Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01487/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 October 2014	**On 14 October 2014**

Before

Upper Tribunal Judge Kekić

Between

A K
(anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: **Ms C Robinson, Counsel**
For the Respondent: **Mr T Wilding, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. This appeal comes before me following the grant of permission to appeal to the Secretary of State by First-tier Tribunal Judge Cox on 6 January 2014. For ease of reference, I continue to refer to the Secretary of State as the respondent.

2. The appellant is a citizen of Turkey born on 27 July 1970. He came to the UK as a spouse and subsequently obtained indefinite leave to remain although his marriage ended months later. He then started to use drugs and began to suffer from mental health problems. He stabbed himself twice. His brother decided to send him to Turkey where he remained for some 18 months before returning to the UK. His problems continued. In 2004 he returned to Turkey for a year. In July 2007 he was arrested for waving a knife in public, pursuing members of the public and threatening to kill one of them. When the police arrived, he stabbed the roof and windscreen of their vehicle and stabbed a police officer (who was fortunately wearing a stab resistant vest). On 25 February 2008 the appellant was found not guilty by reason of insanity and hospitalised under the Mental Health Act 1983. On 6 December 2010 the Mental Health Tribunal set out several conditions for his release and he was discharged into the community in April 2011. He is required to reside in a particular local authority nursing home, to be compliant with all medications prescribed by his care team, to attend all appointments, to abstain from illicit drugs and submit to random drug testing. He is also liable to recall to hospital for further treatment should that become necessary.

3. On 8 July 2013 the respondent made a decision to deport the appellant under section 3(5)(a) of the Immigration Act 1971. She considered that his deportation was conducive to the public good and took account of the public interest and the presumption in favour of deportation for someone liable to same.

4. An appeal was lodged and heard by a panel of the First-tier Tribunal consisting of Judge Rothwell and Mrs Jordan. The panel found that as the appellant was not criminally responsible for his actions, he "ought not to be considered for deportation" (at paragraph 45). In the alternative, it considered that paragraphs 399(a), (b) and 399A did not apply and so proceeded to consider article 8. it found the appellant had little or no contact with his family in Turkey, that he was no longer in touch with his brother who had returned there and that his family would not wish to take responsibility for him (paragraph 48). The Tribunal considered the evidence, noted that he had taken several courses, had the tools to ensure he kept well and abided by the terms of his discharge. It concluded that he posed little risk to others and that the risk of re-offending was low (paragraph 50). Finally, it set out a list of what it considered to be exceptional circumstances (paragraph 51) and concluded that deportation was disproportionate. As stated, the respondent challenged the determination and the matter came before me on 2 October 2014.

Appeal hearing

5. The appellant was present at the hearing and observed the proceedings. I heard submissions from both parties as to whether or not the judge made an error of law.

6. Mr Wilding chose not to rely on the argument made under paragraph 398c; accepting that the panel had not erred in looking at that. He accepted that as the appellant had not been convicted, he was not an offender. He relied upon the three other grounds put forward. These were: 1) that the panel made a material misdirection of law in finding that the appellant ought not to be considered for deportation; 2) that the panel failed to give reasons, or adequate reasons, for the finding that the appellant would have no family support in Turkey or why such support was required; 3) that inadequate reasons were provided for the proportionality assessment. I shall deal with the amplification of the grounds later in my determination.

7. Ms Robinson submitted in response that the panel had conducted a comprehensive assessment of the case, that any errors were not material to the outcome, that the Tribunal had been correct on the issue of liability and that the article 8 assessment was not infected by the finding on liability. She submitted that prior to the paragraphs setting out the findings, the Tribunal had considered the evidence and the determination had to be read as a whole. The Tribunal had the public interest in mind and weighed up all the relevant factors. His conditional discharge showed that the risk he posed had diminished. A holistic assessment had been undertaken. The Tribunal would have been aware of the presumption of deportation. The findings with regard to the appellant's family in Turkey accorded with his evidence that his family had washed their hands of him when he had returned there.

