Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00257/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Skype	**On 21st December 2020**
On 1st December 2020	

Before

THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

'TP'
(ANONYMITY DIRECTION CONTINUED)

Respondent

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

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

Representation:
For the appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the respondent: Mr D Furner, Solicitor, Birnberg Peirce & Partners Solicitors

DECISION AND REASONS

Introduction

These are the approved record of the decision and reasons which were given orally at the end of the hearing on 1st December 2020.

Both representatives attended the hearing via Skype and the Tribunal panel attended the hearing in-person at Field House. The parties did not object to attending the hearing via Skype and we were satisfied that the representatives were able to participate in the hearing.

The Secretary of State appeals against the decision of First-tier Tribunal Judge Andonian (the 'Judge') who, following a hearing at Taylor House on 14th February 2020, allowed the appeal of the respondent (hereafter, 'Claimant') against his deportation under Regulation 36 of the Immigration (EEA) Regulations 2016 (the 'Regulations').

The Secretary of State had concluded, in issuing the deportation order, that the Claimant was entitled to the 'basic' tier of protection under Regulation 27(1) of the Regulations and the Claimant did not appeal against that part of her decision. In essence, the Claimant's claims before the Judge had involved the following issues:

1.1. whether the Secretary of State's decision to make the deportation order on 28th March 2018 complied with Regulations 27(5); 27(6); and Schedule 1 of the Regulations, including (but limited to):

1.2. whether the personal conduct of the Claimant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the Claimant and that the threat does not need to be imminent (regulation 27(5)(c)); and

1.3. the principle of proportionality (regulation 27(5)(a)).

The Judge's decision

The Claimant was accepted as being a Portuguese national, aged 31 at the date of the Judge's decision, having entered the UK in around 1992/3, aged 3 years' old (paragraph [2] of the Judge's decision). The deportation order was made following the Claimant's conviction and sentence to six years in prison for grievous bodily harm. His conviction was in August 2014, which, as recorded in the Secretary of State's decision, was the last of 7 convictions for 12 offences between 29th April 2005 and August 2014. Those offences were: shoplifting; destroying or damaging property; theft from a meter; failing to surrender; depositing litter; failing to comply with a requirement to surrender a container believed to contain alcohol; using disorderly behaviour and threatening/abusive/insulting words likely to cause harassment alarm or distress; assault of a constable; using threatening abusive or insulting words or behaviour with intent to cause fear or provocation of violence; and the index offence. The sentences for these offences increased in severity, with the penultimate offence resulting in a suspended eight-week prison sentence, suspended for one year. The Claimant committed the index offence whilst he was on police bail for a similar, but less violent, offence.

The Judge considered the level of protection to which the Claimant was entitled at paragraphs [3] to [5]. At paragraph [5], the Judge recorded:

> *"Since therefore the appellant had not shown he had acquired a right of permanent residence, consideration had only therefore been given to the principles of Regulation 27(5) and Schedule 1 of the EEA Regulations 2016…."*

The Judge then carried out an analysis of the risk posed by the Claimant, referring to two OASys reports (paragraph [8]); the nature of the index offence, as described by the sentencing judge in 2014 (paragraphs [9] to [14]); the Claimant's current family circumstances including the evidence of the Claimant's mother, with whom he lived (paragraphs [22] and [23]); and an expert psychiatric report (paragraph [27]).

At paragraphs [28] to [30], the Judge considered whether the Claimant's deportation would prejudice his rehabilitation, which was in progress, and concluded at paragraph [30] that it would.

At paragraph [31], the Judge recorded the issues as being whether the Claimant's personal conduct represented a genuine, present and sufficiently serious threat, with the burden of proof on the Secretary of State. If this could not be proved, then the Claimant's appeal should be allowed; but if it were proved, then it was said that Article 8 (presumably of the European Convention on Human Rights) and proportionality would be important factors to take into account.

