Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00608/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th December 2018	**On 9th January 2019**

Before

THE HONOURABLE MRS JUSTICE COKERILL
UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEANDRE [B]

Respondent

Representation:
For the Appellant: Mr S Kotas, Home Office Presenting Officer
For the Respondent: Mr R Layne, Counsel instructed by Victory Solicitors

DECISION AND REASONS

1. This is a matter relating to a Mr Leandre [B] who is a French national. He entered the United Kingdom in 1999 when he was aged 8. On 14th November 2014 he was convicted of perverting the course of justice, receiving ten months' imprisonment and on 28th September 2015 he was convicted of a number of drug-related offences for which he received a sentence of three years and four months' imprisonment. On 30th November 2016 a decision was made that he be deported under the provisions of the EEA Regulations on the basis that he constituted a present and immediate threat to public order and security. Indeed he was

in fact deported on 26th April 2016 but was allowed to re-attend the hearing of his appeal against that decision, an appeal which came before the First-tier Tribunal and before Judge Birk of that Tribunal on 13th September 2018. In the decision promulgated on 5th October 2018 the appeal was allowed, both in respect of the EEA Regulations and also in relation to Article 8.

2. The Secretary of State sought to appeal against that decision, essentially on two grounds. The first was failing to give adequate reasons for finding that the appellant no longer presented the relevant risk; and finding indeed that there was no risk to the public or to the community. The Judge also went on to consider briefly the matter of proportionality and that is the second ground of challenge by the Secretary of State. Leave to challenge the decision was granted to the Upper Tribunal and thus the matter comes before us today to resolve the issues joined as between the parties.

3. The first issue which arises sharply in this context is indeed the basis upon which the decision was considered. The relevant decision under Regulation 27 of The Immigration (European Economic area) regulations is one taken on the grounds of public policy, public security or public health. There are essentially three categories. There is one at the lowest level of protection, namely that grounds exist on the basis of public policy, public security or public health. Those who have a permanent right of residence can only be removed on serious grounds of public policy and public security, and those who have ten years' residence and exercising treaty rights only in relation to imperative grounds of public security.

4. What is manifest to us, and indeed to some extent very fairly conceded on behalf of the appellant today, is that the Judge failed to identify with any clarity precisely on what basis matters fell to be considered. Although it is right, as we have indicated, that the appellant has been in the United Kingdom for a long period, the question arises whether he or his father exercised treaty rights such as to give them a permanent right of residence. It would seem from the evidence that was presented, and indeed from remarks that are recorded from the appellant himself, that no such permanent right was established. It is therefore somewhat surprising for the Judge, who seems to have accepted that fact, to go on in paragraph 25 of the determination to say that the respondent was required only to show serious rather than imperative grounds of public security. As Mr Kotas submitted, that is not correct. If he has no permanent right to reside it is the lower standard simply of grounds. Thus there in the decision is already a misunderstanding as to the correct approach to be taken, which in our view is a significant matter in this appeal.

5. The assessment of risk is clearly a matter for the judge, but it is submitted that the approach taken by the judge was defective in a number of respects. That is a submission which appears to us to have force, both as to the structure and the content of the Judge's consideration of this central

question. The OASys Report was before the Judge. The report is rather curious in that it does not give an assessment of risk which normally would be expected but rather sets out a self-assessment of the appellant, particularly at page 84, where it says "I aim to not be in the same surroundings I was prior to coming to prison, and to change my circle of friends". That was his hope which clearly would have an impact, if carried out successfully, as to risk but it was not an impartial finding and appears (as the Respondent accepted) to have been misread as an impartial assessment by the Judge. The assessment essentially of the offence is set out at page 82 in the OASys Report. It speaks of the fact that on 27th October 2015 at the Inner London Sessions the appellant pleaded guilty to a number of serious drug matters for which he was sentenced to a substantial period of imprisonment. He was at the time working as a market trader, mainly on a stall in Brixton. He had seemingly done some security work as well. He had never signed on for benefits, he did not like to rely on his family for money, and he says that his goals were to get away from Brixton and go back to college. He stated that before he came to prison his main source of income was from working, but he had a gym debt. He grew up with his mum and dad and had a happy upbringing and started using drugs at the age of 14, introduced by his peers. It is perhaps somewhat surprising that there was little in that report to assist as to the assessment of risk on an objective basis.

