Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00087/2016

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 26 June 2017

Decision & Reasons Promulgated
On 25 July 2017

Before

Upper Tribunal Judge Southern

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHRIST ADAM STEVEN SAMBA

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: In Person

DECISION

1. The Secretary of State for the Home Department has been granted permission to appeal against the decision of First-tier Tribunal Judge Beach who, by a determination promulgated on 11 April 2017, allowed Mr Samba's appeal against a decision that he should be expelled from the United Kingdom. Mr Samba is a citizen of France and the decision that he was to be removed was taken pursuant to Regulation 19(3)(B) of the Immigration (EEA) Regulations 2006 ("the 2006 Regs").

2. Although this means that it is the Secretary of State who is the appellant before the Upper Tribunal, as it will be necessary to reproduce extracts from the decision of

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the First-tier Tribunal Judge, it is convenient to refer to the parties as they were before the First-tier Tribunal.

3. Mr Samba arrived in the United Kingdom in 2003. Before that, having lived the first eight years of his life in France, he then lived in Cote D'Ivoir with his grandmother for about a year, travelling from there to join his mother in the United Kingdom. He attended school in the United Kingdom but was excluded from his secondary school in year 9, although when he was 15 or 16 years old he attended John Ruskin College where he obtained a BTec in Business studies.

4. He first came to the attention of the police in April 2007 when he was cautioned for an offence of theft/shoplifting. Since then, the appellant has committed a number of serious offences. In October 2011, he was convicted of burglary of a dwelling and, being still a juvenile, was made subject to a referral order. In April 2012, he was sentenced to one day's detention, deemed served at court, for possession a controlled drug of Class B. After that there was an escalation in the seriousness of his offending. In July 2012, he was fined for offences of dishonestly handling stolen goods and the following year, in August 2012, for three offences of burglary of a dwelling and an offence of dishonestly handling stolen goods he was sentenced to concurrent terms of detention in a Young Offenders' Institution totalling 16 months.

5. Having served that sentence, he was convicted of some motoring offences in August 2013 and was made subject to a conditional discharge for assault in January 2014 and was fined for his second offence of possessing controlled drugs in February 2014. It was, though, while subject to that conditional discharge that he committed his next offence of possessing a bladed article in a public place for which he was sentenced to 4 months' imprisonment. The judge imposed concurrent terms of imprisonment for offences of assault and failing to surrender to bail.

6. Finally, on 3 September 2015, the appellant was convicted after a trial before the Peterborough Crown Court of robbery, burglary of a dwelling and of intimidating a witness with intent to obstruct, pervert or interfere with justice. For the robbery and burglary he was sentenced to four years' imprisonment and was sentenced to a consecutive term of six months' imprisonment for witness intimidation so that the sentence overall was one of 4 years and 6 months. At the date of the hearing before the Upper Tribunal the appellant was still serving that sentence but he anticipated that his release on licence was imminent.

7. In his sentencing remarks, HHJ Bridge made clear the factual basis upon which the appellant was to be sentenced. Together with two accomplices, the appellant had entered a flat by climbing in to a flat roof and through a window:

> "You proceeded with the other two men to attack (the occupant); you'd seen him from the outside speaking on his phone and in due course… you stole his mobile phone, clearly a high value mobile phone…In the course of the attack, (the occupant) was punched to the face; he also received blows to other parts of his

> body… and he also said that he was threatened; he was cut to his left eyebrow and that required stiches…"

The judge then spoke of the offence of witness intimidation, the victim being a lady who was the owner or the tenant of the flat that was burgled where a male person, ("the occupant") had been attacked and robbed:

> "… you came across (the victim) on 31 December of 2014; that was an accidental meeting it seems. You were aware that she had been reporting you to the police and you threatened her; you told her that you knew where she lived; she had in fact left the flat where the burglary had been committed, you told her that you could get people round to, as you put it, smash her face in; this was a clear attempt to intimidate her as a potential witness in the pending proceedings and she clearly was intimidated, and later was to report this incident to the police about 2 weeks after this occurred."

Having noted that the offences were aggravated by the fact that the appellant had 8 previous convictions for 14 offences the judge concluded that the least sentence he could properly impose was one of 4 years' imprisonment with a consecutive term of six months for the witness intimidation.