8. In response, Mr Wilding submitted that there was no engagement with the Secretary of State's case and it was unclear from the determination why the public interest was found to be outweighed. The error as to liability had infected all the other findings. The error was material because there was little engagement of public interest factors.

9. Having heard the submissions I reserved my determination. I now give my decision and reasons.

Conclusions

10. I have carefully considered the determination, the submissions, the helpful written arguments and the evidence and case law I was referred to.

11. This is a case where a decision to deport was made under s.3(5)(a), not (b) as stated in the determination (at paragraphs 1 and 41) which relates to family members of a person subject to deportation. This was not an error relied on by the respondent and although it is clearly an error, I do not consider it to be a material one as the panel was plainly aware that the decision related to the appellant. The other errors in the determination which were relied on by Mr Wilding are, however, such that the determination is unsafe.

12. First, it is the respondent's case, with which I concur, that the panel fell into error in its approach towards liability to deportation. As per EO (deportation appeals - scope and process) Turkey [2007] UKAIT 00062, liability under s.3(5)(a) arises from the Secretary of State taking a view; i.e. that an individual's conduct is such that deportation is conducive to the public good. A view is taken, a decision is made and that decision renders the appellant liable to deportation. Although the Tribunal is required to consider liability, such an assessment was considered to be essentially an examination of whether the Secretary of State deemed the appellant's deportation to be conducive to the public good, or whether he was the family member of a person subject to deportation or whether he had been recommended for deportation by a criminal court. This was expanded in Bah (EO (Turkey) - liability to deport) [2012] UKUT 00196 (IAC). Mr Justice Blake explained that when considering whether the person liable for deportation, the judge was required to examine 1) whether the facts alleged by the Secretary of State were accepted, 2) whether on the facts as a whole the conduct character or associations reached such a level of seriousness as to justify a decision to deport and 3) any lawful applicable policy. There being no dispute about the facts and no applicable policy, the Tribunal was required to consider the second issue.

13. It may be that in its finding that the appellant ought not to be deported because of the lack of criminal responsibility on his part, the Tribunal meant that the appellant's circumstances did not meet the level of seriousness required to justify deportation. If that is so, then its finding is flawed because it only took account of that single factor; the other factors listed by the Secretary of State in her letter of 8 July 2013 were disregarded at this stage of the assessment process. That letter set out full reasons for the view the Secretary of State had

taken; it considered the appellant's long history of aggression, violence, drugs abuse and his paranoid schizophrenia. It noted that he had been hospitalised for his behaviour on a number of occasions and discharged when his condition stabilised. It noted that the public was entitled to a system of immigration that protected it from harm borne by a person's poor mental health, noted that the appellant's conduct had been found by the sentencing judge to pose a risk to the public and considered that deportation was justified by the legitimate aim of preventing crime or disorder. Therefore, notwithstanding the not guilty verdict in respect of his most recent offences, the Secretary of State was entitled to make a decision to deport the appellant on non conducive grounds for all the reasons given in her letter of 8 July. As confirmed in Bah, there is nothing in section 3(5) and (6) that requires there to have been any convictions at all for a decision on deportation to be made (at paragraph 45).

14. It may have been open to the Tribunal to find that the appellant's conduct was not serious enough to justify deportation, but only after a full assessment of all the factors relied upon by the Secretary of State had been considered. This was not done.

15. Moreover, the Tribunal erred in presuming that the appellant ought not to be deported because the respondent had wrongly applied paragraph 398(c) (at paragraph 45 of the determination). Whilst Mr Wilding does not challenge the finding in respect of the inapplicability of paragraph 398(c), his complaint about the Tribunal's approach in those circumstances has substance. The fact that an inappropriate paragraph of the rules was considered does not render the deportation invalid. The Secretary of State had set out reasons for the deportation in her letter and it was for the Tribunal to grapple with them. The Secretary of State accepted that the appellant was not responsible for his actions in 2007 but other factors were relied on to justify deportation and those were not addressed by the panel when it reached its decision on liability.

