Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00335/2017

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 22nd January 2019	**On 5th March 2019**

Before

THE HONOURABLE MRS JUSTICE FARBEY DBE
UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMA

Claimant/Respondent

Representation:
For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Claimant/Respondent: Mr D Chirico of Counsel, instructed by Bindmans LLP

DETERMINATION AND REASONS

1. The claimant is a national of the Democratic Republic of Congo, born on 24th January 1984.

2. He entered the United Kingdom in 1989 or 1990, when he was approximately 5 to 6 years of age.

3. The claimant has nineteen convictions arising out of 49 offences, first entering the criminal justice system in 1988, when he was convicted of indecent assault at the age

of 14. In 2000 he was convicted of domestic burglary and driving matters and in 2001 for further offences of burglary. He was convicted of actual bodily harm and sexual assault, resulting in a five year term of imprisonment in a youth detention centre. In 2007, after leaving prison, he was convicted on three occasions for threatening behaviour, driving matters and attempted burglary. More offences followed in 2008, including the possession of crack cocaine. He offended again in 2009 and in 2010 was convicted of fraud and handling stolen goods and driving matters.

4. The claimant was diagnosed with schizophrenia in 2009, for which he is still receiving treatment.

5. After the claimant was released from custody in 2013 there was a deterioration in his health and he was placed in medium support accommodation and under the care of a consultant psychiatrist.

6. In 2004 the Secretary of State revoked the grant of indefinite leave to remain and sought to make a deportation order against the claimant. That was the subject of an appeal, which came before an Immigration Adjudicator in November 2004. Following the lengthy process of that appeal, that appeal finally came before Senior Immigration Judge Gleeson and Senior Immigration Judge Perkins for hearing on 12th December 2008 and 15th May 2009. In a very detailed and well-considered determination the appeal was allowed on the basis of human rights. Judges considered that, although the appeal was finally balanced, it was not proportionate to remove the claimant from the jurisdiction.

7. The Tribunal in coming to that conclusion clearly had in mind the potential risk which the claimant continued to pose to society and the risk of re-offending. The pattern of re-offending continued.

8. The Secretary of State once again sought to implement the deportation of the claimant in the light of his further serious offences, outlining the reasons for doing so in a decision of 13th August 2012. Eventually the appeal against that decision came before the First-tier Tribunal on 31st May 2013, before First-tier Tribunal Judge Keane and Miss S E Singer. The Tribunal also allowed the appeal on the basis of Article 8, finding that the deportation of the claimant to the DRC was not necessary or proportionate.

9. The current appeal arises from a decision to deport made on 14th June 2017, triggered by the claimant's conviction on 15th June 2015 for conspiracy to burgle with an intent to steal, for which he was sentenced to five years' imprisonment. In the sentencing remarks, the Judge stated that the claimant with five others targeted schools in a systematically organised way to steal computers. Some of the burglaries were violent, destructive and determined in which there were smashed doors and gates and in one school 50 classrooms were destroyed. Apart from the financial loss caused by the loss of computers and the damage, the work of the schoolchildren stored on the computers was lost, including work for GCSEs. The Judge indicated that there was a rolling conspiracy between a team of people who trusted each other

and who were central to it. The final valuation of property stolen was in the region of £300,000 and the cost of repairing damage in the region of £100,000. It was the finding that the claimant was central to this conspiracy, when at large, although he had been in custody for the second half of the conspiracy.

10. The basis of the challenge to that decision that it was in breach of the claimant's rights under the EEA Regulations and that of his family under Article 8 of the ECHR.

11. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Robertson on 21st November 2017. The Judge found there to be compelling circumstances making the claimant's deportation disproportionate even when balanced against the very strong public interests in deportation.

12. The Secretary of State sought to appeal against that decision. Leave to appeal to the Upper Tribunal was granted on 7th February 2018. Thus, the matter comes before us to determine the issues as between the parties.

13. Mr Chirico seeks to raise, as a preliminary issue the timeliness of the appeal lodged by the Secretary of State. The First-tier Tribunal decision of Judge Robertson was promulgated on 13th December 2017. When taking into account the Christmas period the deadline to lodge an appeal fell on 3rd January 2018. The Secretary of State acknowledged that the application was made eight days out of time and said that this had arisen due to an administrative error. It was the initial understanding that the determination had dismissed the appeal and the case was filed as dismissed. It was not at that time noted that the appeal had been allowed in respect of Article 8 ECHR.

14. The First-tier Tribunal Judge, in granting permission to appeal to the Upper Tribunal on 7th February 2008, found there to be special circumstances and accordingly extended time and admitted the application.

