IAC-CH-SA/LR-V1

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

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 1st February 2016	**On 18th March 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Clarke, Senior Presenting Officer
For the Respondent: Ms E. King, Counsel instructed by Irving and Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal panel (Judge Froom and Mr C P O'Brien) (hereinafter referred to as "the panel") promulgated on 1st April 2015 in which the

Tribunal allowed the appeal of AK against the decision of the Secretary of State to make a deportation order against him.

2. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to her as the Respondent as she was the Respondent in the First-tier Tribunal. Similarly I will refer to AK as the Appellant as he was the Appellant before the First-tier Tribunal.

3. There is no dispute between the parties that the Tribunal should make an anonymity direction pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) as the case involves the interests of an Appellant with significant health problems. Unless the Upper Tribunal or a court orders otherwise, no report or any proceedings or any form of publication therefore shall directly or indirectly identify the Appellant or the minor children. This prohibition applies to, amongst others, all parties and their representatives.

Background:

4. The Appellant is a citizen of Turkey. He appealed against the decision of the Respondent who on 8th July 2013 decided to make a deportation order against him under Section 5(1) of the Immigration Act 1971 on the ground that, for the purpose of Section 3(5)(a) of the 1971 Act, the Appellant's deportation is conducive to the public good.

5. The Appellant's history is not in any dispute. He came to the UK as a spouse and subsequently obtained indefinite leave to remain although his marriage ended months later. There is no dispute that he ever resided in the UK unlawfully. He then started to use drugs and began to suffer from mental health problems and self-harmed on two occasions. 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. The Appellant received three convictions; on the 4th April 2003 he was convicted of common assault and ABH for which he was fined. On the 18th August 2003 he was convicted of harassment and was conditionally discharged for two years. On the 14th April he was convicted of battery, possessing cannabis and possessing an offensive weapon in public and was sentenced to two terms of imprisonment of three months.

6. 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 25th February 2008 the Appellant was found not guilty by reason of insanity and hospitalised under the Mental Health Act 1983. On 6th December 2010 the Mental Health Tribunal set out several conditions for his release and he was discharged into the community in April 2011. He was 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 was also liable to recall to hospital for further treatment should that become necessary. It is recorded that he received positive reports from the staff and was compliant with his medication and the other supervision required.

7. The Secretary of State wrote to the Appellant on the 9th January 2012 seeking reasons as to why he should not be deported from the UK and on the 1st May 2012, a decision was made to make a deportation order. The appeal against that decision was listed on three occasions until the Secretary of State withdrew that decision.

8. On 8th 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.

9. The reasons given for that decision are set out in a letter of the Respondent dated 8th July 2013 (see M1 of the Respondent's bundle) and are summarised in the decision of the panel at paragraphs [7]-[11].

10. The Appellant appealed against that decision to the First-tier Tribunal.

The Decision of the First-tier Tribunal:

11. The first appeal came before the First-tier Tribunal panel (Judge Rothwell and Mrs Jordan) on 22nd November 2013. In a decision promulgated on 9th December of that year, the panel allowed the appeal on human rights grounds.

12. The panel found that as the Appellant was not criminally responsible for his actions, he "ought not to be considered for deportation" (at [45]). In the alternative, it considered that paragraphs 399(a), (b) and 399A did not apply and so proceeded to consider Article 8. The panel 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 (see [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 (at [50]). Finally, it set out a list of what it considered to be exceptional circumstances [51] and concluded that deportation was disproportionate.

13. The Secretary of State appealed to the Upper Tribunal and the appeal was heard by Upper Tribunal Judge Kekic on 8th June 2nd October 2014 and in a determination promulgated on 14th October 2014 gave her reasons as to why she considered the decision of the First-tier Tribunal had erred in law.

14. The judge recorded that the appeal was a decision to deport which was made under Section 3(5)(a) and further recorded the concession made by Mr Wilding on behalf of the Secretary of State that paragraph 398(c) was not applicable to the Appellant's circumstances for the reasons given by the First-tier Tribunal panel and that the Appellant was not an "offender" within the meaning of the Rules. The Upper Tribunal consider that 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. The Upper Tribunal considered that that had not been done and consequently the judge remitted the appeal to the First-tier Tribunal to be determined de novo (see paragraph 19 of the determination).

15. Consequently the judge remitted the appeal to the First-tier Tribunal to be determined *de novo* (see paragraph 19 of the determination).