8. The appellant gave oral evidence before the First-tier Tribunal. He said that he had worked only for a year, while at college, at a shop operated by a friend of his mother. He hoped and intended to start his own business, either in painting and decorating or by starting a mini cab business. He said he could not do that in France because he no longer speaks French and has no one there to help him. He told the judge that he was wrongfully convicted of the serious offences for which he is currently imprisoned, although he did not appeal against those convictions. The appellant did not know if his mother had taken out comprehensive medical insurance for herself and him and he was not in a position to provide evidence of his mother's work record as she had not attended the hearing and had not provided any written evidence.

9. Next, the judge summarised submissions advanced on behalf of the respondent. It was submitted that the appellant had not qualified for permanent residence because he could not demonstrate having spent five years' continuous residence in accordance with the 2006 Regs, either in his own right or on the basis of being the family member of a mother exercising Treaty rights. As his recent sentence of imprisonment punctuated the 10 year period prior to the decision that he should be removed from the United Kingdom, and as the evidence showed that he had failed to integrate into the United Kingdom, he did not qualify for any enhanced level of protection from removal under the 2006 Regs. Therefore, the appellant enjoyed only the basic level of protection provided by regulation 21. The judge recorded the respondent's submissions:

> "Mr Lowton said that the appellant had the lowest level of protection only. He said that the offending was so serious that the decision to deport must comply with the

principle of proportionality. Mr Lowton said that the appellant had had to be removed from society on a number of occasions which suggested that he had not integrated into the UK. He said that the decision to deport was based on the appellant's conduct and the appellant's conduct showed that the appellant was a genuine and present threat to society. Mr Lowton said that the appellant broke into the home of the victim, threatened him and robbed him. He said that the decision was not taken on the grounds of general deterrence but was taken to prevent the appellant from offending in the UK. Mr Lowton said that the decision was not solely based on the appellant's previous convictions. He said that the appellant was sentenced to a four year sentence and that the offence must have been a terrifying ordeal for the victim. Mr Lowton said that the offence was aggravated by the appellant threatening a witness. He said that the appellant claimed he was innocent of the offence but he had not appealed the conviction and the judge and the jury would have made a full assessment of the evidence. Mr Lowton said that the tribunal could not go behind that conviction.

Mr Lowton referred to the OASys and said that this shows that the appellant was a medium risk to adults, the public and staff. He said that the risk of reoffending within the next two years was 54% and the risk of violent reoffending was also 54%..."

10. Finally, the judge summarised the submissions made by the appellant himself:

> "The appellant said that he had made the decision to move to Swindon when he was released from prison because he did not want to go back to the area where his old friends lived. He said that he has opportunities in Swindon. The appellant said that he had learned everything in the UK and this was where he had offended. He said that he gained qualifications in prison because he wanted to undertake the qualifications and not because he had to do them. He said that he wanted to do something positive. The appellant said that the only reason he was found guilty of the offence was because his friend pleaded guilty and because of his past. He said that he had not committed the offence and was judged on the basis of his past."

I should add that the significance of the appellant's stated intention to move to Swindon when released from prison is that his mother now lives in Swindon and it was the appellant's case that he would live with her there.

11. Next, the judge set out the legal framework applicable, and it is convenient for me to do so also.

12. Regulation 19 of the 2006 Regs provides, so far as is relevant for present purposes:

> 19. …
>
> (3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if -

(a) …

(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; or

…

Subparagraphs (4) and (5) of regulation 19 are not relevant to the circumstances of this appeal.

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.
>
> …

13. The conclusions of the judge, and the reasoning that led to those conclusions, are set out between paragraphs 29-45 of his judgment. She determined, correctly, that on the facts and on the basis of the evidence before her, the appellant was entitled only to the basic level of protection from removal provided by regulation 21. The evidence did not demonstrate that the appellant had managed to accumulate a continuous period of residence in accordance with the 2006 Regs for five years and, counting back from the date of the decision, the continuity of his residence had been interrupted by his last prison sentence of 4 ½ years.

14. Pausing there, it is appropriate to note that in *SSHD v Franco Vomero (Italy)* [2016] UKSC 49 the Supreme Court considered it "necessary or appropriate" to refer to the Court of Justice the questions:

> (1) whether enhanced protection under article 28(3)(a) depends upon the possession of a right of permanent residence within article 16 and article 28(2)."

