Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00595/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 August 2019	**On 22 August 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR YATHUKULAN PASKARAMOORTHY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bisson, instructed by Lova Solicitors
For the Respondent: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed with permission against the decision of the First-tier Tribunal promulgated on 20 March 2019 dismissing his appeal against the decision made on 17 September 2018 to make a deportation order against him pursuant to Regulation 23(6)(b) and Regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. Subsequent to the decision of 17 September, on 23 November 2018 the respondent made a decision to refuse the appellant's claim for asylum, a

decision which the Secretary of State certified pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

3. The appeal came before the First-tier Tribunal on 6 March 2019. It was conceded that this was not an asylum appeal, there being no evidence any asylum appeal had been lodged after 23 November 2018. It was, however, observed both parties' position that there was some overlap in assessing "very compelling circumstances" of what might have been said about asylum (see First-tier Tribunal decision at [11]).

4. The appellant is married to a German citizen, and had acquired the right of residence on that basis.

5. On 23 November 2016 at Southwark Crown Court the appellant was convicted of sexual assault on a female by penetration for which he was sentenced to four years' imprisonment. It was that conviction which triggered the Secretary of State's decision to commence deportation proceedings against him under the EEA Regulations and it was subsequent to the service of a notice of liability for deportation that the appellant claimed asylum.

6. The applicant's case was that he was at risk of unlawful killing or torture at the hands of the Sri Lankan Army on the basis that the army would want from him information about the LTTE and its activities in the United Kingdom. His case is also that he had been harassed and arrested by the army in 2006 and 2008 on suspicion of causing an explosion; detained; beaten; and, released through army contacts. He had then first moved to the north of Sri Lanka and then to India in 2009 before returning to Sri Lanka in 2010. He came to the United Kingdom in 2012 while married to his wife who is a German citizen, returning in 2014 to Sri Lanka for his sister's wedding where he remained for ten days without incident.

7. On appeal the judge found:-

   (i) that the appellant had not been living in the United Kingdom for a continuous period of five years and thus not acquired a permanent right to reside in the United Kingdom [14] to [16];

   (ii) that in light of the attack, the OASys Report and the probation officer's report that the appellant remains at risk to the general public/women and continues to represent a genuine, present and sufficiently serious threat [23] to [32];

   (iii) that the appellant's account of what had happened in Sri Lanka lacked credibility [44] and that the medical reports did not support his assertion [45] concluding that although he had scars which may be due to the history given, the overall account was inconsistent and inconclusive;

   (iv) that there was no proper evidence of mental health deterioration and whilst there was a suggestion that he had demonstrated suicidal ideation in detention, there was no proper reason to assume this

would arose suspicion on return to Sri Lanka, the OASys Report recommending significant support be provided *if* mental health issues arose [47];

(v) that there were no compelling reasons why the appellant should not be deported [53]; or there would be nothing unduly harsh in his removal [55] and that there were no compelling reasons to take a different view other than the appellant had repented, the strong public interest in deportation prevails [56].

8. On 29 April 2019 Upper Tribunal Judge Jackson granted permission on the sole ground that the First-tier Tribunal had simply failed to determine whether deportation was in accordance with Regulations 27 and 28, having appeared to proceed on the mistaken basis that the appellant was appealing against an automatic deportation order, it being noted that there was no actual decision under the EEA Regulations and no findings made in relation to the factors set out in Regulation 27.

9. In her decision, Upper Tribunal Judge Jackson expressly rejected the contention that the First-tier Tribunal had erred in concluding it had no jurisdiction to consider the appellant's asylum claim; in concluding that the appellant did not have five years' continuous residence; in making a decision contrary to that of the sentencing judge in the criminal proceedings; taking into account the OASys Report; failing to give weight to the responsibility taken by the appellant for his offence and his regret there for that; failing to take into account medical reports; failing to accept the appellant's wife's intention to reunite given that there was no evidence of intention to divorce as well as failing to consider the appellant's private life in the United Kingdom and overlooking the fact that he was released on licence therefore indicating that he was no longer a threat nor taking into account the risk of double jeopardy.

10. The matter came before the Upper Tribunal on 18 June 2019 when the appellant was represented by Mr Paramjorthy of Counsel and the Secretary of State was represented by Mr D Clarke, a Senior Home Office Presenting Officer.

11. It was on that occasion common ground between the parties that the judge had erred in that he failed to address the EEA Regulations properly in reaching his findings and on the basis on which he had dismissed the appeal, in particular failing to have regard to Schedule 1 and failing to dismiss the appeal under the EEA Regulations.

12. It was the Upper Tribunal's view that the findings of fact set out at paragraphs 12 to 16 and 23 to 32 from the First-tier Tribunal's decision should be retained and the matter should be adjourned remaking on a later date.

