



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00574/2019

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)
On 24 August 2020

Decision & Reasons Promulgated
On 27 August 2020

Before

UPPER TRIBUNAL JUDGE BLUM

Between

TAHSIN AL BADER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S. Saeed, Solicitor Advocate, of Aman Solicitors Advocates
(London) Ltd

For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Kainth (the judge) who, in a decision promulgated on 21 January 2020, dismissed the appeal of Mr Tahsin Al Bader (appellant) against the decision of the Secretary of State for the Home Department (respondent) dated 19 November 2019 to make a deportation order against the appellant in accordance with regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016.

Background

2. The appellant is a national of Norway born on 17 April 1961. He was born in Iraq but naturalised as a Norwegian citizen after entering the country in 1993. He is married with four children, two of whom were adults at the date of the judge's decision. The judge did not accept that the appellant had a genuine and subsisting relationship with his wife, and the judge did not accept that the appellant had a genuine and subsisting parental relationship with any of his four children. These findings have not been challenged by the appellant.
3. The appellant entered the UK in 2013. On 3 February 2015 he was arrested pursuant to a European Arrest Warrant and extradited to Norway on 21 July 2015. On 13 November 2015 the appellant was convicted of indecent assault of a female under the age of 14 in respect of events occurring between 1 January 1995 and 31 December 1998. The victim was aged between 2 and 4 years old when the offences were committed. The appellant was sentenced to 3 years and 9 months imprisonment and ordered to pay compensation of 420,000 Norwegian kroner.
4. The appellant attempted to enter the UK at Heathrow on 2 August 2017 but he was refused admission on public policy grounds based on his offending. He was removed to Norway the following day. On 24 October 2019 the appellant was encountered at a Scottish port after arriving by ferry from Northern Ireland. He was detained and, on 27 October 2019, he was served with a liability to deportation notice. On 19 November 2019 a decision was made to make a deportation order against him. The appellant exercised his right of appeal against this decision pursuant to regulation 36 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

The decision of the First-tier Tribunal

5. Prior to the hearing listed for 9 January 2020 an adjournment application was made (on 16 December 2019, sent at 16:23) because the appellant wanted to obtain evidence from Norway regarding his conviction, and because he had advised his solicitors that he had been prescribed Propranolol to treat anxiety and he was not fit to attend the hearing and needed "more time to recover". The application was refused on 18 December 2019 because no evidence had

been provided to show what efforts had been made to obtain evidence from Norway regarding the appellant's conviction, and because the limited medical evidence provided by the appellant did not confirm that he was taking the medication for the treatment or anxiety or that he was unfit to attend the hearing. A further adjournment application was made on 6 January 2020 on the basis that the appellant had now instructed a lawyer in Norway who was in the process of obtaining relevant documents relating to his conviction. No further reliance was placed on the appellant's medical condition as a basis for an adjournment. This application was refused the following day as no details were provided about the nature of the documents sought.

6. At the outset of the hearing on 9 January 2019 Mr Waithe, of Counsel, representing the appellant, renewed the adjournment application based on the documents the appellant wanted to obtain from Norway. No reference was made by Mr Waithe to the appellant's alleged medical condition. After being given an opportunity to take further instructions Mr Waithe confirmed that the appellant sought, *inter alia*, prison records confirming that he was transferred to an open prison, prison records confirming that his family visited him, prison records indicating that he had leave of up to 4 days per week when incarcerated in an open prison, and confirmation that he had undertaken a computer course in prison. The Presenting Officer accepted that the appellant had been transferred to an open prison, that he had worked while serving his prison sentence, and that he had increased home leave. In light of the points accepted by the Presenting Officer the appellant's representative conceded that there was no requirement for any documents to be obtained [17]. The appellant gave evidence that he had undertaken a computer course but when asked whether he had undertaken any rehabilitation courses he answered in the negative [18]. Mr Waithe confirmed that the appellant accepted that he had not undertaken any rehabilitation courses while serving his prison sentence. The application for an adjournment was withdrawn [19]. The judge then heard oral evidence from the appellant, his wife and his 2 adult sons.
7. At [21] of his decision the judge set out the relevant legal framework. At [23] to [26] the judge set out the three levels of protection against deportation within the EEA deportation regime. It was accepted by both parties that the appellant was only entitled to the basic level of protection (at [32]). The judge noted, at [34], that he had to have regard to the factors detailed in Schedule 1 of the 2016 Regulations when assessing whether the appellant's conduct posed a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. At [36] the judge properly noted that the respondent's decision had to comply with the principle of proportionality.
8. At [40] the judge stated that the appellant was only entitled to the basic level of protection. Then at [41] to [47] the judge set out a number of relevant legal principles and supporting authorities including, *inter alia*, that the assessment of any risk to the public must be based exclusively on the personal conduct of the person concerned [41], that considerations of general prevention did not justify

