Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00042/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th March 2019	**On 29th April 2019**

Before

UPPER TRIBUNAL JUDGE KING TD
UPPER TRIBUNAL JUDGE LINDSLEY

Between

HUSSEIN [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Eaton, Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant was born on 26th January 1990 and is a citizen of Denmark.

2. This is an appeal which falls within the Immigration (European Economic Area) Regulations 2006. The appellant was involved in an event of gang violence which resulted in a death. On 17th April 2007 at the Central Criminal Court he was convicted of murder and received on 11th May 2007 an intermediate custodial

sentence to serve a minimum of ten years' imprisonment. The Secretary of State, by notice of 2nd February 2016, indicated the intention to make a deportation order.

3. The appellant upon his release exercised the right of appeal against the decision and in particular against the certification applied by virtue of Regulation 24AA. The decision was upheld that he would be removed to Denmark on 22nd December 2016, and indeed he was.

4. The matter came before First-tier Tribunal Judge Cameron for hearing of that appeal on 26th March 2018 and in a decision promulgated on 18th April 2018 the appeal was dismissed.

5. The appellant through his legal representatives sought to challenge that decision, and permission to do so was granted by the Upper Tribunal. And thus it was that the matter came before Justice Cockerill and Upper Tribunal Judge King for hearing on 11th December 2018. For the reasons set out in an error of law decision promulgated on 20th December 2018 it was the conclusion of the panel that the First-tier Tribunal Judge had acted in error of law such that the decision should be set aside to be remade in the Upper Tribunal.

6. Thus, the matter comes before us to remake the appeal.

7. The relevant Regulation for the purposes of this appeal is Regulation 21 of the Immigration (European Economic Area) Regulations 2006.

8. The decision must be based exclusively on the personal conduct of the person concerned and must comply with the principle of proportionality.

9. The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

10. Matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision nor does a person's previous criminal convictions in themselves justify the decision.

11. The appellant does not have a permanent right of residence in the United Kingdom, as such he enjoys the lowest level of protection within the Regulation.

12. Regulation 21(6) provides that before taking a relevant decision on the grounds of public policy or public security in relation to a person's residence in the United Kingdom a decision maker must take into account considerations such as age, state of health, family, economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

13. The appellant's close family live in the United Kingdom, they consisting of mother, father and sister. It was indicated the appellant was removed to Denmark where he now resides.

14. In terms of wider context the appellant, within his witness statement dated 25th November 2016, indicated he had been born in Somalia and had come to England with his mother and five siblings in 2005. The appellant was 4 years old when his family settled in Denmark where he was brought up in a stable family environment. The family came to the United Kingdom when he was 14 or 15. The index offence took place on 28th January 2006 shortly after his 16th birthday, and thus he had been in the United Kingdom for a short time before the offence took place.

15. Ms Isherwood on behalf of the respondent essentially makes two submissions. The first is that the past conduct of the appellant is so serious and that itself must be considered a threat to the requirements of public policy. The second submission is that the appellant continues to present a current, present and sufficiently serious threat to the public such that he should continue to be excluded from the United Kingdom.

16. In terms of the submission as to conduct alone reliance is placed upon the decision of **R v Bouchereau [1978] 1 QB 732** as affirmed in **SHHD v Robinson (Jamaica) [2018] EWCA Civ 85**.

17. The principle is set out by the Court of Appeal in paragraph 71 as follows:-

> "It is important to recognise that what the ECJ (in **Bouchereau**) was there talking about was not a threat to 'the public' but a threat to 'the requirements of public policy'. The latter is a broader concept. At paragraph 28 the ECJ said that past conduct can only be taken into account insofar as it provides evidence of personal conduct constituting a 'present threat to the requirements of public policy'. As the ECJ said at paragraph 29 'in general' that will imply that the person concerned has a 'propensity to act in the same way in the future' but that need not be so in every case. It is possible that the past conduct 'alone' may constitute a threat to the requirements of public policy. In order to understand in what circumstances that might be so, I consider that it is helpful and appropriate to have regard to the opinion of the advocate general in **Bouchereau**, when he referred to 'deep public revulsion'. This is the kind of extreme case in which past conduct alone may suffice as constituting a present threat to the requirements of public policy".