16. I have considered whether the Tribunal's finding that the appellant was not liable to deportation because of his insanity and the inapplicability of paragraph 398(c) is an error which taints the remaining findings. Ms Robinson urged me to find it was not. However, having read the determination in its entirety, several times, I am unable to agree with her. Mr Wilding is right to submit that the impression gleaned from a reading of the proportionality assessment at paragraphs 49-52 is that the panel was influenced by its erroneous starting point in its subsequent findings. Whilst there is a reference to the public interest in paragraph 49, it is brief and only a statement of what the respondent says. I can see no engagement with the

presumption of deportation and no weighing up of the public interest as against the factors argued for the appellant. Mr Wilding argued that a clear finding on re-offending had not been made; the appellant was still considered to pose a risk when discharged by the Mental Health Tribunal as he was required to live in 24 hour staffed accommodation where he still resides. There is also, of course, the appellant's previous history set out in Dr Haydn Smith's psychiatric report of July 2012; convictions in 2003 and 2004 and repeated admissions to hospital for his erratic and violent behaviour. Whilst the appellant may have been stable when conditionally discharged in April 2011 and when the reports were prepared, he had been stable in the past as well but continued to suffer relapses. In the absence of up to date medical evidence and a full analysis of the chances of recurring violent behaviour, Mr Wilding is right to argue that a clear and reasoned finding on re-offending has not been made.

17. The respondent also argues that the panel gave no reasons, or no adequate reasons, for its finding that the appellant would have no family support in Turkey and that it failed to explain why such support would be needed in the first place. The appellant is one of eleven siblings. His mother is still alive although his father passed away in 2005. The appellant's evidence on contact with his family indicates that he "is" in contact with his brother in Turkey. His psychiatrist confirmed contact with a brother and other reports confirm contact with his mother. It is argued by Ms Robinson that the family washed their hands of the appellant when he returned to Turkey but that was at a time when his condition was far more volatile. In any event, it would appear that the appellant's own evidence suggested contact was maintained with at least some family members after that time yet the panel finds otherwise. The panel failed to consider why, if the appellant had appropriate medical care in Turkey, and it is not suggested that this would not be available, his condition could not be managed by health care professionals rather than his family.

18. The final ground is linked with the first one and takes issue with the proportionality assessment. The respondent complains that the assessment was inadequate and that the panel was required to weigh up the public interest, including the provisions of the rules and weigh that against the rights of the appellant. The greater weight to be attached to expulsion in deportation as opposed to removal cases was emphasised in JO (Uganda) [2010] EWCA Civ 10. It is right, as Mr Wilding submitted, that the failure of the appellant to meet the requirements of the rules was not factored into the balancing exercise and that a balanced assessment of the broader public interest is needed.

19. For all these reasons, I am of the view that the panel made errors of law which require its determination to be set aside in its entirety except as a record of proceedings.

Decision

20. The decision of the First-tier Tribunal is set aside. The appeal shall be re-heard by another judge of the First-tier Tribunal for the decision to be re-made.

Anonymity

21. I continue the order for anonymity made by the First-tier Tribunal.

Directions

22. This appeal shall be re-heard by a panel chaired by a Designated Judge. All documentary evidence relied on by the parties (except for that which has already been submitted) must be filed and served upon one another and upon the Tribunal in duplicate no later than five working days prior to the next hearing. The appellant's evidence must include an updated witness statement, addressing his living circumstances, and updated medical evidence which should focus on the treatment/medication he has been and is receiving, on the risks of relapses of his schizophrenia and any other relevant matters.

23. Should an interpreter be required, the Tribunal is to be notified forthwith and in any case no later than ten working days prior to the hearing.

Signed:

Dr R Kekić
Upper Tribunal Judge

Date: 13 October 2014