



**Upper Tribunal
(Immigration and Asylum Chamber)**

Restivo (EEA – prisoner transfer) [2016] UKUT 00449(IAC)

THE IMMIGRATION ACTS

**Heard at Field House
On 8 September 2016**

Decision Promulgated

.....

Before

**Upper Tribunal Judge Southern
Upper Tribunal Judge Kopieczek**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANILO RESTIVO

Respondent

Representation:

For the Appellant: Mr J. Strachan QC, counsel instructed by SSHD

For the Respondent: Mr B Hawkin, counsel instructed by David Wyld & Co, solicitors

The European Framework Decision 2008/909/JHA has replaced the framework previously set out in the Council of Europe Convention on the Transfer of Sentenced Persons, itself supplemented by the Protocol of 18 December 1997, to provide the framework within which a request may be made to another Member State for the transfer of an EEA national sentenced in the United Kingdom to serve that sentence in his own country. In the United Kingdom context, it is a precondition for making a transfer request that there be in place a deportation order. A decision to make a deportation order is not a decision to transfer a serving prisoner to another Member State to serve his prison there and so in any appeal against a decision to make a deportation order the Tribunal is not concerned with whether there is any legal impediment to such a transfer taking place.

Where the personal conduct of a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the fact that such threat is managed while that person serves his or her prison sentence is not itself material to the assessment of the threat he or she poses. The threat exists, whether or not it cannot generate further offending simply

because the person concerned, being imprisoned, has significantly less opportunity to commit further criminal offences.

ERROR OF LAW DECISION

1. On 29 June 2011, before the Crown Court at Winchester, the respondent was convicted of murder, an offence committed on 12 November 2002, for which he was sentenced to life imprisonment, the term to be served being subsequently amended by the Court of Appeal from the whole life term imposed by the trial judge to a minimum term of 40 years.
2. The Secretary of State for the Home Department ("SSHD") has been granted permission to appeal against the decision of a panel of the First-tier Tribunal, by a determination promulgated following a hearing on 23 April 2014, to allow the respondent's appeal against a decision to make a deportation order as a consequence of that conviction. Permission was granted by Haddon-Cave J following a successful "Cart challenge" to the decision of an Upper Tribunal judge who had refused to grant permission to appeal. In granting permission to bring the application for judicial review Cobb J said:

"The application raises important points of principle in relation to the correct interpretation of the relevant statutory instruments for the deportation and transfer of a prisoner within the EEA; given the particular context of this offence/offender, there is a compelling reason to achieve clarity."

Which view was echoed by Hadden-Cave J who said in granting permission to appeal:

"In my view Cobb J was right to find that the application in the present case raised important points of principle as to the correct interpretation of the [Immigration (EEA) Regulations 2006] and the Framework Agreement leading to the deportation and transfer of prisoners within the EEA."

3. Before examining the reasons given by the First-tier Tribunal for allowing the appeal and the grounds upon which permission to appeal was sought and granted it is necessary to set out some detail of the nature of the respondent's offending, both in the United Kingdom and in Italy, because this becomes relevant to the discussion that is to be conducted below.
4. As can be seen from how the trial judge, Burnett J, expressed himself when passing sentence, this was a particularly brutal murder, disclosing behaviour by the respondent that seriously aggravated the offence of murder itself. The judge said that the evidence of the respondent's guilt was overwhelming. The jury had heard also that he had murdered another young woman in Italy in September 1993 in a manner that bore striking resemblance to the way in which the murder of Ms Barnett had been carried out. The judge said that the respondent had gone to Ms Barnett's flat intending to murder her and to mutilate her body:

“... You made careful preparations. You had with you a hammer, or something similar, with which you killed her by beating her repeatedly about the head. You had with you the knife with which you mutilated her after her death. You cut off her breasts and cut her throat. You also left carefully incised marks on her abdomen.

...

You carefully arranged her body in a way strikingly similar to the way in which you had arranged Elisa Claps' body in 1993. Her body was not found until last year. You cut both bras at the front. You lowered the trousers and underwear to expose the pubic hair. Most strikingly, perhaps, you cut Heather Barnett's hair and placed some of it under her left hand, just as you had done with Elisa Claps. You also left a lock of hair of an unknown person in Heather Barnett's right hand.

