Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00240/2019 V

THE IMMIGRATION ACTS

Heard at Field House
On 3rd August 2021

Determination Promulgated
On 27th August 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

LLOYD JUNIOR MORGAN
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr G Symes, of Counsel, instructed by David & Vine Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Jamaica born in 1987. He arrived in the UK on 16th July 2001. He was granted an EEA residence card as the dependent of his Dutch grandmother on 22nd October 2003, and a permanent residence card on 5th February 2010.

2. The claimant has three convictions since coming to the UK, and a caution. The index offence was committed on 13th April 2012 when the claimant was convicted of wounding with intent to do grievous bodily harm and conspiracy to rob. He was sentenced to 12 years imprisonment on 3rd December 2012. On the 16th April 2019 the Secretary of State made a decision to deport the claimant. His appeal against the decision was allowed by First-tier Tribunal Judge NM Paul in a determination promulgated on the 11th December 2019. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Grant Hutchinson on 15th January 2020. On 15th September 2020 Upper Tribunal Coker found, in a decision under Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 without a hearing, that the decision of the First-tier Tribunal did not involve the making of an error of a point of law and upheld that decision allowing the appeal. On 29th September 2020 the Secretary of State appealed to the Court of Appeal against the decisions of Judge NM Paul and Judge Coker.

3. On 7th October 2020 Upper Tribunal Judge Bruce made a decision provisionally setting aside the decision of Judge Coker on the basis that it was vitiated by procedural irregularity under Rule 43(1)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008. This was because Judge Coker dismissed the Secretary of State's appeal on the basis that the claimant had been sentenced to 12 months imprisonment because this was the sentence stated in the Secretary of State's grounds. In fact, the claimant had been sentenced to 12 years imprisonment for the index offence. Judge Bruce permitted either party to make any submissions within 14 days and directed if no submissions were received the decision would be set aside and relisted for an error of law hearing. On 4th February 2021 Upper Tribunal Judge Norton-Taylor made a decision setting aside the decision of Judge Coker, and directed that a hearing be listed to decide whether the First-tier Tribunal had erred in law and whether it's decision should be set aside. On 29th June 2021 the Principal Resident Judge transferred the matter to a differently constituted Tribunal.

4. Permission to appeal was granted on the basis that it was arguable that the First-tier judge had erred in law in firstly not taking into account the high risk of harm to the public recorded in the OASys report and the fact that the claimant refused to take into account responsibility for his actions and minimises his role and use of a weapon. Secondly, it was found to be arguable that the First-tier Tribunal erred by failing to take into account the seriousness of the offending in line with Kamki [20178] EWCA Civ 1715. Thirdly, it was found to be arguable that there was a failure to consider matters at Schedule 1 of paragraph 7 of the Immigration (EEA) Regulations 2016.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Microsoft Teams, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing.

Submissions – Error of Law

6. The grounds of appeal argue, in summary, that the First-tier Tribunal erred in law due a legal misdirection. This is because, it is argued, that there was a failure to factor into the findings that it was not proportionate to deport the claimant the fact that he did not accept responsibility for his actions and had continued to minimise his role in the robbery and use of a weapon which resulted in life-threatening injuries to the victim. It is argued that although the First-tier Tribunal weighed the finding that the claimant presents a high risk of harm to the public, from the OASys report, this was not sufficient and that ultimately the First-tier Tribunal failed to consider the seriousness of the offending in line with the decision in Kamki. As set out in SSHD v Robinson (Jamaica) [2018] EWCA Civ 85 at paragraphs 84 to 86 (relying upon the decision of CJEU in Bouchereau) whilst the court must look for a present threat to the public policy requirements in an extreme case that threat might be evidenced by past conduct which has caused deep public revulsion. Mr Tufan added in oral submissions that the crime committed by this claimant was such that it was so repugnant in of itself that like that in R v SSHD ex p Marchon [1993] Imm AR 384 (where a doctor had imported a substantial amount of heroin) that there were serious grounds of public policy justifying his deportation simply based on this past conviction as a result. In the grounds this approach, it is argued, is supported by a recent case in CJEU, K (and allegations de crimes de guerre) (Citizenship of the European Union – Right to move and reside freely within the territory of the Member States – Restrictions – Judgment) [2018] EUECJ C- 331/16. It is additionally argued that there was a failure to have regarding to Schedule 1 of paragraph 7 of the Immigration (EEA) Regulations 2016, Mr Tufan expanded this submission by arguing that matters under Schedule 1 paragraph 3 and paragraph 7(f), (g) and (j) were not properly and explicitly considered in the conclusions.

