, and the reasons as to why they were imposed. Mr. Lindsay placed reliance upon *Secretary of State for the Home Department v. KE (Nigeria)* [2017] EWCA Civ 1382, [2018] 1 W.L.R. 2610, in particular [5]:

‘5. Under a hospital order without restriction, the power to release the individual from detention lies in the hands of clinicians. However, where such an order is coupled with a restriction order under section 41, discharge of the patient can only take place with the consent of the Secretary of State or order of the appropriate tribunal. A restriction order can only be made where, on sentence, it appears to the court that, having regard to the nature of the offence, the antecedents of the offender and his risk of committing further offences if set at large, it is necessary to make such an order for the protection of the public from serious harm (section 41(1) ). No doubt because predictions about the future course of the relevant mental disorder – and, thus, about the risk posed – are difficult, restriction orders must now be made unlimited in time (section 41(1) of the 1983 Act, as amended by section 40 of the Mental Health Act 2007). An order remains in place until lifted by the Secretary of State (under section 42 of the 1983 Act) or discharged by the appropriate tribunal, i.e. in England, the First-tier Tribunal (under sections 73 or 75 of that Act). A direction by the Secretary of State or order of the tribunal releasing an offender into the community may be conditional (in which case, the offender is liable to recall) or absolute. Not only is the period of a restriction order indeterminate when imposed, it is common for orders never to be absolutely discharged because, even if an offender is conditionally discharged into the community, the risk of a recurrence of the mental disorder or its symptoms – and thus of danger to the public – remains.’

36. Though acknowledging the professional assessment that the likelihood of relapse is low, Mr. Lindsay contended that the Judge had erroneously allowed the appeal on the basis of the claimant’s presently identified low risk of harm when failing to factor into her consideration the ongoing risk to the public in circumstances where the claimant resides in 24-hour accommodation and requires support as to his medication. Ultimately, consideration should properly have been given to the risk to the public when such support was not provided.
37. Mr. Lindsay further submitted that it was unclear from the decision as to whether the Judge understood the hospital order to be a custodial sentence.
38. Having carefully considered the papers placed before me, I conclude that the fundamental problem for the Secretary of State is that it is not possible to read into the grounds of appeal the challenge advanced at the hearing.
39. The grounds of appeal run to 9 paragraphs over 3 pages. Mr. Lindsay confirmed that no reliance could properly be placed upon para. 9. Paras. 1 to 3 are introductory statements of fact. Para. 4 asserts that the Judge erred in law in concluding that the Secretary of State had not discharged the burden placed upon her. There is no merit to this challenge, as acknowledged by the Secretary of State who did pursue this ground at the hearing. The remaining paragraphs are concerned with what is said to be a failure to have regard to Schedule 1 of the 2016 Regulations: para. 5. At para. 6 it is asserted that the Judge ‘merely refers in passing to Schedule 1 at [9] and [24]’. Para. 7 simply sets out Schedule 1, without more. Para. 8 details:

'8. It is submitted that it is quite clear that paragraphs 2, 3 and 4 of Schedule 1 are in varying degrees applicable in the instant case and have not been considered at all by the judge. Similarly, under the heading 'The fundamental interests of society' paragraph 7 of Schedule 1, particularly sub-paragraphs b, c, f, g and j, have completely been left out of the judge's analysis. It is submitted that these omissions amount to a (sic) fundamental and material errors in law.'

40. As observed above the ground of challenge advanced at paras. 5 to 8 can properly be considered to be a narrow one, drafted in different ways over several paragraphs, namely that the Judge failed to have proper regard to Schedule 1 of the 2016 Regulations. There is no requirement for a Judge to expressly detail the contents of the Schedule itself, so long as it is lawfully engaged within in the decision. I find that what are said to be 'passing' references to the Schedule at §§9 and 24 of the decision constitute lawful engagement with the Schedule. I further find upon reading the decision as a whole that the Judge clearly had in mind the fundamental interests of society identified by the Schedule and so this challenge simply amounts to a disagreement with the Judge's conclusion.

41. I am satisfied that the arguments skillfully advanced by Mr. Lindsay before me cannot properly be identified as forming part of the narrow grounds of appeal upon which permission was granted. They constitute an impermissible challenge that is far beyond that advanced by the drafted grounds of appeal. In reaching such conclusion I observe the confirmation by the Court of Appeal that procedural rigour is to be applied as to the adoption of an evolving case on appeal: *R (Talpada) v. Secretary of State for the Home Department* [2018] EWCA Civ 841, per Singh LJ, at [68]-[69]:

'68. In the context of an appeal such as this it is important that the grounds of appeal should be clearly and succinctly set out. It is also important that only those grounds of appeal for which permission has been granted by this Court are then pursued at an appeal. The Courts frequently observe, as did appear to happen in the present case, that grounds of challenge have a habit of "evolving" during the course of proceedings, for example when a final skeleton argument comes to be drafted. This will in practice be many months after the formal close of pleadings and after evidence has been filed.

69. These unfortunate trends must be resisted and should be discouraged by the courts, using whatever powers they have to impose procedural rigour in public law proceedings. Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to the case, but potentially to the wider public interest, which is an important facet of public law litigation.'

42. The Tribunal is increasingly aware as to grounds of appeal filed on behalf of the Secretary of State being discursive in nature and/or lacking expected particularity. Several members of this Chamber have expressed concern in recent times as to the poor drafting of grounds filed on behalf of the Secretary of State. The rise in

inadequately drafted grounds has resulted in Presenting Officers, who are not the authors of the grounds relied upon, requesting that particularised challenges 'be read into' grounds of appeal in the absence of a formal request for permission to amend grounds. I observe that no application to amend was made by the Secretary of State in this matter. In such circumstances the Tribunal is properly to be mindful of the guidance provided by the Court of Appeal in *Talpada*.

43. Having found that the challenge now relied upon does not form part of the grounds of appeal in relation to which permission to appeal was granted, upon concluding when assessing procedural rigour that it is unfair to the claimant that such amendment be permitted in the absence of a formal application to amend, and upon considering there to be no arguable merit in the grounds upon which permission was granted, this appeal must be dismissed.
44. This Tribunal takes the opportunity to observe that it has not been aided by the grant of permission by Judge Grant. Having identified in broad terms the challenge identified by ground 2, the reasons for granting permission to appeal was simply limited to, 'The grounds may be argued'. Such approach, which fails to provide required reasoning, should not be adopted in any event but is of particular concern where the grounds advanced are poorly drafted. In this matter it is entirely unclear in the absence of reasons as to how the grounds could be considered arguable, in circumstances where the Secretary of State did not consider them to have sufficient merit to rely upon them, as drafted, at an oral hearing.

### **Notice of decision**

45. The decision of the First-tier Tribunal did not involve the making of a material error of law. The decision sent to the parties on 22 December 2020 is upheld, and the Secretary of State's appeal is dismissed.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 10 August 2021

**TO THE RESPONDENT**  
**FEE AWARD**

Judge Dean made a fee award in favour of the appellant.

No fee was paid and therefore no fee award can properly be made.

No fee award.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 10 August 2021