Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00130/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 16 February 2022	**On the 21 March 2022**

Before

THE HON. MRS JUSTICE FOSTER,
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
and
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROMAN SAMKO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the Respondent: Ms M Sardar, Counsel, instructed by Turpin & Miller LLP

DECISION AND REASONS

Introduction

1. For ease of reference we shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more "the Respondent" and Mr Samko is "the Appellant".

2. This is an appeal brought by the Respondent against the decision of First-tier Tribunal Judge Andrews ("the judge"), promulgated on 5 August 2021. By that decision, the judge allowed the Appellant's appeal against the Respondent's decision, dated 27 February 2020, to make a deportation order pursuant to regulation 23 of the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

3. The Appellant is a citizen of Slovakia, born in 1982. He came to the United Kingdom in 2010 and has remained here ever since. On 15 May 2019 he was convicted on two counts of causing death by dangerous driving, of driving a motor vehicle otherwise than in accordance with a licence, and of using a vehicle without valid insurance. For these offences, he was sentenced on 20 September 2019 to 2 years' imprisonment and disqualified from driving for 5 years.

4. The circumstances of the offences were both somewhat bizarre and tragic. The Appellant had been driving a car on the A2. His passengers were his brother and a friend. The car began to lose power, but rather than pull over onto the hard shoulder, the Appellant proceeded to stop the car in the fast lane. His brother and the friend then exited the car and attempted to push it across the lanes of traffic and onto the hard shoulder. The brother and the friend were hit by another car and killed.

5. The Respondent initiated deportation action. She concluded that there was a real risk that the Appellant might re-offend in the future and that it would be proportionate to deport him. Over the course of time, the Respondent issued supplementary decision letters, a consequence of which was an acceptance that the Appellant had acquired a permanent right of residence in the United Kingdom.

The decision of the First-tier Tribunal

6. Having set out the background to the appeal, the judge addressed the central question of whether the Appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society. This question fell to be answered in the context of the medium level of protection afforded to the Appellant under the Regulations; i.e. whether there were "serious grounds" of public policy and public security in play.

7. In the context of this case, we consider it appropriate to set out [29]-[35] in full:

> "29. The Appellant's offences were serious, and led to the deaths of two people. He had failed to obtain the correct driving licence and failed to properly maintain or ensure his car. As the Respondent suggests (e.g., at paragraph 14 of the 2 July 2020 letter), any similar instances of offending would carry the risk of serious harm. However, EEA Regulation 27(5)(c) requires me to consider the level of threat the Appellant *now* poses…

30. Mr Ojo submitted that it should count against the Appellant that he originally pleaded not Guilty to his offences… However, all the evidence since then suggests that the Appellant now accepts, and is remorseful, for his offences. For example:

(i) The Sentencing Judge accepted that the Appellant had 'genuine remorse'

(ii) The September 2020 OASys Assessment report states as follows…

> 2.6. The Appellant does recognise the impact and consequences of offending on victim, community/wider society..
>
> 2.8. The Appellant recognises his culpability.
>
> 2.11. The Appellant accepts responsibility for his actions.
>
> 4.10. He says he has no intention of repeating his previous driving.

Taking these factors into account, I find that the appellant has now accepted responsibility for the accident. Because of this, I attach limited weight to his previous Not Guilty plea.

31. As stated in paragraph 21 above, [the OASys report] gave the appellant a Reconviction calculation of 8% within one year, and 15% within two years, placing him in the lower bracket for general reoffending. Mr Ojo highlighted these 8% and 15% Reconviction calculations, submitting that these are significant figures. Ms Sardar focused on the fact that the report assessed the appellant's risk of reoffending as 'low'. It is now about 10.5 months since that OASys report, and since the appellant's released from prison. It is not claimed that he has committed any similar, or indeed, any) offences in that 10.5-month period. However, plainly, such a period is really too short to be able to demonstrate whether or not the appellant is likely to reoffend.

32. I also take particular account of the following factors, on the Respondent's side of the balance:

(i) Although the Appellant shows remorse, I was not directed to any positive evidence of rehabilitation, in terms, for example, of courses indicating that he has successfully addressed the issues that prompted him to offend. However, the weight I attach to this factor is reduced by what the Sentencing Judge said (which I particularly take into account, because that Judge was closer to the events surrounding the Appellant's offences). The Judge states that the sentencing guideline:

> "talks about prospects of rehabilitation; that is not a classic application because you are not a recidivist criminal with lots of previous convictions"

(ii) As Mr Ojo also submitted, the Appellant had used the car to drive his son to school. Thus, the events of 10 March 2018 [the date of the index offences] were by no means the first time the Appellant had driven this vehicle without a licence and without insurance. Indeed, [the OASys

report] states that he had driven the vehicle 'numerous times' prior to the accident, stating that this indicates that he:

> "does hold some pro-criminal views and attitudes, in that he does not believe he needs the necessary paperwork and training to drive a motor vehicle on public roads. That he did not consider the seriousness of potential fatal consequences of his actions."

33. However, it is on the Appellant's side of the balance that he has no convictions, other than those arising from the events of 10 March 2018. The Sentencing Judge specifically addresses risk to the public, when considering the sentencing guidelines, stating:

> "[The guideline talks] about a person presenting a risk or danger to the public; I do not take that view that that applies."

