Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00297/2020
UI/2022/000184

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 May 2022	**On 7 July 2022**

Before

THE HON. MRS JUSTICE HILL
(sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AIANLE GULED
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms E Griffiths, Counsel instructed by Turpin Miller Solicitors

DECISION AND REASONS

Introduction

1. We refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a German national, born on 12 March 1990. The Secretary of State for the Home Department ("SSHD") appeals against a decision of Judge Brannan of the First-tier Tribunal ("the Judge") promulgated on 14 February 2022 after a hearing on 27 January 2022. By that decision, the

Judge allowed the Appellant's appeal against the SSHD's decision dated 7 September 2020 to deport him under regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). Permission to appeal was granted by First-tier Tribunal Judge Sills on 1 March 2022.

The factual background

2. The Appellant moved to the UK in 2003, when he was aged 13, his parents having fled Somalia as refugees in 1986 and settled in Germany. They were German nationals. He was educated in the UK.

3. Between 17 June 2011 and 6 June 2018 the Appellant was convicted of a number of criminal offences. Among these was a conviction for resisting or obstructing a constable. The most serious penalties were sentences of 10 and 12 weeks' imprisonment imposed on 8 December 2016 and 6 June 2018 respectively.

4. On 10 January 2017 the SSHD issued the Appellant with a letter warning him that any further criminality could result in his case being reviewed.

5. On 23 May 2018 the Appellant pleaded guilty to one count of being concerned in the supply of a Class A drug (heroin). As noted by the Judge at [47], the Appellant had been identified as one of two people running the drugs line in a 'county lines' drug dealing enterprise in Bracknell. He was alleged to have "operated with a string of other well know[n] and gang affiliated criminals, under the heavy surveillance of the police". On 13 June 2018 he was sentenced to 54 months' imprisonment.

6. On 1 October 2018 the SSHD served the Appellant with a notice that he was liable for deportation and gave him the opportunity to provided reasons why he should not be deported.

7. On 29 June 2020 the Appellant made his representations against deportation.

8. On 7 September 2020 the SSHD decided to deport the Appellant. He appealed that decision to the First-tier Tribunal.

9. In late 2020 the Appellant was released on licence. He was recalled to prison after it was suspected that he had re-offended, but upon investigation no further action was taken against him.

10. In 2021 the Appellant's father died.

The hearing before the Judge

11. The Appellant, his sisters Hani and Aian Guled, his mother Asha Malin and his friend Asad Bashir Chaudry gave oral evidence. The Appellant was cross-examined by the SSHD's Presenting Officer about his recall to prison,

his health and whether he had any family in Germany. The other witnesses were tendered for cross-examination but were asked no questions.

12. The documentation before the Judge included a letter from Elite Project Services referring to the Appellant's completion of an 'On the Right Track' course while in custody. The letter noted the support that would be available to the Appellant on his release from custody and set out arrangements aimed at assisting him in securing work within the rail industry on his release.

13. The Judge was also provided with the National Offender Management Service's 37 page OASys Assessment on the Appellant.

14. As a matter of EU law, Regulation 23(6)(b) of the 2016 Regulations enables the removal from the UK of an EEA national or one of their family members if the Secretary of State has decided that their removal is justified on grounds of public policy, public security or public health in accordance with Regulation 27. Regulation 27 sets out certain factors which must be taken into account. It also requires that any removal is proportionate. The Appellant argued that the decision to deport him was in breach of these requirements of EU law. He also argued that it was in breach of his rights under Article 8 of the European Convention on Human Rights.

The Judge's decision

15. The Judge found that the Appellant had resided in the UK for five years, as a child under the age of 21 of an EU national exercising a treaty right as a worker or self-employed person, such that he had a right of permanent residence in the UK: [36].

16. He then found that although the Appellant had been resident in the UK for 10 years prior to his imprisonment, his integrative links had been broken and he was not entitled to the highest level of protection from expulsion: [37] and [58].

17. The Judge considered each of the factors which must be taken into account under Regulation 27(5), concluding that the threat the Appellant posed was sufficient to require expulsion: [59]-[72].

18. He then considered the Appellant's personal circumstances, with reference to the factors set out in Regulation 27(6), concluding that the decision to remove him did not comply with the requirement of proportionality in Regulation 27(5)(a): [73]-[99].

19. The Judge therefore allowed the Appellant's appeal on the EU ground. He did not consider it necessary to make findings on the Appellant's Article 8 ground: [100].

The appeal

20. The SSHD advanced one ground of appeal, to the effect that the Judge failed to give adequate reasons for his findings in respect of material matters. The Grounds of Appeal identified several such matters but the SSHD's Skeleton Argument and submissions at the appeal focussed on two, namely the Judge's findings with respect to (i) the Appellant's risk of re-offending; and (ii) the Appellant's prospects of rehabilitation both in the UK and in Germany.

21. The Appellant resisted the appeal, in summary, on the basis that (i) the Judge's reasoning was adequate; (ii) the SSHD's grounds amounted to assertions in respect of matters not placed before the Judge or disagreements with his rejection of matters that had been raised; and/or (iii) the alleged errors were not material as the Judge had a wealth of evidence before him on which to allow the appeal.

