Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00162/2020
UI-2022-000095

THE IMMIGRATION ACTS

Heard at Field House
On: 25 March 2022

Decision & Reasons Promulgated
On: 1 July 2022

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

GIOVAN MENGKRIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms U Dirie, Counsel
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

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1. This is the Secretary of State's appeal against the Decision of First-tier Tribunal Judge Atreya allowing the Appellant's appeal against the Secretary of State's decision dated 12 May 2020 [AB, 27-45] to make a deportation order on grounds of public policy pursuant to regulation 23(6)(b) and regulation 27 of the Immigration (European Economic Area) Regulations 2016 ("EEA Regulations").

2. Although this is the Secretary of State's appeal, we shall refer to the parties as they were constituted before the First-tier Tribunal for ease of reference.

Background

3. The Respondent appealed against that decision and was granted permission to appeal by First-tier Tribunal Judge Moon in the following terms:

> 1. The in-time grounds assert that the Judge erred in failing to give adequate reasons for finding that the appellant benefited from enhanced protection from deportation and in failing to give sufficient weight to factors said to have triggered the offending behaviour. It is also asserted that there has not been sufficient time for the appellant to demonstrate that he is adequately rehabilitated.
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> 2. It is arguable the Judge has not given adequate reasons for finding that the appellant has been in the United Kingdom since 2015 and therefore benefits from enhanced protection, the Judge has accepted the oral evidence without saying why this evidence was accepted.

4. We were also provided with a Rule 24 Response from the Appellant.

5. At the start of the hearing, Mr Tufan applied to amend the grounds of appeal relied upon by the Respondent way of oral enlargement. We were told that we were obliged to consider the factors listed in Schedule 1 of the EEA Regulations 2016, specifically Regulation 27 which stipulated that a Tribunal must have regard to the considerations in Schedule 1 (f), (g), (h) and (j). We observed that these provisions were in fact mentioned by the Judge in her Decision, however Mr Tufan insisted that this is merely because they were mentioned in the Reasons for Refusal Letter at page 14.

6. Ms Dirie replied that Mr Tufan had not addressed the three-stage approach identified in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; Denton v White [2014] EWCA Civ 906 and R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1663 as approved by the Upper Tribunal in R, (on the application of Onowu) v First-tier Tribunal

(Immigration and Asylum Chamber) (extension of time for appealing: principles) (IJR) [2016] UKUT 185 (IAC). She submitted that the Respondent needs to identify and assess the seriousness and significance of her failure to comply with the rules for seeking to appeal on the grounds now raised *ad hoc* by Mr Tufan. Ms Dirie highlighted that the Decision was promulgated in early January 2022 and the delay in raising the grounds at today’s hearing was significant, at well over 3 months, and further highlighted that no reasons were given for the delay. In final reply, Mr Tufan accepted it was at our discretion whether or not to grant the application to amend the grounds and accepted that he could not address us on the delay element.

7. We refused the application for an extension of time and to adduce a further ground. As stated in BO & Others (extension of time for appealing) Nigeria [2006] UKAIT 00035, where an appeal (or here an additional ground of appeal) is given out of time, “the first task in deciding whether to extend time is to see whether there is an explanation (or a series of explanations) that cover the delay”. As stated during the hearing, we found that the application to adduce an additional ground was flawed, first and foremost, as there were no reasons given for the delay of three months in adducing the further ground, which is significant in length. In addition, the application itself was not made in writing and was not made on notice to the Appellant without explanation. In any event, considering the merits of the point sought to be raised, I our view, the provisions Mr Tufan alleged were not considered by the Judge, were in fact listed in the Decision and it was not apparent to us that any omission in the Judge’s analysis was evident from the Decision.

8. In relation to the grounds of appeal, we heard submissions from both Mr Tufan and Ms Dirie which we summarise as follows.

9. In respect of the main argument before us, that the Judge erred in failing to give adequate reasons for finding that the appellant benefited from enhanced protection from deportation, Mr Tufan argued that there was one serious offence but also noted that the Oasys report suggested there was a low risk of reoffending. He argued that the Judge had misapprehended whether the Appellant came under the ambit of heightened protection because this provision was included at paragraph 67 under a section sub-headed “Relevant Law”. Mr Tufan argued that the mere inclusion of this provision in the Decision shows that the Judge misdirected herself as to the duration of the Appellant’s residence in the UK.

10. In reply, Ms Dirie argued that the Appellant had never argued that he had established Permanent Residence over a period of five years. She

highlighted that Mr Tufan was not able to point to any sentence or paragraph to show that enhanced protection from deportation or a lower standard had been applied by the Judge. She highlighted that the Oasys report showed a low risk of reoffending and that the letter from the Probation Officer shows the Appellant engaged with the requirements of his licence and attended courses.

11. Mr Tufan did not seek to respond to these submissions.

12. At the close of the hearing we indicated that we reserved our decision which we are now in a position to give.

13. We do not find that there was a material error of law in the decision such that it should be set aside. Our reasons for reaching this conclusion are as follows.

14. First, in the Rule 24 Response provided by Ms Gunn of Counsel (who appeared on behalf of the Appellant before Judge Atreya), it is explicitly confirmed at §§4-5 as follows: "*At no point during the Appellant's appeal before the First-tier Tribunal was it submitted that the Appellant had acquired a right of permanent residence, such that he should benefit from enhanced protection to deportation under the EEA Regulations. Consequently, the Appellant's appeal was run on the basis that he satisfies the higher threshold, namely that he does not pose a 'genuine, present and sufficiently serious threat': reg 27(5)(c), EEA Regulations. On this basis, FtTJ Atreya made no finding as to whether the Appellant had acquired a right of permanent residence and was subject to the enhanced deportation regime under the EEA Regulations, as this was not a live issue in the appeal. Rather, FtTJ Atreya set out and applied the higher threshold [§3,§9] and ultimately concluded: 'I do not find that the respondent can demonstrate to me that the appellant represents a genuine, present and sufficiently serious threat' [§87]*".

15. We accept this argument as made by both the Appellant's counsel. Save for the reference to the existence of enhanced protection at paragraph 67 of the Decision, there is no indication that the Judge mentioned the subject of enhanced protection, let alone any indication that she substantively considered it or applied protection without giving reasons. As such, the argument is completely unfounded and wholly misconceived.

16. In relation to the alleged failure to give reasons for finding the Appellant would not reoffend, risk of reoffending, although Mr Tufan did not enlarge upon this ground and in fact noted the Oasys assessment, we nonetheless give our view on this second point and indicate that we find that the Judge amply considered the relevant evidence as to the risk of re-offending in

her decision at paragraphs 77-84. The Judge took into account the Appellant's evidence, his statement, the letter from his probation officer, the terms of the Appellant's licence, the OASYS assessment (which assessed the Appellant to be at low risk of re-offending), the evidence that the Appellant is employed with plans to continue his study to become an electrician, and that he has a stable family life. Consequently, the grounds of appeal do not reveal a material error or lack of reasoning as to finding that the Appellant is at a low risk of re-offending and a perusal of the Decision points to the opposite conclusion.

17. In light of the above findings, we find that the Decision of the First-tier Tribunal is free of material errors of law as alleged by the Respondent and the Decision of Judge Atreya shall stand.

Notice of Decision

The appeal is dismissed.

Signed: P Saini Date 16/06/2022

Deputy Upper Tribunal Judge Saini