Having reminded himself of the well-known authority of MC (Essa principles recast) Portugal [2015] UKUT 520 (IAC), the Judge concluded at paragraph [41] that the Secretary of State had not shown, on the balance of probabilities, that the Claimant's conduct represented a relevant threat. At paragraph [42], the Judge referred to the Claimant's current family circumstances providing him with a strong incentive not to commit further offences, which was consistent with the report of a psychiatrist and his probation officers. The history of previous offending was insufficient for the Secretary of State to prove that the Claimant represented a relevant threat.

The grounds of appeal and grant of permission

The Secretary of State appealed against the Judge's decision on the following grounds:

2. (1) The Judge had failed to make a finding on whether the Claimant had acquired a permanent right of residence and so had 'middle-tier' protection.

3. (2) The Judge had failed to consider the Claimant's previous convictions. The fact that the Claimant had not offended since July 2017 was insufficient time, in her words, to "*yield a durable change*", particularly in light of the most recent OASys report, which still showed his risk of offending as "medium".

4. (3) The Judge had failed to consider the seriousness of the consequences of the Claimant's reoffending, in line with the

authority of Kamki v SSHD [2017] EWCA Civ 1715. The potential consequences of his reoffending were serious.

5. (4) The Secretary of State cited paragraph [19] of the Court of Appeal's decision in MA (Pakistan) v SSHD [2014] EWCA Civ 163, where a risk of 17% of reoffending over a two-year period could not be treated as "insignificant".

6. (5) The Judge had failed to consider that the Claimant had a history of persistent offending (see the case of Chege ("is a persistent offender") [2016] UKUT 187 (IAC).

7. (6) Whilst the Judge had considered the Claimant's rehabilitation, he had not been entitled to assume that the availability of state support for rehabilitation would be less in another EU member state, such as Portugal (see SSHD v Dumliauskas & others [2015] EWCA Civ 145).

8. (7) The Judge had failed to consider that the Claimant was not integrated into the UK, as social and cultural integration required an adherence to the law (see Binbuga (Turkey) v SSHD [2019] EWCA Civ 551).

9. (8) The Judge had failed to identify which factors concerning the Claimant's age or state of health, which were potentially relevant under the Regulations, would make his deportation disproportionate.

First-tier Tribunal Judge Saffer granted permission on 27th March 2020. The grant of permission was not limited in its scope.

The hearing before us

The Secretary of State's submissions

In written submissions, the Secretary of State argued that it was incumbent on the Judge to have made a finding on whether the Claimant had acquired permanent residence in the UK.

Given the number of offences committed by the Claimant over a lengthy period, the Judge's conclusion that the Secretary of State had not shown that the Claimant posed a relevant threat was inadequately reasoned. The Judge had ignored the latest OASys report, which assessed the Claimant as being a medium risk to public. While references were made to the Claimant's family and his ability to work, both had been present prior to the index offending and had not prevented it.

In oral submissions, Ms Cunha began to suggest that because there was a lack of integration, that the Claimant could not rely upon any rights under the Regulations whatsoever. However, when we explored this with her further, she confirmed that this was not an assertion or proposition on which she intended to rely and therefore we made no further analysis of it.

Ms Cunha's next submission was that the Judge had provided inadequate reasons for concluding that the Claimant did not pose a relevant threat, in the context of (1) the seriousness of his index offence and (2) his prior offending. Ms Cunha referred us to a misdirection of law, relying on a proposition in the case of Kamki. When we discussed with her what that proposition was, she referred us to paragraphs [24] and [43] of Kamki. We indicated to Ms Cunha that we were struggling to see what proposition was contained in those paragraphs, as they appeared to be findings of fact, found by a First-tier Tribunal Judge, rather than a legal proposition. Ms Cunha referred briefly to a legal "blog", which had discussed Kamki, although she did not have that blog to hand and was not able to refer us to the point relied on. Instead, she returned to the basic proposition that the Judge had failed to make adequate findings on the relevant threat represented by the Claimant's personal conduct. In particular, the Secretary of State had, at paragraph [13] of her deportation decision, referred to the Claimant's prior offending, which the Judge ought to have taken into account (see Regulation 3 of Schedule 1 of the Regulations), which the Judge had failed to consider and had not referred to at all in his decision.

