IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005456
First-tier Tribunal No: EA/53962/2021
IA/17782/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WAHIDULLAH DADWAL
(No anonymity order made)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr J Martin, instructed by Connaught Law Limited

Heard at Field House on 24 March 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Dadwal's appeal against a decision to make a deportation order against him under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Mr Dadwal as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Immigration History

3. The appellant is a citizen of the Netherlands, born on 1 January 1990 in Afghanistan. He claims to have lived in Afghanistan until 2003, to have moved to the Netherlands in December 2003 and lived there until July 2011, and to have arrived in the UK in July 2011 from the Netherlands, with his parents and siblings. He was issued

with a registration certificate as an EEA national on 10 June 2014. He was granted Settled Status – Indefinite Leave to Remain in the UK under the EU Settlement Scheme (EUSS) on 9 December 2019.

4. On 5 February 2021 the appellant was convicted of intimidating a witness in his brother's criminal case and he was sentenced on 7 June 2021 to 12 months' imprisonment and made subject to a restraining order prohibiting him from contacting the victim. On 8 July 2021 he was notified of his liability to deportation. He made written representations in response on 4 August 2021.

Deportation Decision

5. On 2 December 2021 the respondent made a decision to deport the appellant on grounds of public policy, in accordance with regulation 23(6)(b) and regulation 27 of the EEA Regulations 2016. Since the appellant had been granted Settled Status – Indefinite Leave to Remain in the UK under the EUSS, it was accepted that he was protected under the EU Withdrawal Agreement and that he had acquired a permanent right to reside in the UK in December 2019 in accordance with the EEA Regulations 2016. As such consideration was given by the respondent as to whether his deportation was justified on serious grounds of public policy. It was not accepted that he had been resident in the UK for 10 years and therefore consideration was not given to whether his deportation was justified on imperative grounds of public security.

6. The respondent noted that the circumstances of the appellant's offence were that between 7 March 2020 and 1 April 2020 he sought to intimidate the victim of his brother's criminal offending into withdrawing her complaint of serious allegations made against his brother and deliberately contacted her on a number of occasions and attempted to pressurise and emotionally blackmail her, seeking to bribe her in order to get her to withdraw her complaint. The appellant's brother was convicted at the same time as the appellant, of committing rape, kidnapping and assault against his former girlfriend, and the appellant was convicted of intimidating the victim shortly after his brother was arrested up until the stage when the case was due to come before the Crown Court. The respondent noted that the sentencing remarks of the judge who sentenced him in the Crown Court recorded that his offender manager had assessed him as posing a medium risk of harm to the public and known adults but a low risk of re-offending and that the sentencing judge regarded his offence as a serious one. The respondent considered that there remained a risk of the appellant re-offending and continuing to pose a risk of harm to the public and concluded that his deportation was justified on serious grounds of public policy or public security. The respondent considered that the appellant's deportation was in the public interest, that his deportation would not prejudice the prospects of his rehabilitation and that the decision to deport him was proportionate.

7. As for Article 8, the respondent noted that the appellant had a partner and two children living in the UK, aged seven years and three years, who were Dutch nationals. The respondent accepted that the appellant had a genuine and subsisting relationship with his partner and children but considered that it would not be unduly harsh for them to live in the Netherlands or to remain in the UK without him. The respondent did not accept that the appellant had been lawfully resident for most of his life in the UK and did not accept that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in the Netherlands. The respondent considered that the exceptions to deportation on family and private life grounds were therefore not met and that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

Appeal to the First-tier Tribunal

8. The appellant appealed against that decision and his appeal was heard by Judge Turner in the First-tier Tribunal on 31 August 2022. The judge allowed the appeal under the EEA Regulations, concluding that the appellant did not pose a genuine, present and sufficiently serious threat to the fundamental interests of society.

9. Permission to appeal was sought by the Secretary of State on the grounds that the judge had failed to give adequate reasons for her findings on a material matter, namely the seriousness of the consequences of re-offending; and that the judge had made a material misdirection of law by failing to have regard to the provisions of Schedule 1 (7) of the EEA Regulations 2016 and failing to give adequate reasons for concluding that the appellant's deportation was disproportionate.

10. Permission to appeal was refused in the First-tier Tribunal but was subsequently granted on a renewed application by Upper Tribunal Judge Pickup, on the following basis:

> "Whilst Schedule 1 was referred to in the respondent's submissions at the appeal, as noted by the judge at [20] of the decision, there appears to have been no consideration of Schedule 1 by the First-tier Tribunal, which amounts to an arguable material error of law. It is also arguable that the judge paid undue attention to the low risk of reoffending and scant regard to the medium risk of harm should he in fact re-offend. The judge appeared to concentrate on the background rationale for the commission of the offence, finding that he would unlikely commit such an offence in the future. It is arguable that the assessment is imbalanced, even though the burden was on the respondent."

11. The matter then came before us for a hearing.

Hearing and submissions.

12. Both parties made submissions.

13. Mr Whitwell relied upon Upper Tribunal Judge Pickup's reference, in the grant of permission, to Judge Turner having "scant regard to the medium risk of harm" and submitted that the judge had erred in that respect. He submitted that Judge Turner's reference, at [62] of her decision, to the appellant describing being shocked at the allegations made against his brother by the victim, ought to be contrasted with the Crown Court Judge's sentencing remarks where reference was made to the appellant's approaches to the victim involving a degree of cunning, which Judge Turner did not appear to have considered. The judge found that it was unlikely that the appellant would commit such an offence in the future, but that finding was based upon the fact that he would not find himself in the same circumstances, simply because his brother was in prison for the next few years. The judge had given no weight to the restraining order made against the appellant but had given weight to supporting letters from friends and family. She had therefore made a one-sided assessment. The decision did not contain any consideration of the fundamental interests of society set out in Schedule 1 to the EEA Regulations 2016, when such consideration was required under regulation 27(8).

