Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00377/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 4 February 2021	**On 2 March 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHARMARKE YARYARE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Ms R Pettersen, Senior Home Office Presenting Officer
For the respondent: Mr M Singh, OISC Level 3 representative from One Immigration

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

Background

1. The Secretary of State for the Home Department ("the appellant") has been granted permission to appeal against the decision of Judge of the First-tier Tribunal Birk ("the judge"), promulgated on 20 November 2019, allowing the appeal of Mr Sharmarke Yaryare ("the respondent") against the appellant's decision dated 15 July 2019 to make a deportation order against the respondent in accordance with regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 and the appellant's refusal of the respondent's human rights claim, contained in the same document.

2. The respondent is a national of the Netherlands, born on 1 August 1994. He maintains that he entered the UK in May 2000 when he was almost 6 years old. In a decision dated 6 January 2019 the respondent's mother was issued with a document confirming that she had a permanent right of residence in the UK. According to this decision she was deemed to have acquired a permanent right of residence in the UK on 2 October 2018.

3. On 9 January 2019 the respondent was convicted of offences of conspiracy to commit violent disorder and affray, both offences having occurred on 30 April 2015. On 13 February 2019 he received a sentence of 19 months imprisonment in respect of the conspiracy to commit violent disorder offence and 6 months imprisonment in respect of the affray, making a total sentence of 25 months imprisonment.

4. On 12 March 2019 the appellant notified the respondent that she intended to make a deportation order against him. On 15 July 2019 the appellant decided to make a deportation order and, in the same document, refused the appellant's human rights claim. The appellant availed himself of his right of appeal both in respect of the decision to make a deportation order under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") and the refusal of his human rights claim (under s.82 of the Nationality, Immigration and Asylum Act 2002).

The Decision of the First-tier Tribunal

5. The bundles of documents prepared both by the appellant and the respondent contained, amongst other things, educational certificates, qualifications, awards and other education related documents (including those issued by Student Finance England and the Student Loans Company and the University of Derby) relating to the respondent, bank statements, Register of Electors letters from the local authority, and documents from Education Maintenance Allowance addressed to either the respondent or the respondent's parent or guardian, and Housing Benefit and Council Tax Support documentation relating to the appellant's mother (but mentioning the respondent), all of which covered a range of dates from 2005 to 2019, and most of which were addressed to the

residence occupied by the respondent, his mother and her other children. The respondent's bundle also contained statements from the respondent, his mother and his siblings to the effect that the respondent had lived with his mother all his life, that he was dependent on her and had never worked, and that he had lived continuously in the UK since 2000 apart from short holidays. The judge heard oral evidence from the respondent and his mother.

6. Having summarised the submissions from the representatives and having set out the relevant legal framework the judge found, at [19], that there was:

> "… sufficient and ample evidence from independent sources, such as educational institutions and the local council, to establish that the [respondent] is extremely likely to have been present in the UK since 2000 to the present date. This is evidenced by his educational record which shows that he entered schooling by 2.9.02. Upon completion of his A-levels he went to University for a 2-year HND course and he withdrew on 19.1.17. The offences that he was convicted of he states took place in 2015 but that he was not charged until 21.6.18. There is no evidence to challenge the chronology. I find that it is highly unlikely that his mother would have left him behind when she came to the UK. The [respondent] has, therefore, been continuously resident in the UK for well over 10 years."

7. At [20] the judge stated:

> "I find that the [respondent] has always been a dependent upon his mother. I find that he has always resided at his mother's address, which is conceded by the [appellant]. I find that his mother has exercised Treaty rights. I find that the [respondent] has not worked and so has always been financially dependent upon his mother. The issue of insurance therefore does not arise. There is documentary evidence from the local authority in respect of housing benefit and council tax which supports that he was until his imprisonment he was [*sic*] a student living at home."

8. At [21] the judge found that the respondent had a high degree of integration in the UK given that he arrived around the age of 6 and was now (at the date of the hearing) 25 years old. The judge noted that the respondent spoke English, that all of his education had taken place in the UK and all his friends and social contacts have been based in the UK. The judge found that the respondent was significantly culturally, educationally and socially integrated into UK society. At [23] the judge did not find that the intervening period of imprisonment had been sufficiently long in length to break the strong integration that the respondent had established in the UK.

9. At [24] the judge found that the respondent was part of the family unit consisting of his mother and his 3 younger siblings. The judge noted that the respondent's father had not been present for the majority of his life and she accepted as credible that, as the eldest child, the respondent had been involved in looking after and bringing up his siblings and had acted as the male figure head of the family. The judge found that there was consequently more than the

usual level of emotional and financial dependency between the adult members of his family and himself due to his family circumstances.

10. At [25] and [26] the judge found that the respondent was entitled to the 'imperative grounds' level of protection. At [28] the judge noted that the respondent had expressed some remorse for his criminal behaviour but that he had not been on relevant courses to addresses difficulties or the motivation behind his offending, and he had not displayed any real insight into his criminal offending in either his oral or written evidence. Noting that the respondent was still living at his mother's address and that his family were not a protective or preventative factor as he committed his offences when he lived with them, the judge found that there was "still a genuine threat that he may commit further offences and challenge the public security of society." At [29] the judge found, with respect to proportionality, *inter alia*, that the respondent had a very lengthy record of residence in the UK and had a very high degree of integration. The judge was satisfied that the respondent's family were all in the UK and that he had no links at all with the proposed country of return. At [30] and [31] the judge found that, although there was a genuine and serious threat from the respondent, take into account his entitlement to the highest tier of protection and that he did not have a record of persistent serious offending, and given that he had not displayed a blatant disregard for society, and in light of the absence of a break or discontinuation in his integration, the threat posed by the respondent was not sufficiently or significantly serious to cross "the high threshold."

