Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00364/2018

THE IMMIGRATION ACTS

Heard at: Bradford	**Decision and Reasons Promulgated**
On: 16th September 2019	**On: 11th November 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mubashar Arif
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Ahmad, Counsel instructed by FMB Solicitors**
For the Respondent: **Mr Diwnycz, Senior Home Office Presenting Officer**

DECISION AND DIRECTIONS

1. The Appellant is a national of Belgium born on the 9th September 1987. He has lived in this country since 2007, but the Respondent now wishes to deport him.

2. The legal framework to be applied in remaking the decision in this appeal is Regulation 27 of the Immigration (European Economic Area) Regulations. By my decision of the 18th June 2019 I found that the First-tier Tribunal had erred in law in accepting that the Appellant had established an enhanced level of protection against expulsion by virtue of having attained a permanent right of

residence. I so found because the evidence of the Appellant's economic activity over the relevant period was of such a low level that it could only rationally be described as marginal: in the tax year 2009-10, for instance, he had earned an average of £2.92 per week. That being the case the Appellant had failed to demonstrate that he had acquired a permanent right of residence and the case fell to be determined applying the principles set out in Regulation 27 as highlighted here:

> **27.**—(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 right of permanent residence under regulation 15 except on serious grounds of public policy and 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 in the best interests of the person concerned, 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) The **public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also 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 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;**
>
> **(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 preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

(6) **Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") 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 P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin.**

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation or is not a disease listed in Schedule 1 to the Health Protection (Notification) Regulations 2010(18); or

(b) if the person concerned is in the United Kingdom, any disease occurring after the three month period beginning on the date on which the person arrived in the United Kingdom,

does not constitute grounds for the decision.

(8) **A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).**

3. The relevant part of Schedule 1 is paragraph 7:

7. For the purposes of these Regulations, the fundamental interests of society in the United Kingdom include—

(a) preventing unlawful immigration and abuse of the immigration laws, and maintaining the integrity and effectiveness of the immigration control system (including under these Regulations) and of the Common Travel Area;

(b) maintaining public order;

(c) preventing social harm;

(d) preventing the evasion of taxes and duties;

(e) protecting public services;

(f) excluding or removing an EEA national or family member of an EEA national with a conviction (including where the conduct of that person is likely to cause, or has in fact caused, public offence) and maintaining public confidence in the ability of the relevant authorities to take such action;

(g) tackling offences likely to cause harm to society where an immediate or direct victim may be difficult to identify but where there is wider societal harm (such as offences related to the misuse of drugs or crime with a cross-border dimension as mentioned in Article 83(1) of the Treaty on the Functioning of the European Union);

(h) combating the effects of persistent offending (particularly in relation to offences, which if taken in isolation, may otherwise be unlikely to meet the requirements of regulation 27);

(i) protecting the rights and freedoms of others, particularly from exploitation and trafficking;

(j) protecting the public;

(k) acting in the best interests of a child (including where doing so entails refusing a child admission to the United Kingdom, or otherwise taking an EEA decision against a child);

(l) countering terrorism and extremism and protecting shared values.

4. The question before me is therefore whether the Secretary of State can show the deportation to be justified, having regard to those matters. The Secretary of State accepts that account must be taken of the Appellant's personal circumstances, including that he has a wife and a young son in the United Kingdom, but submits that his deportation is nevertheless proportionate because of the following matters:

    i) The Appellant was cautioned for battery on the 6th December 2007;

    ii) On the 27th August 2010 he was convicted of affray, and received a suspended sentence of 6 months imprisonment, a community service order and a fine;

    iii) On the 28th September 2017 MA was convicted of wounding with intent and was subsequently sentenced to 18 months imprisonment, with the court imposing a five-year Restraining Order. On the same date MA was convicted of possessing an

offensive weapon – a metal extendable baton – for which he received a concurrent sentence of 12 months' imprisonment;

iv) This latter offence arose from a planned attack carried out by MA and his brother on another man who was subject to an 'ambush' by them in an isolated location. MA had come armed to the scene;

v) The April 2018 assessment by the probation service that the Appellant presents a 41% risk of reoffending within 2 years.