This suggests that, in September 2019, the Sentencing Judge did not consider the Appellant to represent a serious risk or danger to the public. The [OASys report] is addressed in paragraph 31 above. The most recent professional evidence I have, concerning the Appellant's risk of reoffending, is the April 2021 email from his Probation Service Officer, which states:

> "I would say that the risk level is low on Risk of Serious Harm and Offending. In my assessment, he scores low on all counts."

34. As stated by the Sentencing Judge, his conduct ignored a significant risk to the safety of others. However, the Respondent does not argue that this is an 'exceptional case' (as referred to in [17] of Straszewski; paragraph 26 above). In the circumstances, [17] of Straszewski indicates that I should look at the future rather than the past. The Appellant's past offending was serious and contrary to the fundamental interests of society. However, the weight of the evidence suggests that he now has a low risk of reoffending.

35. Having considered all the evidence in the round, the Respondent has not satisfied me that the Appellant's personal conduct represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The required 'serious grounds' do not exist in this case. I find that the Respondent's Decision is not in accordance with the EEA regulations."

8. The appeal was duly allowed.

The grounds of appeal and grant of permission

9. The Respondent's grounds of appeal can be summarised as follows. First, the judge failed to have regard to the seriousness of the Appellant's offending when assessing risk: "low risk is not the same as no risk."

Second, the judge failed to have regard to the Appellant's past conduct which had not led to convictions. Third, as past conduct was a "key assessment" when considering future risk, the period between the OASys report and the date of the hearing was "not determinative of a durable change sufficient for a finding that the Appellant's deportation is not justified…". Fourth, the judge failed to consider the seriousness of the consequences of re-offending. Past behaviour was "strongly indicative of a propensity to re-offend" and it was "highly probable that [the Appellant] is seeking to minimise his previous offending behaviour to conceal a regular pattern of offending behaviour…" Fifth, there were no factors in the case which demonstrated that deportation would be disproportionate.

10. In a very brief decision dated 2 September 2021, the First-tier Tribunal granted permission to appeal on all grounds.

The hearing

11. Mr Kotas described the issues for consideration as "very narrow", relied on the grounds of appeal, and had nothing further to add.

12. Ms Sardar relied on her rule 24 response and submitted that there were no errors in the judge's decision. The judge had taken account of all relevant evidence going to pass conduct and future risk. Given the judge's conclusion that the Respondent had failed to demonstrate that the Appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of society, there had been no need for him to go on and consider proportionality. In any event, the evidence before the judge clearly pointed towards deportation being disproportionate.

13. In reply, Mr Kotas quite fairly accepted that if the Respondent failed in respect of the grounds relating to the assessment of risk, the final element of her challenge would fall away.

Conclusions on error of law

14. As we announced to the parties at the conclusion of the hearing, there are no errors of law in the judge's decision. Our reasons for this can be stated relatively briefly.

15. The utility of setting out a number of paragraphs of the judge's decision in full, above, is that, in our judgment, they speak for themselves and show the Respondent's grounds of appeal for what they are, namely nothing more than unjustified complaints about a balanced assessment based on the evidence as a whole.

16. The judge was plainly cognisant of the seriousness of the offending, both as it related to past conduct and the potential consequences of re-offending: see [29] and [34].

17. The judge specifically referred to past conduct which had not led to convictions, namely the use of the car on numerous occasions to drive his son to and from school: [32].

18. There was an exercise of specific caution relating to the reconviction calculations, given the short period of time between assessment and the date of hearing: [31]. The assessment of "low" risk was manifestly not being relied on as "determinative of a durable change", contrary to what is implied in the grounds of appeal.

19. The judge was quite clearly entitled to take account of the Sentencing Remarks and the evidence from the Probation Service Officer when assessing risk.

20. All-told, the grounds of appeal relating to the assessment of risk come nowhere near demonstrating errors of law.

21. Mr Kotas was right, in the context of this appeal, to concede that if these grounds failed, the issue taken on proportionality fell away. If proportionality had been a live issue, and whilst we did not hear argument thereon, we observed that the underlying evidence likely to have been relevant to a balancing exercise appears to be strong.

22. The Respondent's appeal fails on all grounds.

23. We add this observation. The grounds of appeal did not sufficiently engage with what the judge had actually stated on the face of her decision. The heading under which the substance of the grounds was set out, "Failing to give adequate reasons for findings on a material matter", was misconceived and did not reflect the alleged "errors" said to have been committed by the judge. In addition, paragraph 5 of the grounds (summarised as the fourth point in paragraph 9, above) cannot properly be read as anything other than a simple disagreement. At most, it is a poorly articulated rationality challenge. Quite apart from the absence of any merit to such a challenge, we emphasise the importance of the clear identification of alleged errors of law when grounds of appeal are drafted.

Anonymity

24. The First-tier Tribunal made no anonymity direction and nor do we. There are no features of this case which outweigh the public interest in open justice.

Notice of Decision

25. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

26. The appeal is dismissed.

Signed: H Norton-Taylor Date: 24 February 2022

Upper Tribunal Judge Norton-Taylor