The second hearing before the First-tier Tribunal:

16. In accordance with that decision, the appeal came before the First-tier Tribunal panel on the 25th March 2015. In a determination promulgated on the 1st April 2015 the panel allowed the appeal. The panel had the advantage of considering the oral evidence from the Appellant and further relevant evidence relating to his mental health and his current circumstances. At paragraphs [16 to 23] the panel set out the law. At paragraph [24 to 31] the panel considered the matters set out in the decision of **Bah (EO (Turkey) - liability to deport) [2012] UKUT 00196** and began by considering the issue of whether the Appellant was liable to deportation. At [24] the panel recorded the decision of the Upper Tribunal in which it upheld the decision of the previous First-tier Tribunal panel that paragraph 398(c) could have no application in this appeal. The panel set out that although permission to appeal had been granted to the Respondent on that point it had not been pursued at the hearing before the Upper Tribunal as the Secretary of State had accepted that the Appellant had not been convicted and was therefore not an offender. Thus the panel recorded that their starting point was that the Appellant did not fall within paragraph 398 of its three limbs and therefore fell outside the "complete code" of the Rules in which deportation is resisted on Article 8 grounds. They also recorded at [25] that the same reasoning applied to the Appellant as not coming within the definition of a "foreign criminal" provided by Section 117D of the 2002 Act. They stated that whilst 117D(2)(c)(ii) and (iii) cover conducive deports not falling within the automatic deportation provisions, the Appellant was not an offender.

17. The panel reached the conclusion that the Appellant's background entitled the Respondent to deem his deportation conducive to the public good. The panel set out at length the evidence that was before them and in particular the Appellant's mental health problems and summarised that evidence at paragraphs [32 to 44]. This also included a consideration of the evidence given by the Appellant concerning his current circumstances and his present contact with his family in Turkey.

18. The panel at paragraphs [45 to 52] set out the relevant law relating to Article 8 and began its assessment at paragraphs [53 to 62] of the determination. They identified the legitimate aim to justify deportation as being the prevention of crime and the protection of public from the risk of harm. The panel recorded that

> "the public interest in securing the deportation of offenders is considerable and the public interest in relation to the particular legitimate aim identified in this case is stronger than in an ordinary immigration removal case (see **JO (Uganda) [2010] EWCA Civ 10, paragraph 29**). We have kept in mind that the Rules contain a presumption that deportation is in the public interest."

19. On that side of the scales, the panel took into account that the Appellant had caused significant harm in the past even though he had been found not guilty by reason of insanity. They considered the Appellant's circumstances since that conduct had taken place in 2007 and that they had reached the conclusion that nine years on there was only a minimal risk to the public. The panel did not discount the possibility of a relapse noting that if that were to take place there would be some risk of committing acts which could cause harm. However, they considered their assessment on the basis of the most recent and up-to-date evidence. They found the Appellant to be living semi-independently, managing his own medication, showing a good insight into his illness he was compliant with his treatment, both in terms of taking his medication and attending appointments. He had abided by the terms of his conditional discharge from hospital and had stopped using cannabis. He had also found strategies for coping with stress and the panel gave an example of this at [56]. At [57] the panel found that the Appellant had

> "plainly made great strides towards stabilising his condition since 2007. Not only did he remain well in the care home but he has recently moved on to semi-independent living in a situation in which there are less controls in place. There is nothing in the evidence since 2009 to suggest there is a significant risk of the Appellant having a relapse. We rely on the series of letters submitted on behalf of the Appellant from the relevant professionals which are unanimous in this respect. If the expert team which monitors and supports the Appellant is satisfied he is making progress and can be trusted, we can see no reason to go behind their judgment."

Thus they reached the conclusion that "the risk of the Appellant causing harm is minimal." [see 57].

20. In reaching that conclusion the panel took into account that the Appellant remained a restricted patient, that he had a strong team around him which monitored and supported him and remained under supervision and that he would be subject to recall to hospital at any time. They reached the conclusion that in the event that the Appellant did relapse, they considered it would be picked up immediately and he would be returned to hospital.

21. The panel reminded themselves also as a relevant factor that the Appellant was not under the threat of deportation as a result of any criminal behaviour but was found not guilty by reason of insanity of the index offence which the panel took as meaning that he had no criminal responsibility for his actions. They found his last conviction was in April 2004 eleven years ago and that was a matter to take into account when making a decision as to whether or not the public interest was outweighed.

22. At [60] the panel took into account the list of factors set out in Section 117B reaching the conclusion that sub-Section (1) did not apply as he had indefinite leave to remain and sub-Section (2) the Appellant spoke fluent English. As regards sub-Section (3) they found that he was not ready yet to become financially independent but that his reliance might foreseeably diminish in view of the progress that he had made and thus in relation to that factor there was some public interest in deportation. They did not regard that as carrying significant weight because the panel reached the conclusion that on the particular facts of the case it would be unreasonable to expect the Appellant to engage in activities which might halt or reverse his progress. The panel found that sub-Sections 4(4) and (5) were not applicable because the Appellant had always resided in the UK lawfully.

