Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001798
DA/00074/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 August 2022	**On 11 October 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S S N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Ms B Asanovic, Counsel, instructed by Birnberg Peirce & Co Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent, also called "the claimant", is granted anonymity. No-one shall publish or reveal any information, including the name or address of

the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court. I make this order because an order was made by the First-tier Tribunal and the respondent has asked for international protection and so is entitled to privacy.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State on 12 February 2021 to make him the subject of a deportation order and refusing him leave to remain on human rights grounds.

3. The refusal letter dated 12 February 2021, appropriately, shows that the decision that the claimant is liable to deportation was made "in accordance with the Immigration (European Economic Area) Regulations 2016" and then indicates that representations had been but the Secretary of State "decided to refuse them". The claimant was notified of his right of appeal under Regulation 36 of the EEA Regulations 2016. The actual decision to make the deportation order shows that the decision was made on grounds of public policy in accordance with Regulation 23(6)(b) and Regulation 27 of the EEA Regulations 2016. The decision made clear that the Secretary of State accepted that the claimant is a family member of an EEA national and qualified for consideration under the EEA Regulations 2016.

4. The grounds of appeal to the First-tier Tribunal show that the appeal was brought under Regulation 36 of The Immigration (European Economic Area) Regulations 2016 and assert, inter alia, that the decision to remove the claimant breaches his rights under the European Union treaties in relation to residence in the United Kingdom *and* is unlawful because it contravenes the claimant's human rights.

5. The First-tier Tribunal's Decision and Reasons identifies the appeal as an appeal against a decision of the respondent on 12 February 2021 to make the claimant the subject of a deportation order, also identifying the claimant as a person who had made a human rights claim. The First-tier Tribunal clearly refers to the decision letter of 12 February 2021 and then, after paragraph 26, the First-tier Tribunal Judge said: "I allow this appeal".

6. The Notice of Decision at the end of the Decision and Reasons did not purport to restrict the appeal to being allowed on any particular grounds or any particular basis.

7. The Secretary of State's challenge begins with the startling, but by no means unjustified, suggestion that the judge "errs in failing to consider the appeal under the EEA Regulations".

8. Paragraph 40 of the Secretary of State's "Decision to Make a Deportation Order" is under the heading "Assessment of Threat". There the Secretary of State directed herself to the provisions of Regulation 27(5) and particularly that the decision must comply with the principle of proportionality, and be based exclusively on the personal conduct of the person concerned and "must represent a genuine, present and sufficiently

serious threat affecting one of the fundamental interests of society, taking into account past conduct of the individual and that the threat does not need to be imminent".

9. The Secretary of State's decision outlined the claimant's offending. Essentially the claimant allowed himself to be a "drug mule" and imported cocaine from Sao Paulo. He said that he committed the crime to pay off a £8,000 debt which was money borrowed from a friend to deal with family needs in Nigeria.

10. The Secretary of State noted, correctly, that the OASys assessment of the offender manager found that the claimant posed a "low risk of harm to the public". The letter then made predictable but wholly justified observations about the seriousness of importing drugs and said that the appellant had been well organised and played a significant role. The Secretary of State noted that the offender manager found the claimant posed a low risk of reoffending. The Secretary of State took the view, apparently uncontroversially and consistent with the claimant's own explanation, that he had committed the offence for gain. At paragraph 53 the letter stated, using slightly odd syntax:

> "Your offender manager has stated that your thinking and behaviour skills and problem-solving skills all give cause for concern. Your offender manager has stated that you were aware of the consequences of such behaviour, however you chose to offend anyway, possibly considering the financial benefits to outweigh your perceived risk. Your motivation to commit this offence financial greed this shows deficit in your thinking skills around problem solving and the ability to recognise problems".

11. The Secretary of State said that paragraph 55:

> "… the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for you to reoffend".

12. The Secretary of State found that the claimant had produced no evidence of any improvement in his personal circumstances and found it:

> "reasonable to conclude that there remains a risk of you re-offending and continuing to pose a risk of harm to the public, or a section of the public".

13. The Secretary of State also said that the appellant had:

> "failed to provide convincing evidence that you have distanced yourself from your criminal accomplice."

14. The Secretary of State then looked at the risk of harm and re-offending and decided at paragraph 60 that:

> "All the evidence indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation on grounds of public policy."

15. The Secretary of State then found the decision proportionate, noting the appellant is a Nigerian national who spent his formative years and some of his adult life in Nigeria and had been educated there.

16. The letter then showed consideration of rehabilitation. The Secretary of State acknowledged that, following the decision of the Court of Appeal in **Essa [2012] EWCA Civ 1718**, that in applying Regulation 27 a decision-maker must consider whether a decision to deport may prejudice the prospects of rehabilitation from offending in the host country and factor that into the proportionality exercise. The Secretary of State noted again that the claimant had produced no evidence that he had undertaken any rehabilitative work. His wife, partner and son live in the United Kingdom but his family obligations had not prevented him getting into trouble before. The Secretary of State again asserted that the claimant did present a "genuine, present and sufficiently serious threat" and the deportation was justified.