... There is no doubt that at least in part your motivation was sexual. You had a long-standing hair fetish which you indulged by cutting the hair of women on public transport and in cinemas in England and in Italy.”

Burnett J then explained how the careful planning of the respondent had included that he had sought to set up for himself an alibi and continued:

“... you knew that she had children at school, and you knew that the children would return after school on the day you had killed their mother. You knew that an 11-year old girl and a 14-year old boy would find their mother butchered on the bathroom floor. That feature of this case will haunt those who have sat through it.

...

...Why you picked out Heather Barnett as a victim I do not know, but it is clear that you did so to satisfy a sadistic sexual appetite. The evidence in this case is that you are a cold, depraved, calculating killer...”

5. The SSHD had concluded, in the light of this conviction, that the respondent was a person whose removal was justified on grounds of public policy or public security so that the requirements of Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006 (“the EEA Regs”) were met. It was accepted by all concerned that, in view of the time the respondent had lived in the United Kingdom, he had secured a permanent right of residence under Regulation 15 and so the relevant test was that in Regulation 21(3) that the decision may not be taken except on serious grounds of public policy or public security. As the SSHD was satisfied that this test was met, a decision to make a Deportation Order pursuant to section 5 Immigration Act 1971 was made. It is important to recognise, given the issues that arise in this appeal, that the decision under challenge is one to make a deportation order and not the actual making of such an order.
6. Although the appeal before the First-tier Tribunal was against the decision to make a deportation order, it was clear from the documents before the tribunal that the SSHD's purpose in so doing was in order to explore the possibility of securing agreement of the Italian Government to the transfer of this respondent to Italy so that he could serve in Italy the sentence imposed by the British court for the murder

of Ms Barnett. The respondent had been sentenced also by an Italian court to 30 years imprisonment for the murder of Elisa Claps. Although the respondent had been convicted of that murder in his absence, he had been subject to temporary extradition arrangements in March 2013 so that he could participate in what proved to be for him an unsuccessful appeal against that conviction.

7. The position as at the date of the hearing before the First-tier Tribunal was that the rejection of that challenge had not exhausted the respondent's rights of appeal in Italy and that he intended to pursue a final further onward right of appeal against conviction. Mr Hawkin informed us that final appeal available to the respondent in Italy was finally dismissed on 7 March 2016 which was, of course, after the date of the decision of the First-tier Tribunal.

The legal framework.

8. As we shall see, it becomes plain from the determination of the First-tier Tribunal that the panel misunderstood the legal framework relating to the process for the transfer of EEA nationals sentenced to imprisonment in the United Kingdom to serve their sentence in their own Member State. That framework was originally established by the Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983. That provided for such transfers only with the consent of the person concerned. A Protocol of 18 December 1997 allowing transfers without the serving prisoner's consent, subject to certain conditions, although ratified by the United Kingdom, was not ratified by all Member States and those States who had chosen not to ratify that Protocol were under no duty to accept such transfers. The Council of Europe resolved that the time had come to impose such a duty and this resulted in the Council Framework Decision 2008/909/JHA, the fifth recital of which included that:

“Notwithstanding the need to provide the sentenced person with adequate safeguards, his or her involvement in the proceedings should no longer be dominant by requiring in all cases his or her consent...”

This Framework Decision did not require to be ratified in order to take effect. The only Member State excused from the duty to accept, where appropriate, such transfers was Poland, because:

“Poland needs more time than the other Member States to face the practical and material consequences of transfer of Polish citizens convicted in other Member States, especially in the light of an increased mobility of Polish citizens within the Union. For that reason, a temporary derogation of limited scope for a maximum period of five years should be foreseen.”

Before leaving the recitals to the Framework Decision, it is helpful to set out what is said in recital 13:

“This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union...”

9. Regulation 19 of the Immigration (EEA) Regulations 2006 provides, so far as is relevant for present purposes:

Exclusion and removal from the United Kingdom

...

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom... may be removed if-

...

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21;

Regulation 21 provides, again so far as is relevant:

Decisions taken on public policy, public security and public health grounds

21. – (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 permanent right of residence under regulation 15 except on serious grounds of public policy or 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 necessary in his best interests, 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) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, 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 concerned must represent a genuine,

present and sufficiently serious threat affecting one of the fundamental interests of society;

(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.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person 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 the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

Article 33(2) of Directive 2004/38/EC ("the Citizens Directive") provides:

If an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the Member State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

The Council Framework Decision 2008/909/JHA:

Article 6

Opinion and notification of the sentenced person

1. Without prejudice to paragraph 2, a judgment together with a certificate may be forwarded to the executing State for the purpose of its recognition and enforcement of the sentence only with the consent of the sentenced person in accordance with the law of the issuing State.

