



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003739

First-tier Tribunal No: EA/51859/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th January 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Farah Musa
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms A Sepulveda, Fountain Solicitors

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard remotely at Field House on 10 January 2024

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were at the First-tier Tribunal.
2. By the decision of the First-tier Tribunal (Judge Buchanan) dated 31.8.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Aziz) promulgated 12.5.23 allowing the appellant's appeal against the respondent's decision of 23.2.21 rejecting his submissions against deportation on grounds of public policy pursuant to the Immigration (EEA) Regulations 2016, and
3. The appellant, a citizen of Sweden, was convicted of a number of criminal offences, including robbery and making false representations, for which he was sentenced in June 2019 to a term of imprisonment of three years and six months. He was subsequently deported to Sweden in 2021. His 'out of country' appeal was heard with him appearing by video link on 31.1.23 and 11.5.23.

4. In summary, the respondent's grounds argue that the First-tier Tribunal erred by: making a material misdirection in law; failing to take material matters into account; and failing to provide adequate reasoning. The grounds turn on whether the judge engaged with part of the requirement under regulation 27(5)(c), to the effect that past conduct is to be taken into account and that the threat to one of the fundamental interests of society need not be imminent.
5. In granting permission, Judge Buchanan considered it arguable that the First-tier Tribunal failed to take account of past conduct when considering "whether the principles set out in regulation 27(5)(c) had been applied. It is arguable, that when deciding whether the appellant represents a genuine, present, and sufficiently serious threat at #77 of the Decision no account is expressly taken of past conduct."
6. As the judge noted at [13] of the decision, regulation 27(5) sets out a number of principles to be taken into account when making a decision on grounds of public policy, public security, and public health under the Regulations, setting these out as follows:
 - (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;
 - (f) the decision may be taken on preventive grounds, even in the absence of a previous criminal conviction, provide the grounds are specific to the person;
7. At [14] the judge also referenced Schedule 1's non-exhaustive list of the fundamental interests of society, noting that the respondent relied on:
 - (i) Maintaining public order;
 - (ii) Preventing social harm;
 - (iii) Excluding or removing an EEA national family member or family member of an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action; and
 - (iv) Protecting the public.
8. However, it is apparent that the judge did not set out the full terms of Regulation 27(5)(c), which provides that "*the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent.*"
9. It is obvious from the above that the judge's citation of regulation 27(5)(c) omitted to the need to take into account past conduct and that the threat does not need to be imminent. However, that failure is not necessarily fatal to the assessment, provided it can be seen that the judge took it into account in the assessment subsequently made. As explained in Budhatkoki [2014] UKUT 00041

(IAC), “it is generally unnecessary and unhelpful for First-tier Tribunal judgements to rehearse every detail or issue raised in a case. This leads to judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.”

10. Furthermore, in Durueke (PTA: AZ applied, proper approach) [2018] UKUT 00197 (IAC), the Upper Tribunal held that “permission should only be granted on the basis that the judge who decided the appeal gave insufficient weight to a particular aspect of the case if it can properly be said that as a consequence the judge who decided the appeal has arguably made an irrational decision.” Further, “Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not “sufficiently consider” or “sufficiently analyse” certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material.”
11. I accept that if the judge did not take any account of past conduct and was only concerned whether the appellant represented a ‘present threat’ to the exclusion of past conduct, the assessment would necessarily be flawed and amount to a material error of law.
12. On behalf of the respondent, Mr Wain pointed to the discussion between [67] and [77] of the decision, noting that the judge was “only just persuaded” that the appellant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The “only just persuaded” statement is repeated at [87]. At [68] the judge stated that the key issue was whether the appellant continued to represent a ‘present threat’, stating, “I have to make that assessment as of the date of this hearing.” It was submitted that there is no explicit reference within the assessment to the judge having taken into account past conduct or that that the threat need not be imminent. In this regard, Mr Wain relied not only on the appellant’s criminal convictions but his poor behaviour whilst serving his sentence and aspects of the OASys report.
13. However, I note that at [67(ii)] of the decision, the judge specifically noted that past conduct alone could be sufficient to establish a present threat. I am satisfied that is a clear indication that the judge was fully aware of and alive to the full requirement under regulation 27(5)(c). Furthermore, it can be seen that the judge took a careful note of the submissions on behalf of the respondent, particularly as to the appellant’s poor conduct whilst serving his sentence, summarised at [69] of the decision with extracts from the OASys report. At [70] the judge commented that the contents of the “report do not make pretty reading for the appellant and reflect poorly on him.” The judge found that the report contents supported the submission made on behalf of the respondent that the appellant had not shown any real insight into his offending, nor remorse for his actions, nor any genuine attempts at rehabilitation at the time he was assessed in 2021.
14. Unarguably, it can be assumed that all relevant negative factors were taken into account in the assessment, even if the judge did not reference each and every negative factor or incident in the OASys report. It is obvious from the decision as drafted that the judge did have regard to the appellant’s past conduct and that

the threat need not be imminent. Unarguably, the judge conducted a careful and balanced assessment of factors for and against the appellant before reaching a finely balanced decision. I am satisfied that it cannot properly be said that the findings and conclusion of the First-tier Tribunal were irrational, unreasonable, or not supported by cogent reasoning open to the judge on the evidence. A different judge may well have reached a different conclusion, but I cannot agree that the decision as made discloses any material error of law. It follows that this appeal cannot succeed.

Notice of Decision

The respondent's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the appellant's appeal remains allowed.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 January 2024