17. The Secretary of State then looked at Article 8 of the European Convention on Human Rights but found nothing there that assisted the claimant and the decision explained why the application was refused on Article 8 grounds. This included consideration of the appellant's medical needs. At paragraph 130–132 the Secretary of State indicated that the claim was certified as clearly unfounded. This, I think, must relate exclusively to the Article 3 element of the claim because the same notice explained to the claimant that he could appeal the EEA decision under Regulation 36 of the EEA Regulations 2016 and he could appeal the decision to refuse the human rights claim under Section 82 of the Nationality, Immigration and Asylum Act 2002.

18. Against this background the First-tier Tribunal Judge's failure to give explicit consideration to the EEA provisions is, at least, surprising.

19. I consider in outline the evidence that was before the First-tier Tribunal concerning the claimant's rehabilitation. There was a "supplementary bundle" provided but this is essentially concerned with circumstances in Nigeria and medical issues.

20. Much of the statement is concerned with the circumstances leading up to his offending and his relationship with his child. He said at paragraph 38:

> "I also want to say that I accept that I made a really bad choice in agreeing to and then carrying out the drugs importation. I have never committed a criminal offence previously and I will never commit one again. At the time I felt I had no choice but I now realise that was not the case and I have no excuse."

21. There is also a statement from the appellant's then partner, a Dutch national, laying the foundation for the basis of plea entered in the Crown Court.

22. In outline, the appellant said that he had borrowed £7,000 from a friend but had only paid back £1,000 and was being chased for the money. As an alternative to giving the money he was offered a chance to bring in cocaine from Columbia, Bolivia or Brazil and he decided to go to Brazil. He decided not to involve the police but to accept the suggestion that he committed the offence of settle the debt.

23. The Offender Supervisor Conduct Report confirmed that the claimant is "assessed as a low risk in all areas". Under the heading "Behaviour in custody including adjudications, IEP warnings, progress in addressing offender behaviour and results of MDTS/VDTS if applicable" the officer wrote:

> "[The claimant] has a full OASys and is assessed as a low risk in all areas. [The claimant] is currently Enhanced on the IEP scheme. He has received numerous positive entries for his quality work and attitude. [The claimant] conforms to the wing regime and engages well with staff, keyworker and other offenders. He has completed everything that has been required of him through his sentence plan. Money Management and Victim awareness. He has completed the Samaritans course and is a trained listener. He is*(sic)* conducted himself in a pro social manner whilst in custody as evidenced by the 18 positive entries".

24. There is an email from an official at HM Prison and Probation Service confirming that the claimant is at low risk of reoffending and the officer added her personal view that she agreed with that assessment. There is a note from an ICT tutor at Her Majesty's Prison Wormwood Scrubs describing the claimant as a learner on an ICT course. The letter spoke well of the claimant's attitude and progress. There is a manuscript note from a prison officer who had supervised him at Wormwood Scrubs. This describes the claimant as a "role model prisoner" and the officer expressed himself to be "really impressed".

25. Other officers make similarly supporting comments.

26. There are also supporting letters from friends.

27. There are four grounds of appeal to the Upper Tribunal.

28. I have considered the Secretary of State's grounds but they are fairly summarised in the "Appellant's Skeleton Argument" signed by Ms Asanovic for the claimant and dated 16 August 2022.

29. Ground 1 of the Secretary of State's grounds submits that the judge totally failed to consider the appeal under the EEA Regulations and that as a consequence his conclusions were unreliable. It was unacceptable not to have made a clear finding about what degree of protection was available to the claimant under the EEA Regulations. According to the Secretary of State the claimant was only entitled to the lowest level of protection because his period of lawful residence exercising treaty rights was less than 5 years when his sentence of imprisonment was considered.

30. The skeleton argument does not engage with the contention that the judge failed to consider the EEA Regulations but says that any failure of that kind does not of itself undermine the decision to allow the appeal on human rights grounds because there was indeed a human rights appeal. Neither did failure to refer to the EEA Regulations undermine the facts or findings made.

31. The fact that the claimant was sent to prison for four years does not disqualify him for protection under the lowest level of protection under the EEA Regulations and, according to the skeleton argument, the findings

made, particularly at paragraphs 17 and 18, show that the judge found the claimant did not represent a "genuine, present and sufficiently serious threat to the fundamental interests of society".

32. This goes to the heart of the matter. It is, of course, regrettable that the First-tier Tribunal Judge's decision did not show a clear appreciation of the fact that it was an EEA appeal. However, I see considerable merit in the contention that the findings of fact are not in any way undermined by the alleged failure to identify the correct Regulations.

33. I also find considerable merit in the contention that the judge did find that the claimant did not represent a "genuine, present and sufficiently serious threat to the fundamental interests of society" with a consequence that the appeal ought to have been allowed under the EEA Regulations. At paragraph 26 of his Decision and Reasons the judge says unequivocally that:

> "I do not, when making a "predictive assessment" … come to the view that the [claimant] is a risk to the public at large now".