2. The consent of the sentenced person shall not be required where the judgment together with the certificate is forwarded:

(a) to the Member State of nationality in which the sentenced person lives;

(b) to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment;

(c) to the Member State to which the sentenced person has fled or otherwise returned in view of the criminal proceedings pending against him or her in the issuing State or following the conviction in that issuing State.

3. In all cases where the sentenced person is still in the issuing State, he or she shall be given an opportunity to state his or her opinion orally or in writing. Where the issuing State considers it necessary in view of the sentenced person's age or his or

her physical or mental condition, that opportunity shall be given to his or her legal representative.

The opinion of the sentenced person shall be taken into account when deciding the issue of forwarding the judgement together with the certificate. Where the person has availed him or herself of the opportunity provided in this paragraph, the opinion of the sentenced person shall be forwarded to the executing State, in particular with a view to Article 4(4). If the sentenced person stated his or her opinion orally, the issuing State shall ensure that the written record of such statement is available to executing State.

4. The competent authority of the issuing State shall inform the sentenced person, in a language which he or she understands, that it has decided to forward the judgment together with the certificate by using the standard form of the notification set out in Annex II. When the sentenced person is in the executing State at the time of that decision, that form shall be transmitted to the executing State which shall inform the sentenced person accordingly.

5. Paragraph 2(a) shall not apply to Poland as an issuing State and as an executing State in cases where the judgement was issued before the lapse of five years from 5 December 2011. Poland may at any time notify the General Secretariat of the Council that it will no longer avail itself of this derogation.

The grounds of appeal

10. Both parties are, of course, aware of the full detail of the reasoning that led the First-tier Tribunal to conclude that the appeal should be allowed, and for present purposes the following summary will suffice:

a. The First-tier Tribunal considered that the decision to make a deportation order was premature, first because agreement of the Italian authorities under the Framework Decision for the respondent to serve his sentence in Italy had not yet been secured (indeed, the Italian authorities had not even been approached concerning such a request) and secondly because the appeal process in Italy in respect of the respondent's conviction for the murder of Elisa Claps had not been exhausted. The First-tier Tribunal said, at paragraph 55:

“We do find that it is premature for the Secretary of State to seek to deport the Appellant until that final appeal is determined by the Italian Courts.”

b. Regulation 21(5)(c) of the 2006 regulations required that the personal conduct of the respondent represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As the respondent was imprisoned as a Category A prisoner serving a 40 year minimum term, that risk “cannot and has not been properly and comprehensively and fairly assessed at the present time”;

- c. The conditions in which the respondent would be imprisoned in Italy would be such as to infringe rights protected by Article 3 of the ECHR;
 - d. The appeal fell to be allowed under Article 8 of the ECHR also, on the basis that since his transfer to serve his sentence in an Italian prison would subject him to treatment contrary to Article 3, therefore the decision was not in accordance with the law and so not a lawful decision for the purposes of Article 8 of the ECHR either.
11. The essence of the grounds upon which the SSHD sought and was granted permission to appeal may be summarised as follows:
- a. This was an appeal against a decision to make a deportation order and not against a decision to request a transfer of a serving prisoner to Italy. Therefore the First-tier Tribunal was not concerned with issues that might possibly arise in the future consequent to a transfer decision, if one were to be made, and was wrong to conflate the two issues. The approach of the First-tier Tribunal represents a potentially serious impediment to the proper operation of proposed prisoner transfers under the Framework Decision.
 - b. The First-tier Tribunal were wrong in law to approach the assessment of risk posed by the respondent on the basis that as a prisoner at the start of a long sentence there is no genuine, present and sufficiently serious threat because he is incarcerated. This is said to be “a fundamental misinterpretation of the requirement in Regulation 21 and one that would defeat the object and purpose of the European prisoner transfer arrangements”. Alternatively, Mr Strachan submits that the First-tier Tribunal made an error of law in failing to carry out such an assessment at all.
 - c. The First-tier Tribunal erred in principle in seeking to resolve the issue of whether a prison transfer would breach Articles 3 or 8 of the ECHR as these were dependent upon a possible future transfer decision and did not arise from the decision to make a deportation order.