22. The Appellant cross-appealed on the basis that the Judge should have allowed the appeal on the basis that he has permanent residence and there are no serious grounds to deport him. The Appellant argued that if the SSHD's appeal was allowed, the case should be remitted to the First-tier Tribunal for a fresh determination of his Article 8 grounds.

The legal framework

23. Pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007, the right of appeal to the Upper Tribunal is limited to points of law.

24. In Flannery v Halifax Estate Agencies [2001] All ER 373 at 377, as approved in MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), the Court of Appeal observed that "It is not a useful task to attempt to make absolute rules as the requirement for the judge to give reasons. This is because issues are so infinitely various".

25. However, a judge is required to address all material considerations and to explain their conclusions in such a way that the parties can see why they won or lost on any particular point. The issues which the judge is deciding and the basis on which they have reached their decision may be set out directly or by inference, and if the judge fails to do this, then the decision may be quashed: R v Immigration Appeal Tribunal, ex parte Khan [1983] QB 790, per Lord Lane CJ at 794.

26. In SSHD v Jamaica [2014] EWCA 7477, the Court of Appeal found that it was readily apparent why a First-tier Tribunal judge had not accepted the SSHD's submissions on the credibility of an asylum claim. What the SSHD was effectively seeking in that case was "not simply reasons, but "reasons for reasons", and this went too far in light of the authorities: [10].

27. In VV (Grounds of Appeal) Lithuania [2016] UT 53, it was emphasised that (i) First-tier Tribunal decisions should be read fairly, as a whole and without excessive legalism; and (ii) parties should not seek to argue that a particular consideration was not taken into account by the tribunal when it

can be seen from decision, read fairly and as a whole, that it was (and the real disagreement is with the tribunal's assessment of the evidence or the merits).

28. The Upper Tribunal is not entitled to remake a decision of a First-tier Tribunal Judge simply because it does not agree with it, or because it thinks it can produce a better one. Further, an appellate court should not assume too readily that a first instance tribunal misdirected itself simply because not every step in its reasoning is fully set out: UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095, per Floyd LJ at [19] and [26].

Analysis

29. Although the SSHD formally advanced only one ground of appeal, relating to reasons, several of the arguments ranged over matters that went beyond a reasons challenge. In several respects, we considered that her arguments were in reality a challenge to the factual findings made by the Judge, albeit that this was not advanced as a perversity appeal. We address the arguments below in the way in which they were advanced.

(i): Risk of Re-offending

30. First, the SSHD argued that the Judge's conclusion at [71], that the risk of Appellant committing further offences was low, was materially inconsistent with the findings in the OASys report, as set out by the Judge at [65] to [66], to the effect that he had a medium (39%) probability of committing further non-violent offences within two years of release from detention. The SSHD argued that no or no adequate reasons were given by the Judge for departing from the professional assessment of the OASys report, noting that judges should "properly be cautious" about their ability to make findings on the risk of re-offending: HA (Iraq) and another v SSHD [2020] EWCA Civ 1176 at [141].

31. We are of the view that the Judge was clearly aware of the OASys assessment of the Appellant's risk of re-offending, the distinction between the general risks of violent and non-violent offending and the risk of serious recidivism: [65]. He expressly noted the OASys finding that the Appellant's convictions had all been for non-violent offences such that the writer's view was that the risk of engaging in such offending again is medium: [66].

32. The Judge was not required to base his findings on risk on the OASys assessment alone: AA (Nigeria) v SSHD [2020] EWCA Civ 1296 at [40]. Accordingly, he was entitled to and did take into account the evidence that the Appellant's recall to prison had acted as a "wakeup" call for him and the evidence of improving activities and better character since the recall [67].

33. We therefore conclude that the Judge was entitled to reach the finding he did on risk, and explained his reasons sufficiently. Further, although he found that the risk of re-offending was low, he accepted at [68] that the level of risk constituted "serious grounds of public policy or public security" (the threshold set out Regulation 27(3) for decisions in respect of those such as the Appellant with permanent residence).

34. Second, the SSHD submitted that while the Judge had noted the Appellant's "striking lack of insight" into his offending and the fact that his family had not been able to prevent or influence his criminality in the past (at [43], [44] and [49]), he had not factored these elements into the consideration of the threat the Appellant posed or the proportionality of his proposed removal from the UK, despite the fact that these factors are strongly indicative of ongoing risk.

35. We find that the Judge did factor the Appellant's attitude to his offending into his assessment. He noted the Appellant's evidence that the recall to prison had been a "wakeup call" for him and accepted that he now had "good intentions", but fairly noted that this did not eliminate all risk of him re-offending: [67].

36. We consider that the Judge did also identify a specific factor that could explain while although the Appellant's family ties had not been able to prevent him from offending in 2011, there were better prospects of them being able to do so now. This was the death of his father in 2021. It is well recognised that such a change in personal circumstances since the offending is capable of reducing the risk of further offending: AA (Nigeria). The Judge had heard evidence from the Appellant's relatives of the significance of his new role as the oldest man in his household, as he would step up as the father figure and provide guidance and support for others. The SSHD had not challenged this evidence in cross examination or in submissions. The Judge was entitled to accept this evidence, as he did, and to find that this change was a "good reason" for the Appellant to "stay out of trouble": [76]-[77].

