
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01619/2014

**THE IMMIGRATION ACTS**

| **Heard at Nottingham** | **Decision and Reasons Promulgated** |
|---|---|
| **on 7th August 2015** | **on 16th November 2015** |

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**GAEL TAMUE KAMKI**
**(Anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Tsalikis instructed by Middleweeks Solicitors
For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

**DECISION AND REASONS**

1. This is an appeal against a determination of First-tier Tribunal Judge M Davies promulgated on the 5th November 2014 in which the Judge dismissed the appellants appeal against the order for his deportation from the United Kingdom.

## Background

2. The appellant is a national of Cameroon born on the 20th May 1980. On 26th January 2005 he made an application for entry clearance as an EEA family member to join his wife, a Spanish national exercising treaty rights in the United Kingdom.

3. Following his arrest the parties have separated and this is not a case in which there are issues regarding the ability of the wife to exercise her right of free movement if the appellant is removed.

4. On 19th August 2010 the appellant was issued with a Residence Card in recognition of his having acquired a right of permanent residence in the UK by virtue of Regulation 15 Immigration (EEA) Regulations 2006. Such status attaches to the individual and shall only be lost through absence from the United Kingdom for a period exceeding two consecutive years, according to the Regulations, although it has been suggested that in Onuekwere v Secretary of State for the Home Department [2014] 1WLR, 30 the decision of the court was that even a right of permanent residence given by a five year period can be brought to an end as a result of a criminal conviction. This was not an issued explored before the Tribunal and appears contrary to the clear provision in Article 16(4) that it was only absence from the host Member State for a period of at least two years that could bring permanent residence to an end. The possibility of the removal of that right by virtue of conduct serious enough to justify such a consequence will have to be considered elsewhere.

5. On 27th March 2012 the appellant was served with notice of liability to deportation by reference to the EEA Regulations. In July 2014 the reasons of deportation letter was served. As the appellant and his wife have separated it was conceded at the opening of the appeal hearing before the First-tier Tribunal that the appellant was not relying on Article 8 ECHR.

6. The deportation decision was made as a result of the appellant's convictions for rape of a female over the age of 16, sexual assault on a female and sexual assault on a female by penetration. In his sentencing remarks His Honour Judge Smith stated:

> "Gael Kanki, you were convicted by the jury of the 'Rape'; 'Assault by Penetration' and the 'Sexual Assault' of Maria Amelia Lopez Eduardo.
>
> In May 2010, she was a Birmingham University student and she had come, with her boyfriend, to a party which you were having to celebrate your birthday. A great deal of alcohol was consumed by most people and in particular, Maria Eduardo made herself ill, with a cocktail of different drinks. You knew that, because you were told that she had been sick and had to be put to bed.

> She was asleep and incapacitated by alcohol, when you saw her on the bed. Which bed in the house it was, was of course in issue, but it doesn't matter. You sexually interfered with her and then raped her while she was in an almost comatose state.
>
> You ejaculated inside her vagina, without any regard to the risk of her becoming pregnant. She woke in the morning and found semen, which turned out to be your semen, near to her vagina and she felt completely violated. Her reaction is entirely understandable; rape takes many forms and what you did, was to truly violate and use the body of a defenceless woman, for your own sexual satisfaction."

7. A sentence of six years imprisonment was passed for the Rape offence, a concurrent sentence of two years of the Assault by Penetration, and in respect of the Sexual Assault, no separate penalty.

8. The Appellant has never accepted his guilt. It is not disputed that intercourse took place on that night but he maintains it was consensual, hence the need for a jury trial. The appellant also appealed his conviction to the Court of Appeal Criminal Division which is reported as Regina v Gael Tamue Kamki [2013] EWCA Civ 2335. It is said at paragraph 8 of that judgement: "The ground of appeal that is raised relates to the manner in which the learned judge directed the jury on the issue of consent, and the relevance of intoxication to that issue". The appeal was dismissed the Court finding: "In our judgment, we agree with the written argument of the Crown that the relevant propositions were extracted and put to the jury in a correct way. The directions given to the jury fully satisfied the needs of the case and the issues the jury had to decide".

9. The appellant has since referred the case to the Criminal Case Review Commission but no outcome is known and it was accepted by Mr Tsalikis that the Tribunal has to approach this matter on the basis his client is a convicted sex offender, a rapist.