14.Mr Martin submitted that there were no material errors of law in the judge's decision. The judge was plainly well aware of the evidence and the seriousness of the appellant's offending. There was nothing wrong with what the judge said at [62] in regard to the relevance of the background to the appellant's offending. She was entitled to look at the circumstances of the case and to find it unlikely that the appellant would find himself in similar circumstances again in the future, not just because his brother was in prison but also for the reasons given at [64] and [65]. She was entitled to have regard to the lack of further issues since the appellant was released from prison and to the many supportive statements from family, friends and associates, of whom some were professional people. She was entitled to take the approach that she did at [67] in relation to the restraining order and was entitled to rely on the low risk analysis. The medium risk of harm only applied if the appellant committed further offences but he had not done that. As for the fundamental interests of society, the respondent had relied upon four of those, as set out at [29] of the refusal decision, and had focussed on the aspects about protecting the public, which the judge had dealt with. The respondent had not challenged the judge's findings as such, but was relying upon matters which it was said the judge had not considered, whereas it was implicit that she had.

Discussion and findings

15.It is asserted by the Secretary of State that Judge Turner failed to consider the assessment made by the probation service that the appellant posed a medium risk of harm and focussed only upon the assessment of being a low risk of re-offending, thus failing to consider the seriousness of the consequences of re-offending. The Secretary of State relied, in that respect, upon the case of Kamki v The Secretary of State for the Home Department [2017] EWCA Civ 1715, where the distinction between the two different senses of risk was discussed and at [35] approval was given to the approach of taking the probability of re-offending in combination with the serious harmful effects if it occurred.

16.It seems to us, however, that that distinction was particularly relevant on the facts of that case, where the appellant was denying his guilt, whereas that was not the case for the appellant before Judge Turner. In any event, Judge Turner essentially followed that approach in the appellant's case and assessed risk in both senses. She was clearly fully aware of the respondent's case, which she set out at [23], whereby reliance was placed upon the assessment of the appellant as posing a medium risk of harm and plainly that was what she had in mind when making her findings from [60] onwards. In her observations at [60] and [61] she fully appreciated and had regard to the serious nature of the offence. She went on, at [62], to consider the offence against the background to, and in the context of, the offending, accepting the appellant's explanation for his behaviour, and taking account at [64] to [66] of the various positive factors which she then set out. She gave weight to the appellant's lack of further offending, his expression of remorse, his understanding of the impact of his actions not only upon the victim but also upon his own family and society in general and his engagement in a victim awareness course in prison and she concluded that he had learnt from those experiences.

17.Mr Whitwell, however, challenged the judge's findings at [62] on the appellant's explanation for his offending behaviour, submitting that those findings had to be contrasted with the Crown Court Judge's sentencing remarks. He questioned the lack of references by the judge to those sentencing remarks and submitted that she had erred in law by failing to take them into account. However the judge made it clear at [61] that she had read the sentencing remarks in full and we see no reason to

conclude that her findings were not made with that at the forefront of her mind. We agree with Mr Martin that there was nothing wrong with the judge's comments and observations at [62] and that she was entitled to find that it was unlikely that the appellant would find himself in such circumstances again. We also agree that that latter finding was not made solely in the context of the appellant's brother being in prison, but was made in a much wider context, considering the particular circumstances at the time of the offence and the subsequent findings about the appellant's awareness of the adverse impact of his actions, his remorse and his attempts at rehabilitation. We do not agree with the respondent that the judge's approach to the restraining order and her consideration of the supporting letters from family, friends and colleagues, reflected an imbalanced approach but consider that the judge was perfectly entitled to consider the restraining order in the context that she did at [67] and to accord the weight that she did to those matters. As such we consider that the judge undertook a full and balanced assessment of all relevant matters and we reject the assertion to the contrary.

18.In the circumstances we are not in agreement with the assertion that the judge focussed only on the low risk of re-offending and that she failed to consider the seriousness of the consequences of the appellant's re-offending. It seems to us that the judge considered the risk posed by the appellant in all relevant senses and we cannot see how the absence of a specific reference in her findings to the medium risk assessment would have made any material difference to her decision. In our view the respondent's challenge in this regard is nothing more than a disagreement with the judge's findings and we do not consider that the grounds identify any error of law in those findings and conclusions.

19.Likewise, we consider that nothing material arises from the judge's failure specifically to cite Schedule 1 to the EEA Regulations and to refer to the fundamental interests of society in her findings. The judge was fully aware that the fundamental interests of society formed part of her assessment and referred to that at [20] when summarising the respondent's case, as well as at [57] when directing herself on the applicable regulations. There was no requirement for her to cite them again in her findings, when it is otherwise implicit from those findings that she considered all matters relevant to such an assessment. As Mr Martin submitted, the respondent focussed on the protection of the public and prevention of social harm aspects of Schedule 1 after citing the relevant provisions at [29] of her decision. Clearly, those were fully considered by the judge in her findings from [60] when assessing the risks the appellant posed to society, as we have discussed above. We therefore reject the respondent's challenge in that regard as well and again consider it to be little more than a general disagreement with the judge's decision.

20.For all of those reasons, whilst it may be that another judge could have reached a different decision in the appeal, we consider that Judge Turner's decision was one which she was fully and properly entitled to reach. Her findings and conclusions were cogently reasoned and were open to her on the evidence before her. Accordingly we uphold Judge Turner's decision.

Notice of Decision

21.The Secretary of State's appeal is dismissed. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision of First-tier Tribunal Judge Turner to allow the appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 March 2023