Discussion

12. At paragraph 46 of their decision the First-tier Tribunal said:

“... We find that the proposed deportation of the Appellant to Italy under the Convention is premature until it is established that Italy has signed up to the Additional Protocol and/or has accepted that they will accept the transfer of the Appellant in compliance with the Framework Decision and/or would make an application on their own behalf for the return of the Appellant to serve the sentence imposed by the Italian courts for the murder of Elisa Claps.”

Thus, two reasons were given for considering that the decision to make the deportation order was premature. First, arrangements were not already in place for

the transfer of the respondent to Italy for him to serve his sentence there. Indeed, the First-tier Tribunal observed that they could not be because Italy, unlike the United Kingdom, had not by then ratified the Protocol of 1997. As we have said, the First-tier Tribunal were wrong about that. The Protocol had been overtaken by the Framework Decision, precisely because some Member States had not ratified it.

13. Thus, the First-tier Tribunal considered that the making of a deportation order before the transfer arrangements were in place was premature and so, presumably, unlawful. For the reasons that follow, we are in no doubt at all that in that regard the reasoning of the First-tier Tribunal discloses material and fundamental legal error.
14. It is important to recognise that the decision of the SSHD to make a deportation order is not a decision to make a request for, let alone to secure the transfer of a serving prisoner to another EEA Member State to serve his sentence in that country. Indeed, that is not even a decision to be taken by the SSHD because it is a decision for the Secretary of State for Justice to make, she being the competent authority notified to the General Secretariat of the Council pursuant to Article 2 (1) of the Framework Decision. In conflating the two issues the First-tier Tribunal fell into legal error. If a deportation order is made, that will enable the Secretary of State for Justice to consider whether or not to seek to pursue a transfer request.
15. Although the First-tier Tribunal, wrongly, thought the making of the deportation order was premature because the transfer request had not been agreed, in fact precisely the opposite is the case. It would be premature, for two reasons, for the Secretary of State for Justice to have sought to secure agreement of the Italian authorities to a transfer request where no deportation order had been made. That is because it had to be established, regardless of any ambition to transfer the respondent to Italy, that a deportation order could properly be made in the light of the requirements of Regulation 21 of the 2006 Regulations. Secondly, a transfer request cannot be made unless and until a removal or deportation decision is in place.
16. In his oral submissions Mr Hawkin advanced an argument to the contrary, seeking to demonstrate that there was no requirement in the form of a precondition that a deportation order be in place before a transfer request is made. We reject that submission. Article 6(2)(b) of the Framework decision enables the transfer of EEA national prisoners to their own Member State, without their consent, in consequence of an expulsion decision. It is clear from Article 6 that the mechanism of transfer depends upon a prior deportation decision. This is reinforced by the format of the certificate found at Annex 1 to the Framework Decision which, at section (g) (b) requires confirmation of the “expulsion or deportation order...” and, if the order is not included in the judgment itself, as will be the case for those convicted in the United Kingdom, “the name of the authority that issued the order, the date of issue and, if available, the reference number” from which it is clear that the order must have been issued.

17. Therefore a deportation decision is a necessary pre-condition for the transfer of a prisoner, without his consent, under Article 6(2)(b) of the Framework Decision. Thus, the making of a deportation decision was not premature but an essential step to taken before the mechanism of the Framework Decision could be engaged. It follows that it was an error of law for the First-tier Tribunal to proceed on the basis that the transfer request should have been made before the deportation decision was taken.
18. The second reason given by the First-tier Tribunal for finding that the making of the deportation order was premature was that the respondent's onward appeal in Italy in respect of his conviction there for the murder of Elisa Claps was unresolved. We are satisfied that this reasoning was also fundamentally flawed such as to disclose material legal error. The deportation order was made as a consequence of the respondent's conviction for the murder of Ms Barnett. Although the jury that convicted the respondent of that murder were told also of the murder committed by the respondent in Italy, the conviction for the murder of Ms Barnett stands regardless of the outcome of any appeal to the Italian courts. Further confirmation of this, should it be required, is found in the decision of the Court of Appeal (Criminal Division) in *David Oakes and Others v R* [2012] EWCA Crim 2435. This was a special constitution of the court, the Lord Chief Justice sitting with Hallett, Hughes, Leveson and Rafferty LJ, convened to consider:

“... sentences which were imposed on different occasions following very grave crimes...”