Ms Cunha added that there was a 'danger' (and she put it no higher than that) that the Judge may have confused the tests for basic, as opposed to middle-tier or even the highest 'imperative grounds' protection, as he had referred at paragraph [39] to the authority of R v Bouchereau [1987] QB 732 no longer being good law, which was a case that was not relevant to the basic level of protection.

Ms Cunha made submissions in relation to the Claimant's integration and the Judge's analysis of the Claimant's rehabilitation. She began referring to the proposition at paragraph [33] of Dumliauskas, about whether rehabilitation could continue in other EEA member states. We explored with Ms Cunha in what sense the question of integration could be relevant to the Judge's 'threshold' analysis of whether the Claimant's conduct represented a relevant threat and the extent to which the Judge had erred in that analysis. Ms Cunha said that it was relevant as the Judge had failed to put appropriate weight on the Claimant's prior offending. This omission was compounded by the lack of findings on whether the Claimant had permanent residence, or integrative links had been broken. She referred, on the issue of integration, to the case of Binbuga, which whilst not a case dealing with the Regulations (it was a non-EEA deportation case), was nevertheless relevant to the question of integration.

Ms Cunha did, however, accept that if the Judge was entitled to conclude that the Claimant's conduct did not represent a relevant threat, there was no need for the Judge to have considered the proportionality of the deportation decision. Here, Ms Cunha's criticism was that the Judge had gone straight on at paragraph [44] to consider the issue of proportionality, without a proper analysis of the Claimant's age or other relevant circumstances, as required by the Regulations.

The Claimant's submissions

In the skeleton argument prepared on behalf of the Claimant, Mr Furner argued that the Judge had correctly identified two core issues, namely whether the 'threshold' stage of the Claimant's personal conduct represented a genuine, present, and sufficiently serious threat, was met; and only if the threshold test were met, whether the Claimant's deportation was proportionate (the 'proportionality' stage). The Judge had allowed the Claimant's appeal at the 'threshold' stage (paragraphs [41] and [43]). Therefore, any errors by the Judge, to the extent there were any, in relation to future prospects of rehabilitation; integration; the Claimant's age, state of health and family considerations were irrelevant, as they all related to proportionality.

There was no issue between the parties by the time of the hearing before the Judge on whether the Claimant had acquired permanent residence and might have middle-tier level protection. The Claimant did not suggest he had such status in his grounds of appeal to the Judge. It was therefore unsurprising that the Judge had made no findings as to whether he had such a permanent right of residence and had plainly proceeded on the basis that the Claimant had a basic level of the protection.

With regard to whether the Secretary of State had proven the 'threshold' test, the Judge was aware of, and had analysed, the risk of the Claimant offending, noting a change in circumstances over time, particularly in his family circumstances (paragraphs [42] and [44]). The Judge had considered the Claimant's history of offending (paragraphs [24] and [25]) but equally noted that past criminal conduct alone could not justify deportation. The Secretary of State's reference to the case of Chege could not be sustained as that was a case dealing with scope of how the public interest in deportation applied under the Immigration Rules, not the Regulations, and Ms Cunha was seeking to conflate principles in one legal framework with those in another, separate set of rules. The Judge had properly focused on whether the Claimant's conduct represented a relevant threat under the Regulations.

The case of Kamki took the Secretary of State's challenge no further. In that case, there was a specific set of facts, namely the offender, convicted of rape, had continued to deny personal responsibility for his crime and had refused to participate in the any rehabilitation courses. Neither circumstance applied to the Claimant.

The case of MA (Pakistan) equally took matters no further, as it did not relate to deportation under the Regulations, but instead related to the Immigration Rules, so that the legal framework was entirely different.

Contrary to the grounds, the Judge had not "brushed over" the OASys reports. He had plainly considered and referred to both, as well as expert evidence from a psychiatrist and the Claimant's probation officers.