## The First-tier Determination

10. Having considered the evidence the Judge set out the findings from paragraph 43 of the determination. In relation to the risk of reoffending the Judge found in paragraph 46:

> "46. The judge's view expressed in his sentencing remarks indicated that the Appellant was a low risk of reoffending. What in my view is different now is represented by two stands of evidence. Firstly, for reasons which have been explained, the Appellant has seen fit not to address his offending behaviour to reduce the risk to members of the public. The reason for that is that the Appellant does not accept that he has committed the offences for which he was convicted. Not only has he perused an appeal from his conviction and sentence at the Crown Court he has made an application to the Criminal Cases Review

> Commission. In those circumstances it is clear that the Offender Manager was concurring with the view of the sentencing judge that the Appellant is at low risk of reoffending, properly concludes in my view, that whilst that risk is low the risk in relation to committing similar offences against young females who are similarly vulnerable is high. I concur with that view."

11. In paragraph 51 it is found:

> "51. The Appellant's relevant personal conduct in this case was that he sexually assaulted and raped his best friend's girlfriend who was so drunk as to be unable to give any form of consent. That personal conduct was carried out for the Appellant's own sexual gratification when he took advantage of a woman who was particularly vulnerable. Women who are similarly vulnerable have a right not be violated by men who seek to take advantage of them. The aggravating features of the offence of rape which the Appellant has committed was that he took no steps to have protected sex and thus there was a high risk to the victim that she would become pregnant or contract a sexually transmitted disease. The consequences of a pregnancy would of course be extremely severe for the victim. She would be faced with having an abortion or of bringing up a child which had been born after she had been violated. There is no doubt in my mind that the Appellant's personal conduct represents a genuine threat as set out in the Rules. That threat at the date of my decision is a present threat taking into account the assessment of the risk posed by the Appellant to young vulnerable females. The fact that the Appellant does not accept his guilt makes that present threat even more acute. Taking into account the nature of the offence the Appellant has committed and the effects upon his victim that threat is sufficiently serious to affect one of the fundamental interests of society. It is a fundamental interest of society that young vulnerable females who are not in a position to consent to sexual advances should be protected from being violated by men such as the Appellant who has been assessed as posing a high risk to such females."

12. In paragraph 56 the Judge finds:

> "56. I have concluded that whilst the Appellant may be at low risk of offending any risk that does relate to him is high relating to vulnerable females."

## Discussion

13. Ground 2 of the appellants challenge seeks to argue that the decision to deport is based upon the rape conviction. It is accepted by the appellant that there is nothing erroneous in taking this as the starting point but it is submitted that the Judge did not understand that the decision could not be made on this conviction as it is a previous conviction. Such a claim has no arguable merit and, if correct, would mean it was

impossible for the respondent to deport any EU national or family member, as by definition any decision to deport must be preceded by a qualifying act of criminality that occurred in the past. The word 'previous conviction' in this context does not refer to the chronology of time but to the order of offences committed. It is accepted it is lawful to make a decision to deport an EU national on the basis of past offences. It must, however, be on the basis of the most recent offence that engages the power to deport. In this case that was the conviction for rape which can be properly described as being the current offence rather than a past offence.

14. The Directive by Article 16 deals with the right of permanent residence. It provides by Article 16(1), so far as material:

> "Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there … "

15. Article 16(2) refers to family members and (3) deals with how continuity of residence is to be affected by short absences. We then come to (4) which provides – "once acquired the right of permanent residence shall be lost only through absence from the host Member State for a period exceeding two consecutive years".

16. So far as removal is concerned Article 27, so far as material provides:

> (1) Subject to the provisions of this Chapter Member States may restrict the freedom of movement and residence of Union citizens and their family members irrespective of nationality on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

17. Article 28 which is central to the issues arising in this appeal provides, under the heading "Protection against Expulsion", as follows:-

> '1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and
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> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> > (a) have resided in the host Member State for the previous ten years; or

(b) are a minor, which of course does not apply in this case.'

18. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

19. The Appellant challenges the decision by reference to four grounds of appeal. The first asserts an error in assessing the appellant's risk of reoffending. This is an important element for Mr Tsalikis submits that if there is no risk of reoffending the appellant cannot be deported. Although he is not a citizen of an EEA state he has a right of permanent residence in the UK and so the automatic deportation provisions to be found in domestic law do not apply.

20. Regulation 21(4) of the EEA Regulations states that a relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security. Regulation 21(5)(c) states that the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

21. In MG and VC (Ireland) [2006] UKAIT 00053 the Tribunal said that "where regulation 21(3) applies to an individual (because he is an EEA national with a permanent right of residence but not a minor or along term resident) he may be removed as previously on the grounds that there is a risk of his committing further offences, with the proviso that the risk of harm must constitute serious grounds of public policy for his removal."