The outcome for the respondent was that the whole life term imposed by Burnett J was varied to a minimum term of 40 years. At para 78 The LCJ said:

“When the judge summed the case up to the jury, he directed them, quite correctly, that the only court with jurisdiction to try DR for the murder of Elisa Clap[s] and to convict him of the offence was an Italian court. It is also clear that there was a vast body of evidence which provided strong evidence that he was indeed guilty of that murder. However, as the case was left to the jury, it was clearly open to them to convict DR of the murder of Heather Barnett even if they were not sure that he had murdered Elisa Clap[s]. In short, therefore, DR was not tried for or convicted of the murder of Elisa Clap[s] (a murder which he denied), and the verdict did not and could not carry with it the inevitable conclusion that the jury must have been sure that he murdered her...”

Put another way, as did Mr Strachan in his submissions, it was not open to the SSHD to approach the matter in any way other than that the respondent had been convicted of the murder of Ms Barnett and that would remain to be the case regardless of the outcome of any further appeal pursued by the respondent against conviction for another offence in another country.

19. Therefore, the fact that the respondent was seeking to pursue an appeal against his conviction in Italy was no basis at all to consider that the SSHD was not lawfully entitled to proceed to make the deportation decision she did. Indeed, if it were otherwise, the SSHD would be precluded from making a deportation decision where any person had unresolved criminal proceedings or appeal rights in another country. There is nothing in the domestic or European jurisprudence to justify such a proposition.
20. For these reasons we are also satisfied that the First-tier Tribunal fell into material legal error in concluding that the decision to make a deportation order was premature because the respondent's appeal rights in Italy in respect of a different offence altogether were not yet exhausted.
21. Next, we address the reasoning of the First-tier Tribunal that as the respondent had a further 37 years of his sentence to serve, therefore the risk posed by him could not and had not been properly and comprehensively and fairly assessed so that it is not established for the purposes of Regulation 21(5)(c) that he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. There are two aspects to this issue. Mr Strachan submits that it is implicit from the decision of the First-tier Tribunal, although not specifically articulated, that the panel considered there was no genuine, present or sufficiently serious threat posed by the respondent to a fundamental interest of society because, as the respondent was a Category A serving prisoner, any risk that he may represent is adequately managed so that there was no risk to the public at large. Alternatively, it was their task to carry out an assessment of the level of threat for the purposes of their consideration of the EEA Regs and it was an error of law for them to decide not to do so. At paragraph 53 the panel said:
- “... At the present time the Appellant is in a high-security prison. The risk assessments have not been carried out and they are unlikely to be done for a period of time. What risk assessments we have could be described as contradictory as we have outlined above but in any event the Appellant has 37 years of his sentence left. We find that the risk posed by the Appellant, at the very beginning of an extremely lengthy prison sentence, cannot and has not been properly and comprehensively and fairly assessed at the present time.”
22. It is plain both that the First-tier Tribunal was required to carry out the assessment of threat or risk that they declined to, and that there was ample material before them to inform that assessment. That material was in the form of the decision letter which identified all that the SSHD relied upon in asserting that threat was established, the sentencing remarks of the judge, the “Categorisation Document” representing the decision of the Prison Governor as to the respondent's designation as a Category A prisoner, explaining why the conclusion reached was that:

“Mr Restivo continues to pose a high risk to the public and a serious risk of re-offending in a similar unlawful way if at large.”

and the NOMs report, discussed by the First-tier Tribunal at paragraph 48 of the determination. The fact that the First-tier Tribunal detected tensions in some of the views expressed as to the risk of re-offending is no basis upon which to consider that no assessment of risk should be made.