a removal decision [41], that in exceptional cases, where an individual's conduct has caused deep public revulsion, public policy may still require a person's removal ([41], with reference to **R v Bouchereau** [1978] ECR 732), and that a decision made on public policy grounds cannot be made on the basis of criminal actions alone [44]. Then at [45] the judge stated,

It is for the respondent to show that the appellant poses a threat to the United Kingdom that his expulsion is either justifiable proportionate. It is for the respondent to show that there are imperative grounds which justify his deportation.

9. At [48] the judge stated,

With respect to the appellant's index offence, the appellant during the course of his evidence explained that the victim who gave evidence as an adult claimed that she had been sexually assaulted between the ages of 2-4 years of age. He disputed the conviction. I note that there was no appeal with respect to the conviction which relates to an extremely serious offence taking place over approximately 3 years of a very young [sic]. Whilst I acknowledge it is the appellant's sole conviction, it does not detract from the seriousness of the conviction.

10. At [49] the judge stated,

I agree with respect to the respondent's assessment of the conviction at paragraph 21 of the reasons for refusal letter "this type of offence involving children are amongst the very worst kind and the public rightly expect children to be protected from those perpetrated such appalling crimes."

11. At [50] and [51] the judge stated,

The offence type is perpetrated by those who wish to fulfil their own sexual gratification without having regard to the impact upon victims and the lifelong consequences victims experience particularly psychological harm. There is in addition the impact upon the victim's immediate and wider family coupled with trust issues for the victim. The appellant continues to dispute the conviction. The appellant is a sex offender.

Does the appellant have a propensity to re-offend and does he represent a genuine, present and sufficiently serious threat to the public to justify his deportation on grounds of public policy? The answer to that is yes. Based on the conviction, circumstances of the offence and the sentence, coupled with the appellant's denial, there remains in my assessment a risk of re-offending of a similar type if the opportunity arose. No evidence was presented to suggest that the appellant has undertaken any rehabilitation courses with respect to his sexual deviancy.

12. Having found that the appellant's conduct did constitute a genuine, present and sufficiently serious threat to public policy, the judge went on to consider the principle of proportionality. At [53] the judge stated,

There was no evidence to suggest that he [the appellant] was not in good health. He had spent the vast majority of his life either in Iraq or Norway. He has held employment in Norway where he lived between 1993 until the latter part of 2019 say for the periods when he was in the United Kingdom as referred to within the body of this decision.