22. In BF (Portugal) v SSHD [2009] EWCA Civ 923 the Appellant, a citizen of Portugal, arrived in the UK and had acquired permanent residence. He was convicted of battery against his partner and sentenced to 42 months imprisonment. He could only be removed on serious grounds of public policy or public security. The Tribunal first had to determine the claimant's relevant personal conduct; secondly whether the conduct represented a genuine present and sufficiently serious threat; thirdly whether that threat affected one of the fundamental interests of society; and fourthly whether deportation would be disproportionate in all the circumstances. The Tribunal noted the evidence that the claimant had a high propensity to re-offend against the same victim and any new partner, but went on to find that the SSHD had failed to prove that there were serious grounds of public policy or security which made

deportation proportionate. In remitting the appeal, the Court of Appeal said the Tribunal should have reached a conclusion as to whether the threat, which was clearly present at the time of the offence, was still present at the hearing. The Tribunal had to decide whether there was a present serious threat and if so the extent of that threat.

23. Following the guidance provided in BF (Portugal), the Tribunal first has to determine the claimant's relevant personal conduct. This is his conviction for rape and the circumstances in which that offence was committed which are outlined above and in the sentencing remarks. This is a case in which the appellant has been found guilty of rape and sexual assault upon a female who was so intoxicated by alcohol that she lacked the ability to consent to intercourse, yet the appellant ignored this fact and proceeded to have unprotected sex with her. The NOM report describes it as a 'reckless and predatory offence on a victim who was very drunk'.

24. In Commission v the Netherlands Case C-50/06 the Commission said that under article 3(1) of the Directive 64/221 measures taken on the grounds of public policy or public security were to be based exclusively on the conduct of the person concerned. Article 3(2) specified that previous criminal convictions were not in themselves to constitute grounds for taking such measures. They could be taken into Account only in so far as the circumstances which had given rise to that conviction were evidence of personal conduct constituting a present threat to the requirement of public policy.

25. In relation to the question, whether the conduct represented a genuine present and sufficiently serious threat, this element requires an assessment of the likelihood of the appellant reoffending for, as confirmed by the Court of Appeal in SSHD v Arturas Dumliauskas, Lukasz Wozniak and ME (Netherlands) [2015] EWCA Civ 145, at paragraphs 40 and 55, if there is no real risk of reoffending then the power to deport nationals of other Member States on the grounds of public policy or public security does not arise.

26. The First-tier Judge found that the appellant's personal conduct represented a genuine threat as set out in the Rules taking into account the threat posed to vulnerable young females by the appellant. The fact the appellant had no previous convictions was noted and that he had never been previously cautioned. The Sentencing Judge when considering the question of the need for an indeterminate sentence for public protection found:

> "I do not find it necessary to pass upon you an 'Indeterminate sentence for public Protection'. There is no suggestion that you will present a danger in the future, to the public or indeed to women. This from a sentencing guideline perspective, is a single offence of rape, by a single offender, with a serious

> aggravating feature; arsing as I say, from the fact that you, without contraception ejaculated into her vagina."

27. Indeterminate sentences, which were abolished in 2012, were intended to protect the public against criminals whose crimes were not serious enough to merit a normal life sentence but who were regarded as too dangerous to be released when the term of their original sentence had expired. They were composed of a punitive "tariff" intended to be proportionate to the gravity of the crime committed and an indeterminate period which commences after the expiration of the tariff and lasts until the Parole Board judges the prisoner no longer poses a risk to the public and is fit to be released.

28. It is therefore a different test from establishing whether a person presents a genuine present and sufficiently serious threat for the purposes of EU law. This being to ascertain whether there is a risk of further offending of a sufficient degree to warrant exclusion from the UK whereas the criminal test is to ascertain whether there is a risk and, if so, whether the person needs to be remain in custody to protect the public, indicating a higher degree of risk.

29. Sexual offences are those that provoke the strongest reaction from the public especially if involving children or rape. In addition to the sexual element it is arguable rape is also an act of violence against the individual. There is considerable variation in estimates of recidivism rates among convicted rapists (e.g., Furby, Weinrott, & Blackshaw, 1989; Hanson & Brussiere, 1998), studies that use long follow-up periods tend to show alarming rates of sexual reoffending among rapists. For example, Prentky, Lee, Knight, and Cerce (1997) reported a 39% sexual reoffending rate over a 25 year follow-up among rapists who had undergone sex offender treatment. Quinsey, Rice, and Harris (1995) reported a 20% rate of reconviction for sexual offenses after only a four year follow-up period that included only a two-and-a-half year period of offending "opportunity." Further, these figures are widely viewed as underestimates, because a high proportion of sexual crimes are never reported, effectively hiding these crimes from researchers.