7. Mr Tufan added an additional extension to the grounds by arguing that the assessment of low risk by the Offender Manager was not one which necessarily meant there was only an insignificant risk of reoffending. He relied upon MA (Pakistan v SSHD [2014] EWCA Civ 163 at paragraph 19, and argued that the percentage risk of reoffending in this case meant it was therefore a significant risk for the public.

8. In a Rule 24 response dated 30th January 2020, drafted by Mr G Symes of Counsel, it is argued, in summary, that the First-tier Tribunal Judge does not err in law. Proper consideration is given to the Offender Manager's comments, the whole OASys report and the evidence of the claimant before him. It is further argued that Kamki is not authority for the proposition that the seriousness of the offence is in itself indicative that the claimant may reoffend. The appellant in Kamki lost his appeal because he posed a high risk to vulnerable young females and had not engaged in courses designed to address his sex-offending or minimise the risk he posed. The claimant here is not a high risk of reoffending in relation to any subset of the population and has been found by the First-tier Tribunal to be making efforts to rehabilitate himself. The authority of Bouchereau only holds that a

previous conviction may be taken into account in considering whether there is personal conduct which constitutes a threat to public policy; and any Bouchereau exception does not survive following the decision of the President of the Upper Tribunal in Arranz (EEA Regulations – deportation – test: Spain) [2017] UKUT 294. In any event, even if it were found that the Bouchereau exception survived, it was clear from Robinson that the crime in this case although very serious was not in the category of very grave sexual abuse or a doctor who imported heroin, and so as a sole factor it was not capable of providing serious grounds of public policy to justify deportation.

9. It is argued by Mr Symes that it was not an error of law to fail to refer to Schedule 1 of paragraph 7 of the Immigration (EEA) Regulations 2016, as the First-tier Tribunal refers to Regulation 27, of which this is a part, and sets out a summary of the Home Office's full guidance, and this in itself refers to Schedule 1. There is no error of law to have simply failed to reference this particular part of Regulation 27, as all material matters raised in the Schedule are dealt with in the decision. It is clear that the First-tier Tribunal took into account the seriousness of the offence and the fact that this was relevant to the risk to public policy as required by Schedule 1 paragraph 3, and that all relevant factors in paragraph 7 had been explored in the decision.

10. Mr Symes submitted in response to Mr Tufan's additional ground with respect to whether the OASys evidence really showed this claimant had a low risk of reoffending that the finding in MA (Pakistan) was that a 17% chance of reoffending was not insignificant. However it is not the case that the First-tier Tribunal finds that the claimant's percentage risk is insignificant so there is no error to be found by reference to this authority. The First-tier Tribunal takes all the evidence into account and concludes that there is no sufficiently serious present threat to public policy in a decision which is not irrational and should therefore be upheld.

11. In conclusion Mr Symes argued that the decision of the First-tier Tribunal was entirely lawful as a proper exercise had been conducted in which, as is stated explicitly at paragraph 28 of the decision, all factors had been placed in the mix and the conclusion that the claimant was a low risk of reoffending, based on the opinion of the offender manager's report, was entirely rational and fully reasoned.

Conclusions – Error of Law

12. It is unchallenged by the Secretary of State that the claimant is entitled to "serious grounds" protection as a result of his having permanent residence in the UK, as set out at paragraph 5 of the decision.

13. I do not find that the First-tier Tribunal errs in law for failure to set out the entirety of Schedule 1 paragraphs 3 and 7 of the Immigration (EEA) Regulations 2016. This is simply not required in any decision writing. The First-tier Tribunal clearly references Regulation 27 when directed itself on the law at paragraph 12 of

the decision. As Mr Symes has pointed out Schedule 1 relates solely to this provision so it can be understood as part of that provision. The decision then sets out extracts of the Home Office Guidance "EEA decisions on grounds of public policy and public security, version 3.0 dated 14th December 2017. There was no submission from Mr Tufan that this was not relevant up to date guidance on which the First-tier Tribunal was entitled to rely. The guidance which is cited specifically draws attention to the fact that a low risk of reoffending is not automatically determinative of the appeal in an appellant's favour and that the seriousness of the offence must be considered. The Secretary of State has failed to identify any factor relevant on the facts of this case in Schedule 1 paragraphs 3 and 7 which was not considered in the decision-making (for instance there is clear consideration of the length of the sentence, issues of harm and protecting the public) and I find therefore there is no error of law on this ground.