23. That alone is sufficient to identify legal error in the approach taken to this issue by the First-tier Tribunal.
24. It is apparent also that the First-tier Tribunal have fallen into error in conflating issues of the existence of risk or the risk of reoffending and the management of that risk. It may well be that while he serves his sentence as a Category A prisoner there is a very much reduced risk of any reoffending, even though he was described by the sentencing judge as “a man capable of inhuman depravity” and “a cold, depraved, calculating killer”. As Mr Strachan submits, if the approach of the First-tier Tribunal were maintained, that would defeat the objective and purpose of the European prisoner transfer arrangements because, if it were the case that a serving prisoner must be regarded as a person who, on account of being in prison, did not represent such a risk, then no removal or deportation decision could be made and so the result would be that no deportation order could be made until release from prison was imminent and so no transfer under the Framework Decision could ever be made.
25. The third reason given by the First-tier Tribunal for allowing the appeal was that on being transferred to serve his sentence in Italy, the respondent would be subjected to treatment such as to infringe Article 3 of the ECHR. At paragraph 58 of their decision the First-tier Tribunal said:

“In any event we find that the decision does not comply at the present time with the principle of proportionality under Regulation 21(5) as it does not, for reasons which we shall give, comply with Article 3 of the European Convention on Human Rights.”

This is not altogether easy to follow as the rights protected by Article 3 are absolute and not qualified so the question of whether there is a real risk of infringement of Article 3 is not a matter informed by the principle of proportionality.

26. In reaching its conclusion concerning Article 3, the First-tier Tribunal made a further material error of law because there was no arrangement in place for the applicant to serve his sentence in Italy and that was not the basis upon which their assessment was to be made. Put another way, the consequence of the deportation order was not that the respondent would be sent to serve his sentence in an Italian prison. Such a transfer could take place only if a subsequent decision were made under the Framework Decision and if such a decision was made the respondent would have an opportunity to raise any legal challenge he thought appropriate at that stage. As we have observed, that would be a challenge not to a decision of the SSHD but to a decision of the Secretary of State for Justice.

27. In discussion at the hearing before us, Mr Hawkin submitted that, by analogy with the position in asylum appeals, there should have been a theoretical assessment of the respondent's circumstances on the basis that he was returned to Italy. As he has been sentenced to 30 years' imprisonment by the Italian courts, on arrival he would be detained to serve that sentence and the First-tier Tribunal was entitled to find, on the basis of the material before them, that he would serve that sentence in conditions that were in breach of Article 3 of the ECHR. Therefore, the issue of prison conditions arose whether the position of the respondent is assessed on the basis that he was returned under the Framework Decision to serve the sentence imposed by the United Kingdom court or whether his position is considered on the hypothetical basis of being in Italy without regard being had to the United Kingdom sentence. In either case, Mr Hawkins submits, the respondent faces a real risk of treatment contrary to Article 3 while serving a lengthy prison sentence.
28. As Mr Strachan submitted, the reality of the situation is that the respondent will return to Italy only if a transfer request is accepted by the Italian authorities and that will occur only if the processing of the request establishes that there is no Article 3 risk. The Secretary of State has no power to set aside a prison sentence imposed by the court and so the alternative scenario simply does not arise.
29. Thus, any assessment of the existence of any article 3 risk is one to be carried out at a future date as part of the transfer request mechanism. An illustration of the fact that the approach of the First-tier Tribunal in having regard to a possible future decision of the Secretary of State for Justice was itself premature is found in *Elashmawy & Riva v Italy* [2015] EWHC 28 (Admin). In giving the judgement of the court Aikens LJ said, at paragraph 101:

“Taken overall, and bearing in mind the high threshold, we are satisfied that the evidence demonstrates that there are not substantial grounds for believing that there is a real risk that the appellant, or Mr Riva, would face prison conditions that were in breach of Article 3 upon extradition to Italy...”

In reaching the conclusion that they did, the First-tier Tribunal made clear, at paragraph 60, that they placed reliance on the decision in *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin), an extradition case, which found that the burden was on the SSHD to provide evidence to satisfy the court that the relevant real risk of incarceration in conditions contrary to Article 3 did not arise in that particular case and she had failed to do so. The First-tier Tribunal proceeded on the basis that as the court had found, therefore, that there were substantial grounds for believing, that there was a real risk of treatment contrary to Article 3, those findings were pertinent to the appeal and so should be followed. However, in *Elashmawy* Aikens LJ said, at paragraph 91 that events had moved on since *Badre*. This illustrates that in wrongly conflating issues arising from the making of the deportation order, which were in play, with the position in which the respondent may find himself if a decision were subsequently made for his transfer to Italy, the error of the First-tier Tribunal was a material one.