18. In that connection our attention was also drawn to the case of **the Secretary of State for the Home Department v Straszewski [2015] EWCA Civ 145**.

19. It is important therefore to look at the context of the offence and in particular to the sentencing remarks of His Honour Judge Kramer QC.

20. Shortly after 10:30 p.m. on Saturday 28th January 2006, Mahir Osman was set upon by eight individuals out of a wider group acting as a gang on the night in question.

21. Mahir Osman belonged to a gang from Camden called the Centric Gang and there would seem to have been some problems and fighting between that gang and the gang who subsequently attacked him. The group in which the appellant was consisted of some 25 or 30 persons seemed to have come to Camden looking for Mahir Osman or members of his gang. The group were armed with knives, bottles, sticks.

22. The appellant was one of those found to have taken part in the attack upon Mahir Osman. He died very quickly from some twelve stab wounds, three of which were fatal. This was described as a frenzied and sustained attack by a number of people on a man from a rival gang.

23. In terms of the appellant it was noted specifically by the Judge that he was not armed with a weapon except for a bottle which he never used and which he left intact on a ledge of a nearby public house as he left the scene of the killing. His part in the joint enterprise was stamping on the body of Mahir Osman at the time that he was being attacked. Though the appellant had been of good character it was found that he was part of a group intent on violence in public and he played a part in the subsequent attack.

24. The case advanced on behalf of the appellant was that he was not part of any gang but on his way home in the Camden area he and his cousin become involved with the youths and with the subsequent events. He was 15 at the time of the offending behaviour.

25. It is clear from a number of authorities in particular set out in **Nazli and Others (External relations) [2000] EUECJC-340/97** and in particular paragraph 59 thereof that the European Court of Justice concluded that community law precludes the expulsion of a national of a member state on general preventive grounds, that is to say an expulsion ordered for the purpose of deterring other aliens. An important feature of the case of **Straszewski** was the contention made by the Secretary of State that the Tribunal had wrongly failed to take into account the public revulsion as a factor that was relevant to the assessment of Mr Kersys' conduct for the purpose of deciding whether there were serious public policy grounds justifying his deportation. He had in 2013 been convicted of offences of identity fraud for which he and his wife had used bank cards belonging to a vulnerable elderly neighbour whom they had befriended to obtain £112,000 from the bank account. It was described by the Judge as a "mean spirited and nasty piece of offending". That argument was rejected by the Court of Appeal and in paragraph 31 was the following comment:-

> "For the reasons given earlier, I do not think that public revulsion at the offender's conduct has any part to play in deciding whether there are

> sufficiently serious grounds of public policy to justify his deportation, save in exceptional cases of a kind in which failure to remove the offender might itself tend to undermine confidence in the state's ability to administer justice. This case falls far short of that. However, even if it were a factor to be taken into account in this case, I find it impossible to accept that a rational Tribunal could have come to any other conclusion. Although the offences for which Mr Kersys was sent to prison did not represent his first brush with the law, his previous convictions must have been of a modest kind, since the Judge when passing sentence was content to treat him as a man of good character. Moreover, a report made by NOMS concluded that he posed a low risk of further offending and a low risk of causing harm to the public. In those circumstances I find it difficult to understand how behaviour, although properly described as 'mean spirited, nasty and despicable' could possibly be said to represent a genuine and present and sufficiently serious threat to one of the fundamental interests of society to justify overriding the right of free movement on which the permanent right of residence remains".

26. In terms of Mr Straszewski he had attacked another with broken glass causing serious injuries to face and neck. Whilst on bail for that offence he broke in to a flat for the purposes of burglary and punched and kicked two women before making his escape. Notwithstanding the very unpleasant nature of those offences once again the decision to deport him was not upheld.

27. Given the reasoning set out in **Straszewski** we do not find that the nature of offending of this appellant falls within that exceptional category that was envisaged of past conduct alone. As a minor he did not use a weapon but became caught up in a serious and unfortunately incident arising out of gang culture. Whilst in no sense making light of the very serious offence of murder he does not seem to us to exhibit the characteristics of such an extreme case causing deep public revulsion. We turn to the decision of **Robinson**, in particular the comments of Lord Justice Singh set out at paragraphs 85 and 86.

