Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00181/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 11 July 2019	**On 16 August 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE J F W PHILLIPS

Between

SAMIR [J]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr S Joseph, Counsel instructed by Turpin & Miller LLP
For the Respondent:	Ms S Rushforth, Home Office Presenting Officer

DECISION AND REASONS

1. This is the continuation of an appeal by the Appellant against the decision of the First-tier Tribunal (Judge C J Woolley) in which the Judge dismissed the appeal of the Appellant, a citizen of Iraq, against the Secretary of State's decision to make a deportation order pursuant to the Immigration (EEA) Regulations 2016 (SI 2016/1052).

2. At a hearing on 26 April 2019 the Vice President and Upper Tribunal Judge Grubb decided that the First-tier Tribunal erred in law in dismissing the appeal and set aside the decision of the First-tier Tribunal to be remade by the Upper Tribunal.

3. The primary reason that the decision was set aside was because, due to a factual error, the Judge found that the Appellant had not acquired a permanent right of residence and therefore that serious grounds of public policy or public security were not required to justify his deportation. It is now accepted that the Appellant has resided in the United Kingdom as the family member of an EEA national for more than five years and so by virtue of Regulation 15 of the Immigration (European Economic Area) Regulations 2016 has acquired a permanent right of residence and therefore that in accordance with Regulation 27(3) "serious grounds of public policy or public security" are required to justify his removal.

4. At the resumed hearing before us Mr Joseph appeared for the Appellant and submitted a supplementary bundle containing 61 pages. Ms Rushforth represented the Secretary of State and did not submit any additional documents.

Oral Evidence

5. The Appellant gave oral evidence and adopted his two witness statements. Cross-examined and referred to the OASys assessment in the Appellant's bundle he said that he had changed his life not because of this appeal but for himself, his son and his family. He said that he does not take drugs and that he now only drinks alcohol occasionally with his foster parents. He denied drifting back to the kind of people he associated with before and said that they are in prison. Referred to previous incidents of threatening behaviour and damaging his ex-partner's car, the Appellant said this occurred before he went to prison and he received community service sentences. So far as the index offence was concerned, he said that he made no money, pleaded guilty immediately and got the lowest sentence. He denied that his pattern of behaviour suggested that he will commit further offences.

6. The Appellant said that he sees his son, [Z], at least three days per week and he stays over with the Appellant. He takes him to and from school. Contact is not prearranged; it changes every week by agreement with his former wife. He said that his son visited him in prison, but he did not want him to see him there, he got his foster parents to bring him every couple of months. Otherwise he maintained contact by telephone. His son has family members on his mother's side and the Appellant's foster carers have a lot of contact with him. He said that they have done more

for him than his own parents. The Appellant said that he works intermittently at a car wash dependent on the weather. He supports his son financially by taking him shopping and buying meals. There is no regular payment.

7. [AH] (his former foster parent) gave evidence and adopted her two written witness statements. In cross-examination she said that she sees the Appellant once or twice a week depending on whether [Z] is with him. The Appellant sees [Z] at least once per week and [Z] stays overnight with him. His mother contacts the Appellant or the witness if she can't pick up [Z] from school. She agreed that she took [Z] to see the Appellant in prison about three times.

Submissions

8. For the Respondent Ms Rushforth relied on the reasons for refusal letter of 9 March 2018. Paragraph 37 of that letter asserts that even if the Appellant had permanent residence the requirement for serious grounds of public policy would be satisfied. The index offence of conspiracy to supply a controlled class A drug resulted in a sentence of two years and four months. There is a history of offending and an increase in seriousness. The Respondent submits that the Appellant poses a present genuine and sufficiently serious threat affecting one of the fundamental interests of society. Such a threat does not need to be imminent or identified. Ms Rushforth referred to the OASys report at page 36 where it is said that he is a person who tries to shift the blame and to give the impression that he was complying with supervision because it will help him. It is accepted that he has not been convicted of any offence since his release just over a year ago but his immigration appeal has been pending. The index offence resulted in a sentence of more than two years imprisonment and so was particularly serious. There is no evidence that he undertook any courses in prison. The OASys report, compiled a year ago, said that he does not drink but now he admits to the occasional drink. This could indicate that he is slipping back into bad behaviour. Ms Rushforth said that the Appellant is 28 years old and is in fairly regular contact with his eight-year-old son. Whereas this would cease if he were deported, it is proportionate to the threat. The child has her mother plus her mother's family and the Appellant's foster carers.

