Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00038/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 May 2019	**On 25 July 2019**
Ex tempore judgment	

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR EMMANUEL KYEREMEH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr Z Jafferji, Counsel

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal ("FtT")

2. The appellant is a citizen of the Netherlands born in 1990. He arrived in the UK in 2004 at the age of 14. The appeal before the FtT arose following a decision by the respondent on 13 January 2017 to make a deportation order against him. The appellant was convicted of an offence of

importation of Class A drugs, committed on or about 2 December 2012. In the Crown Court at Isleworth on 10 February 2015 he received a sentence of six years' imprisonment.

3. The circumstances of the offence are evident from the decision of First-tier Tribunal Judge Scott-Baker ("the FTJ") who heard the appeal on 19 December 2018, whereby she allowed the appeal under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). No point is taken by either party in terms of what are the applicable Regulations, those of 2006 or 2016.

The FTJ's decision summarised

4. The FtJ referred to the conviction, and the sentencing judge's remarks. The appellant had an operational function within the criminal chain, which the sentencing judge was satisfied revealed that the appellant was motivated by financial or other advantage. The submission that he fell within a lesser role was rejected.

5. The FtJ referred at paragraph 6 to an OASys report which stated there were no concerns indicative of a risk of serious harm in the current offence, this being his only offence and that there were no additional concerns indicative of a risk of serious harm, although no full analysis had been completed. It seems that the OASys report to which she was referring is dated 9 January 2017. There is in fact a further OASys report dated 2 October 2018 contained at page 259 of the appellant's bundle of documents.

6. The FtJ summarised the respondent's decision and set out the procedural history of the appeal. She identified the evidence that she had before her and summarised the appellant's background, including that he was deported to the Netherlands on 3 February 2017 following the death of his eldest sister in Ghana on 3 April 2017. He returned to the UK the next day and he was arrested for breach of a deportation order. He was granted bail; then re-detained and again granted bail. He was deported for a second time on 4 December 2017.

7. The FtJ summarised the appellant's witness statement, including in terms of his education and qualifications, and family background.

8. As part of his evidence before the FtJ the appellant accepted his guilt although that is not what is reflected in the OASys report. He accepted, as recorded at para 37 of the FtJ's decision, that he had not pleaded guilty at trial and that he had reiterated that he did not know what was in the parcel that he had signed for (which was the importation).

9. The FtJ summarised the evidence of the witnesses, and some of the documentary evidence which the appellant relied on in support of the claim that he was entitled to the highest level of protection against deportation under the EEA Regulations, that is imperative grounds.

10. She made a further summary of the circumstances in which the offence was committed and summarised the OASys reports. She referred at para 68 to a letter dated 22 June 2017 from the National Probation Service stating that its author had carried out a probation assessment in relation to the risk of harm. In summary, that risk was said to be low in all areas when in custody. In the community it was assessed that he was at medium risk of serious harm to members of the public due to the index offence but at low risk in all other areas.

11. The FtJ then referred to what was described as an independent psychological risk assessment dated 10 October 2018 from Lisa Davies. The FtJ referred to para 1.7 of the report which stated that the appellant presented as a low risk for general non-violent offending and presented a very low risk of causing serious harm at that time.

12. The FtJ referred to other aspects of the report including apparent inconsistency in terms of what the appellant said about denying coming into contact with friends involved in the use of illicit drugs or alcohol but yet stating that he had mixed with the wrong crowd. A further inconsistency was noted in that he told the author of the OASys report of September 2016 that he was not in receipt of any student loan but then said that he was.

13. That was all relevant to the financial background to the index offence. Nevertheless, the FtJ returned at para 76 to refer to the conclusion in Ms Davies' report to the effect that the risk of reoffending was in the low range. The FtJ then summarised the parties' submissions before moving on to her findings.

14. As regards evidence of the appellant's father's employment, the FtJ said that the Presenting Officer accepted at the hearing that the letters produced from HMRC were reliable and that the records from HMRC accorded with the appellant's father's evidence as to his employment in the UK. At para 91 she said this:

> "Ms McKenzie at the hearing on 19 December 2018 after a careful consideration of documents accepted that the appellant fell within the imperative category, maintained that removal was justified as the appellant had not demonstrated that he had addressed any of his offending behaviour although she accepted that rehabilitation was an issue in **Essa**."