30. Mr Hawkin submitted that a decision to make a deportation order can be made lawfully only if the SSHD is able to move immediately to give effect to it by removing the person from the United Kingdom. Thus the First-tier Tribunal were correct to consider all that might possibly flow from that as at the date of the hearing so that they were correct to conflate consideration of both the deportation arrangements and the possibility of transfer under the Framework Decision. We reject that submission also because it is clear that there are various reasons why that cannot be correct. For example, there are obvious pragmatic reasons for making a deportation decision in respect of a serving prisoner sufficiently before his earliest release date so that any appeal process pursued can run its course before then, avoiding the possible need for him to be moved into immigration detention, thus extending the length of time he is detained. There may be pragmatic obstacles to removal by the SSHD of a nature that do not prevent a voluntary departure should the person concerned choose to do so at some future date. The making of a deportation order would prevent re-entry. There may be good reason why the SSHD, even though removal for one reason or another cannot be effected immediately, wishes to make a deportation order, not simply to establish the principle inherent in it, but also to invalidate any leave previously given. Further, Article 33(2) of the Citizens' Directive, which we have reproduced above, plainly recognises that an expulsion order may not be acted upon for some time, providing that it is to be reviewed if not executed within two years to see if there has been any material change in circumstances.

31. We can dispose of the final plank of the reasoning of the First-tier Tribunal shortly. The appeal was allowed on Article 8 ECHR grounds because, as the tribunal had found that prison conditions were such as to infringe Article 3 of the ECHR, the Tribunal said:

“In particular we find that it would not be in accordance with the law under the *Razgar* provisions to return him to Italy as his Article 3 rights would be breached.”

In allowing the appeal on that basis, the Tribunal made a further error of law. The finding that the respondent faced a real risk of being subjected to treatment such as to infringe article 3 was, for the reasons we have given, one not reasonably open on the evidence since he would not, on account of the making of a deportation order, find himself in an Italian prison and no other reason was offered for fearing an infringement of Article 3. Therefore, the First-tier Tribunal was plainly wrong to allow the appeal on Article 8 grounds for that reason alone.

32. For all of these reasons we are satisfied that the First-tier Tribunal made errors of law material to the outcome of this appeal such that the decision to allow the appeal must be set aside. It is therefore necessary for the Upper Tribunal to remake the decision on the respondent's appeal against the deportation order made against him.

Summary of conclusions on the points of principle identified in the grant of permission

33. The European Framework Decision 2008/909/JHA has replaced the framework previously set out in the Council of Europe Convention on the Transfer of Sentenced Persons, itself supplemented by the Protocol of 18 December 1997, to provide the framework within which a request may be made to another Member State for the transfer of an EEA national sentenced in the United Kingdom to serve that sentence in his own country. In the United Kingdom context, it is a precondition for making a transfer request that there be in place a deportation order. A decision to make a deportation order is not a decision to transfer a serving prisoner to another Member State to serve his prison sentence there and so in any appeal against a decision to make a deportation order the Tribunal is not concerned with whether there is any legal impediment to such a transfer taking place.
34. Where the personal conduct of a person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the fact that such threat is managed while that person serves his or her prison sentence is not itself material to the assessment of the threat he or she poses. The threat exists, whether or not it cannot generate further offending simply because the person concerned, being imprisoned, has significantly less opportunity to commit further criminal offences.

Summary of decision:


35. The First-tier Tribunal made material errors of law and the decision to allow the appeal against the deportation order is set aside.
36. The appeal will be listed for a resumed hearing after which the Upper Tribunal will substitute a fresh decision to allow or to dismiss the respondent's appeal against the decision to make a deportation order.

Directions

1. The Upper Tribunal will now refer to Mr Restivo as "the appellant" and to the SSHD as "the respondent".
2. The appellant's representatives are to serve upon the respondent and file with the Tribunal, not later than 14 October 2016, a witness statement in respect of any witness relied upon, including the appellant himself, to be drawn in sufficient detail to stand as evidence-in-chief.
3. The respondent is to respond in writing, no later than 21 October 2016, indicating to what extent, if at all, she takes issue with any assertion of fact made in any such witness statement.

4. Any skeleton argument is to be served on the other party and filed with the Tribunal no later than 2 working days before the resumed hearing.

Signed



Upper Tribunal Judge Southern

Date: 9 September 2016