Any challenge that the Judge had failed to give adequate reasons faced a high hurdle and risked, in reality, being a disagreement with a judge's findings In this case, the Judge's thought processes were entirely clear and his conclusions about the Claimant's personal conduct not representing a

relevant threat were consistent with the reports of the psychiatrist; the OASys reports; and the probation officers. Not all of the factors which now existed (such as the Claimant living with his mother) had existed at the time of the index offence.

The Claimant's skeleton argument also addressed the issue of proportionality, which for the sake of brevity we do not repeat here, as the Claimant's appeal was determined on the basis of the 'threshold' test of whether the Claimant's personal conduct represented a relevant threat.

The gist of Mr Furner's oral submissions was as follows. First, he reiterated that there was no issue between the parties, before the Judge, that the Claimant had anything more than the basic level of protection. It could not, in the circumstances, be an error of law for the Judge not to have made a finding in relation to an issue that was not in dispute. Similarly, the assertions and references to any arguable errors in relation to proportionality were entirely irrelevant where, as here, the Judge had clearly stated at paragraph [41] that the 'threshold' test was not met.

Mr Furner urged us to read the Judge's decision as a whole. The Judge's conclusions, stated at paragraphs [42] and [44], were not simply reached in isolation, but had been the result of a series of findings earlier in the decision, for example details of the Claimant's immigration ad offending history, and, in detail, the nature of the index offence, for which the Claimant was sentenced to six years' imprisonment. The Judge had referred to, and considered the 'medium risk' of reoffending identified in the most recent OASys report. Mr Furner remined us and asked us to take judicial notice of the fact that the definition of 'medium risk' of offending in OASys reports, including the Claimant's, was that it was unlikely that the Claimant would reoffend unless certain risk factors continued.

Contrary to the grounds, at paragraph [7] the Judge did go on to consider those risk factors, such as the Claimant's mental health and his access to alcohol and drugs; his accommodation and continuing contact with other offenders. The Judge also found the Claimant to be remorseful and that he had completed training courses on alcohol use and anger management (paragraphs [15] to [17])

Kamki simply could not assist the Secretary of State. It was unclear what proposition from that case that Ms Cunha sought to rely on. At best, if the proposition relied on was that any assessment of the threat that the Claimant's conduct posed had to be considered in the context of all of the available evidence, that was trite law, and the Judge had considered all of the evidence.

The Judge had gone on to consider the change in the Claimant's circumstances at paragraph [22], including that the Claimant was now living with his mother, which was not the case at the time of the index offence. The Judge had considered the detail of the index offence (at paragraphs [24] to [26]) but was unarguably entitled to conclude on the evidence before him, that the Claimant's circumstances had improved (paragraph [30]). The Judge properly directed himself by reference to MC (Essa recast) at

paragraph [31] and reached the conclusions to which we have already been referred at paragraphs [42] to [44], explaining clearly why he did concluded that the Claimant's conduct did not represent a relevant threat. The Judge's reference to Bouchereau no longer being good law was not material to the Judge's reasoning.

Discussion and our conclusions

We remind ourselves that the right of appeal to this Tribunal is on a point of law. The Upper Tribunal is not entitled to remake a decision of the Judge simply because it does not agree with the Judge or would express matters differently.

On the first ground, we accept Mr Furner's submission that the Judge cannot be criticised for failing to make a finding on an issue that was no longer in dispute. The Claimant's ground of appeal to the First-tier Tribunal did not contest the part of the Secretary of State's decision which was that the Claimant was only entitled to the basic level of protection and this is reflected at paragraph [37] of the Judge's decision, to which we have already referred. It might have been different had the Judge then gone on to analyse the Claimant's case on the basis of a higher level of protection than that to which he was entitled, but the Judge has not done so and there is therefore no error of law in his decision.

