Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00315/2018**

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 2 December 2019	**On 23 December 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR RICARDO MACQUEEN DE AGUIAR
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr L Youseffian instructed by Sabz solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Mill, promulgated on 17 September 2019, allowing Mr Aguiar's appeal against a decision to deport him as a result of a conviction for which he was sentenced to twelve months' imprisonment, made the subject of a Sexual Harm Prevention Order, and a requirement to be subject to the Sexual Offenders Notification requirements for a period of ten years. The appeal came before Judge Lal on 3 September 2018. He then allowed the appeal. The Secretary of State appealed successfully to

the Upper Tribunal and the appeal was then remitted to the First-tier Tribunal where it was heard by Judge Mill.

2. The judge directed himself at paragraphs [10] to [14] as to the relevant legislation in particular the Immigration (European Economic Area) Regulations 2016. The judge noted the respondent's statement that he entered the United Kingdom in May 2007 at the age of 19 [22]. He concluded that:

   (i) the respondent had acquired permanent residence and had accrued ten years' continuous residence counting back from the date of decision to deport [22];

   (ii) the respondent had initially been a student and had worked part-time whilst studying; and although the documentary evidence of the respondent exercising his treaty rights was not continuous, that was not fatal and that looking at the evidence (including that of his father) as a whole together with the oral evidence was satisfied that the respondent had either worked or studied in the United Kingdom throughout his residence;

   (iii) it was for the respondent to establish he is entitled to protection on imperative grounds on the basis of ten years' continuous residence [24]; that he was substantially integrated; and, having had regard to the entirety of the evidence that the sentence of twelve months' imprisonment, imposed after he had accrued ten years' continuous residence, did not in his case break the continuity of residence; and accordingly, it was for the appellant to show that the appellant's deportation was justified on imperative grounds of public security;

   (iv) the respondent's residence with his father is considered to be a protective factor [34], and he is in stable employment in the construction industry; has successfully completed work on the abstinence from a list of substances and successfully completed the rehabilitation programmes [35, 36]; that the most recent OASys assessment dated 15 February 2019 confirmed that he had complied with all expectations, no longer has contact with his peers with whom he associated with previously in the course of his offending; the risk he posed was not imminent [40] that he has a support structure in place and has been drug free from two years and "he is rehabilitated".

   (v) the judge concluded that the appellant had not shown that the respondent was likely to reoffend further given his rehabilitation and the low risk of future offending [43]; that he was integrated into UK society; and that the public interest does not require his deportation.

   (vi) that although fundamental interests would be breached in the event of the respondent re-offending, on the basis of the findings he was not a threat, the most recent OASys Report showing that he is at a low risk of offending but whilst it was not required to establish that the risk of reoffending was imminent, the appellant's lifestyle and

behaviour since his release back into the community demonstrates he is not a real risk, he having undertaken specific targeted rehabilitation work in regard to his former offence. Accordingly the decisions by the respondent breached Regulation 27(5)(c).

3. The appellant sought permission to appeal on the grounds that the judge had erred:

(i) in finding that the respondent had ten years' continuous residence there being no reason for finding that the appellant and his father were credible; and,

(ii) in his consideration the respondent had substantially integrated, relying on oral evidence which was in issue, the judge failing to consider the nature of the index offence of the appellant's lifestyle and misuse of drugs which damaged his claim to be integrated;

(iii) in not noting that the correct level of protection is the medium level conferred by Regulation 27(3) and that the respondent's conduct does warrant deportation for the reasons given in the deportation order;

(iv) in failing when concluding that the respondent did not pose a sufficiently serious threat to give sufficient consideration to all the evidence, in particular that he was subject to orders demonstrating that it had been concluded that he continues to pose an ongoing threat to society, a Sexual Harm Prevention Order being imposed early when the court is satisfied that it is necessary in order to protect a person or a sector of the public, the very existence of this demonstrating that he must be a threat to society, the judge erring in failing to consider the orders at all.

(v) In failing to take into account that there was a risk of harm and in failing to have proper regard to Kamki [2017] EWCA Civ 1715.

4. Mr Tufan submitted that the judge had not dealt properly with the issue of integration the judge referring only to the Sexual Harm Prevention Order at paragraph 2 and had not taken this into account in his overall assessment nor had he taken into account the matters set out in Schedule 1 to the 2016 Regulations. He submitted that although the more recent OASys Report did show that there was a low chance of reoffending it was still relatively high, there being a 20% chance of reoffending within three years, relying on **MA** that 17% is a significant threat. He accepted that **Kamki** was not applicable.

5. Mr Youseffian submitted that the judge's finding that the appropriate level of protection was the highest is sustainable, given that there was no error in the judge accepting the evidence of the respondent and his father. He submitted further that the respondent had shown he is integrated, and that the judge had been entitled to conclude that the integrating links had not been broken by the term of imprisonment.

