IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001096

First-tier Tribunal Nos: HU/54377/2023
LH/05782/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 June 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAHIR LLESHAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr N Wain, Senior Home Office Presenting Officer
For the Respondent: Ms E Gunn, Counsel, instructed by AG Law Ltd

Heard at Field House on 1 May 2024

Extempore judgment

DECISION AND REASONS

Introduction

1. Although the appellant in the proceedings before me is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The respondent appeals a decision of First-tier Tribunal Judge Hillis, who allowed the appellant's appeal against a decision dated 9 March 2023 to remove him pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Judge Hillis' decision was promulgated on 14 February 2024.

3. He allowed the appeal because, in summary, having considered the requirements of regulation 27 of the EEA Regulations, he was not satisfied

that the requirements for removal under regulation 27 were met. He also decided at paragraph 29 that the appellant's Article 8 rights in terms of family or private life with his partner would be breached by his removal. Article 8 point has not featured in the Secretary of State's appeal or in the arguments by either party before me today, but I shall say something about it at the end of this decision.

4. The appellant is a citizen of Albania who was born in 1993. He arrived in the UK illegally in 2012. He was convicted on 14 April 2022 of an offence of assault occasioning actual bodily harm and received a sentence of 15 months' imprisonment in the Crown Court sitting at Wood Green. The result of that was that on 9 March 2023 the respondent made the decision to which I have referred.

5. Judge Hillis made a number of findings of fact. He found that the appellant unsuccessfully applied for an EEA residence card as a non-EEA family member on 8 October 2018 and following subsequent applications on 2 July 2019 he was eventually issued with a residence card as the family member of an EEA national, his wife, a Romanian citizen. That residence card was valid until 24 July 2024. The appellant was then granted limited leave to remain in the UK under the EU Settlement Scheme on 9 March 2020. Judge Hillis concluded, therefore, that the appellant had lawful residence in the UK which commenced on 2 July 2019. It followed that he had not accrued lawful residence for a period of five years.

6. That is significant in terms of the levels of protection against removal that the appellant is afforded. He has the benefit of the lowest level of protection under the EEA Regulations which means that he may not be removed except on grounds of public policy, public security or public health. A person with a permanent right of residence cannot be removed under the EEA Regulations except on serious grounds of public policy or public security. The highest level of protection against removal is on imperative grounds of public security but those second and third levels do not apply to this appellant.

7. Judge Hillis referred to the time that the appellant had spent in prison, commencing on 27 March 2022, following the conviction by a jury of the assault occasioning actual bodily harm. Judge Hillis said that the period of time in prison could not count towards his residence for the purposes of establishing five years' lawful residence (which would allow protection from removal as a person with permanent residence).

8. At para 17 of his decision he referred to the sentencing judge's remarks of Recorder Weekes KC. Judge Hillis noted that the appellant did not plead guilty but was convicted by a jury following a trial. Recorder Weekes applied sentencing guidelines and gave the appellant fifteen months' imprisonment. Following his release he was on licence for the remainder of that sentence. In her sentencing remarks Recorder Weekes said that the victim was attacked by the appellant together with three others and

that he required hospitalisation and an operation. She regarded those as aggravating features. There was a discount in recognition of the appellant's previous good character and references of support were provided from friends and colleagues.

9. Judge Hillis noted that the sentence was less than two years' imprisonment. He also noted at para 18 that the appellant was released on licence on 10 January 2023 and that his licence expired on 26 August 2023, with post-licence supervision ending on 10 January 2024. From para 19 Judge Hillis referred to factors in relation to the risk of reoffending. He referred to the pre-sentence report and the conclusion that there was a low risk of probability of reconviction within two years. There was evidence from the person who supervised the appellant throughout his prison licence to the effect that he had attended all of the twelve appointments. There was further evidence as to the risk of reoffending in various categories. In every category the risk was low with percentages given of the risk of reoffending, the highest of which was 14% in terms of probability of proven reoffending and probability of proven violent reoffending at the two year mark in each case.

10. Judge Hillis reminded himself at para 20 that the risk or threat of harm did not need to be imminent. He took into account certain certificates that indicated the appellant had completed courses following his release, in terms of critical thinking and anger management, and he concluded that there was no evidence that the appellant was not fully engaged in those courses.

