IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00030/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 February 2020	**On 22 April 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAMTOCHUKWU EZEPUE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms S Shakir, Counsel instructed by Pillai & Jones Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for the sake of clarity, I will refer to the parties as they were referred to in the First-tier Tribunal.

2. The appellant is a citizen of Nigeria born on 24 March 1976 who is married to an EEA national. He was granted a permanent right of residence in the UK under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") in July 2014.

3. In March 2015 the appellant was convicted of assaulting his wife and was sentenced to sixteen months in prison. The respondent decided to deport him in accordance with reg. 21 of the 2006 Regulations on the basis that his deportation was justified on serious grounds of public policy. The appellant appealed to the First-tier Tribunal where his appeal was heard by Judge of the First-tier Tribunal Swaney ("the judge"). In a decision promulgated on 14 November 2019 the judge allowed the appeal under the 2006 Regulations. The Secretary of State is now appealing against that decision.

Decision of the First-tier Tribunal

4. The judge directed herself that it was necessary to consider the risk of whether the appellant will cause harm by further offending and that this required an evaluation to be made of the likelihood that he would re-offend and what the consequences would likely be if he were to do so.

5. She noted that prior to his conviction for actual bodily harm the appellant had been cautioned on one occasion for assaulting his wife (in 2007) and that between 2007 and 2014 the police had been called on approximately ten occasions. The judge noted that the sentencing judge, following his conviction in 2015, remarked that this appeared to be "an appalling repeat of what appeared to be bullying" of his wife.

6. The judge stated that the OASys Report dated January 2016 described the appellant as posing a medium risk of serious harm to known adults and children in the community and a low risk of harm in all other respects. She noted that the OASys Report identified circumstances in which risks would be greatest, one of which was the risk that the appellant would reconcile with his wife.

7. The judge noted that the appellant had now reconciled with his wife. She stated at paragraph 64:

> "The situation has changed in that their evidence is that they are now once again living together with their children. I take into account that the restraining order against the appellant was lifted by the judge in July 2018, indicating the judge accepted it was no longer necessary for the protection of the appellant's wife."

The judge found that both the appellant and his wife were dishonest when they denied at the hearing that there had been any further involvement with the police since the appellant's release from prison and that it was only when confronted with a record that the appellant was arrested in July 2019 on suspicion of actual bodily harm against his wife that the appellant confirmed he had been arrested. The judge observed that the appellant's wife denied outright that the appellant had been arrested and when asked whether she and the appellant had any major arguments since his release from prison she denied that they had. At paragraph 67 the judge stated:

> "It is regrettable that neither the appellant nor his wife told the truth in their evidence in this respect [the arrest in July 2019 on the suspicion of actual bodily harm]. Notwithstanding this, I place limited weight on this aspect of their evidence. This is one incident since the appellant's release and comes some twelve months after they say they resumed living together. While it is concerning that this is similar to other incidents in the history of this relationship, it does appear to be a one-off. There was nothing to suggest that this forms part of a pattern of behaviour that was evident previously. I do not consider this one incident is of itself enough to suggest that the assessment of the risk of re-offending are inaccurate or otherwise unreliable. I find on that basis that the risk of re-offending remains low and this carries weight in the balancing exercise."

8. At paragraph 70 the judge concluded:

> "I find that the appellant does not pose a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. I have considered all the matters referred to above, but the key factors that have contributed to this finding are:
>
> a. The assessed low risk of re-offending which takes into account the steps the appellant has taken to rehabilitate himself.
>
> b. The fact that a judge of the Crown Court lifted the restraining order against the appellant.
>
> c. The evidence of the appellant's wife that she is satisfied that he has changed and that she is happy to have him back in the family home.
>
> d. The appellant's social and cultural integration in the United Kingdom and the personal factors that I have outlined above."

Grounds of Appeal and Submissions

9. The grounds of appeal make several arguments under the heading "material misdirection of law".

10. First, it is argued that the judge's finding that the appellant is at a low risk of re-offending is inconsistent with the OASys Report which assessed the appellant as being a medium risk of serious harm to known adults and children in the community.

11. Second, it is submitted that the judge failed to give proper consideration to the evidence of the appellant continuing to arouse suspicion of marital abuse as recently as July 2019 in the context of, over a long period of time, the appellant having repeatedly come to the attention of the police for conduct towards his wife.

12. Third, the grounds of appeal submit that the judge failed to assess the obvious credibility issues arising from the appellant and his wife failing to mention the 2019 arrest.

13. Fourth, it is submitted that the judge improperly placed weight on various courses the appellant claimed to have completed when documentary evidence was not submitted.

14. Mr Lindsay argued that the judge's approach to the OASys Report, the threat posed by the appellant, and to his credibility, were not sustainable and did not adequately address whether he is a present threat.

15. He noted that the OASys Report identified, as one of the greatest risks, that the appellant would reconcile with his wife, and this is what has in fact occurred. He argued that the judge has not engaged with the fact that the current circumstances are such that there is an increased risk, based on OASys Report.

16. He also argued that it is plain that the appellant and his wife were not credible given that they denied having any further involvement with the police and it was only when they were confronted with the evidence that the appellant admitted he was arrested in July 2019. Mr Lindsay submitted that the judge failed to adequately explain how he could still find the appellant and his wife credible despite this.