28. The cases in which past conduct alone is sufficient would be one in which the facts were very extreme, for example a person committing grave offences of sexual abuse or violence against young children. The court went on to comment:-

> "I would not wish to belittle the seriousness of the offence in the present case but it is not the sort of offence in which public revulsion at the past events alone will be sufficient. I note that in **Straszewski** Moore-Bick LJ referred to 'the most heinous of crimes' at paragraph 17. That gives an indication of the sort of offence the ECJ had in mind when it said a past offence alone might survive".

29. The court went on to consider at paragraph 86 of **Robinson** that such cases would need to be "especially horrifying" and "repugnant to the public" such as the importation of a large amount of heroin committed by a medical doctor in **ex parte Marchon**.

30. It seems to us to apply the reasoning of these various decisions that the nature of the offending of the appellant who was a minor at the time of the offence does not constitute past conduct such as in itself sufficient to justify expulsion and deportation.

31. We turn therefore to the issue of whether the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. We notice that he has no right of permanent residence and as such falls to the lowest level of protection.

32. We note in the appellant's bundle that there are many helpful documents charting the progress of the appellant and his response to detention. In general they are all positive about his attitude and progress over the years. He attended an anger and emotional management programme in 2012. A report of the same noted his motivation to change and his positive response to the programme itself. We have regard to the OASys assessment of 1st October 2015.

33. The OASys assessment concludes that as a result of his conviction for murder he presents a serious risk of harm to the public if such an offence is repeated and in terms of risk of offending in the community that is assessed as low. Throughout his sentence the appellant displayed a very positive and mature attitude to maintain and manage his own risk in the future and he has undertaken a number of programmes and interventions aimed at reducing his risk to the public. He has undertaken various types of employment whilst at HMP Highpoint which helped him to exercise responsibility, assertiveness and an ability to refrain from pressure or influence from prisoners. He has had a good relationship with prison staff and exhibited exemplary behaviour. There were a number of adjudications in the early part of his sentence, but since 2009 the only adjudication was in 2015 for possessing a memory stick. He engaged in offending behaviour work and an addendum parole assessment report dated 16th August 2016 moving towards the appellant being released to open conditions to explore employment and training opportunities states that he remained positive and no concerns were raised regarding his risk management.

34. It was found that the appellant was focused upon progression and his expression of such motivation was considered to be genuine and sincere. It was noted he had good family support with frequent visits by family members. Thus it was that a recommendation was made for his release.

35. There is in the bundle also a letter from the Parole Board of 20th September 2016 noting the improvement in his behaviour and the positive steps which he has taken to improve his situation. It was noted that the appellant's scores placed him within the low risk band category and at page 271 was the comment by the parole board as follows:-

> "If you do reoffend, you are assessed, using OASys as posing a high risk of causing serious harm to the public in the community. Most unusually your offender supervisor assessed risk of serious harm as low. The panel felt that risk of serious harm was probably best described as medium".

36. Ms Isherwood relies heavily upon that comment, and also focused on the fact that the assessments were carried out whilst he was in a protective framework and none had been made testing his ability to adapt to the community. She submits his protestation of motivation to lead a proper and law-abiding life was also largely untested in the community. It is to be recognised of course that following his release from custody the appellant went on administrative detention, thereafter being deported without the opportunity of having demonstrated an ability to exhibit good behaviour whilst living in the community in the UK.

37. The Parole Board however ultimately decided as follows with respect to the appellant: "The Panel concluded that you had considered and taken responsibility for your offending and were clearly highly motivated to lead a pro-social life and avoid any return to custody. You had demonstrated that you were able to avoid or deal with confrontation whilst in custody and you had realistic and achievable plans for your future, with strong family support. In these circumstances, the panel was satisfied that it is no longer necessary for the protection of the public that you be confined."