6. That having been said, there was an e-mail, which was received from the probation officer and that is referred to at paragraph 30 of the judge's decision. It was from a Mr Nazir who was the probation officer. It was dated 24th November 2016 and indicates that, given the previous issues of domestic violence, weapon possession and the offending being gang related, the appellant was considered to be a high risk. The weighting of low risk in the OASys report failed to take into account his offending placed within the context of gang offending. For some reason which is not entirely apparent to us, the Judge gave little weight to that document. It seems to us that it was, in common sense, a particularly relevant document, given that it was from the probation officer and presumably followed on from the report. The last page of the OASys assessment at page 89 sets out goals and objectives and sets out times for work and review, so it is quite clear that various matters were set for the appellant to do after release. It seems in those circumstances entirely reasonable for his probation officer to make comments, particularly if the risk had not been expressly identified. We find it to be unreasonable to reject so quickly something that was potentially of importance in relation to the assessment of risk.

7. In fairness to the Judge he identifies a number of matters which seemingly would go to reducing that risk, but there is a difference, as we find, between identifying factors that would reduce the risk and factors that negate it. For example, in paragraph 34 of the determination, the Judge accepted that the drug problem had been addressed to a limited extent based on his actions of work done on drug misuse and his ability to find and retain employment. That does not necessarily mean that the extent

of the problem has gone away. The appellant offended when he was a market trader and it is noted in paragraph 35 of the determination that he intends to go and stay with his sister, to be again a market trader.

8. As was highlighted by the Secretary of State in the submissions, although the Appellant says that he was going to live with his sister in the Tottenham area, his partner speaks of his going to live in the Streatham area. That may not be a great matter, but it is a significant one, which comes to have greater practical importance in the context of the Judge's remarks set out in paragraph 35 of the decision:-

> "I find that neither he nor [CR] were credible in their assertions that they might resume their personal relationship because their written evidence was silent on this and their oral evidence was non-committal and vague. I find that if the Appellant had plans to move in with Ms [R] and present this as a united front that this would have lacked all credibility and be something designed simply to bolster his appeal"

If that was the view of the Judge that there was a lack of credibility in what the appellant was seeking to say that he would do, it is obvious that should have alerted the judge that all was not as was presented on behalf of the appellant.

9. As we have indicated therefore there are difficulties in the lack of any critical assessment of the risk in the decision without any structure or proper basis to assess it. It is a matter of public importance that these matters are looked at with care, not only for the interest of the appellant, but also in the wider public interest.

10. So far as the assessment of proportionality is concerned, we have serious reservations as to whether that was properly or sensibly carried out. We illustrate that by reference to paragraph 44 of the determination, in which reliance is made upon a report of Julia Avnon of 8th August 2017, seeking to suggest that such a report states that the continual separation from her father will have a seriously detrimental effect on the child's wellbeing. We struggle to find that at all in the report which is before us. Rather, we note that the daughter scores a well-within average range for all criteria. The report indicates that she is a healthy, happy, well-adjusted child who has been nurtured and adequately and appropriately cared for. She of course will be living with her mother and is doing so rather than with the appellant who resides in France. We can find nothing in the report to indicate the degree of detriment as described.

Notice of Decision

11. We have come to the view that the assessment of risk and the assessment of proportionality are both fundamentally flawed. There is indeed no acknowledgement as to the public interest in either assessment. We uphold the challenges made of the decision and find that it was one made in a material error of law. For those reasons the appeal by the Secretary of

State before us is to be allowed. The decision of the First-tier Tribunal Judge is to be set aside to be remade.

12. Having listened to submissions, it seems to us that, as credibility is in issue and evidence will be given, the appeal should go back to the First-tier Tribunal for a de novo hearing. We are mindful of the Senior President's practice direction.

13. Any directions that are necessary will of course be given by the First-tier Tribunal.

14. No anonymity direction is made.

Signed Date 20 Dec 2018

Upper Tribunal Judge King TD