23. At [61] the panel considered the submission made on behalf of the Secretary of State that the Appellant could settle in Turkey and that he would receive some support from his family members who resided there. The argument advanced by the Secretary of State was that there were mental health services there and medication would be available. The panel set out the Appellant's evidence concerning this issue.

The Appeal Before the Upper Tribunal:

24. The Secretary of State sought permission to appeal that decision and permission was granted on the 26th April 2015 by First-tier Tribunal Judge Foudy.

25. Mr Clarke for the Secretary of State relied upon the written grounds and Ms King, relied upon the Rule 24 response to those grounds dated 3rd June 2015.

26. Mr Clarke on behalf of the Secretary of State submitted that the First-tier Tribunal panel erred in its approach to the public interest when considering the Section 117D factors at paragraph [60] and that the panel did not properly consider the issue as to his financial independence and that the reasoning was flawed as set out in Ground 1 of the written grounds. He also relied on the written grounds at paragraphs [4] and [5].

27. In relation to Ground 2 he submitted that in reliance on the decision of **GS (India) [2015] EWCA Civ 40**, the United Kingdom was not obliged to provide medical treatment and that the circumstances found by the panel

relating to his medical health was not enough on a proportionality assessment to outweigh the public interest and that this was a matter of weight.

28. He further submitted that the panel erred in law by failing to assess the Appellant's circumstances as at the date of the hearing and at paragraph [61] the panel should not have considered that his condition may deteriorate on return and that such a finding was not open to him.

29. Ms Clarke relied upon the written response dated 3rd June 2015 which dealt with Ground 1. As to Ground 2, she submitted the decision of **GS [India]** was not on all fours with the present appeal and the circumstances of this particular Appellant. In this case the Appellant had indefinite leave to remain but for the decision to deport him and this was an important distinction thus the points raised as to whether there was an obligation to provide medical care did not bite in the same way as it did in the decision of **GS [India]** and thus it would be disproportionate to remove him as he was entitled to NHS care which were different circumstances to that of the Appellant in **GS**. She submitted that whilst the question of appropriate medical care was part of his case it was not the sole basis of his stay and it was a wider aspect of establishing his private life.

30. As to the ground in which it was asserted that the panel did not consider the claim at the date of the hearing she submitted it would be wholly artificial of the panel to have considered his circumstances to be "frozen in time" and that it was open to the panel to take into account the likelihood of what would happen from the evidence before them. She submitted there was sufficient evidence before the panel at [44] and that there were two reports in the Appellant's bundle each report making it plain that there was a need for careful and supervised return to independent living. The panel were entitled to take into account the Appellant's demeanour and the three monthly reviews. She submitted that whilst the evidence did not make a prediction as to what would happen if the treatment ended, and the evidence given by the Appellant himself were matters that the panel were entitled to take into account.

31. I reserved my decision.

Discussion:

32. Dealing with Ground 1, it is submitted that in considering his claim outside of the Rules the panel erred in law as to whether there were "exceptional circumstances" relying on paragraph 10 of the determination. However that paragraph is taken from paragraph 50 of the refusal letter and following the consideration of paragraph 398 and 399 which the Secretary of State accepted did not apply in the Appellant's case. As the panel recorded at paragraphs [24 and 25] of the determination, AK did not fall within paragraph 398 of the Immigration Rules for the reasons already accepted by the Secretary of State before the Upper Tribunal. Nor could he be seen as a "foreign criminal" again an issue conceded by the

Secretary of State. Consequently the decision was to be considered outside of those Rules.

33. The grounds also challenge the panel's assessment and findings at paragraph [60] (see paragraphs [3 to 5] of the written grounds relied on by the Secretary of State) whereby the panel considered the factors listed in Section 117B. Whilst it is asserted that there are no findings made at [60] as to whether he might be able to support himself (relying on Section 117(3) of the NIA Act 2002), the panel did make findings on this particular issue. They found that he was not yet ready to become financially independent but that the evidence was that his reliance on benefits might foreseeably diminish if he continued to make progress but that this was some way off at present. On this issue, the panel weighed in the balance that he had not been in employment since the year 2000 and therefore when applying the criteria under Section 117B(3) this was a factor that was in favour of deportation on the public interest side of the scales.

34. I do not accept the submission made on behalf of the Secretary of State that the panel's reference to this at [60] where it was said "to this extent there is some public interest in deportation" to be puzzling or unclear. The grounds do not appear to recognise that at [60] the panel were considering the specific factors listed in Section 117 and that the factors relating to financial independence was only one of those factors. The panel were therefore entitled to reach the conclusion on this particular issue that they did not consider that it carried significant weight on the particular facts of this case because it would be unreasonable to expect the Appellant to engage in activities which might halt or reverse his current progress. This was a finding that was open to the panel on the evidence before them. At [44] the panel recorded the Appellant's evidence as to his ability to work and then become financially independent and that he had wanted to begin with voluntary work and gradually build this up to paid work but that this would be a gradual process. It is correct that the medical evidence before the panel did not provide a timescale for any such progression but given his past history, it was reasonable for the panel to reach the conclusion that it would be likely to be a slow process to ensure that progress made thus far was maintained.

