



IAC-AH-DP-V1

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

Appeal Number: DA/00164/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 August 2018**

**Decision & Reasons Promulgated  
On 4 September 2018**

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**OYEYEMI [O]  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Mr S A Salam, Solicitor

**DECISION AND REASONS**

1. Although the appellant in these proceedings is the Secretary of State, I continue to refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Nigeria, born in 1990, who arrived in the UK in 2004 as the family member of an EU national. A decision was made by the respondent on 16 February 2018 to make a deportation order against him under the Immigration

(European Economic Area) Regulations 2016 (“the EEA Regulations”) on account of his criminal offending.

3. On 2 July 2007 the appellant received a caution for theft (shoplifting). He received another caution on 20 August 2014 for criminal damage, and on 4 October 2014 a third caution for resisting or obstructing a constable.
4. More seriously, on 20 May 2015 he was convicted of harassment, contrary to the Protection from Harassment Act 1997 and received a community order, compensation and a restraining order. On 1 December 2015 he was convicted of an offence of wounding with intent to do grievous bodily harm and received a sentence of four years and eight months’ imprisonment.
5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Evans (“the FtJ”) on 27 April 2018. The appeal was allowed. Essentially, the FtJ concluded that the appellant did not then represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, because he found that the required risk of reoffending was absent. The respondent’s grounds of appeal in relation to the FtJ’s decision, in summary, take issue with that aspect of the FtJ’s conclusions, arguing that inadequate reasons had been given for that finding. Reference is made in the grounds to the seriousness of the appellant’s offending, the nature of the offences, and what is said in the OASys report. It is argued that the evidence produced by the appellant in terms of participation in courses and the letter of reference from a prison chaplain did not displace the evidence of risk.

*The FtJ’s decision*

6. At the hearing before the FtJ the appellant was in immigration detention. He gave oral evidence.
7. The FtJ identified the legal framework within which his decision needed to have been made. He summarised the appellant’s criminal offending and the details of the most serious offences of harassment and wounding with intent, as set out in the OASys report and the sentencing judge’s remarks. He also summarised the basis of the respondent’s decision as set out in the decision letter.
8. The FtJ referred to the documentary evidence he had before him, referring in detail to the OASys report and an undated internal memo or note from the Offender Management Unit at HMP Risley stating that the appellant was not suitable to downgrade to a lower security category.
9. He referred to documentary evidence provided after the hearing by the appellant who apparently was not able to provide it at the time of the hearing. The respondent was aware of that fact and no complaint is made in that respect. Part of that evidence was a certificate referring to the appellant’s active participation in a Restorative Justice and Victim Awareness Programme, a Gateway Qualification showing that he

had obtained a level 2 award in Understanding the Restorative Justice Programme, as well as two certificates showing credits towards that award. Copies of the documents were sent to the respondent to provide an opportunity to make submissions on them but none were made. The FtJ took the precaution of directing that further copies be sent to the respondent notwithstanding that the appellant's correspondence indicated that the documents had been sent to the respondent.

10. In his "Findings and conclusions" the FtJ said that he started by considering what evidence there was in relation to the risk of reoffending. It is necessary to quote verbatim from various paragraphs of the FtJ's decision. At [27]-[40] the FtJ said as follows:

- "27. The OASys Assessment was completed on 22 December 2015 (page 51 of the Respondent's bundle) in relation to the Appellant's conviction in May 2015 for harassing his former partner. The OASys Assessment documents that the harassment comprised the Appellant repeatedly phoning, texting and messaging his former partner, following other people into the accommodation where she lived and finally entering the former partner's flat where he entered her bedroom and filmed her. After leaving he attempted to re-enter the property through a bedroom window. The harassment followed the ending of the Appellant's relationship with his former partner. The OASys Assessment under the heading 'Why did it happen - evidence of motivation and triggers' states that 'Mr [O]'s coping skills in response to rejection were poor and under-developed'. It states 'his attitudes suggest immaturity as well as issued (sic) around his emotional well-being, contributing to his problematic response to rejection'. It notes 'he remains unwilling to accept the end of the relationship' and that his offending 'reflects an insistence on gaining the responses he wanted and willingness to use force and intimidation'.
28. The OASys Assessment notes the 2014 caution for destroying or damaging property related to property of his former partner (punching the windscreen of her car). It notes that 'there are also concerns that he may have the capacity to cause serious physical harm to others, suggested by the outstanding Wounding offence, which again is linked to his response to inter-personal difficulties'. (It appears that this is a reference to the GBH offence.)
29. The OASys Assessment notes links between relationship issues and the risk of serious harm and the offending behaviour. Alcohol was provisionally assessed as linked to risks of serious harm and re-offending.
30. The OASys Assessment identifies 'potential concerns' around temper control and aggression. It states that the Appellant said the GBH offence arose out of a disagreement with the victim of that offence who had advised the Appellant to accept the end of his relationship with his former partner. It notes the Appellant held 'highly rigid' views refusing to accept the end of the relationship and stated that there were clear links between thinking/behavioural issues and risks of serious harm/reoffending.
31. The OASys Assessment identifies links between the Appellant's attitudes and the risk of serious harm and re-offending. 'Some capacity for remorse'

was identified but he showed only 'limited willingness to consider the impact of his offending upon the victims'.