6. The appellant's first challenge to the finding as to the ten years' continuous residence is founded primarily on the submission that the judge should not have accepted the evidence of the appellant and his father. There is no indication that in the challenge to the father's credibility was made before the judge or within the refusal letter; Mr Tufan was unable to take me to any indication that this submission had been made. Even taken at its highest, all that happened is that the appellant's father was arrested and it then turned out that it was the son who had been misusing the computer to download images. The father was not charged; that is not a proper basis on which it could properly be said that his credibility was undermined.

7. It was open to the judge to conclude having heard oral and evidence from the appellant and his father to find that continuous residence had been established by that and the documentary evidence. There is no indication that the respondent's evidence was contrary to the documentary evidence which, although partial, was supplemented by evidence from his father. There is no suggestion either that it was submitted that the respondent or his father's evidence should not be believed. Whilst it may be that, in retrospect, the appellant may have wished to have made these submissions, the grounds of appeal to the Upper Tribunal are not a vehicle for a party to make points he wished he had made to the First-tier Tribunal. There being no other challenge to the finding of ten years continuous residence, I am not satisfied that it has been shown that the judge made an error on this point. The decision was sustainable and adequately reasoned

8. Turning to the issue of the challenge to whether the appellant has substantially integrated, the sole challenge within the grounds is that the judge failed to consider the nature of the index offence or the lifestyle of "chem sex parties" and misuse of drugs.

9. At [29] of the decision the judge sets all these issues out. She sets out the background to the index offence at [33] as well as the respondent's circumstances, and his an attempt to reform and to undergo rehabilitative treatment indicating that these were in the judge's mind in reaching her conclusion. This express reference to the history as documented and elaborated by the respondent and his father at [24] are indicators as are thee conclusions at [43] that the appellant has integrated into UK society.

10. It needs to be noted also that before the respondent began to use drugs, he had been educated here, had studied here and has held down various different employments whilst studying. The employment and friendships as well as a long term relationship are indicative of societal integration beyond his family. Whilst the use of drugs and the criminal offending are indicators that there has of a lack of integration these have to be looked at as a whole. There is no suggestion here that integrative links were formed as a means of evading deportation. It is also relevant to bear in mind that in this case the appellant had been continuously resident for over 10 years before it appears the crimes were committed.

11. It is also of note in this case that the respondent is now employed, no longer and has a stable home life. He attended and successfully completed treatment programmes and lives with his father which as the OASys Report noted, was a stabilizing influence. He spent a relatively short time in prison and, taking this evidence in the round, as the judge said she did, the decision that the respondent's integrative links had not been broken by the imprisonment is a sustainable conclusion. It is sufficiently clear, reading the decision as a whole, that although the reasoning could be more detailed, the judge did take into account the relevant considerations when reaching a conclusion that the integrative links had not been broken which was one open to her on the material and in the light of the circumstances set out above which were in the evidence before her. Accordingly, I am satisfied that the judge did not in concluding that the appellant was entitled to the highest level of protection.

12. As Mr Youseffian submitted, the Secretary of State did not submit that if this were engaged, that the imperative grounds were justified. That is a sensible conclusion given the most recent OASys Report showing that the appellant presents a low risk of reoffending. Accordingly, I am satisfied that the decision did not involve the making of an error of law. It cannot be argued that the judge erred in concluding that the respondent's offending was such that his deportation could be justified on imperative grounds. It is therefore strictly unnecessary to address the remainder of the grounds

13. For the sake of completeness, however, and in the alternative, I conclude that the judge was justified that the appellant does not pose a sufficiently serious threat. The submissions made with regard to the OASys Report are mistaken as it is clear that the threat was found to be low. I consider there is significant merit in Mr Youseffian's submission that the existence of orders is not sufficient to demonstrate there is a threat. There is an extent to which the Secretary of State in her grounds appears to in effect say that the existence of the Sexual Harm Protection Order is if not actually, close to determinative of the issue of harm. Here, I consider that the judge has properly considered all the chances of the appellant reoffending including the fact that he has now in her view (and this is not challenged) become rehabilitated has undergone drug treatment and given that drug abuse was a significant factor in this offending is a positive factor as is the stable home environment and regular employment. The judge gave adequate and sustainable reasons for concluding that the appellant did not present a genuine and sufficiently serious threat and accordingly, even on the medium level which the Secretary of State accepts is applicable, the judge's conclusion that he did not present a threat was one open to her and properly reasoned.

14. Accordingly, for these reasons, I conclude the decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it

Signed Date 19 December 2019

Upper Tribunal Judge Rintoul