13. The Upper Tribunal also directed that any further evidence which either party sought to rely should be served at least ten days before the date; a skeleton argument by the appellant was also directed.

14. The appeal thus came before me on 13 August 2019.

15. I heard submissions from both representatives, Mr Bisson accepting that there was little he could say in terms of the factors to be taken into account, there being no additional evidence. He accepted there was no evidence of employment, either at present or previously, and that the appellant had a sister and brother-in-law in the United Kingdom. He was unable to take me to any other evidence of other ties the appellant might have in the United Kingdom beyond evidence of the qualifications he had obtained. He drew attention to the fact that the appellant had continued to attend meetings of AA but accepted that there was no evidence material before me to show there had been a reconciliation between the appellant and his wife.

16. Mr Tufan submitted that the appellant continued to be at risk and that there was nothing in his favour to suggest that, given the preserved finding at paragraph [32], that his deportation would not be proportionate. He submitted to the contrary, the Secretary of State had made out his case. In response, Mr Bisson drew my attention to the OASys Report at page 129 of the appellant's bundle and also the Rule 35 report referred to the decision of the First-tier Tribunal.

The Law

17. Regulation 27 of the EEA Regulations provides as follows:-

> '**27.**-(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health.
>
> (2) A relevant decision may not be taken to serve economic ends.
>
> (3) A relevant decision may not be taken in respect of a person with a right of permanent residence under regulation 15 except on serious grounds of public policy and public security.
>
> (4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—
>
> (a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or
>
> (b) is under the age of 18, unless the relevant decision is in the best interests of the person concerned, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> (a) the decision must comply with the principle of proportionality;

> (b) the decision must be based exclusively on the personal conduct of the person concerned;
>
> (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
>
> (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> (e) a person's previous criminal convictions do not in themselves justify the decision.
>
> (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.
>
> …
>
> (8) A court or Tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.).

18. It is important to note Dumliauskas [2015] EWCA Civ 145 at [40]

> "I have to say that I have considerable difficulty with what was said by the Advocate General in relation to rehabilitation. In the first place, it had no, or very little, relevance to the questions referred to the Court, which concerned the meaning of "imperative grounds of public security". **Secondly, it is only if there is a risk of reoffending that the power to expel arises** [emphasis added] It is illogical, therefore, to require the competent authority "to take account of factors showing that the decision adopted (i.e., to expel) is such as *to prevent* the risk of re-offending", when it is that very risk that gives rise to the power to make that decision. Secondly, in general "the conditions of [a criminal's] release" will be applicable and enforceable only in the Member State in which he has been convicted and doubtless imprisoned. …"

19. The sentence highlighted is confirmed at paragraph [55].

20. In this case, there is a preserved finding of fact that the appellant does present a risk of reoffending and that he presents a genuine, present and sufficiently serious threat. It is thus necessary to go on to consider whether the decision to deport him is proportionate, an assessment to be undertaken applying principles of EU law and noting that it is for the respondent to demonstrate on the balance of probabilities that it is so.

21. In assessing proportionality, I consider that significant weight has to be attached to the threat the appellant poses to women.

22. I have considered whether the appellant's health would be a problem on removal to Sri Lanka but I find that it would not. The findings of the judge in the First-tier with respect to the Rule 35 report are sustainable and permission to challenge them was not granted. There is in any event

nothing to show from the Rule 35 report that he is at any continuing problem owing to ill health. Further, there is no evidence that he would be at risk of ill-treatment on return nor is there any real evidence of mental ill health. As Mr Bisson conceded, and was agreed, the OASys Report which refers to suicidal ideation was completed on 1 February 2017. That is over two years ago when the appellant was in detention. At best, this is an indication that at the time he had considered suicide but there was insufficient evidence to show that he has any continuing mental health problems which would require treatment still less that that treatment would not be available in Sri Lanka.

23. Other than the fact that the appellant has relatives in the United Kingdom there is insufficient evidence from them to show any ties between them over and above the fact of the biological relationship, or how any relationship would be affected by the deportation. There is no proper evidence from the appellant to show that being able to remain in contact with them in the United Kingdom is a matter which should attach weight. There is therefore little or no evidence of significant ties to the United Kingdom, it being conceded that the appellant is not employed here. It is evident from the previous determination and from the appellant's previous evidence that the relationship between him and his wife had broken down. Thus I accept that he made statements to the effect that at least he would seek to rekindle the relationship, though there is nothing from him or her to confirm that that has occurred.

24. In summary therefore I conclude that given the lack of ties to the United Kingdom, when balanced with the risk that the appellant continues to present, the Secretary of State has shown that the appellant's deportation is proportionate and I therefore dismiss the appeal under the Immigration Rules, the EEA Regulations, as that decision is in all circumstances proportionate.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I remake the decision by dismissing the appeal under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed Date: 16 August 2019

Upper Tribunal Judge Rintoul