13. The judge referred to the appellant's family in the UK and noted the medical and mental health issues relating to two of his four sons. The judge found that the appellant failed to demonstrate he would be unable to survive independently and economically if returned to Norway [55], noting that the appellant's wife confirmed that he had been employed in Norway where he had rented accommodation [59]. At [56] the judge noted that the appellant had not undertaken any rehabilitation courses in respect of his index offence and that he continued to deny the offence. The judge noted that there was nothing in the papers to suggest the appellant had lodged an appeal in respect of the offence [56]. At [57] the judge found there was little evidence that the appellant would be unable to continue to support himself upon return to Norway and that his deportation would not prejudice the prospects of rehabilitation in that country. At [58] the judge considered that any interference in respect to the appellant's rehabilitation would be a proportionate and justified measure when balanced against the continuing risk posed to the public at large, specifically children. The judge concluded that the appellant's deportation was proportionate under the 2016 Regulations.
14. In his assessment of the appeal under Article 8 ECHR the judge found that the appellant's period of imprisonment at an open prison and his ability to go home for certain periods of time did not necessarily indicate that Article 8 was engaged in his favour. The judge considered in detail the evidence relating to the appellant's children and his wife and concluded that his deportation would not constitute a disproportionate interference with the right to respect for family life. The judge dismissed the appeal.

The challenge to the judge's decision

15. The Grounds of Appeal, amplified by Mr Saeed in his oral submissions, challenge the judge's decision on 4 bases. The 1st ground contends that there was insufficient evidence before the judge to entitle him to find that the appellant's conduct now represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The fact of the conviction, and the appellant's oral evidence at the hearing, were not enough to discharge the burden of proof on the respondent. The judge only relied on the appellant's conviction, considerations of general prevention and the alleged impact on the victim and her family and his continued denial of the offence. There was however no evidence that the offence was committed for the purposes of the appellant's own sexual gratification. The factors identified at paragraphs 48 and 49 of the decision could not be taken into account and there

was no evidence before the judge of the alleged impact upon the victim and her family.

16. The 2nd ground of appeal contends that the judge failed to take into account relevant evidence. No reference was made to a letter written by the Norwegian authorities dated 18 March 2019, contained in the respondent's bundle, indicating that the appellant was not wanted by the Norwegian Police, that he was not subject to any pending investigation and that he was free to travel. Nor did the judge take into account the fact that the appellant was transferred to an open prison in Norway and that he had leave to go home of up to 4 days every four weeks whilst in prison. The grounds contend that it is trite that prisoners are not allowed to leave prison whilst serving a sentence unless they pose a low risk, and that these were factors that were relevant when determining whether the appellant posed a threat to society. The judge also failed to take into account evidence that the appellant was not in good health. There were said to be evidence in the appellant's bundle (at pages 24 and 25) that he had a history of self-harm, that in 2015 he was depressed and anxious and that officers at HMP Wormwood Scrubs express their concern that he was confused and very very low in mood. As a result of this he was given an urgent referral to a primary mental health team. There was also said to be evidence pages 34 to 41 of the bundle that the appellant was suffering from anxiety as recently as December 2019 and was taking medication for his anxiety.
17. The 3rd ground of appeal contends that the judge failed to consider all of the factors relevant for an assessment of the appellant's rehabilitation, as set out at paragraph 34 of **Essa (EEA: rehabilitation/integration)** [2013] UKUT 00316 (IAC), including the appellant's family ties and responsibilities, accommodation, education, training, employment, active membership of the community and the like.
18. The 4th ground contends that, although the appellant did not renew his application to adjourn the First-tier Tribunal hearing on account of his anxiety, there are now concerns about the possible effect that his anxiety had upon his ability to give evidence. Reference is made to the appellant now informing his solicitors that the Norwegian judge's Sentencing Remarks demonstrated leniency to the appellant and made recommendations as to his care when he was sentenced (although no independent documentary evidence has been provided). According to the solicitors there was no reasonable explanation as to why the appellant failed to mention this earlier other than his anxiety. A letter from someone purporting to be the appellant's Norwegian GP, dated 21 August 2020, stated that the appellant still has anxiety. Whilst the grounds appreciate that this information post-dated the hearing it is claimed that it raises serious concerns that the failure to adjourn rendered the hearing unfair.