11. At [33] the judge engaged in Article 8 ECHR assessment and found, based on her findings of fact, that the respondent's circumstances did outweigh the public interest in his removal and that his removal would breach Article 8. The judge allowed the appeal under the EEA Regulations and on human rights grounds.

The challenge to the judge's decision

12. The grounds noted that the appellant was 24 years old by the time his mother acquired a right of permanent residence and that he had been removed from his university course in January 2017 due to non-attendance. The grounds contend that the judge failed to refer to any evidence that the respondent was a family member of his mother as set out in regulation 7(b)(ii) of the 2016 Regulations and that the evidence in the respondent's bundle failed to demonstrate such dependency. The grounds content that the respondent did not therefore benefit from any enhanced protection and that his deportation was justified given the judge's consideration of the respondent's propensity to reoffend.

13. It is important to note that the grounds did not challenge the Article 8 ECHR assessment made by the judge. There was no challenge in the grounds to the judge's decision allowing the respondent's appeal against the appellant's

refusal of his human rights claim. There was no application to amend the grounds of appeal following the grant of permission to appeal or during the course of directions issued to the parties in light of the Covid-19 pandemic. The absence of any challenge to the judge's decision in respect of the respondent's human rights appeal was expressly confirmed by Ms Pettersen at the outset of the remote 'error of law' hearing. The only issue therefore before me, as accepted by both parties, was whether the judge erred in her assessment of the EEA appeal.

14. In her oral submissions Ms Pettersen relied on the written grounds and submitted that, given the respondent's age when his mother obtained her right of permanent residence, he was not dependent on her. Ms Pettersen confirmed that the appellant's challenge to the judge's decision was only based on the adequacy of reasons given by the judge with reference to the issue of dependency.

Discussion

15. I confirm again that there has been no challenge to the judge's decision in respect of the Article 8 human rights claim. The grant of permission was based solely on the EEA decision and there has been no application at any stage to amend the grounds so as to challenge the decision allowing the appeal against the refusal of the respondent's human rights claim.

16. The grounds were narrow in focus and only challenged the judge's assessment as to whether the respondent was a dependent on his mother so that he could be considered a family member for the purposes of article 7(b)(ii) of the 2016 Regulations, and consequently whether he was entitled to the highest tier of protection. No issue has been raised at any stage with the respondent's entitlement to the highest tier of protection other than with respect to his dependency on his mother. In light of the Supreme Court decision in **SSHD (Appellant) v Franco Vomero (Italy) (Respondent)** [2019] UKSC 35, if the judge was entitled to find that the respondent was a dependent of his mother while she was exercising Treaty rights for the period until she obtained a permanent right of residence, the respondent himself would have obtained a right of permanent residence and, given that he had continuously resided in the UK since 2000, he would meet the requirements in regulation 27(4)(a) of the 2016 Regulations.

17. The grounds of appeal, amplified by Ms Pettersen's commendably brief and concise oral submissions, essentially contend that the judge failed to give adequate reasons for finding that the respondent was dependent on his mother given that he turned 21 on 1 August 2015. The grounds contend that the judge failed to refer to any evidence in support of her conclusion on dependency and that the evidence contained in the respondent's bundle failed to demonstrate dependency.

18. The test for assessing dependency as understood in the 2016 Regulations is now well established following the Court of Appeal decision in **Lim v Entry Clearance Officer Manila** [2015] EWCA Civ 1383. Elias LJ held, at [32]:

> In my judgment, the critical question is whether the claimant is in fact in a position to support himself or not, and Reyes now makes that clear beyond doubt, in my view. That is a simple matter of fact. If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights. The fact that he chooses not to get a job and become self-supporting is irrelevant.

19. Any support that is provided by the respondent's mother therefore only needs to be 'material' or 'necessary' to enable him to meet his essential needs (see **Lim**, at [25] & [32]; see also the Secretary of State's Policy Guidance 'Extended family members of EEA Nationals, version 7.0, published for Home Office staff on 27 March 2019, which states, "The applicant does not need to be dependent on the EEA national to meet all or most of their essential needs. For example, an applicant is considered dependent if they receive a pension which covers half of their essential needs and money from their EEA national sponsor which covers the other half.").

20. Although the judge did not make express reference to **Lim**, I am satisfied she applied the principles identified in that authority. Contrary to the grounds, the judge demonstrably referred to evidence supporting her conclusion that the respondent was dependent on his mother. This is readily apparent from [19] and [20] of the judge's decision, set out above at paragraphs 6 and 7 of this decision. The judge was rationally entitled to conclude that the respondent continued to be a dependent of his mother after he turned 21 given that the respondent had never worked and lived at home. The judge's conclusion was further supported by reference to the documents in the appeal bundles prepared by both parties. All the documents addressed to the respondent were sent to the residence occupied by his mother and his siblings. There was nothing in any of the documents to indicate that the respondent lived separately or that he had ever been employed. Although the respondent had received a maintenance loan this was for a relatively small amount and, as he maintained in his statement, this was not enough to enable him to support himself. The judge properly identified the evidential basis supporting her conclusion on dependency and she gave legally adequate reasons for her conclusion. I consequently find that the grounds of appeal are not made out.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error on a point of law.

The Secretary of State for the Home Department's appeal is dismissed.

For the avoidance of doubt, the First-tier Tribunal's decision allowing the appeal on human rights grounds stands, as does the First-tier Tribunal's decision allowing the appeal under the Immigration (European Economic Area) Regulations 2016.

D.Blum

Signed Date 10 February 2021
Upper Tribunal Judge Blum