15. On behalf of the respondent a question is raised in the grounds as to whether in fact any concession was made. The Presenting Officer's minute or note has been provided. We shall return to that momentarily.

16. At para 95 the FtJ concluded that the appellant had entered the UK in 2004 aged 14 and from that date until the date of expulsion he had remained in education, had progressed to university and was seeking to qualify as a quantity surveyor. She concluded that his immediate family were exercising Treaty rights in the UK and that he remained dependent on his

father, living at home whilst a student, and is now dependent on his father in the Netherlands.

17. She concluded that through his education he is socially and culturally integrated in the UK. The FtJ referred to support from his local church and his engagement in church-related activities. She found that the appellant had not returned to the Netherlands apart from when he was deported in 2017 and that he does not have significant links to his country of nationality.

18. However, although the appellant said that he could not speak Dutch, the FtJ found that he would be able to speak some words of Dutch because he was in education there until the age of 14.

19. The FtJ noted that the EEA Regulations require that the personal conduct of the individual in question must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and that criminal convictions themselves do not justify an expulsion decision.

20. At para 97 it was noted that this was the appellant's first offence, but that he had not accepted responsibility and continued to maintain that he was set up or framed, notwithstanding that he had been found guilty by a jury.

21. The grounds contend that the FtJ failed to have regard to the fact that the appellant denied his guilt, but it is clear that the FtJ was well aware of the fact that he still maintained his innocence.

22. The FtJ noted that he had not committed any further offences since the offence was committed and since his release from prison or detention. She took into account that he had returned to the UK in breach of the deportation order but said that that was an impulsive act that arose from the death of his elder sister. The FtJ nevertheless regarded that matter as a negative factor in her assessment.

23. At para 98 the FtJ reminded herself that the appellant was convicted and sentenced to six years' imprisonment. She further noted that the sentencing judge expressed some sympathy for the circumstances in which the appellant found himself but nevertheless reiterated the appellant was convicted and sentenced to a lengthy term of imprisonment. The FtJ said that motivation for the offence still remained unclear and concluded that did not assist in the assessment of whether there was any propensity to reoffend. She referred to the OASys report prepared on 11 December 2017 and that it indicated at para 7.5 that the author was aware that the appellant appeared to be involved in a larger scale drugs operation but there was no further evidence of that before her and nor was it an issue highlighted by the respondent.

24. At para 99 the FtJ referred to the conclusion that the appellant was at medium risk to the public in the community and medium risk of serious

harm. She referred to the factors that were identified as to the risk of serious harm and she said that the issue of finance was clearly related to the risk of reoffending at it was believed that his motivation was financial. She concluded that that was probably a correct assessment on the evidence available. She found that there was no evidence before her to indicate that there was any risk arising from lifestyle and associates and that it was difficult therefore to quantify that matter. She further summarised aspects of the OASys reports and then returned to the report of Ms Davies.

25. The FtJ referred to the issue of rehabilitation and cited the case of *MC (Essa principles recast) Portugal* [2015] UKUT 520 (IAC) and made an assessment of the question of rehabilitation. She stated that the more serious the risk of offending and the offences that a person may commit, the greater the right to interfere with the right of residence. No complaint is made about that aspect of her decision.

26. At para 103 the FtJ said that the appellant had established that he had acquired a permanent right of residence, that the offence was committed or completed in December 2012 when he was aged 22, and that he was therefore a young adult at the time.

27. She referred to there having been no breach of bail conditions or any reoffending. The FtJ thus concluded that in all the circumstances the appellant may be receptive to reform for the reasons that she gave.

28. She did, however, find that in the Netherlands, where he would be subject to some degree of isolation, the prospects for rehabilitation were likely to be less than in the UK.

29. Drawing the threads of her analysis together at paras 104 and 105 the FtJ reminded herself again that the fact of a criminal conviction was not enough to establish a genuine, present and sufficiently serious threat.

30. She concluded that on the evidence there was not “a present threat” as the appellant had not been involved in further offending between 2012 and 2015 or in 2017 and 2018. She said that the OASys report and Ms Davies’ report that the appellant is of medium risk to the public had to be considered within the methodology, as Miss Davies had said. That is to say, referring to the risk as set out in the OASys report, the FtJ found that Ms Davies’ comments had some weight.

31. The FtJ referred to the passage of time, the fact that the offence was committed at the age of 22 and that the appellant was now aged 28. She found that if there had been any peer pressure on him at the time, this had not been evidenced before her and in any event, there was the possibility that he had now grown away from any adverse influence given that he had been living in the Netherlands and had now matured.