37. Accordingly we do not accept that the Judge failed to take these factors into account in his proportionality assessment in the way alleged by the SSHD.

38. Third, the SSHD argued that the Judge's acceptance of evidence from the Appellant's mother and two sisters to the effect that he now has good reasons not to re-offend was unsustainable given that he had concluded that the same witnesses were minimising the gravity of his conduct leading to his recall [55].

39. However, the Judge was entitled to accept some of the evidence the Appellant's witnesses had given, but to have reservations about other aspects of their evidence. He adequately explained his overall approach to their evidence.

40. Fourth, the SSHD submitted that the Judge had failed to properly engage with the level of harm to UK society and the requirements of public policy if and when the Appellant does reoffend.

41. We do not consider that this assertion is borne out. The Judge specifically considered the risk of the Appellant committing both violent and non-violent offences in the future. He gave careful consideration at [65]-[72] to all the relevant factors, having already considered the offence, the Appellant's offending history and the wider operation in which he was involved at [40]-[49]. The Judge considered the Appellant's previous offending and the escalation of it, but also his approach to it and the means in place to address his offending, which did not appear to have been present before at [56]-[72] and [95]-[96]. He also considered his prospects of rehabilitation in the at UK [97]-[98].

    We therefore do not discern any error of law here.

(ii): Rehabilitation

42. First, the SSHD argued that the Judge had erred by stating that she had not really explored the extent to which any family ties the Appellant had to Germany were relevant to his prospects of rehabilitation [86]. The decision letter had noted the SSHD's view that there was no reason why the Appellant could not work towards rehabilitation in Germany with the support of family members and friends living there. It was not to be assumed that prospects of rehabilitation in another EU state are materially different from those prevailing in the UK: SSHD v Dumliauskas and others [2015] EWCA Civ 145 at [59].

43. The Judge expressly noted at [86] that the Appellant had family in Germany. However, it was for the SSHD to establish that the Appellant's removal was proportionate and she had not challenged the evidence that in practice the Appellant would be alone in Germany and would not have family support there. The Judge was also aware that the Appellant had never lived outside the UK as an adult: [77].

44. In those circumstances the Judge cannot properly be criticised for taking a more favourable view of the Appellant's prospects of rehabilitation in the UK. This was especially the case given that the Judge accepted at [95]-[96] and [98] that the Appellant had opportunities in the UK to address his offending behaviour, including his stable family home and the targeted support available as a result of the railways-related training programme.

45. Second, the SSHD argued that it was unclear how the Judge had concluded that the appellant was "at last seeking to address his offending" and that there had been "a change in [his] attitude since the recall" at [96] and [98], given the OASys report assessment that there was "much to doubt" about him "wanting to change his life around".

46. The Judge gave careful consideration to the OASys reports addressing the Appellant's attitude before and after the recall. He specifically accepted that these these reports did not show an improvement in the Appellant's attitude: [96]. However there was other material which did suggest such a change, specifically the evidence that the recall had acted as a "wakeup call" to him, other evidence of improving activities and better character since the recall ([67] and [98]), and the structures in place to assist with his attitude after release from prison including his stable family home and the prospect of work: [97]. The Judge was therefore entitled to make the finding that he did and explained himself adequately.

47. Finally, in granting permission First-tier Tribunal Judge Sills stated that it was arguable that the Judge in this case had erred in applying Maslov v Austria (2008) 47 EHRR 20 when considering the Appellant's length of residence in the UK. Maslov refers to settled migrants who have lawfully spent "all of the major part" of their childhood and youth in the host country. The Appellant had arrived in the UK when he was 13.

48. The SSHD did not seek permission to appeal or make submissions on this issue. However we are satisfied that the Judge's approach to Maslov at [78]-[79] was appropriate. The fact that the Appellant was 13 when he arrived in the UK, not younger, is not a reason in itself not to apply the principle that a settled applicant who has spent a major part of his childhood and youth in the host country is in a materially stronger position to resist deportation than someone who is not. A fine assessment is needed and that is what the Judge carried out. We do not discern any error of law here.

Conclusions

49. The central question for the Judge to assess was whether the Appellant's removal was proportionate. He made a series of findings weighing up all the factors for and against proportionality, before arriving at a decision that removal would not be proportionate. He had regard to all the matters he was entitled to take into account under Regulation 27(6). The findings he reached were supported by the evidence before him.

50. Applying the case-law summarised above, the Judge gave adequate reasons to explain why he did not consider the SSHD's decision was proportionate.

51. The SSHD has therefore failed to establish an error of law in the Judge's decision and her appeal is dismissed. Accordingly there is no need to consider the Appellant's cross-appeal or the Article 8 issue.

Notice of Decision

The appeal is dismissed.

Signed: Mrs Justice Hill Date: 16 May 2022

The Hon. Mrs Justice Hill

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email.**