5. The Secretary of State accepts that he cannot, by operation of Reg 27(5)(e), simply point to the Appellant's convictions. He submits instead that two particular features of the evidence should attract substantial weight in my balancing exercise. First, the findings of the probation service, to which I return below. Second, the existence of the Restraining Order, imposed upon the Appellant by HHJ Farrell QC on the 27th October 2017; I begin by addressing the relevance of that Order.

Restraining Orders

6. Restraining Orders may be imposed by a sentencing judge under s5 of the Protection from Harassment Act 1997 (as amended by s12 of the Domestic Violence, Crime and Victims Act 2004):

> (1) A court sentencing or otherwise dealing with a person ("the defendant") convicted of an offence may (as well as sentencing him or dealing with him in any other way) make an order under this section.
>
> (2) The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from conduct which—
>
> (a) amounts to harassment, or
>
> (b) will cause a fear of violence,
>
> prohibit the defendant from doing anything described in the order.
>
> (3) The order may have effect for a specified period or until further order.
>
> (3A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.

> (4) The prosecutor, the defendant or any other person mentioned in the order may apply to the court which made the order for it to be varied or discharged by a further order.
>
> (4A) Any person mentioned in the order is entitled to be heard on the hearing of an application under subsection (4).
>
> (5) If without reasonable excuse the defendant does anything which he is prohibited from doing by an order under this section, he is guilty of an offence.
>
> (5A)..
>
> (6) A person guilty of an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both, or
>
> (b) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum, or both.
>
> (7) A court dealing with a person for an offence under this section may vary or discharge the order in question by a further order.

7. It is established that an order may only be imposed where a Judge is satisfied that it is *necessary* to protect the victim/victims from harassment or a fear of violence: R v Stuart Brough [2011] EWCA Crim 2802.

8. An Order was in this case imposed on both the Appellant and his brother, who was his co-defendant. In his sentencing remarks Judge Farrelly notes how the pair of them had deliberately lured the victim – a man with whom they had had a dispute – to an isolated place and set about him, assaulting him with the extendable baton brought by the Appellant for that purpose. He recognised that both defendants had expressed remorse and pleaded guilty, and commented on the "extremely positive" character references he had been shown: for that reason he imposed the lightest sentences he felt able to impose. The Appellant's brother got 15 months' imprisonment for wounding with intent, the Appellant 18 months; the Appellant received an additional, but concurrent, sentence of 12 months' imprisonment for possession of the baton. As to the reasons for imposing the Restraining Order on them both, the Judge noted, in light of the foregoing, that he considered it "necessary" to do so. The terms of the Order are that the Appellant is not to contact, in any way, the victim of his assault, or to go within 10 metres of his home. If the Appellant breaches the Order, he is to be sent to prison for up to five years.

9. On behalf of the Appellant Mr Ahmed accepts that on the date upon which it was imposed, the Crown Court considered the Order necessary to protect the victim from harassment or conduct causing fear of violence by the Appellant.

He submits however that the nature of that risk is fluid. The statute itself recognises that the risk may diminish or change over time: it is for that reason that s5(4) provides that subjects of such Orders may apply to have them varied or discharged. The question for the Court, upon such an application, would be whether the circumstances have changed to the extent that the Order is no longer necessary. On that basis, submits Mr Ahmed, this Tribunal cannot be bound by the findings made by the Crown Court in September 2018. The task for the Tribunal is to make its own evaluation of risk. Whilst the making of the Order remained relevant, it must be considered alongside the Appellant's more recent conduct.

10. The Respondent emphasises that the Court will not make an order unless it considers is necessary to do so, and that the risk that it seeks to prevent is a risk of criminality. Whilst the Appellant may be able to bring evidence to suggest that the Restraining Order should now be varied or discharged, that would be a matter for the Crown Court. Absent evidence that the Order had in fact been varied this Tribunal should treat as it as highly persuasive evidence that the Appellant does pose a genuine present and sufficiently serious threat so as to justify deportation.

11. In confronting Regulation 27(5)(c) the decision maker is asked to consider whether the Respondent has demonstrated that the personal conduct of the person concerned represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. That is a global assessment, that must be made taking into account not simply the fact of the individual's past conduct, but whether he presents a current risk. It is self-evident that a finding by a Crown Court Judge that the Appellant continues to present a risk to his victim must be relevant, but to what extent?