38. We find it difficult to understand without more why the Parole Board should consider risk in the community to be medium, when all other assessments was that he posed a low risk to the society. However, the ultimate conclusion was that the appellant's imprisonment was no longer required for the protection of the public, and this expert assessment of the level of risk that he poses must, we find, be given very significant weight in our decision-making.

39. Had the appellant remained in the United Kingdom in the community he would of course have been subject to supervision as part of his sentence of life and that his progress could have been monitored in an official capacity. Nevertheless it is to be noted that at the hearing before the First-tier Tribunal Judge on 26th March 2018 he was present as were members of his family and gave evidence. He adopted his statement of 25th November 2016 and oral evidence was received by his mother who in turn adopted her statements of 1st November 2016 and 26th March 2018. Both the appellant and his mother were the subject of cross-examination. From this evidence we understand that the current situation is that he is studying in Denmark for the equivalent of A levels in Danish and maths. He is supported by money he receives from the government from attending school. There are a number of references positively speaking of his behaviour and good character. So far as the appellant's sister is concerned she too provided a statement, she lives with her mother, father and two sisters and is currently attending college. She has learning difficulties. The appellant's mother has a number of health problems also. She travelled to Denmark in December 2016 to settle in her son. Four family members indicate that they would

like the appellant to be at home to assist them to re-establish life as a family. The appellant is now 26. There is no evidence to indicate otherwise than that the appellant has been adjusting to life in Denmark and seeking to improve his position. There has been no suggestion that he has reoffended whilst in Denmark. Such we regard to be a significant matter.

40. The appellant is living in the community in Denmark and would seem to have adjusted well to that community, and there is nothing suggested to his detriment arising from his significant period that he has now spent in Denmark. He is not subject to any supervision of an official kind in Denmark and that again is something perhaps to be held to his credit that he has managed to develop his own life largely as a result of his efforts and of family support.

41. We also take note of the report and assessment from Deborah Kelland, forensic psychologist, dated 10th January 2017. It is a psychological report addressing the issue of risk of reoffending and risk of serious harm. This was a report prepared based on an assessment by Ms Kelland on 8th December 2016 whilst the appellant was held in HMP Highpoint in immigration detention pending deportation. It noted that following his conviction the appellant had never lived in the community as an independent adult and had not had the opportunity to resettle through a period of open conditions. It noted that the appellant matured during his time in custody and had developed a non-criminal identity. It is the opinion of the author of the report that the appellant posed a low risk of violent re-offending in the community and a low risk of serious harm to the public. We give weight also to this opinion.

42. We find overall that the evidence is that the appellant has managed to stand on his own feet as a young citizen and has not been violent or engaged in antisocial behaviour so far.

43. We observe that it is perhaps unfortunate that up-to-date evidence as to the appellant's current situation and circumstances and that of his family had not been obtained. Equally however there would seem to be no past challenge to the truthfulness of family members and of the appellant in his speaking about his current and social involvement plans.

44. Clearly remixing with a gang culture or with a similar peer group would be likely in the circumstances increase the risk of harm. There is however no indication that there has been any contact between the appellant and former gang members or indeed any desire to live in the area of gang culture.

45. The appellant was directed to be released from custody by the Parole Board on the basis that his detention was no longer necessary for the protection of the public and we find that his subsequent life in Denmark has confirmed his ability to live as a citizen without such risk arising to the public. He is a young man who has developed considerably over the past eleven years also in terms of maturity and also in terms of a positive approach to his responsibilities.

46. Further it is to be noted that if the appellant were to return to the United Kingdom he would be the subject to a requirement to live in Probation Premises accommodation and have ongoing supervision by the Probation service which is in itself a useful monitoring tool as well as a means of support.

47. In considering therefore the factors which arise by reason of Regulation 21 of the Immigration (EEA) Regulations 2006 we do not find, having regard to the totality of the evidence, that the appellant represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In coming to that view we have regard to the factors which are set out herein.

48. In the circumstances the appellant's appeal is allowed under the EEA Regulations.

Conclusion

49. The appellant's appeal is allowed under the EEA Regulations.

No anonymity direction is made.

Signed *Fiona Lindsley* Date 24th April 2019

p.p. Upper Tribunal Judge King TD