11. He took into account letters of support but noted that because the authors of those letters had not had their evidence tested in cross-examination, they did not have the full evidential weight that they would otherwise have had.

12. At para 23 he said that the appellant had made significant progress in remaining free from offending, and he referred to his having established a roofing company since his release, and referred to the financial records of that business.

13. At para 24 he accepted that the appellant and his wife are in a genuine and subsisting marriage, and he found their evidence credible. At para 25 he referred to their particular circumstances in terms of whether the appellant would be permitted by the Portuguese authorities to relocate to Portugal with his wife to maintain their marriage or whether they would be permitted to relocate to Albania. He referred to the appellant's wife's permanent employment in the UK.

14. Judge Hillis concluded at para 26 as follows:

> "In my judgment, the above facts do not support the Respondent's Findings in the Conclusions Section of the Deportation Decision… that: 'You have committed a serious criminal offence and, as explained above, the

> professional assessment is that there is a real risk that you may re-offend in the future'".

Judge Hillis obviously found to the contrary in terms of the risk of reoffending.

15. Under a subparagraph "The Legal Framework", Judge Hillis identified the correct legal framework in terms of regulation 27 of the EEA Regulations. Prior to quoting regulation 27 he said that the basic level of protection requires the expulsion decision be taken on grounds of public policy, public security or public health "with reference to the principles contained in Regulation 27(5), 27(6), and Schedule 1". The reference to Schedule 1 is a reference to Schedule 1 of the EEA Regulations. That is significant because regulation 27(8) states:

> "A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)."

16. Judge Hillis then set out the requirements of regulation 27(5). He did not set out the requirements of Schedule 1 specifically. At para 28 he said as follows:

> "In my assessment of the evidence I have followed the content of the above paragraph and conclude, on the Findings and reasons set out above, that the Respondent has failed to show, on the balance of probabilities, that the Appellant comes within Regulation 27(5) above and, in particular, Regulation 27(5)(c)".

17. Regulation 27(5)(c) requires that the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account past conduct of the person and that the threat does not need to be imminent. Judge Hillis then, very briefly, dealt with Article 8.

The grounds of appeal and submissions

18. The respondent's grounds of appeal argue, in summary, that Judge Hillis failed properly to engage with Schedule 1 of the EEA Regulations, with specific reference to subparagraphs 7(b), 7(f) and 7(j), which the grounds argue are relevant factors in determining the appellant's conduct in terms of the fundamental interests of society.

19. The grounds go on to argue that no reasons have been given by Judge Hillis as to how those paragraphs applied, given that the appellant is only entitled to the lowest level of protection.

20. At para 4 of the grounds it is also argued that the judge's findings fail properly to consider the seriousness of the offence, given that it was a violent crime which attracted a lengthy sentence, and which had significant consequences for the victim. The grounds continue that although the appellant had taken steps to rehabilitate, albeit within a

controlled environment having pleaded not guilty, his progress is not necessarily a persuasive argument when related to behaviour outside a controlled environment.

21. The grounds contend that it cannot, therefore, be said with any certainty that the appellant does not pose a genuine, present and sufficiently serious threat to the public, bearing in mind that the threats do not need to be imminent. Para 6 the grounds argues that the judge failed to have due regard to the public interest in the prevention, detection and prosecution of those who commit serious offences and in the maintenance of deportation action to protect and safeguard the public.

22. In his submissions on behalf of the respondent, Mr Wain relied on the grounds. He emphasised the contention that the judge had failed to apply Schedule 1. Both parties referred me to *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC) and its guidance on regulation 27. Mr Wain submitted that at para 17 Judge Hillis went no further than referring to the length of sentence as being less than two years and the post-licence supervision. However, Mr Wain submitted, those are not the only factors to be considered. It was submitted that if regulation 27(5)(c) (personal conduct of the person; and genuine, present and sufficiently serious threat) is *not* met, one has to look at proportionality.