17. Mr Lindsay also argued that the reliance by the judge on the evidence of the appellant's wife that she believed the appellant had changed his ways failed to engage with the remark of the sentencing judge as to the appellant bullying his wife. He also maintained that the judge had not addressed whether the apparent support given to the appellant by his wife might be a result of bullying or compulsion; or taken into account that she and the appellant were untruthful as witnesses.

18. Mr Lindsay submitted that the judge had not adequately considered the implication of the appellant being arrested in 2019. He recognised that the appellant was not charged or convicted; but noted that an arrest is still capable of meeting the relevant civil standard. He commented that the absence of any analysis in the decision of the arrest in 2019 notable. He also argued that the reference by the judge at paragraph 67 to the incident in 2019 appearing to be a "one-off" is not consistent with the long history of abuse and the police being called, prior to the conviction in 2015, on approximately ten occasions. He argued that the incident in 2019 appears to be consistent with this pattern and therefore it was not open to the judge to state that there was "nothing to suggest that this forms part of a pattern of behaviour".

19. Ms Shakir argued that this is a properly made decision. She submitted that the appellant was not charged, let alone convicted, in 2019; and it was a matter for the judge to determine how much weight to place on the arrest. She observed that it has been four years since the OASys Report, and that the incident in 2019 was a "one-off" incident. The judge, argued Ms Shakir, was entitled to reach a conclusion on

credibility, having heard oral evidence and it was the judge who was best placed to decide credibility.

Analysis

20. This is a comprehensive and clear decision where the judge has:

    (i) accurately identified the applicable law,

    (ii) engaged with all of the material evidence (and not relied on any immaterial evidence), and

    (iii) given clear reasons to support the conclusions reached.

21. Although the grounds of appeal are framed as a challenge based on a "misdirection of law" and Mr Lindsay submitted that aspects of the evidence had not been adequately considered, the Secretary of State's case, in reality, is that the conclusion reached by the judge was irrational/perverse.

22. The first ground submits that the judge was wrong to assess the appellant as low risk when the OASys Report assessed him as a medium risk. The judge set out the OASys assessment, considered the events occurring in the intervening years, and explained why her conclusion differed. The only possible error is that the conclusion reached was not rational. This is the point made in the grant of permission, where it was stated:

> "It is arguable that it is perverse and/or irrational that the FTT Judge placed no or very little weight on an arrest by the police for domestic violence, even though not proceeded with to charge, given the content of the OASys Report, the contradictions in the appellant's and his wife's evidence and the lack of documentary evidence to corroborate the appellant's evidence of the courses he claimed to have undertaken."

23. The second ground of appeal submits that the judge failed to give proper consideration to the evidence of the appellant continuing to arouse suspicion of marital abuse as recently as July 2019 in the context of, over a long period of time, the appellant having repeatedly come to the attention of the police for conduct towards his wife. It is clear from the decision that the judge considered – in some detail, and accurately- the arrest in July 2019 along with the evidence relating to a lengthy history of abuse. The real point advanced by the Secretary of State is not that there was "improper consideration" but that it was not reasonably open to the judge to not place weight on the arrest in the light of all the circumstances.

24. The grounds of appeal submit that the judge failed to assess the credibility issues arising from the appellant and his wife failing to mention the 2019 arrest. It is simply not the case that the judge "failed to assess" the credibility issues arising from the appellant, and his wife, being dishonest at the hearing, as she clearly did consider this and

gave reasons to support her position. The real basis for this challenge is that it was not rational to treat the appellant's, and his wife's, evidence as credible given the dishonesty.

25. The fourth ground submits that the judge improperly placed weight on various courses the appellant claimed to have completed when documentary evidence was not submitted. However, there was evidence before the judge, in the form of the witness evidence of the appellant. Again, the real issue is whether it was irrational to accept the evidence of the appellant given his dishonesty at the hearing.

26. The key issue in this appeal was whether the appellant was now at low risk of offending. There were strong reasons to find that he was not, including that:

    (i) he (and his wife) were dishonest at the hearing on an important issue;

    (ii) the appellant was arrested in 2019 for an incident that, on its face, seems to fall into the pattern of previous offending; and

    (iii) the appellant had reconciled his wife, which was a risk factor identified in the OASys report.

27. However, there were some factors that reasonably could be considered as pointing to the appellant now being at low risk. These include:

    (i) The OASys report was prepared over 4 years earlier and since then the appellant had not been charged or convicted of any offence (in 2019 he was arrested but not charged);

    (ii) the restraining order against him had been lifted; and

    (iii) his wife gave oral evidence that she believed he had changed.

28. The relative weight to give these factors was a matter for the judge. I am in no doubt that many judges would have decided the appeal differently. In particular, other judges might have attached significant weight to the lack of honesty at the hearing. However, the matter for me to determine is not whether I (or another judge) would have reached a different conclusion as to whether the appellant was at low risk of reoffending, but whether it was irrational (i.e. not open to the judge) to reach such a conclusion. The conclusion reached by the judge is generous to the appellant, but not irrational. There are sustainable reasons (as set out above, in para. 27) to support the judge's conclusion. Having reviewed for myself the evidence before the First-tier Tribunal, I am satisfied that the decision was open to the judge. I therefore dismiss the appeal.

Notice of Decision

29. The appeal is dismissed.

Signed

Upper Tribunal Judge Sheridan

Dated: 24 March 2020