15. Mr Chirico invites our attention to the GCID case record sheets for the relevant period and submits that a study of them gives rise to a significantly different interpretation from the one as presented to the First-tier Tribunal Judge. The notes indicate that the dismissed determination was received on 13th December 2017. The appeal screen updated showed appeal dismissed. However, when the determination was received it showed appeal dismissed under Article 3 but allowed under Article 8. There was an entry in the record "ask decision maker if he has heard anything further regarding how to proceed and refer to SCW/SATT for advice". Seemingly, that advice was not forthcoming and it was only the receipt of a letter from the solicitors on 4th January 2018 which prompted further communication, resulting in an indication from SAT that the appeal had not been fully dismissed, "must look into whether late application for PTA should be made". This was made on 11th January 2018. Thus, he submits that the misunderstanding as to what was or what was not dismissed was apparent on 14th December 2017 and that considerable time had therefore elapsed before any action was taken to submit the appeal. He invites us to

find that a First-tier Tribunal Judge, having such notes, might have come to a different conclusion as to timeliness.

16. It is clear from the minute case notes that there had been initial confusion which was in the process of being sorted out internally before the decision to appeal was made. Although the circumstances are more fully set out, we do not find the circumstances to be such to call in question the propriety and fairness of the Judge having extended time. We do not interfere with that decision and make it clear that were we invited to reconstitute ourselves as Judges of the First-tier Tribunal and remake the decision on timeliness, we would exercise the discretion in favour of the Secretary of State. We find there to be no undue delay.

17. In essence, the challenge mounted by the Secretary of State to the determination was that the Judge has failed to conduct the proportionality exercise correctly under the EEA Regulations, in particular had given little consideration to the public policy in that proportionality assessment. Further, it is submitted that the Judge has misapplied Section 117C of the Nationality, Immigration and Asylum Act 2002 in that he did not consider whether the claimant was socially or culturally integrated into UK society. The factors identified as giving rise to "very compelling circumstances" in fact go no where near founding such circumstances. We are grateful to the parties for their detailed representations, particularly to Mr Chirico for his helpful skeleton argument.

18. In terms of the appeal in respect of the EEA Regulations, the Judge dealt with that matter in paragraph 78 of the determination in these terms:

> "78. Both the panel and the Tribunal in 2013 were under no illusions regarding the seriousness of the appellant's offending and the likelihood that he would continue to re-offend (see paras 39(b) above and the findings of the panel at paragraphs 3 – 4, 48 and 153, as set out above and paragraph 41 (setting out paragraph 156 of the decision of the panel). I make my findings in line with those findings. However, given that the appellant has been in the UK for most of his life, and he effectively has no ties to the DRC, and all his ties are in the UK, I find that it would be disproportionate under the EEA Regulations to remove him. This has been a finely balanced decision, and I have not taken the decision lightly. I would therefore allow his appeal under the EEA Regulations."

19. It is not apparent to us that the Judge gave any independent consideration of the issues, in the light of the recent conviction.

20. Challenge has been made that the Judge has given only distinct consideration to the earlier offences and outcome, rather than to the decision to deport, which is the subject of the appeal. There is no assessment, for example, as to the nature of the risk which is posed by the appellant in the current situation and no assessment of the public interest in his removal by reason of that risk. We say that because it is to be noted in paragraph 48 of the determination that reference is made to the OASys Report, which was written on 29th November 2017, and which deals with the probability of violent re-offending. The probability of the appellant re-offending is

described as "high" and the probability of non-violent offending is described as medium. This was stated to be greatest when the appellant was low on finances, open to negative peer influences or had relapsed into alcohol and illicit drug abuse., particularly if he was non-compliant with his medication. The author of the report noted the lack of full acknowledgement of the appellant as to his actions in the conspiracy." Until the thinking process and behaviour of the appellant's repeat re-offending is addressed he will continue to pose a risk of serious harm to the public." It is also noted that he was diagnosed with antisocial personality disorder. Thus, the fact that the previous Tribunals had allowed his appeal, aware that he may well commit further offences, is not an answer as to whether the proportionality assessment has now changed in the light of the particular nature of the claimant's present offending. It seems to us not only relevant to consider the seriousness of the offence generally, as reflected in sentence, but more particularly the nature and content of the claimant's behaviour.

21. In terms of the assessment of the claimant's rights under Article 8, such are briefly stated in paragraph 79 of the determination, finding that the claimant has a strong relationship with family members who were dependent on him in the past and on whom he depends now and even, whilst he is in prison, there is a strong element of family or private life.

22. Even in that analysis there is little explicit recognition of any countervailing matter. This is particularly so as it was recorded by the Judge in paragraph 49(c) of the determination, that when the index offence was committed he was living in a hostel and associating with negative influences and that he was not available for employment due to his mental health. Prior to custody, his brother managed his finances due to his drug and alcohol abuse and his offences were carried out to feed his drug and alcohol habit. He had many positive periods but also many negative ones. Given the nature and extent of his re-offending, there were concerns expressed in the OASys report that the appellant needed continual monitoring, for example in his drug and alcohol habits. The claimant remains in custody. He sees family members on visits. It is difficult in those circumstances to understand how it can be said that the family comprises a strong element in his private life. Indeed, it is difficult, without further clarification, to understand how it can be reasonably said that family and private life created for him or will create the stability which he needed.