23. Ms Gunn relied on her rule 24 response. She submitted that regulation 27(5)(c) is in two parts, firstly, the personal conduct of the person must represent a genuine, present and sufficiently serious threat; and the second part that the threat must affect one of the fundamental interests of society. It was submitted that no issue was taken with the first part of the judge's findings about genuine, present and sufficiently serious threat. To the extent that there was any error in Judge Hillis decision, it was submitted that it was not material.

24. Ms Gunn further submitted that Judge Hillis had looked at the threat to society, and whilst there was no specific detailed consideration of Schedule 1, para 7 (the fundamental interests of society), it was clear that Judge Hillis had undertaken his assessment in line with it.

25. In reply, Mr Wain opposed the contention that regulation 27(5)(c) can be dissected in the way that that was proposed, submitting that both parts are linked and need to be read together.

Assessment and Conclusions

26. I have set out Judge Hillis' findings in some detail. It is clear that he concluded that the appellant did not represent a risk of reoffending in any respect, or at least that he only represented a low risk of reoffending.

27. I do not accept the contention that Judge Hillis failed to have regard to the seriousness of the offence. If one looks at para 17 one sees that he referred to Recorder Weekes' sentencing remarks, which he summarised. His summary included reference to the fact that there were three

individuals and the appellant who took part in the attack, and that the victim required hospitalisation and an operation. Judge Hillis noted that those were referred to by Recorder Weekes as aggravating features. It is clear that he did have regard to the seriousness of the offence and its effect on the victim.

28. At para 28, which I have quoted, Judge Hillis expressly stated that he had had regard to the factors in regulation 27(5). I do consider, however, that he ought to have set out the requirements of Schedule 1. He ought also, in my view, to have directed himself to the particular features of Schedule 1 that are those in contention in this case. I do not accept, however, that his failure to have done either of those two things vitiates his decision. Judge Hillis was plainly aware of the requirements of Schedule 1 because he referred to it in para 27 and quoted regulation 27(8) which itself refers to Schedule 1. It can reasonably be concluded, given that Judge Hillis considered all the facts, and made detailed findings on the facts, and referred to Schedule 1, albeit that he did not set it out its terms, that he was aware of its requirements and took them into account in coming to his conclusions. At para 28 he stated that he had "followed the content" of his para 28, within which are the references to Schedule 1.

29. I am fortified in my conclusion that Judge Hillis did indeed consider Schedule 1 by the way that the respondent's grounds are advanced, in terms of the contention that Judge Hillis failed to take into account particular paragraphs of Schedule 1. It is para 7 of Schedule 1 in particular that describes the fundamental interests of society which, as I have said, is referred to in paragraph 27(8). The factors that are identified in the grounds are: maintaining public order (sub-para (b)), excluding or removing an EEA national with a conviction and maintaining public confidence in the ability of the relevant authorities to take such action (sub-para (f)), and protecting the public sub-para (j)). It is not said that in this case there is a wider societal harm, for example as in sub-para (g), or that this is a case of exploitation and trafficking (sub-para (i)).

30. In circumstances where the judge found that the appellant in this particular case represented a low risk of reoffending, took into account the details of the offence, its aggravating factors and the sentence, and concluded that his conduct did not represent a genuine, present and sufficiently serious threat, it can reasonably be concluded that he had in mind the fundamental interests of society and those particular subparagraphs that the respondent contends ought to have attracted specific and detailed consideration. There was no evidence to the contrary in terms of the risk of reoffending so far as this appellant is concerned.

31. It may often be the case that a failure to set out the terms of Schedule 1, and to provide reasoned findings specifically in relation to relevant paragraphs, may constitute a material error of law. I am not satisfied that there is such an error of law in this case on the particular facts, or if there is that error of law here, that it is material.

32. I do not need to say much about the Article 8 findings because they were not in contention before me. Suffice to say, I have some doubts about the brevity of Judge Hillis' conclusion in relation to Article 8, but in the light of his primary findings the lack of detailed consideration in para 29 in relation to Article 8 is not material.

33. In conclusion, I am not satisfied that the decision of the FtT involved the making of a material error on a point of law. The respondent's appeal is, accordingly, dismissed. The decision of the FtT to allow the appeal stands, therefore.

A.M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber
10/06/2024