35. The grounds also failed to take into account that the panel properly considered the other factors relevant to Section 117 and that they did not apply on the circumstances of this particular Appellant; the Appellant had indefinite leave to remain (117B(1)), he spoke fluent English (Section 117B(2)) and also sub-Sections (4) and (5) were not relevant as he had always resided in the UK lawfully. Thus the issue financial independence was only one of the factors and the panel at [60] were seeking to consider them when reaching an overall view as to where the balance lay. Contrary to the written grounds at paragraph [5], the panel did give adequate and sustainable reasons for reaching the view that he could not currently work in some capacity but that there was a prospect of that. It was a matter for the panel as to what weight they attributed to each factor.

36. Dealing with Ground 2, it was submitted on behalf of the Secretary of State that the Appellant's "medical claim" was "beset with errors" seeking to rely on the decision of **GS (India)** [as cited] and that the test of whether the claim succeeded should have focused on whether he would be able to form relationships on return quoting paragraph [56 and 87] of **GS (India)**. Thus it is submitted on behalf of the Secretary of State that the Article 8 claim must reflect on "the capacity to form and enjoy relationships."

37. In my view that submission ignores the basis of the appeal before the First-tier Tribunal. The appeal could not simply be described as a "medical claim" but dealt with what Ms King described as the broader considerations of deportation in the light of all the Appellant's circumstances including his mental health but also his previous and hitherto lawful residence in the UK for a significant period of seventeen and a half years (see [53]). The panel were considering a proportionality balance by reference to the principles set out by the Grand Chamber in **Uner v The Netherlands [2006] ECHR 873** which the panel set out at [51] and the Appellant's medical circumstances are only part of that proportionality balance. In this context they were entitled to take into account the Appellant's lawful residence and the significant period of that residence of seventeen and a half years [53] and at [54] and that he was not at risk of deportation due to criminal behaviour [at 59]. Furthermore they took into account his risk of re-offending and his conduct since the last incident which was relied upon by the Secretary of State in 2007. In this respect the panel took into account the evidence recorded at [36 to 41]. Their findings on this issue at [55] when considering the public interest side of the scales concluded that there was only a minimal risk to the public and that he had made great strides towards stabilising his condition since 2007. Thus they reached the conclusion that the risk of the Appellant causing harm was "minimal".

38. There is also no merit in the grounds at which it is asserted that the panel misdirected itself in law by failing to have regard to the evidence as at the date of the hearing. It was open to the panel to consider the issue of return and the possible outcome of his return to Turkey. In this context, the panel was entitled to take into account the evidence of the Appellant as to his last stay in Turkey and the reaction of his family in the light of his mental health difficulties. Thus the panel said at [61] that they had made an assessment of how the family might react to his return taking into account the Appellant's subjective fear which they considered would undermine his current stability as would the "abrupt loss of the team which currently provided the Appellant with treatment and support." Against this background, it was open to the panel to consider the likelihood of the stresses that might occur on return to Turkey.

39. The fact that the Appellant had contact with the family did not undermine the findings that were made by the panel at [61]. That it was open for the panel to consider on the evidence and to take into account the likely reaction to him were he to be returned.

40. The parties agreed that this was an "old style deportation" and it was expressly conceded before the Upper Tribunal and the second First-tier Tribunal panel that paragraph 398(c) had no application to the appeal and this Appellant was not subject to the provisions relating to automatic deportation. Consequently the panel were required to carry out an evaluation of the evidence and to carry out a proportionality balance. In any given case an evaluative exercise of this kind may admit of more than one answer. If so, provided all the appropriate factors have been taken into account, the decision cannot be impugned unless it is perverse or irrational, in a sense of falling outside the range of permissible decisions. The panel properly considered the relevant factors in the balance and gave weight to the presumption in favour of deportation (see[54]) but nonetheless after a careful consideration of all those relevant factors reached a decision open to them that the public interest was outweighed on the particular facts identified in this appeal. Whilst it may be said it was a generous decision, it cannot be said that it was a decision that fell outside the range of permissible decisions and was one open to them on the evidence presented before them. Therefore the grounds advanced on behalf of the Secretary of State are not made out and do not demonstrate any error of law in the decision of the First-tier Tribunal.

Notice of Decision:

The decision of the First-tier Tribunal does not disclose an error of law and the decision stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

Signed Date

Upper Tribunal Judge Reeds