And, in case the answer to this question is in the negative, the Supreme Court also considered it necessary or appropriate to refer to the Court of Justice the further questions:

> "(2) whether the period of residence for the previous ten years, to which article 28(3)(a) refers, is
>
> > (a) a simple calendar period looking back from the relevant date (here that of the decision to deport), *including* in it any periods of absence or imprisonment,
> >
> > (b) a potentially non-continuous period, derived by looking back from the relevant date and adding together period(s) when the relevant person was not absent or in prison, to arrive, if possible, at a total of ten years' previous residence,
>
> (3) what the true relationship is between the ten year residence test to which article 28(3)(a) refers and the overall assessment of an integrative link."

In the confident expectation that the first of those questions will return a negative answer, I recognise that the second and third questions raise matters that may be thought relevant to the facts of this appeal. I shall return to this matter later in this judgment.

15. As I have said, the judge first made clear findings of fact that led to the conclusion that the appellant did not qualify for any enhanced level of protection from expulsion and said:

> "The relevant test therefore is the lower test of whether there are public policy grounds for deporting the appellant from the UK."

16. The judge accepted that the appellant was convicted of "a" serious offence and referred to the sentencing remarks of the judge that I have reproduced above. She noted also that the appellant had 8 previous convictions for 14 offences and that his last conviction included his third for burglary of a dwelling house. The judge observed that the appellant "seeks to evade responsibility for his offence by denying the offence" and said:

> "… The appellant talks about the effects of his offending on others but this appeared to me to relate primarily to the effect on his family rather than a true understanding of the effect on his victims or the effects on wider society."

17. Despite this, the judge detected a willingness by the appellant to change. The judge noted that the appellant had manged to cease accumulating prison adjudications because of his bad conduct and that he had completed some courses in prison. The judge continued:

> "It seems to me that this is an appellant who is on the cusp of change and who, if committed, could manage to change his pattern of offending. However, this is, as yet, untested in the community and it is still difficult to know how the appellant would react if he were challenged or felt that he had been disrespected."

18. Next, the judge had regard to the OASyS report, prepared in January 2016:

> "The appellant at that time was assessed as a medium risk in the community to the public, known adults and prison staff. His risk of reoffending was assessed as 36% in the first year rising to 54% in the second year. This is a significant figure. The OASyS assessment notes that the appellant has control issues and lists a number of factors which increase risk including the appellant becoming angry or being challenged. The assessment also lists a number of factors which will reduce risk including disassociating himself from peers and his family maintaining their support. The appellant spoke in evidence about intending to relocate to his mother's area upon release in order to avoid his previous peer group and of finding employment by setting up his own business…"

19. At paragraph 37 of his judgment the judge said:

> "… I find that the respondent's decision is in accordance with Regulation 21(5) because the decision has been based exclusively on the personal conduct of the appellant, the appellant has been a persistent offender over a prolonged period of

time and the prospects of rehabilitation are potentially reduced by the fact that the appellant denies his most recent offence."

20. Despite expressing herself in those terms, the judge went on to allow the appeal on the basis that the decision was not in accordance with the principle of proportionality articulated in regulation 21(5). That appears to be because the judge believed that the appellant had the potential to be reformed. The judge had observed that it seemed to her that the appellant was "on the cusp of change", as I have noted above. Developing this theme, the judge then said that although the appellant had been assessed as a significant risk to the public:

> "The appellant appears to be starting to understand the impact of his offending although it is true to state that this is still in the early stages..
>
> … It seems to me that this is an appellant who has been shocked to some extent by his current sentence and who has now realised the need to address is offending behaviour. He has undertaken courses in prison which should provide him with skills; both practical and emotional and with an understanding of the impact of his offending. It does seem to me that the appellant has only recently begun to understand this but equally I find that he is beginning to understand these issues and wishes to address is offending and work to avoid it in the future….
>
> ... There is some risk attached regarding the appellant's future conduct. However, taking account of all of the circumstances, including the lack of family support in France and the reasons given above, I find that the decision to deport the appellant does not comply with the principle of proportionality."

21. For the respondent, Mr Tufan submitted that this was a conclusion that was not reasonably open to the judge on the evidence. The judge has not addressed the issue of the appellant's lack of integration in the United Kingdom and has failed adequately to have regard to the appellant's clearly demonstrated propensity to offend. He may have completed some courses in prison but there was scant evidence of the nature and effect of it. Whilst the judge speculated as to the future possibility that the appellant might not offend in the future, stating that he appeared to be "on the cusp of change", the evidence pointed in a different direction, particularly the OASyS report which confirmed that the appellant represented a high risk of harm to the public which plainly established that he represented a genuine present and sufficiently serious threat affecting one of the fundamental interests of society. The nature of the offences committed by this appellant and his propensity to offend plainly satisfied the requirements of the regulations and it was not reasonably open to the judge to find otherwise.