14. The First-tier Tribunal correctly records the sentence as being one of 12 years at paragraph 3 of the decision and gives details of the extremely serious and life-threatening injuries sustained by the victim. This is reiterated at paragraph 22 of the conclusions as the starting point for the decision-making, at which point weight is also placed on the OASys report which states that the claimant is a high risk of harm to the public, and thus it is concluded that it could be the case that the claimant might present a genuine, present and sufficiently serious threat affecting a fundamental interest of society. At paragraph 28 of the decision it is also stated that the claimant was involved with offending at the highest possible level. I find therefore that the First-tier Tribunal gives weight to the offence as a strong indicator of a potential serious risk to public policy, and I find that in all of the circumstances of this case that the First-tier Tribunal has given lawful and proper consideration to the past offending. There is no attempt to minimise that offending at all at any stage, and I thus do not find that the decision errs in law by reason of failing to place the past offending properly and accurately in the balance when considering if the test for deportation is met.

15. It was not part of Secretary of State's decision or submissions (as recorded at paragraphs 5 -11 of the decision) that the offence alone was one which had caused such deep public revulsion that absent any future risk his deportation was justified on serious grounds of public policy, as per the Bouchereau exception (which I accept survives as held by the Court of Appeal in Robinson at paragraphs 84 -86, contrary to the submissions of Mr Symes). I do not find that this was a matter which the First-tier Tribunal needed, absent the matter being raised before it by the Secretary of State, to make findings on given the type of offending required to make this justification for deportation applicable. Although the claimant's offending was very serious it did not involve violence against children or grave sexual offences or drugs, and it did not involve him holding a position of trust such as a doctor and then offending in a way clearly contrary to that position as had the doctor who was convicted of the importation of a large amount of heroin in ex p Marchon.

16. The First-tier Tribunal then goes on to consider the factors in the claimant's favour at paragraphs 23 to 28 of the decision. Consideration is given to his offender manager's conclusion that he is a low risk of re-offending and the fact that he has not reoffended in the 12 months he has been out of custody (although care is taken to consider that he is on licence and has deportation proceedings hanging over him). As Mr Symes has submitted there was no conclusion by the First-tier Tribunal that the low risk of reoffending was insignificant and did not need to be seriously explored however, so I find that the First-tier Tribunal did not fall into any error as per MA (Pakistan). The First-tier Tribunal Judge then considers the evidence of the claimant before him and concludes that he is a "man chastened by his experience of 6 years' imprisonment", and the fact that he had managed to keep out of serious trouble whilst in prison and accepts his evidence that he wants to avoid gang contact and his previous associations; the claimant's commitment to his son and ensuring that he did not fall into the same criminal errors as him; and his strong family support. The First-tier Tribunal concludes that the claimant does indeed pose a low risk of re-offending as a result of a consideration of all material evidence. The First-tier Tribunal also concludes that it would not be proportionate given the other matters (which include his length of residence in the UK, his key family ties here including his son and his mother, and his lack of family in Jamaica) to deport him.

17. In Kamki the OASys evidence showed that the appellant had posed a high risk of reoffending in relation to serious sex offences in relation to vulnerable young females and so whilst he was generally at low risk of reoffending he was high risk in relation to this particular group, and the Court of Appeal found that this had been properly considered by the First-tier Tribunal in concluding that he was a genuine, present and sufficiently serious threat affecting a fundamental interest of society, and so his appeal was dismissed. There is no evidence, as Mr Symes has submitted, in this case that this claimant poses a higher risk of reoffending to any subset of the population, so I find that the First-tier Tribunal has not fallen into error in this way.

18. I find that the First-tier Tribunal has directed itself lawfully in the determination of this appeal. It has fully and properly given weight to the serious offending of the claimant. It has considered and answered the reasons for deportation put forward by the Secretary of State. It has weighed all of the evidence before it, as explicitly stated at paragraph 28 of the decision, and concluded that the claimant is a low risk of reoffending and that the decision to deport him is not lawful as the Secretary of State has not shown serious ground of public policy and the decision is not proportionate in all of the circumstances.

Decision:

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

2. I uphold the decision of the First-tier Tribunal allowing the appeal against deportation under the Immigration (EEA) Regulations 2016.

Signed: *Fiona Lindsley* Date: 4th August 2021
Upper Tribunal Judge Lindsley