9. For the Appellant Mr Joseph said that it was now accepted that the Appellant had acquired permanent residence in the United Kingdom. He is socially and culturally integrated and the index offence, whilst serious, does not suggest that he poses a genuine present and sufficiently serious threat affecting one of the fundamental interests of society or that there are serious grounds of public policy or public

security requiring his removal. The comments in the current OASys report are copied over from a previous OASys report. There is no escalation in the seriousness of offending because there are no relevant previous convictions. We were referred to paragraph 10 and 11 of the Court of Appeal's judgement when his sentence was reduced. This suggests that he was a vulnerable and exploited street dealer. The OASys report at page 49 shows risk of reoffending as low. It is difficult to see in these circumstances how he can be said to pose a threat.

10. We reserved our decision.

Discussion

11. The Appellant is a 28-year-old Iraqi citizen who arrived in the United Kingdom in 2008 as a 16-year-old minor, asylum seeker. His asylum claim was refused but he was granted discretionary leave to remain. As a minor the Appellant went to live with a foster family, Mr and Mrs [H] and he still maintains a close relationship with them. In 2009, after his discretionary leave had expired, he met and began a relationship with a Portuguese national. The couple were married in 2011 and their son, [Z], was born on 3 November 2012. The Appellant was issued with a residence card as the spouse of an EEA national exercising Treaty rights in 2012. The relationship with his wife finished at the end of 2014. The Appellant's residence card expired on 17 November 2016.

12. On 3 August 2016 the Appellant was arrested for conspiracy to supply a class A drug and on 20 March 2017 he was convicted of the offence and sentenced to 3 years imprisonment (reduced to 2 years 4 months on appeal). He was released from detention on 19 June 2018. This was not the Appellant's first offence. The Home Office decision records (at paragraph 89) offences of possession of class A and class B drugs, an offence of harassment without violence and one of failing to comply with the requirements of a community order. These offences were dealt with by way of cautions, community order and a small fine. The Appellant has not been convicted of any offences following his release from detention.

13. The Respondent asserts that the Appellant poses a genuine present and sufficiently serious threat to the public to justify his deportation on serious grounds of public policy. In assessing the nature and seriousness of this threat the Respondent places significant weight on the sentencing remarks of the Trial Judge and the Appellant's previous offending. Having established that the Appellant has a permanent right of residence Ms Rushforth now suggests that the OASys report indicates that serious grounds remain. In our judgement both the sentencing remarks and the OASys report merit some analysis.

14. In the refusal letter the Respondent, at paragraph 28, quotes from the remarks of the sentencing judge as follows

> *"Each one of you, coming to this country as a foreign national, has chosen to abuse the hospitality, freedom and opportunity this country has offered you, by turning to the supply to the community of drugs. Those drugs are, by their nature, destructive of family, life and ambition. Those things underpin the very community that has offered you that haven*
>
> *…*
>
> *Mr Samir [J], single count, count 23 on this indictment. I see in your case no reason to move one way or the other of category three significant role. It is significant because one sees the nature of the transactions when you are involved on five occasions supplying undercover officers with cocaine. "*

15. The refusal letter does not however mention the judgement of Mr Justice King given when the Appellant appealed against his sentence. Paragraph 10 reads as follows

> *"Mr Hopper (the Appellant's counsel) has identified in particular the following features of the mitigation to such reduced starting point: there were no relevant previous convictions; the evidence showed that the Appellant was a vulnerable young man who had been exploited by others in the conspiracy; at the time of the offences, he was homeless and a drug addict himself; and he had given an account to the police in interview in which he had explained his role and had stated that he was paid £5 to supply the drug, or given food and shelter in return. Mr Hopper further submitted that, on the evidence, the Appellant's role in the conspiracy had been limited; he had no influence on any of the other co-defendants; and he had little understanding of the scale of the criminal enterprise. There was positive mitigation which had emerged from his time in custody. He had fully engaged with the prison authorities, had undertaken numerous courses and classes, and indeed a large number of certificates had been handed up to the sentencing court."*

16. Mr Justice King concludes that

> *"the Appellant had no relevant convictions, and, in truth, he was a vulnerable and exploited street dealer at low-level for little reward"*