30. In assessing existence of a genuine present and sufficiently serious threat the Judge was required to consider:

    - What is the likelihood the appellant will commit subsequent sex crimes?
    - Under what circumstances is this offender likely to reoffend?
    - What can be done to reduce the likelihood of reoffending?

31. The National Probation Service NOMS Report set the MAPPA nominal at Level 1. The level of risk of serious harm is said to be high. The risk factors are identified as lifestyle and associates, thinking skills, attitudes. Those at risk are said to be young females at risk of further

offences. In relation to the likelihood of reoffending, the report finds this to be low.

32. It is argued the Judge misunderstood the conclusion which is said in paragraph 46 to be that although there is a low risk of reoffending the risk in relation to committing similar offences against young females who are similarly vulnerable is high, whereas the report may be more accurately stating that although the risk of reoffending is low if such an offence is committed the risk of serious harm is high.

33. It is not sufficient to say that just because the risk of reoffending is low there is no evidence of a genuine present and sufficiently serious threat. The second of the above questions is relevant in this respect.

34. As the appellant does not accept his guilt he was not admitted to any of the sex offender programmes whilst in detention as it is recognised that unless a sex offender is willing to accept that what they have done is wrong, and to genuinely acknowledge their guilt, there is little purpose in attending such courses which seek it identify the reason(s) for offending and steps needed to prevent re-occurrence in the future. The lack of such intervention in prison does not indicate there is no risk. The appellant is on the sex offenders register for life or until further order of the criminal court although this was a compulsory requirement pursuant to Section 82 of the Criminal Justice Act 2003 and does not show that the sentencing judge considered that he posed a continuing risk to women.

35. The Judge found an ongoing risk as a result of the lack of evidence of steps being taken to address the issues that led to his offending. Whilst this may seem an alien concept to the appellant, whose stance is that as he did nothing wrong there is nothing for him to do, there was insufficient material to explain why the appellant committed the rape before the Judge, other than for his own personal gratification. The NOMS report specifically refers to his thinking skills and attitude which clearly indicates an area of concern. There is no evidence these elements have been addressed. These form part of who the appellant is, his personality, and an indication of how he is likely to react in certain situations. It was his personality that meant that despite his victim being incapable of giving consent the appellant decided he would do as he did, because he wanted to. The Judge was concerned that without evidence of intervention and work to address this issue these characteristics remain unassessed and untreated.

36. The question is not whether there is a High, Medium or Low risk of reoffending. It is whether the appellants conduct represents a genuine present and sufficiently serious threat. The finding made that it does, for the reasons given, have not been shown to be findings outside the range of those available to the Judge on the evidence.

37. The third issue whether that threat affected one of the fundamental interests of society is clear as the act of rape is contrary to the criminal law of the UK. In GW (EEA reg 21: 'fundamental interests') Netherlands [2009] UKAIT 00050 the Tribunal said that the 'fundamental interests' of a society within the meaning of reg 21 (a threat to which may justify the exclusion of an EEA national) is a question to be determined by reference to the legal rules governing the society in question, for it is unlikely that conduct that is subject to no prohibition can be regarded as threatening those interests.

38. Fourthly, whether deportation would be disproportionate in all the circumstances. The appellant's circumstances were considered by the Judge as was the question of rehabilitation. The appellant still refuses to accept responsibility for his action and there is no evidence of an attempt to rehabilitate or prospect of the same on the evidence in the UK. The lawful activities of the appellant were considered by the Judge and it found on balance to be a proportionate decision. This has not been shown to be a decision outside the range of those available to the Judge on the facts of this case. There is no question of interference with the right of free movement of an EEA national as the appellants wife has left him. His status as a family member of an EEA national has therefore also ended. The appellant has not shown he is interested in rehabilitation work in whichever country he lives in.

39. The finding the decision is proportionate when all relevant factors are considered and the rehabilitation question assessed by reference to the guidance provided by the Court of Appeal in SSHD v Arturas Dumliauskas, Lukasz Wozniak and ME (Netherlands) has not been shown to be outside the range of findings available to the Judge on the evidence. No arguable legal error material to the decision to dismiss the appeal has been made out.

## Decision

40. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

41. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 7 August 2015