34. This is very important. The judge's findings on that point were entirely rational. They were based on an overall appraisal of the evidence, not only of the claimant's offending which is of limited value on this point but also the considerable evidence about his conduct both in prison and afterwards.

35. I appreciate that it was a matter of particular significance to the claimant that his basis of plea had been accepted before the Crown Court and it was therefore established that he had committed the offence under a very significant degree of duress. I do not find that the attractive point that the claimant seems to think that I should. As far as matters of deportation are concerned the Appeals Tribunal applying Part 5A of the Nationality, Immigration and Asylum Act 2002 is concerned to see if certain criteria are established, namely that the appellant is a foreign criminal who has been sentenced to at least twelve months' imprisonment or at least four years' imprisonment. Once these criteria are established (they usually are) the circumstances of the offence usually are of little if any relevance. The measure of societal disapproval and public interest can usually be gained entirely adequately from the length of sentence which, absent almost unimaginably extraordinary circumstances, must be regarded as the correct sentence for the offence. The fact that the claimant acted under duress does underline that his conviction does not show him to be an organiser or a driving force in a drug smuggling enterprise, but it does show him to be a man capable of taking on a debt way beyond his apparent ability to pay and then being vulnerable to corruption at the hands of his creditors. However, the fact that he has behaved this way once is not proof that he would behave that way again and the judge was absolutely entitled to find as he clearly did that the claimant has learned his lesson. Only the passage of time will show if that is right but it is not perverse or otherwise unlawful for the judge to have accepted the evidence in the way that he did.

36. Mr Walker clearly appreciated the weight of this point but properly drew my attention to the Secretary of State's grounds. I find that they do not undermine the lawfulness of the decision that has been made. Of course, it does not matter that a differently constituted Tribunal might not have been persuaded in the same way as this one by the evidence. It is not perverse.

37. I am also satisfied that this finding is sufficiently reasoned so that I must dismiss the Secretary of State's appeal. Even if the First-tier Tribunal Judge did not strictly apply the EEA Regulations he could only have found on findings that he did make that the appeal should have been allowed under those Regulations because the claimant was a reformed character. I am satisfied that any error on this point is immaterial and that is a proper reason to dismiss the appeal.

38. Nevertheless, there is more to be said. The appeal was allowed on human rights grounds. Ground 2 contends that while the claimant may have been motivated to commit the crime because of his circumstances that of itself does not reduce his culpability or draw away from the fact that he chose to commit a criminal offence rather than seek help from the police when he was under pressure. As I have already indicated I consider this to be a perfectly good argument but it does not make the judge's contrary finding wrong in law. The judge was perfectly entitled to find that the claimant no longer represented a danger and, having made it, was required to factor that into his thinking and decision making.

39. Ground 3 contends that the reasons for allowing the appeal on Article 8 grounds are reasoned inadequately. It is contended that the fact that the claimant is not a resident parent means that the impact of his deportation cannot be thought unduly harsh. According to the grounds there is a need for "greater harshness than for any other child facing their non-resident parent's deportation and subsequent absence" and there was no professional evidence indicating the nature of the relationship or the impact of removal or how alternative arrangements could be made for the child's care when the mother was in hospital as was expected to come about. I agree with claimant's Counsel that these are disagreements, not matters of law.

40. Ground 4 contends that the judge "appears to have considered the case under the misapprehension that the [claimant] should be treated more favourably than the appellant in **HA (Iraq) and RA (Iraq) v SSHD [2020] EWCA Civ 1176** because the present claimant is in a "low category" rather than a "medium" category. The Secretary of State's grounds contend that the length of sentence is what matters and the claimant was sentenced to four years imprisonment. The judge was aware of his and found that there were very compelling circumstances and gave reasons at paragraphs 19 and 20 of his decision, making clear that he applied the "above and beyond" test.

41. The judge did put a lot of weight on the OASys Report but looked not just at the conclusions but the reasons and the very good impression that the claimant had made on those who guarded him in prison. I find that ground

4 is characterised properly as an expression of disagreement rather than error of law.

42. The First-tier Tribunal's decision might be thought surprising for many reasons especially by those who were deprived of the benefit of actually hearing the evidence and forming a view for themselves on the claimant's future intentions. It is also a matter of surprise that full consideration was not expressed for the EEA Regulations. Nevertheless, for the reasons given I am satisfied the grounds do not expose a material error of law in the decision but a disagreement with it. I am also satisfied that it is quite plain, as explained above, that if the judge had directed his mind expressly to the EEA provisions he would have allowed the appeal.

43. It follows that I accept the weight of Ms Asanovic's submission in the skeleton argument and in outline before me that, as is explained in **R (Iran) [2005] EWCA Civ 982** that in similar ways in many other places, authoritative decisions reveal:

> "the anxiety of an appellate court not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes where he/she was making material findings".

44. Here I can understand the thought processes and I find they were legally permissible. He may be criticised fairly for omitting to make some finding but the findings that were made were proper reasons to allow the appeal. I dismiss the Secretary of State's appeal against the First-tier Tribunal's decision.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 8 September 2021