17. In our judgement the difference in emphasis between the sentencing remarks and the Court of Appeal judgement is significant. In the one, which underlies the Respondent's reasons for deciding that the Appellant poses a present, genuine and serious threat, the Appellant is portrayed as equal in blameworthiness to his co-defendants. He is described as an ungrateful individual abusing the hospitality that he has been shown. In the other, one that corrects the first, he is portrayed as a victim of his co-defendants both vulnerable and exploited. It is perhaps also appropriate to point out that Ms Rushforth's comment in

submissions that the Appellant has not undertaken any courses in prison is shown to be wrong by the Court of Appeal decision noting that he had undertaken numerous course and classes. Indeed, the Respondent's supplementary refusal letter of 19 September 2018 acknowledges and lists at paragraph 12 the certificates provided in respect of courses attended. The paragraph concludes that insufficient time has passed to evidence rehabilitation, that no evidence has been provide that he has distanced himself from his accomplices and that no evidence has been provide that he is financially self-sufficient. In fact, more than a year has now passed since the Appellant's release from detention, and there is no evidence put forward to suggest that he associates with anyone untoward (see further below) and for the last year the evidence shows that he has been working.

18. Turning to the OASys assessment Ms Rushforth pointed in particular to paragraph 12.8 of the assessment dated 17 June 2019. Under the heading **"Motivation to address offending behaviour"** the author suggests

"Mr [J], at the moment, appears to be law-abiding, however his history suggests otherwise. Although he has two convictions, the index offence was committed along with a number of other men, from his own background, albeit he was not found guilty of the other offences on the charge sheet. Mr [J] works with men from his own ethnic group and I'm not convinced, that given the opportunity, he would not return to his previous life …

Mr [J] functions in society at a level that is acceptable, on the surface. He appreciates that he did wrong and should have sanctions applied. He does minimise his own actions over the offences for which he has been convicted. I'm not convinced that if the same situation occurred he would not follow the same path with the same outcome. According to the police, the people who Mr [J] works and socialises with are in the same subculture as his co-defendants, and he needs to recognise is to move away from his past in a positive manner …

Mr [J] seems to be motivated to leave the past behind him. He does appear to have drifted back to the type of people who he was associating with when he committed his index offence. This does not convince me that he really wants to change. If he did he would try to meet people who are from a different background from his past. He may be taking a short-term view until the outcome of his appeal is known but I would consider moving away from the people who remix within the past, would be a more positive course to follow than the one he presently pursues."

19. We find some difficulty with this report. In the first place, despite being dated 17 June 2019 it is, apart from the correction of some of the typographical errors, an exact copy of the assessment from 19 July 2018. The comments suggesting that the Appellant seeks to minimise his own actions do not seem to take any account of the Court of Appeal judgement which gives justification for this view. Further we cannot avoid noting that the sentiments expressed in the assessment are, to say

the least, unfortunate referring in a detrimental way to persons of the Appellant's *"own background", "own ethnic group"* and *"same subculture"*.

20. Mr Joseph rightly pointed out that the particularly relevant part of the OASys assessments is to be found in the risk of reoffending. In both versions of the assessment this is shown as low.

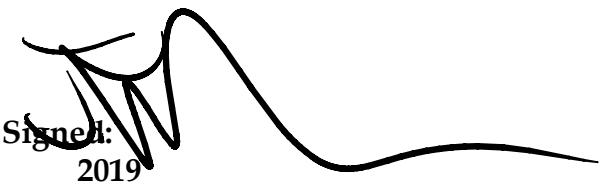
Decision

21. It really is not necessary for us to take matters much further. In our judgement when we combine the decision of the Court of Appeal which shows no relevant previous convictions by a man who was a vulnerable and exploited street dealer with an OASys assessment which records a low risk of reoffending, it is impossible for us to find that the Appellant poses a genuine present and sufficiently serious threat to the public to justify his deportation on serious grounds of public policy. When we add to this the Appellant's relationship with his son, his relationship with and the support he receives from his former foster carers, his employment and his clean record since release from detention we are satisfied that there are no serious grounds of public policy to justify his deportation and therefore that his appeal must be allowed.

Conclusion

22. The decision of the First-tier Tribunal involved the making of a material error of law and has been set aside.

23. We remake the decision and we allow the Appellant's appeal under the Immigration (EEA) Regulations against the Respondent's decision to make a deportation order.



Signed: **Date: 9 August 2019**

J F W Phillips
Deputy Judge of the Upper Tribunal