32. The OASys Assessment did not identify accommodation issues, education/training/employability issues, or financial issues linked to the offending behaviour or the risk of serious harm. It also stated emotional well-being was not linked directly 'to the risks of serious harm, but possibly [sic] re-offending'.
33. The Judge's sentencing remarks in relation to the GBH conviction recorded that the Appellant had attacked [JJ] after he had thrown a blow at the Appellant. The Appellant had knocked Mr [J] to the ground and then had stamped, kicked and punched him and had continued to do so after he offered no resistance and appeared to have lost consciousness. Passers-by had intervened. The Appellant had walked off but then been arrested after he had returned to the scene to retrieve his mobile phone.
34. The sentencing remarks note that the judge had received a pre-sentence report from Claire Leonard and a psychiatric report from Dr McKenna (neither of which were included in either the Appellant's or Respondent's bundles). They reached differing conclusions on the risks posed by the Appellant. The judge stated that he did not need to resolve this divergence of opinion. He noted that he had the discretion to impose a dangerous offender sentence. He concluded:
 

*"I do not have to perform that particular exercise to your detriment, irrespective of whether I considered that you did satisfy the risk that there is a significant risk to members of the public of serious harm occasioned by the commission by you of further specified offences, I do not consider it necessary for me to impose upon you an extended sentence within the meaning of the legislation, I am quite satisfied that a determinate sentence of some length of imprisonment is capable of both reflecting the seriousness of the offending and of protecting the public from harm from you."*
35. The judge decided that the offence was "Category 2" offending. He noted there were aggravating features - the offence had occurred at night and in a public place. He noted that there were mitigating factors: there was no previous conviction for violence (whilst also noting the harassment offence), a limited amount of provocation, limited remorse and the Appellant's guilty plea. At a contested trial the sentence would have been for 7 years and so it was released (sic) to 4 years and 8 months.
36. The Appellant gave oral evidence about the risk of re-offending. He said he had completed a Thinking Skills Programme ("TSP") whilst detained. This had led him to understand 'many things' about himself. He said the damage he had caused to his former partner was 'unforgivable' and that he was also very sorry for the damage done to her car. He felt 'disgusted' by the attack he had carried out on Mr [J]. He had applied to carry out a restorative act whilst doing the Sycamore Tree course. This was a course related to 'restoration': it aimed to help participants understand what they had done to their victims and to understand the damage caused to them and their families.
37. The Appellant said he had become a coordinator for the TSP and the Sycamore Tree course. He had in this capacity become a 'red band'

prisoner and been able to move freely around the prison. He had learnt a lot about himself when in prison. He had realised his mistakes. The certificates which I have detailed above which were submitted after the Hearing provided some corroboration for his evidence: clearly he had participated in a restorative justice course and obtained a qualification relating to restorative justice.

38. The Appellant said that whilst in prison he had attended chapel and worked with the chapel orderly. He had attended group sessions in the chapel for prisoners who wished to express how they felt. They worshipped together.
39. The Appellant said that HMP Risley had failed to produce copies of documents relating to his attendance at the TSP and the Sycamore Tree course. However the letter from the Chaplain dated 19 March 2018 stated:

*"I have known [O] since his arrival at HMP Risley. He has attended Chapel services very regularly indeed and has taken a full part in the worshipping community.*

*[O] has always been polite and exceptionally well-mannered. He has a very caring disposition and always appears to be happy and smiling. I know he endeavours to put his Christian principles into practice with his everyday life and I wish him well for the future."*

40. The relevant 'personal conduct' of the Appellant in this case for the purposes of Regulation 27(5)(b) of the EEA Regulations in this case is his conduct in committing the offences relating to his previous partner and the GBH offence. There can be doubt of the seriousness of that conduct when the offences are taken cumulatively: the conduct began as a relatively minor property offence (punching a windscreen) and escalated to a serious offence of violence (the GBH offence)."