23. The Judge in considering Section 117C(1) and (4) found that the claimant can benefit as to Exception 1 in terms of whether the claimant was socially and culturally integrated into the United Kingdom. The Judge said as follows:

> "However, I have nothing before me to go behind the findings of the Tribunal in 2009 and the Tribunal in 2013. I bear in mind that these findings were made in the full knowledge of the appellant's past offending and the assessment of future risk. I find that the appellant is culturally and socially integrated into life in the United Kingdom."

24. We repeat our concern, as expressed before, that there is of a lack of an independent consideration of the more current offending, and of its relevance to cultural and social integration. Subsequent to the hearing submissions were made by those acting for the appellant linked to the opinion in **Saber and Boughassai v Spain (apps 76550/123 and 45938/14).** The opinion itself was in French with an English summary. It is said that the said decision supports the proposition that the offence could not by itself demonstrate the lack of social or family ties of that person with the host country. However, the opinion also indicates that the nature and seriousness of the offence must be placed in balance with other criteria. Such seems to us to include the lifestyle of the appellant leading up to the offence and his response to community and family support and to the nature of his conduct giving rise to the offending.

25. Our attention in that regard was drawn to the CJEU's recent judgment in **B v Land Baden-Wuerttemberg and SSHD v Franco Vomero** (**C-316/16 and C-424/16** 17th April 2018), in particular paragraph 74 thereof, which provides as follows:

> "While the nature of the offence and the circumstances in which it was committed shed light on the extent to which the person concerned has, as the case may be, become disconnected from the society of the host member state, the attitude of the person concerned during his detention may, in turn, reinforce that disconnection or, conversely, help to maintain or restore links previously forged with the host member state with a view to his future social re-integration in that state."

No such assessment, we find, has been made. That it should have been made is, we find, of particular importance, given the very antisocial nature and violent and destructive course of conduct with which the claimant was concerned. It is necessary not only to look at the nature of the offence but also to the personality and conduct of the claimant, which are relevant considerations in the assessment of proportionality. We find such an assessment entirely lacking in this matter.

26. In terms of whether there would be very significant obstacles to the claimant's integration to life in the DRC, we note the findings made by the Judge, particularly paragraphs 59 to 63 of the determination. Such seems to suggest that the appellant would suffer a rapid, serious and irreversible decline in his mental health if removed to the DRC. It suggests that the appellant could not receive remittances or be in contact with his family by telephone.

27. This is not a situation where the Judge has found, on the basis of Article 3, that the claimant could not safely be removed to the DRC or that the authorities would be adversely interested in him, but rather that he would face difficulties in re-integration.

28. In those circumstances it is even more important to balance the public interest in his removal with his difficulties if removed, in coming to a balanced and proper proportionality assessment.

29. As the Judge has indicated in paragraph 84 of the determination, there was no evidence that the effect of removal of the appellant upon his wife would be unduly

harsh. They have only been in a relationship for a short period of time and have never lived together. Similarly, in terms of R, she lives with her primary carer. There was no independent evidence that the likely effect on her of the claimant's removal would be unduly harsh.

30. In paragraph 86 of the determination, the Judge cites a number of factors as being compelling circumstances. In particular it is said that the compelling factor was his family, to provide stability. Such a finding pays little regard to the reality that at the time of the offence the claimant was living in a hostel and had, apart from support of his brother, very little support or stability. In any event his need for stability must be weighed against the public interest in his removal.

31. Overall, we do not find, despite what is otherwise a detailed and careful determination, that the Judge has really grappled with the risk to the public posed by the further significant and serious offending, and whether such, together with all related factors, renders his removal now proportionate, despite the difficulties which he might face in the DRC. The Assessments made by experienced Tribunals in 2008 and 2013 are clearly relevant matters as a starting point but do not engage with the fundamental question whether the appellant now poses such a significant threat to public order and safety that he should be removed.

32. Having found that that assessment has not been fully conducted, we set aside this decision to be remade.

33. We are conscious that there may be need for significant additional evidence from witnesses or from the medical authorities which requires effectual findings made upon it. In those circumstances, we consider, accordance with the Senior President's Practice Direction, that this is a matter that should be returned to the First-tier Tribunal for a de novo hearing.

Notice of Decision

The appeal Of the Secretary of State is allowed to the extent that the First tier Tribunal decision is set aside to be remade by the First tier Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed  Date 4 March 2019

Upper Tribunal Judge King TD