



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006471
First-tier Tribunal No:
DA/00239/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 June 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M F H

Respondent

(ANONYMITY ORDER MADE)

Representation:

For the Appellant: Mr D. Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr J. Dhanji, instructed by Powell Spencer and Partners
Solicitors

Heard at Field House on 01 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the anonymity order made by the First-tier Tribunal relating to the original appellant is continued. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The original appellant (M F H) appealed the respondent's (SSHD) decision dated 28 May 2022 to remove him on public policy grounds with reference to The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').
3. First-tier Tribunal Judge Welsh ('the judge') allowed the appeal in a decision sent on 24 October 2022. The decision runs to 24 pages and made detailed reference to the evidence within the context of the relevant legal framework. It was accepted that the appellant had acquired a right of permanent residence under EU law as the spouse of an EEA national [4]. The relevant threshold for the purpose of regulation 27(3) of the EEA Regulations 2016 was the higher threshold of whether there were 'serious grounds of public policy and public security' to make a relevant decision to remove the appellant. The judge summarised the appellant's history of criminal convictions [2], the evidence before her [8], and the relevant legal framework [9]-[12].
4. The judge's findings follow a logical sequence with reference to the legal framework. She began by considering whether there were serious grounds of public policy and public security to make a relevant decision [13]-[36]. She went on to consider the proportionality of the decision under EU law with reference to the evidence relating to the appellant's health [38]-[63], length of residence [64], social and cultural integration [65]-[69], links with Algeria [70]-[72], family ties in the UK [73]-[84], and evidence relating to rehabilitation [85]-[87]. This was consistent with Articles 27-28 of the Citizens' Directive (2004/38/EC), and in so far as they must conform with a proper interpretation of EU law, with the EEA Regulations 2016: see *British Gas Trading Ltd v Lock and Anor* [2016] 1 CMLR 25.
5. The judge concluded that it was a 'finely balanced decision'. However, she gave 'significant weight' to the issues surrounding his health, 'weight' to his family life in the UK, and 'limited weight' to his length of residence. She concluded that when these factors were 'weighed in the balanced against the genuine, present and sufficiently serious threat the Appellant presents' the decision was disproportionate [88]. The judge also made a separate finding that the high threshold to show that there are substantial grounds for believing that removal would breach Article 3 of the European Convention on health grounds was not met [89]-[92].
6. The Secretary of State applied for permission to appeal the First-tier Tribunal decision on the following grounds:
 - (i) The First-tier Tribunal erred in its assessment of proportionality by only appearing to take into account repeated offending relating to fraud, and failing to take into account other offences, such as a conviction for a sexual offence.
 - (ii) The First-tier Tribunal made irrational findings relating to the weight to be placed on the appellant's ill-health, given that she concluded that there was treatment and family support available in Algeria, and in light of her finding that the evidence did not meet the Article 3 threshold.
7. The First-tier Tribunal refused permission to appeal to the Upper Tribunal. However, permission was granted by Upper Tribunal Judge Kebede in an order dated 28 March 2023 following a renewed application to the Upper Tribunal.

8. I have considered the First-tier Tribunal decision, the evidence that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but I will refer to any relevant arguments in my findings.

Decision and reasons

9. The grounds of appeal do not appear to launch a direct challenge to the factual findings. Both grounds argue that different weight should have been given to two specific factors when she was assessing the proportionality of the decision.

Ground 1

10. It is clear from the face of the decision that the judge considered the full background of the appellant's offending behaviour when she assessed whether there were serious grounds of public policy for making the removal decision. The judge summarised the offending history at [2], which included reference to a conviction for a sexual assault and noted that it attracted an immediate custodial sentence. At [8] the judge made clear that she had considered the original and update OASys assessments. At [15(2)] the judge summarised the date and length of sentence (26 weeks) for the sexual assault, as well as noting that he was convicted under a false name.
11. I accept that the judge went on to consider the risk that the appellant posed primarily with reference to the evidence relating to repeated fraud offences. I find that it was reasonable for her to do so given that the index offence that triggered the decision was a serious offence attracting a sentence of four years' imprisonment. The judge's task was to assess whether the appellant represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society at the date of the hearing. The most recent offence formed a pattern of offending behaviour of a similar kind. The most recent offence also attracted a far higher sentence of imprisonment.
12. The respondent does not seek to appeal the judge's conclusion that the appellant's overall offending behaviour, and evidence relating to the risk of reoffending, was sufficiently serious to show that he represented a genuine, present and sufficient serious threat to justify removal on serious grounds of public policy in this case. The respondent's case succeeded in relation to this element of the legal framework.
13. Having made a finding that the relevant threshold was satisfied, the judge went on to consider whether the decision complied with the EU law principle of proportionality, which must be based exclusively on the personal conduct of the individual concerned. Article 27(2) of the Directive made clear that previous criminal convictions shall not in themselves constitute grounds for taking removal measures.
14. In assessing whether the decision complied with the principle of proportionality the judge took into account a range of factors relating to the appellant's individual circumstances. She had already set out in detail her assessment of the risk the appellant posed because of persistent offending. The judge did not, and did not need to, repeat findings that she had already made about the risk that the appellant represented. It was clear from the level of detail contained in the decision that she was fully aware of the appellant's offending history, including a

single conviction for a sexual offence in 2008 for which he received a far less lengthy sentence around 6 months' imprisonment.