11. The FtJ then said at [41] that if the appellant's personal conduct represented a genuine, present and sufficiently serious threat, such a threat would affect one of the fundamental interests of society as specified in Schedule 1, paragraph 7 of the EEA Regulations, for example in terms of protecting the public. He then said that the question was whether there was a "present" threat. He noted that previous criminal convictions do not in themselves justify the decision and that the respondent's case had two pillars, firstly the fact of the appellant's criminal convictions and secondly the likelihood of the appellant reoffending in the light of the OASys assessment. He said then that the question was really whether the OASys assessment demonstrated that against the background of the appellant's criminal offences there was "now" a genuine and sufficiently serious threat.
12. Having earlier set out the OASys assessment or report in detail, he noted that it was completed on 22 December 2015, shortly after the appellant had been convicted of the offence of wounding with intent. That was only just after he had begun his imprisonment and therefore did not take account of the period during which the appellant now claims he was rehabilitated. He noted the submissions made on behalf of the respondent to the effect that the appellant would of course say that he had acquired insight into why he had offended and the effects of his offending and

that he had been rehabilitated in prison and so no longer posed a threat. The respondent's position was that the appellant was now faced with deportation. The FtJ accepted that there was weight to that submission.

13. He went on to state however, that there was documentary evidence which supported the appellant's contention that he had been rehabilitated. In that context he referred to the letter from the Chaplain at HMP Risley and the certificates and qualifications relating to the Sycamore Tree restorative justice programme.
14. He then said, at [41.5], that whilst taking into account the respondent's representative's understandable scepticism, he found that the way in which the appellant gave evidence and expressed himself did support his contention that he had acquired insight into why he had offended and the effects of that offending. He stated that the appellant's evidence to the Tribunal "did not even hint at the self-deluding attitude towards his failed relationship which was evident in the OASys Assessment two and a half years previously".
15. He thus concluded that the respondent had failed to prove that the appellant now represented a genuine, present and sufficiently serious threat to one of the fundamental interests of society. He stated that the previous offending related "in the main" to one failed relationship and there was significant evidence to suggest that the appellant now understood why he behaved as he did, appreciated why it was wrong for him to behave in that way and as a result of that understanding and appreciation was not likely to repeat the offending.

#### *Submissions*

16. In her submissions Ms Everett relied on the respondent's grounds of appeal. It was submitted that the appellant's oral evidence about the risk of reoffending was an inadequate basis from which to allay the fears expressed in the OASys report. The issues as to why the appellant had offended in the way that he had were simply not addressed by the courses that he had undertaken. The offence of wounding with intent clearly represented an escalation of offending and that offence was not simply an "out of the blue" loss of control.
17. The OASys report was damning about the appellant's ability to control his temper and to understand his actions. His core understanding was underdeveloped and there was no evidence that he had developed the skills needed to prevent inflicting further harm.
18. Furthermore, it was submitted that in the context of his history of offending it was not a good point that the assessment was completed in December 2015. The issues that the appellant has go back many years. The grounds made the reasonable point about the appellant not having been tested in the community. It was submitted that it was borderline perverse for the judge to decide as he did on the evidence of risk. There was nothing to suggest that the appellant had the core social skills necessary to prevent reoffending.

19. It was accepted that perversity was a high threshold to meet in terms of a challenge to the decision of the FtJ and that perversity probably could not be made out. However, it was submitted that insufficient reasons had been given by the FtJ.
20. The FtJ was entitled to take into account the appellant's evidence but the basis upon which he discounted the assessment in the OASys report was inadequate. The FtJ should have given that report more weight.
21. In his submissions, Mr Salam highlighted various aspects of the FtJ's decision in support of the contention that the FtJ had given adequate reasons for his conclusions. It was pointed out that in fact the OASys report was not put before the FtJ by the respondent, but by the appellant. It was not even referred to in the respondent's decision. Furthermore, that was an initial OASys report. No later OASys report had been provided. The onus of establishing a risk of reoffending was on the respondent.
22. The appellant's convictions were not sufficient to demonstrate that risk. The FtJ had gone through all the relevant reg 27 issues and had taken into account the skeleton argument put before him on behalf of the appellant. There was no evidence from the respondent to suggest that there was a present risk.
23. In reply, Ms Everett argued that even if the respondent's decision did not refer to or rely on the OASys report, that was irrelevant. Furthermore, the nature of the appellant's offending was such as to demonstrate that there was a risk that he would reoffend.
24. Although the FtJ had said at [42] that the appellant's offending was in the main related to one failed relationship, the respondent was not suggesting that the appellant would commit exactly the same offence again. The evidence does suggest that if, for example, the appellant got into another failed relationship there was a risk of reoffending. The evidence to contradict what was said in the OASys report was scant. There would have to have been cogent evidence suggesting that the conclusions of the OASys report should not prevail and the appellant would have to establish that he had addressed all issues.