22. I agree. I am unable to understand how the judge, having recognised that the changes in behaviour of which the appellant has spoken were of the future, and then only if the appellant were committed to achieving such a change, and that the risks to the public identified in the OASyS report continued in respect of "the appellant's future conduct" could properly and reasonably conclude that the appellant did not represent a genuine present and sufficiently serious threat. Rather

than determining the appeal on the basis of circumstances as they have presently been shown to be, the judge has allowed the appeal on the basis of how those circumstances may be in the future. I do not understand the judge to be saying that the appellant does not presently represent such a risk. Indeed, at paragraph 43 she accepted that "some risk" attached to the appellant's future conduct. Rather, the judge allowed the appeal because the appellant was "on the cusp of change" which acknowledges that such change as not yet occurred. Every aspect of the reasoning of the judge is couched in terms of future events: The appellant is on the cusp of change; *if* committed, he *could* manage to change his pattern of offending; however, this is *untested* in the community; the appellant appears to be *starting* to understand the impact of his offending.. this is still in the early stages; he has realised the *need* to address his offending behaviour – the appellant has only *recently begun* to understand this; he *wishes* to address his offending.

23. Although these matters led the judge to conclude that the decision to remove the appellant from the United Kingdom does not comply with the principle of proportionality, there is no indication in the judgment that the judge made any attempt to strike a balance between the competing interest in play in the proportionality balancing exercise required. Proportionality is about balancing one set of considerations against another. Here, the cogent and compelling public interest considerations arising from the need to protect the public from the risk of the appellant continuing to commit serious criminal offences of a violent nature in the United Kingdom appears to have played no part in the decision of the judge.

24. For these reasons, I am satisfied that the judge has made a material error of law and that her decision to allow the appeal must be set aside.

25. At the hearing, I explained to Mr Samba that I would reserve my decision as to whether or not the judge had made a material error of law and, having ensured that he understood that if I did find such an error of law had been made, I would go on to remake the decision in respect of his appeal against the removal decision, I asked him if he was ready to present his case that I would need to consider if the decision to allow the appeal were set aside and I therefore had to make a fresh decision as to whether the appeal should be allowed or dismissed. I explained that if there was any evidence he wished to rely upon that was not available at the hearing, he could apply for an adjournment. He said that he did not require an adjournment and was content to proceed. His mother was present and he would call evidence from her.

26. Mr Samba then gave oral evidence. He said that he had been in and out of jail and had learned a lot from that. He had decided that on release from prison he would not continue to live in London but would move to live with his mother in Swindon. He said that there he would find job opportunities in the construction industry, as he put it. He said that he wanted to make a new start. He had learned his lesson. He did not wish to return to France, where he had lived for 8 years. He has been in this country for 14 years and wished to remain here.

27. For the respondent, Mr Tufan asked a very few questions in cross examination. It was put to the appellant that when interviewed by an Immigration Officer on 2 August 2016 he said that he did not have a good relationship with his mother and that "she is not there for me". Mr Samba denied having said that.

28. Next, the appellant's mother, Vivian Sylvie Touya, gave evidence. She confirmed that she is a French national who moved to the United Kingdom in 2002. She has now established a permanent right of residence. She described herself as a carer and said that she is also studying to become a nurse. I asked Ms Touya when she and her son had last lived together in the same household. She was uncertain as to her answer whereupon the appellant addressed her loudly in French. There was an exchange between them, again in French, from which it was plain that the appellant is fluent in that language.

29. Ms Touya's recollection was that she and her son last lived in the same household in 2013. She said that he had lived with her between the ages of 9 and 16.

30. Ms Touya said that the appellant could, once released from prison, come to live with her and her husband in Swindon, provided the probation officer supervising him on licence approved of that arrangement. It can be seen from this that although the appellant's release was thought to be imminent, no such arrangement had been approved.

31. The witness said that she had no relatives in France. The only question Mr Tufan addressed to this witness was whether she accepted that the appellant had committed a number of offences while he was living with her. Once again, when Ms Touya failed to respond the appellant spoke to her loudly in French but this did not elicit any reply.