15. Mr Clarke took me through various aspects of the evidence contained in the OASys reports, which indicated that the appellant had little insight into the sexual offence and might still pose a risk of committing sexual offences in certain circumstances. However, the evidence also showed that the appellant had not been convicted of any further offences of this kind in the 14 years since that conviction. It is argued on behalf of the Secretary of State that the sexual offence was not properly factored into the proportionality assessment, but no further consideration was given to the appellant's offending history in that section of the decision. The only aspect of the judge's proportionality findings that touched on the appellant's offending was a section relating to rehabilitation. In relation to that issue, the judge made a series of findings that were supportive to the Secretary of State's case, concluding that the prospects of rehabilitation, either in the UK or Algeria, were 'not strong' [86].
16. I find that it was open to the judge to concentrate on the more serious offences that might justify removal on serious grounds of public policy rather than a single historic sexual offence attracting a six-month sentence of imprisonment that would not be sufficiently serious in itself to justify removal. The decision makes clear that the judge was aware of the offence and took it into account as part of the overall assessment. The Secretary of State has made forensic submissions relating to the OASys assessment and argues that it would have made a material difference to the outcome of the appeal in circumstances where the judge described the proportionality assessment as 'finely balanced'. However, I find that, when the decision is considered as a whole, the arguments made by the Secretary of State amount to submissions on the evidence and a disagreement with the outcome. The first ground does not identify any error of law that would have made any material difference to the outcome of the decision.

Ground 2

17. The second ground argues that the judge's conclusion relating to proportionality is irrational. She gave undue weight to the appellant's health as an issue given the nature of her findings about the availability of treatment in Algeria. Again, it is argued that this would have made a material difference to the outcome of the appeal given that the assessment was said to be 'finely balanced'.
18. The judge considered the evidence relating to the appellant's health and treatment in the UK in a great deal of detail. She listed each of the pieces of evidence and made findings in relation to the most pertinent aspects of that evidence [40]-[52]. The judge concluded that the evidence showed that the appellant's mental health would deteriorate with an associated increase in the risk of self-harm and suicide if he were to be removed to Algeria [49]. That finding has not been challenged. The judge made clear that professional opinions as to the exact diagnosis have differed but concluded that the medical evidence disclosed 'fairly consistent recommendations by doctors as to the treatment the Appellant has required.' [51]. This included ongoing assessment and risk management, pharmacological treatment, psychiatric and psychological support as well as support from the community mental health team and close family members in the UK.
19. The judge explained why she did not accept the position stated in the respondent's decision letter, that the appellant's health was immaterial to the

proportionality assessment because treatment would be available in Algeria [53]. She considered that her task was as follows:

'54. ... I am forming a view as to the impact of deportation on the Appellant's mental health in order to determine the weight to be attached to this factor when carrying out the proportionality assessment. In doing that, the extent of support in Algeria, both professional and familial, is a relevant factor because it will have an effect upon the severity of the symptoms that the Appellant will suffer.'

20. This finding was open to the judge. Her approach conformed with the principle of proportionality under EU law.
21. The judge went on to conduct an equally forensic assessment of the evidence relating to the availability of mental health care in Algeria and considered what other support the appellant might have, including family support [55]-[63]. At [61] the judge concluded that the appellant would have access to free psychiatric care, including in-patient treatment. She concluded that care would be available in the form of medication and that there would be access to crisis care in response to suicidal ideation and self-harm.
22. The Secretary of State criticises the final sentence of [61], where the judge found that 'the medical evidence demonstrates that the Appellant requires community care in order to achieve long-term stability in his mental state and this will not be available because mental health treatment in Algeria is still heavily weighted towards inpatient treatment at psychiatric hospitals'.
23. It is argued that this conflicts with the judge's summary of the evidence at [58(7)] where she mentioned the availability of limited out-patient care. The source of this information was a single article by an Algerian psychiatrist from 2017. Before making the finding at the end of [61] the judge also quoted a report of the UN Special Rapporteur on Physical and Mental Health from 2017, which was drawn from the Secretary of State's own CPIN report [60]. That report stated that that the mental health sector in Algeria is 'excessively reliant on psychiatric hospitals and inpatient care' and recommended that additional steps should be taken to reinforce outpatient services to reduce dependency on hospital care.
24. Mr Clarke argued that it was not open to the judge to place such significant weight on the appellant's mental health in the proportionality assessment. It was argued on behalf of the Secretary of State that it was not rational for the judge to conclude that outpatient care would not be available when (a) the evidence was unclear as to what outpatient or community care the appellant required; and (b) was inconsistent with the evidence showing that some outpatient care might be available in Algeria.
25. I find that the second ground of appeal takes the same approach as the original decision letter by arguing that the question of what weight should be placed on appellant's mental health in the proportionality exercise is dependent solely on the availability of treatment in Algeria. First, it was open to the judge to find that her task was to assess the overall impact of removal on the appellant's mental health. Although the evidence showed that there was varying opinion as to the exact diagnosis, the evidence made clear that the appellant suffers from a serious and enduring mental ill-health. Second, although the medical evidence did not specify the nature of the support provided by the community mental health teams over a period of time, it was open to the judge to note that the evidence showed consistent support was required in the community in order to

manage the appellant's condition. Third, it is not arguable that the judge's finding at the end of [61] was not open to her merely because she had noted some evidence of limited outpatient support. It was open to the judge to consider other credible evidence, which indicated that psychiatric treatment in Algeria is still primarily centred on in-patient treatment in hospital. Fourth, the judge did not conduct a binary assessment but considered the appellant's health in the round with other relevant factors including the support that his wife and children provided in the UK.

26. When the second ground is analysed, I find that it also amounts to a disagreement with the weight that the Secretary of State considers should have been placed on the appellant's long term mental health condition. The threshold for showing that a decision is irrational is high. I find that it is not arguable that the judge's findings were outside a range of reasonable responses to the evidence. Another judge might have come to a different conclusion on the same evidence, but it is not arguable that the judge's finding relating to proportionality was one that no rational judge could come to.
27. For the reasons given above, I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law

The decision shall stand

M.Canavan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

06 June 2023