Discussion

19. I am not persuaded that the grounds of appeal are made out. The judge was demonstrably aware that it was for the respondent to prove, on the balance of probabilities, that the appellant's personal conduct represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society (see, for example [35]). Whilst the judge does make reference to the highest level of protection (imperative grounds) at [45], it is manifestly clear, having regard to the decision read as a whole, that he actually assessed the appeal on the basis that the appellant was only entitled to the basic level of protection (see for example [40], [46], [51]). Any mistake that the judge made in respect of the level of protection would, in any event, only be to the appellant's advantage. I am satisfied however that the judge did apply the appropriate level of protection.
20. Whilst I accept that the evidence upon which both the respondent and the judge relied in support of the finding that the appellant's conduct represented a genuine, present and sufficiently serious threat was limited, I am not persuaded that it was insufficient, when considered 'in the round', to support the findings made by the judge, or that the judge acted unreasonably in making his findings. The fact of the appellant's conviction and the nature of his offence have not been challenged. The judge was unarguably entitled to rely on the nature and seriousness of the appellant's conviction, the extremely young age of the victim, and the fact that it occurred over a prolonged period of time. These were all relevant considerations when assessing whether the fundamental interests of society could be affected by the appellant's personal conduct. The judge was rationally entitled to consider that the impact of an indecent assault on a child between the ages of 2 and 4 would cause psychological harm and create trust issues and to impact on the survivor's immediate and wider family even in the absence of specific evidence. Whilst speculative, this was speculation from an entirely rational basis given the serious nature of the offence. Although it was initially suggested by Mr Saeed during the remote hearing that there was no evidence relating to the appellant's motivation for his offence, it is difficult to conceive what motivation there could be for such an offence other than for sexual gratification. Certainly none was offered by the appellant who continued to dispute his conviction, even though there was no evidence that he had appealed the conviction in Norway. The judge was again unarguably entitled to rely on the appellant's lack of remorse, his denial of the offence, and the absence of any evidence that he had undertaken rehabilitation courses when assessing the risk to the British public.
21. Nor is there any merit in the submission that the judge failed to take into account the circumstances of the appellant's imprisonment when assessing whether his conduct established a genuine, present and sufficiently serious threat to the fundamental interests of society. The judge was clearly aware of the appellant's evidence that he had been transferred to an open prison and to have increased home leave as these points were conceded by the Presenting Officer ([16] & [17]). The judge indicated at [51] that his assessment was based, *inter alia*, on the appellant's sentence, and at [62] the judge again specifically

referred to the imprisonment at an open prison and that he was allowed to go home for certain period of time. Reading the decision as a whole I am left in no doubt that the judge was aware of the circumstances of the appellant's imprisonment when undertaking the public policy consideration in Regulation 27(5)(c) of the 2016 Regulations, and that he did take these into consideration. I note by way of observation that the fact that the appellant was moved to an open prison and that he was allowed to return home for certain periods of time does not, without more, indicate that he did not pose a danger to the public in general, or to young girls in particular, given that he would have been under the supervision of the Norwegian prison service and is likely to have been subject to strict conditions.