32. Drawing all of this together, I reach the following conclusions.

33. The appellant enjoys only the basic level of protection against removal because it has not been established that he has managed to complete a single continuous five-year period of living in accordance with the 2006 Regs. The continuity of his residence in the ten-year period preceding the removal decision has been interrupted by his sentences of imprisonment. Whatever the outcome of the refence made by the Supreme Court in *SSHD v Franco Vomero*, that will take the appellant no further because, even if it were possible to string together or accumulate an overall period of ten years during which the appellant was not serving a prison sentence, it is unambiguously clear that he has not managed to integrate into the United Kingdom. His education was interrupted by exclusion from school and in his early years, as he confirmed in the process of the OASyS assessment, he involved himself with gangs, although he chose to disassociate himself from gang culture as he grew older. The continuing commission of criminal offences and the nature of his subsequent record of offending is impossible to reconcile with any assessment of integration. Even while serving his present sentence he has been the

subject of 8 adjudications, mainly for fighting with other prisoners, although it is fair to say that there have been no such adjudications in the latter part of his sentence.

34. The appellant's previous convictions do not in themselves justify the removal decision. What is relevant is the extent to which how the appellant conducts himself informs the question of whether he represents a genuine, present and sufficiently serious risk. The decision must comply with the principle of proportionality and in that regard relevant factors include, but are not limited to, considerations such as the appellant's age, state of heath, family and economic considerations, length of residence in the United Kingdom, his social and cultural integration into the United Kingdom and the extent of his links with France.

35. The appellant has committed a number of serious criminal offences and there has been a clearly demonstrated escalation of the seriousness of his offending as time has gone on. I have no doubt at all that he represents a significant risk of reoffending and that the nature of the offences he has a propensity to commit are offences involving violence. The OASyS report, completed following an assessment in January 2016, concludes that the risk of reoffending within 2 years of release is 54% and the risk of violent offending during that period is assessed to be 45%. The offences of robbery and burglary were aggravated by the subsequent intimidation of a witness, involving a threat of violence calculated to compromise the police investigation. In the OASyS report it is observed:

> "The victim took these threats seriously believing that Mr Samba was capable of arranging for her to be beaten up by others. It was also noted that the victim was aware that Mr Samba had been linked to several stabbings and believed he carried a knife, although this information is obviously not confirmed."

36. I bear firmly in mind all that has been said about the appellant's motivation to change. However, as I have said above, that all looks to the future and will depend upon whether the appellant can muster and maintain the requisite commitment to change. As the judge who initially determined this appeal observed, "this is untested in the community and it is still difficult to know how the appellant would react if he were challenged or felt that he had been disrespected". The appellant has spoken of living with his mother in Swindon once released. She, of course, was unable to prevent his offending when he lived with her when younger and it can be seen that the appellant told the author of the OASyS report that on release he had intended to live with his girlfriend in Peterborough. In any event, the appellant will be on licence and so his living arrangements will need to be approved and as that has not yet been established, despite his release being imminent, there can be no confident prediction of what his living arrangements will be.

37. As the appellant has refused to accept responsibility for his most recent offences the prospects of rehabilitation are not at all encouraging. The appellant's case is that the prospects of rehabilitation are better in the United Kingdom. However, it is plain that, contrary to what the appellant has said, he retains fluency in French and

although he has spent most of his life living in the United Kingdom, as he spent eight years living in France when younger, that country will not be wholly unfamiliar to him even though, of course, he will find challenging the prospect of establishing himself there. The evidence of both his mother and himself is that they have no family members now living in France to whom the appellant could look for support but, of course, his mother will readily be able to maintain contact with him if that is what they choose to do. The appellant has spoken of obtaining work in the construction industry as well as in painting and decorating or in running a mini cab business. There appears to be no reason why he cannot find work, for example, in the construction industry in France just he hoped to in the United Kingdom.

38. On the evidence the parties have put before the Tribunal there is no doubt at all that the personal conduct of the appellant does represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. For the avoidance of any possible doubt, if I were wrong to find that the appellant had not accumulated a five-year period of living in accordance with the regulations, the circumstances I have discussed would still, plainly, constitute serious grounds of public policy or public security such as to fully justify the decision that has been taken.

39. Put another way, in terms of proportionality, the level of risk that I am satisfied this appellant represents is such as to displace firmly all the arguments that speak in his favour.

40. For these reasons the decision under challenge was correct and lawful and the appellant's appeal is dismissed.

<u>Summary of decision:</u>

(i) The Judge of the First-tier Tribunal made a material error of law error of law and her decision shall be set aside.

(ii) I substitute a fresh decision to dismiss Mr Samba's appeal.

Signed

Upper Tribunal Judge Southern

Date: 24 July 2017