In relation to the second ground, the Secretary of State's assertion that the Judge had failed to consider the Claimant's previous convictions is plainly unsustainable. Contrary to Ms Cunha's submissions that the Judge had not referred to the convictions anywhere in his decision, he referred to them at paragraph [24]. The Judge also considered in detail the Claimant's index offence at paragraphs [9] to [14], and the risk, as assessed in the OASys report, of the Claimant reoffending, as 'medium' at paragraph [6] and also later on in his decision. It is simply not the case that the Judge failed to consider the Claimant's prior offending or the assessment of medium risk. The Judge considered all of this in the round, including the report of a Forensic Psychiatrist, Dr Mashru, who considered the trajectory of the Claimant's rehabilitation, i.e. that the current risk was medium, with the hope, based on evidence (because of changed circumstances, noted at paragraph [42]) that the risk of reoffending would be reduced further.

In relation to the third ground, the challenge that the Judge had failed to consider the consequences of the Claimant's reoffending because of the seriousness of the index offence, as we have already outlined, the Judge spelt out in graphic detail the circumstances of the index offence, for which the Claimant was sentenced to six years in prison, but the Judge also considered, and was entitled to consider, the broader context since the Claimant committed the index offence. While the Claimant's index offence was serious (reflected in the length of his prison sentence), we do not accept the proposition that Kamki is a precedent set of facts, which we should apply to the Claimant's circumstances. We accept that the facts of Kamki were different from the Claimant's circumstances, noting that Kamki had refused to accept responsibility whatsoever for his offending or

to complete any courses to mitigate his offending, in stark contrast to the Claimant's case. We struggled to see what proposition Ms Cunha sought to rely on from Kamki; if it was that the issue of the relevant threat that the Claimant's personal conduct represented needed to be considered in light of all of the evidence, we accept this, but we also conclude that the Judge did consider all of the evidence in the round.

In relation to the fourth and fifth grounds, (the Secretary of State relied on the non-EEA deportation cases of MA (Pakistan) and Chege ("is a persistent offender") we did not regard either case as assisting us. MA (Pakistan) dealt with a particular set of facts and the significance of a "17% risk of reoffending over a two year period", while Chege dealt with the issue of whether the offender fell within the definition of "persistent offender," within an entirely different legal framework. We make the general observation that the criteria, burdens of proof and public interest in deportation are different in the two separate legal frameworks (the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002 on the one hand; and the EEA Regulations on the other). Reliance on either a set of particular factual circumstances or the proposition for a legal definition applying to a different set of laws, will at best be irrelevant, and at worst, risks a misapplication of the law.

In relation to the sixth ground, we were also unpersuaded that the proposition relied on in Dumliauskas was relevant to whether the Judge had erred in law. To the extent that rehabilitation was relevant, it was only relevant as to whether the Claimant's conduct represented a relevant, current risk. The proposition relied on by the Secretary of State in Dumliauskas was the effect of deportation on future rehabilitation, which was relevant to the proportionality of a deportation decision, not the 'threshold' issue. As the Judge allowed the appeal on the basis that the Secretary of State had failed to meet the 'threshold' test, the proposition relied on in Dumliauskas is not material to the decided issue.

In relation to the seventh ground, we similarly did not accept the relevance of the authority of Binbuga, and the proposition relied on which relates to integration, in the context of Section 117 of the 2002 Act, when the Judge was considering the question of the relevant threat that the Claimant's conduct represents. That too discloses no error of law by the Judge.

Finally, in relation to the eight ground, the alleged failure to analyse the Claimant's age and state of health in the context of the proportionality of the Claimant's deportation, this ground cannot be sustained, for the same reason as the sixth ground.

For the above reasons, we had no hesitation in dismissing the Secretary of State's appeal. We accept Mr Furner's submissions that the Judge's decision was more than adequately explained, contained no relevant misdirection of law, and the Judge reached a decision that he was unarguably entitled to reach on the evidence before him.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

The anonymity directions continue to apply.

Signed J Keith Date: 14th December 2020

Upper Tribunal Judge Keith