12. I do not accept that level of risk must be recognised to be 'fluid'. In making this submission Mr Ahmed in effect asks me to supplant the role of the Crown Court and make my own assessment about whether that Order should continue to be in force, or whether it should be discharged. That is not the role of this Tribunal. If the Appellant wishes to have the Order discharged he should make his application to the Crown Court. He has not done so, and the Order continues to be in force. In those circumstances it would be quite wrong for the Tribunal, which does not have the power of variation, to take any view other than that the circumstances have not changed and that it therefore remains necessary. In this case that amounts to a finding by another Court that the Appellant presents a risk to his victim, and that he continues to do so until October 2023. My task under Regulation 27(5) is to make rounded assessment, and for that reason it cannot be said that the Restraining Order – or indeed any other evidence – could in itself be *determinative* of the question of risk, but it is a factor attracting the most substantial weight.

13. As to the possible distinction between an order imposed with reference to s5(2)(a) (protection from harassment) or s5(2)(b) (protection from conduct causing a fear of violence) I am not satisfied, in the context of Regulation 27, that anything turns on that: both limbs go to the protection of the victim from criminality. Accordingly, it is not relevant whether or not the Court making the order specifies which subsection the order is made under.

Other Evidence Relating to Risk

14. In September 2017 the Probation Service prepared a Pre-sentence Report for the Crown Court. The author found, applying 'OGRS' criteria[1], there to be a 25% chance of reoffending within 2 years, which is, apparently, classified as a 'low' risk. The report goes on to say that "nevertheless there is a risk of serious harm to the public; namely those with whom Mr Arrif comes into conflict and seeks to address this using violence. The nature of the risk is physical harm, including the use of weapons, and the psychological impact associated with this". The author then considers historic events within the Appellant's family suggesting that he may also pose an ongoing risk to other family members, before concluding that he poses a "medium risk of serious harm".

15. The Respondent's bundle contains an OASys assessment dated the 17th April 2018. At the time that it was completed the Appellant was nearing completion of his sentence at HMP Peterborough. Applying the OGRS criteria at this stage the Probation Service concluded that the Appellant presented a 41% chance of "general offending" within 2 years.

16. The most recent evidence I have been shown is a letter dated 8th July 2019 from Mr Majid Mukhtar, the Appellant's probation officer. Mr Mukhtar properly acknowledges that he has only met the Appellant once, having been allocated his case only in June of this year. He has however conferred with the Appellant's previous Offender Manager and read all of the documents on his file in order to prepare his report. Mr Mukhtar records that whilst serving his sentence at HMP Peterborough the Appellant had asked to undertake the 'thinking skills' course but was unable to do so because he did not meet the criteria. He was therefore offered one on one support by an Offender Manager in completing 'offence focused' and 'victim' work which he successfully completed:

> "The sessions required Mr Arif to explore the offence in detail and to identify the impact of his actions on the victim, community and to identify any indirect victims. The purpose of these sessions was for the client to gain a deeper understanding of their offending behaviour, exploring the gains and losses of offending and the

[1] 'Offender Group Risk Scale' is a measure described by the Ministry of Justice to be a "a predictor of re-offending based only on static risks – age, gender and criminal history".

> impact of offending upon other people, identify the effects of crime upon victims, including long and short-term effects, positive and negative behaviours and identifying coping mechanisms of dealing with difficult situations. This explored Mr Arif's consequential thinking. It is evident that since his release, there have been no further incidents reported to suggest that Mr Arif has ever breached his licence and Post Sentence supervision.
>
> Throughout the sentence Mr Arif has remained of good behaviour and has engaged well with supervision sessions.
>
> Since release, Mr Arif has been offered 30 supervision appointments. Of these, Mr Arif has attended 27 appointments. 3 appointments have been authorised absences and this has been due to childcare and on one occasions, the office was closed and as a result a telephone contact was carried out".

17. Mr Mukhtar has no information to suggest that the Appellant has ever breached the Restraining Order or the terms of his licence. In fact he has always informed his Offender Manager when he has visited the city where the victim lives (and the Appellant also has family).

18. I have further read, and taken account of, the evidence relating to the Appellant's time in HMP Peterborough. I accept that he was a well-behaved prisoner who took the opportunities made available to him to address his offending behaviour, and to support fellow inmates.