32. The appellant had been separated from his family since 2017 and was well aware of the consequences of offending which would lead to deportation, the FtJ said. She concluded that that factor alone would assist the appellant in "reforming".

33. She referred to her earlier conclusion that the respondent had not established that the appellant represented a genuine, present and sufficiently serious threat. There was a slip of the pen at para 105 where it states that the *appellant* had established that fact, but her conclusions are clear.

34. She found that the appellant had resided in the UK for a continuous period of at least 10 years prior to the relevant decision and that removal may only therefore be taken on imperative grounds of public security. The FtJ concluded that the concept of imperative grounds pre-supposes not only the existence of a threat to public security, which she repeated she had found not to be established, but also that such a threat is of a particularly high degree of seriousness. She further said at para 105 as follows:

> "I accept that if it has been established that the appellant is at risk of further offending, that this would reach the standard required by way of imperative grounds but I have not found that such a risk exists."

Assessment

35. The respondent's grounds can be summarised relatively shortly. We referred earlier to the respondent's contention that there was no concession, so to speak, made on behalf of the respondent to the effect that the appellant was entitled to the highest level of protection of imperative grounds. We also referred to a minute from the Presenting Officer. The minute, as was conceded on behalf of the respondent before us by Mr Walker, is not entirely clear on the point. Nevertheless, it seems to us that the matter in issue before the FtJ so far as the Presenting Officer was concerned was the extent to which the documentary evidence established firstly, the period of 10 years' residence but secondly and more importantly, the extent of the exercise of Treaty rights by the appellant's father. Once those matters were established to the satisfaction of the Presenting Officer and more importantly to the satisfaction of the FtJ, it is clear that the issue of imperative grounds was not argued on behalf of the respondent. To all intents and purposes the matter was accepted on behalf of the respondent.

36. The grounds contend that the FtJ did not accept that the appellant represented a genuine, present and sufficiently serious threat because there had been no further offending in the periods to which we have referred. However, as is clear from her decision, that was not the only basis upon which the FtJ made her assessment. Crucially, she took into account the independent report by Ms Davies, quite apart from the fact of the passage of time and the lack of further offending.

37. The FtJ did, contrary to what is asserted in the grounds, make a full assessment of the contents of the OASys reports and in coming to her conclusions she was entitled to make the findings that she did about genuine, present and sufficiently serious threat.

38. The grounds contend that imperative grounds of public security did not only equate to national security but also applied where there is some risk or danger to the security or well-being of the nation. That proposition, it seems to us, is uncontentious. However, the fact is that the FtJ concluded that imperative grounds' protection were in play here. But even if there were not, as is clear from the final paragraph of the FTJ's decision, which we have quoted, she would have come to the same conclusion in any event because she was not satisfied that there was a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. In other words, the FtJ found that the risk of reoffending was not present such as to justify the appellant's deportation.

39. The grounds further argue that the FtJ did not undertake a holistic appraisal of the evidence and that the appellant had clearly exhibited behaviour which resulted in the finding in the OASys report of medium risk to the public and medium risk of serious harm generally. However, the factors involved in that assessment: finance, lifestyle, associates and thinking behaviour, are all matters that the FtJ considered.

40. We do not accept the contention that there was a failure to undertake a holistic assessment of the evidence. That contention is simply not borne out.

41. It is argued that the FtJ failed to take into account the appellant's failure to accept responsibility for his actions and lack of remorse, a matter to which we alluded earlier. On that, it is evident from our summary of the FtJ's decision that those matters were expressly taken into account.

42. The grounds at para 11 state as follows:

> "Put simply, the appellant poses a significant risk to society at large and in light of his conviction for dealing in drugs as part of an organised network in which he took a significant, if not leading role, the Tribunal's rationale for concluding imperative grounds are not made out is inadequate to the extent it amounts to a material misdirection in law."

43. That paragraph, in fact, betrays the essence of the grounds which amount to nothing other than a disagreement with the FtJ's decision. Having summarised the FtJ's decision and appraised the grounds of appeal, we are not satisfied that the grounds establish that there is any error of law in the decision in any respect. Accordingly, the FtJ's decision must stand.

Decision

44. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal therefore stands.

Upper Tribunal Judge Kopieczek 18/07/19