22. The letter from the police prosecutor in Norway, dated 18 March 2019, confirmed that the appellant was not the subject of any pending investigation, nor was he wanted by the Norwegian police in respect of any outstanding criminal matter, and that he was free to travel. This letter indicated that there were no outstanding criminal matters pending against the appellant, and suggests he had not committed any further criminal offences since his extradition back to Norway. It has limited probative value however when assessing the issue of risk to the public. The appellant served his sentence and was subsequently freed. The letter does not purport to assess the issue whether the appellant poses any continuing risk to young girls, and the failure by the judge to specifically refer to the letter does not undermine the sustainability of his conclusions.
23. The grounds contend that the judge failed to take into account evidence that suggested the appellant was not in good health. The judge's finding at [53] relates to the appellant's current good health. Whilst the Patient Record in the appellant's bundle did indicate that officers at Wormwood Scrubs were concerned that the appellant was confused and "of very, very low mood", this related to the appellant's time in custody in 2015 when he was facing extradition to Norway. The appellant was referred to a primary care mental health team who monitored him. The references to self-harm appear to have originated from the appellant himself and related to the death of his son in Iraq. There was no evidence that the appellant tried to self-harm in 2015 and the Patient Record indicates that he did not have suicidal thoughts in 2015. The Patient Record references to the appellant's detention in 2019 note that he had not self-harmed in the previous 12 months and that he had no current thoughts of self-harm or suicide. The Patient Record indicates that the appellant reported experiencing anxiety, but there was nothing in the evidence suggesting that he was not fit to attend the hearing or to give evidence.
24. Nor is there a sufficient basis to indicate that, even if the appellant was suffering from anxiety at the time of the appeal hearing, that this affected his ability to give reliable evidence, or that the quality of the evidence he gave was in any way compromised. It is entirely natural for any individual to be anxious when giving evidence in relation to a legal matter that may have serious

consequences for them. There was however no evidence before the judge, and no indication that any subsequent evidence exists, that the appellant was unfit to attend the hearing or to give evidence. Had there been any issue with the appellant's ability to comprehend what he was being asked and to give full and proper answers, one would expect this to have been raised with the experienced barrister representing him at the hearing. There is however nothing either on the face of the judge's decision or in respect of the record of proceedings to indicate that there were any concerns with the quality of the appellant's evidence and his fitness to give evidence. It is telling that the adjournment application renewed by Mr Waithe of Counsel at the hearing made no mention whatsoever of the appellant's claimed anxiety or his alleged unfitness to give evidence. The adjournment application was, in any event, withdrawn. There was no sufficient factual basis at the time of the First-tier Tribunal hearing capable of supporting a reasonable belief that the appellant would be denied a fair hearing by reason of any medical condition, and the post-decision evidence, consisting of a letter dated 21 August 2020 written by the appellant's GP in Norway and stating that he has anxiety and that he has "lots of thoughts, scary thoughts, and feelings, and problems with sleeping" that "bother him everyday" comes nowhere close to establishing that the appellant was in any way unfit to give evidence or instructions, or that the hearing was rendered unfair.

25. To the extent that the grounds contend that the judge failed to take into account the appellant's family ties when assessing the issue of rehabilitation, this itself fails to acknowledge the judge's unchallenged findings that there was no genuine and subsisting relationship between the appellant and his wife, and no genuine and subsisting parental relationship between him and his children. In the unchallenged part of his decision dealing with Article 8 ECHR the judge considered the appellant's relationships with his children and his wife in detail and gave clear and cogent reasons for his conclusion. Given that the appellant had not been in the UK since his extradition in 2015 and his re-entry in 2019, there was limited evidence that he had any responsibility in respect of his wife and children. To the extent that the grounds claim that the judge failed to take into account the other factors identified at paragraph 34 of *Essa* (the appellant's education, training, employment, and active membership of the community), it is apparent from the appellant's immigration history and the determination, read as a whole, that the appellant did have accommodation in Norway, that he appeared to be employed in Norway (there was no evidence that the appellant had ever worked in the UK), that he had never been educated in the UK and, given his lengthy residence in Norway compared with his relatively short time in the UK, there was nothing to indicate that he had any community ties or that he had ever been an active member of the community in the UK. Nor does there appear to have been any suggestion at the First-tier Tribunal hearing that Norway lacked rehabilitative facilities or programmes. Given the clear absence of cogent evidence in support of any of the factors listed in *Essa*, the judge cannot be said to have materially erred in law by failing to expressly engage with them.

26. The judge's conclusions were reasonable open to him on the basis of the evidence before him and for the reasons given.

Notice of Decision

The making of the First-tier Tribunal's decision did not involve the making of an error. The appellant's appeal is dismissed.

Signed: *D. Blum* date: *24 August 2020*
Upper Tribunal Judge Blum