*Assessment and conclusions*

25. Reg 27(3) of the EEA Regulations states that a relevant decision may not be taken in respect of a person with a permanent right of residence under reg 15 except on serious grounds of public policy and public security. It was accepted before the FtJ that the appellant had a permanent right of residence.
26. It was reg 27(5)(c) which was the initial focus for the FtJ's decision and the basis upon which he concluded that the appeal must be allowed. It 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”.

27. In submissions before me, it was accepted on behalf of the respondent that it could not be realistically argued that the FtJ's decision was perverse. The argument is based on an inadequacy of reasons.
28. I have set out verbatim various aspects of the FtJ's decision. It is evident that the FtJ carefully considered in detail the OASys report which he quite rightly pointed out was completed on 22 December 2015. Although Ms Everett suggested that the OASys report was in fact from 2016, the date of 13 February 2016 which appears at the top of each page seems to be the date when the report was accessed, as it were. Page 2 of the report states that the date that the assessment was completed was indeed 22 December 2015, although there is little obvious difference between the dates.
29. I note that the OASys report ought to consist of 47 pages, but from what I can see only 26 pages were put before the FtJ. The FtJ did not refer to that fact and it seems to me that the precise risk assessments in terms of risk of reoffending and serious harm are not included within the pages of the assessment that had been provided. Having said that, at [21.2] he said that the OASys assessment suggested that there was both a risk of the appellant committing serious harm and of reoffending, and that it showed he remained a threat to society. That was the basis of submissions made on behalf of the respondent and the FtJ did not demur from those suggestions as to the import of the OASys assessment.
30. It is also evident that the FtJ took into account the seriousness of the appellant's offending and the fact that his most recent offence represented an escalation in offending.
31. However, I am satisfied that the FtJ did err in law in his assessment of the risk of reoffending. At [42] he said that the appellant's previous offending related "in the main" to one failed relationship. That is probably an accurate assessment of the appellant's offending. However, putting aside the caution for theft (shoplifting) in 2007, the appellant has offended repeatedly since August 2014. He received a caution in October 2014 for resisting or obstructing a constable, although the circumstances of that matter have not been explored. Nevertheless, I consider that there is merit in what is said in the grounds with reference to the decision in *Kamki v Secretary of State for the Home Department* [2017] EWCA Civ 1715 in terms of the need to look at the likelihood of reoffending and the seriousness of the consequences if there is reoffending (see [18]). Although the FtJ concluded that the appellant was not likely to repeat "the offending", that suggests that he concluded that there was no risk at all of the appellant reoffending. However, such a conclusion belies the fact of the appellant's previous offending which, whilst not alone a sufficient basis from which to conclude that he represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, is plainly relevant to the risk of reoffending.
32. In the event that the appellant should reoffend, there would need to be an assessment of the risk of serious harm that such offending would involve. The FtJ



referred to documentary evidence of courses the appellant had undertaken and the letter from the chaplain at HMP Risley. He also placed significant weight on the appellant's oral evidence, which I accept he was entitled to do.

33. However, there is also merit in the respondent's complaint that the FtJ's assessment fails to take into account that the appellant's apparent commitment not to reoffend had not been tested outside the confines of imprisonment (or immigration detention). At the hearing before the FtJ the appellant was detained. Ms Everett, rightly in my view, emphasised that the respondent was not necessarily suggesting that the appellant would commit exactly the same offence again but that the risk may arise in circumstances where he became involved in another failed relationship. Such circumstances cannot realistically be assessed whilst the appellant is detained.
34. In these circumstances, I am satisfied that the FtJ erred in law in his conclusion that the appellant did not represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. His assessment of the risk of reoffending, i.e. the presence of the threat, was flawed for the reasons I have given. Accordingly, his decision must be set aside.
35. I indicated to the parties that if my view was that there was an error of law requiring the decision to be set aside, I would not re-make the decision without further reference to the parties but may decide to remit the appeal to the First-tier Tribunal for a further hearing. It seems to me that there will need to be a full reassessment of the appeal in all respects. Most of the factual issues are uncontentious and the FtJ did not make any findings of fact that are not infected by the error of law and that thus can be preserved. Accordingly, it seems to me that the appropriate course is for the appeal to be remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Evans.
36. I make it clear that although I have found that there was an error of law in the FtJ's decision in relation to the risk of reoffending, I have not indicated any view of my own in relation to that issue. That is a matter that will need to be reassessed in the light of the evidence before the First-tier Tribunal when it rehears the appeal. In that context, it seems to me that it will be important for the complete OASys report, or any updated report, to be provided, either by the respondent or by the appellant.

### *Decision*

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision to allow the appeal is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Evans, with no findings of fact preserved.