Integration and Family Life

19. It is not in issue that the Appellant has lived in the United Kingdom since 2007, having moved here with his family from Belgium. He got married (by Islamic law) on the 16th May 2015 to British national 'K'. K is employed as a mental health support worker. The couple have a son, born in June 2017. Although the child was very young when the Appellant was sent to prison, he has lived with his father ever since his father's release in mid 2018. It is K's evidence, expressed through her undated and unsigned witness statement, that she would not be able to continue her family life with the Appellant in Belgium as she has no other family living there. Her job and home are here. She believes that if he were to be returned to Belgium the future for her and her son would be "extremely bleak".

20. The Appellant relies on statements in his support made by no fewer than 17 friends and family members. Although none of these statements are signed I am prepared to accept that the Appellant is well regarded in his community and that those who have written in his support believe that if he is allowed to

remain in the United Kingdom he will commit no further crime and will be a dedicated family man. I accept that the Appellant has made a lot of friends in the United Kingdom and that he regards himself as well integrated.

Assessment

21. The Secretary of State pursues the Appellant's deportation on public policy grounds.

22. The Appellant has not demonstrated that he has acquired a permanent right of residence in the United Kingdom; he therefore cannot claim any enhanced protection under Regulation 27(3). It follows, applying Secretary of State for the Home Department v Franco Vomero [2019] UKSC 35, that nor can he claim the highest level of protection under Regulation 27(4).

23. Applying the tests in Regulation 27(5) I find as follows. The Appellant has shown by his conduct a disregard for the law. He was convicted in 2007 of battery, and in 2010 of affray. I understand from the Pre-Sentence Report that both of these convictions arose from domestic disputes where despite the presence of other family members, including children, the Appellant exhibited a propensity to use violence. The offence in 2017 was, as the author of that report notes, an escalation in the level of violence. It was a premeditated attack involving the use of a weapon.

24. There is some evidence that the Appellant has worked to manage his anger. I can see that whilst in prison the Appellant tried his best to address his offending behaviour, in particular his recourse to violence in order to settle personal disputes. I accept the evidence of Mr Mukhtar that the Appellant has, since his release, substantially complied with the terms of his licence, and that he has actively engaged with offender management. I read all of that evidence in light of the very many character references provided for the Appellant in which a diverse group of witnesses speak to the Appellant's integrity and devotion to his wife and child. I have given all of that evidence significant weight.

25. As to the assessment of the probation service that the Appellant indicated a 41% chance of reoffending within two years that is evidence that is bound to attract some weight, coming as it does from a specialist agency whose primary function is to assess and manage risk of re-offending. That weight is, I accept, marginally diminished by the fact that the Appellant has, some 15 months after his release from prison, managed to stay out of trouble. Although it could be said that this is, given the threat of deportation, unsurprising, I give the Appellant some credit for that.

26. There remains however the matter of the Restraining Order. That order was imposed by HHJ Farrelly after careful consideration of the facts in the case, and upon him reaching the conclusion that such an order, for a term of five years, was *necessary* to prevent the Appellant harassing or otherwise causing the victim to fear further violence. That order remains in force. Although I have borne in mind the evidence of the Appellant's success so far on the path to rehabilitation, that is a factor which continues to attract substantial weight. That, taken with the view of the probation service and the Appellant's past conduct, is sufficient for the Secretary of State to discharge the burden of proof in respect of Regulation 27(5)(c). I am satisfied, having regard to all of the foregoing, that the Appellant's conduct does represent a genuine, present and "sufficiently serious" threat to law and order.

27. Against that finding I weigh the unchallenged evidence that the Appellant has established a significant family and private life in the United Kingdom. He has lived here since 2007 and has a great many friends and family members here. I recognise that this must be contrasted with his relative lack of such connections in Belgium. I have given as much weight as I can to that, in particular the fact that the Appellant's wife is a British national who lives and works in this country. I appreciate that she has no desire to uproot herself and her son and go and live in Belgium. I also note, however, that I have been provided with no evidence at all to support her contention that life for them would be "bleak" without the Appellant, or that they would face any particular obstacles in establishing themselves in Belgium. The Appellant's deportation would certainly present them with significant logistical and emotional challenges, but these are not, on the evidence before me, sufficient to render that deportation disproportionate.

Decisions

28. There is no order for anonymity.

29. The appeal is dismissed.

Upper Tribunal Judge Bruce
30th October 2019