Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00644/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 February 2019	**On 11 February 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MOHAMED AMINE DJEDDOUR
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Nishan Paramjorthy, Counsel instructed by Sriharans solicitors
For the respondent: Mr Chris Avery, a Senior Home Office Presenting Officer

DECISION AND REASONS
Amended pursuant to Rule 43 of the
The Tribunal Procedure (Upper Tribunal) Rules 2008 [as amended]

1. The appellant has permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against automatic deportation to Algeria, his country of nationality, pursuant to Regulation 27 of the Immigration (European Economic Area) Regulations 2016. This appeal came before me on 16 November 2018 for an error of law hearing.

2. The appellant is an Algerian citizen married to a French national who exercised Treaty rights in the United Kingdom for over 5 years, such that the appellant and his wife both acquired a permanent right of residence.

3. When convicted on 20 May 2016, the appellant had been married to his wife for only 6½ years. He could not show 10 years' residence in accordance with the Rules preceding his imprisonment and is entitled only to the 'medium' level of protection provided by Regulation 27(3) of the 2016 Regulations, that is to say, whether there are serious grounds of public policy and public security requiring his removal, having regard to the matters set out at Regulation 27(5) and 27(6) of those Regulations, with reference to Regulation 27(8) which requires the Tribunal to have regard to the considerations contained in Schedule 1 of those Regulations.

Background

4. The appellant remains married to his French wife. It is not suggested that the parties' marriage is one of convenience, but they have been estranged for some time, although the appellant hopes that is temporary. The couple have no children and the appellant was in the United Kingdom unlawfully when the relationship began, and when they married on 27 November 2009. While in the United Kingdom, the appellant has not worked. He has been financially dependent first on his wife, and after their estrangement, on others.

5. The appellant has four convictions for theft between 2005 and 2014 which precede the index offence: on 17 January 2005 he received a conditional discharge for shoplifting; on 6 March 2007 he was fined (unpaid) for theft by shoplifting; and on 2 October 2013, he was fined for the offence of theft from a person. On 20 May 2016 he was sentenced to 15 months' imprisonment concurrent on offences of fraud and handling stolen goods. The appellant served half his sentence and was released on licence in January 2017. He undertook no education in prison; he says that OASys and his probation team did not consider him to be suitable for any courses. After his release in January 2017, the appellant was moved into immigration detention but released on bail in March 2017. His licence expired on 20 August 2017.

6. The appellant has complied with his bail obligations since his release. In January 2018, he was discharged by the Probation Service. He has committed no further offences since then, although he no longer has the financial support previously provided by his wife.

First-tier Tribunal decision

7. First-tier Judge Shaerf noted in his decision that the international protection element of the appeal was withdrawn by Mr Paramjorthy at the hearing. The sentencing Judge in 2016 had considered the appellant to be a persistent offender:

> "You have been criminally dishonest, thieving in 2004, 2007, 2013, thefts from the person 2014 again. You have been warned again and again and you have avoided prison so far. That background does not help you … [The] overall harm associated with the underlying offence is very great in my judgment. It is not

> right and not in the interests of justice in my judgment simply to say that this is a fraud which involved less than £600. …"

8. The appellant did not challenge his offending history, but Mr Paramjorthy argued on his behalf that he had not been in trouble since his release and no longer presented a threat to the United Kingdom. For the respondent, Ms Olalade accepted that the OASys assessment indicated that the appellant was not a continuing threat.

9. In a reserved decision, the First-tier Judge noted that there was no evidence of support for his appeal from friends and the support from is wife was limited to a brief letter. The evidence of the extent of any reconciliation was contradictory. The appellant had not worked in the United Kingdom and was still under 40. He had no health issues, and no family members in the United Kingdom other than his estranged wife. The appellant had family in Algeria, 'who enjoy a good life, of which the appellant is jealous, as he stated at interview'.

10. The Judge applied the considerations of public policy, public security and the fundamental interests of society which are set out in Schedule 1 to the Immigration (European Economic Area) Regulations 2016. He noted that the OASys report found that the appellant's offending was financially motivated and that the appellant 'does not fully think about the consequences to the public, which may reflect an ambivalent attitude towards the community' and further, that the OASys report indicated that without his wife's support, the appellant was more likely to return to crime. The First-tier Judge found as a fact that the appellant had not demonstrated that he had substantial ties to the community.

11. The Judge found that given the lack of evidence of integration into the United Kingdom, on balance he represented a genuine, present and sufficiently serious threat to the fundamental interests of society as set out in Schedule 1 to the 2016 Regulations and dismissed the appeal.

Permission to appeal

12. Permission was granted on the basis that arguably the appellant is not a genuine, present and sufficiently serious threat to one of the fundamental interests of society and/or that the Judge's decision on that question was insufficiently reasoned. In particular, Mr Paramjorthy asserted that the Judge had given the appellant's Counsel the following indication orally at the hearing:

> "Mr Paramjorthy, you will no doubt explain to your client that my decision is reserved, but in light of your submissions, and the very high threshold that needs to be met by the respondent, and the lack of re-offending since 2015 by the appellant, you can provide your client with an indication as to where I am with this appeal."

The appellant contended that it was, therefore, unclear to him why the appeal had subsequently been dismissed.

Rule 24 Reply

13. In a Rule 24 Reply, the respondent contended, so far as now relevant, that the challenge to the rationality of the First-tier Tribunal decision was not well-founded, having regard to the demanding test to be met if the Upper Tribunal were to set aside a decision on reasons grounds.

14. He argued that the Judge had given sufficient consideration to the OASys report, which at pages 15, 19 and 20 showed that there remained a risk because of his tendency not to consider fully the consequences of his actions and the risk of his being tempted by financial motives given his current difficult financial circumstances. While the risk of re-offending was low, the serious harm which would be caused if the appellant were to reoffend was such that it was not considered reasonable to leave the public vulnerable to the effects of such re-offending, were it to occur.

15. The respondent further contended that the appellant should be given no credit for his failure to offend since 2015, given that the appellant had been in prison or in immigration detention until 3 January 2017, and had been involved in challenging his deportation since then. The expectation in society was that members of the public should be law-abiding. He contended that the 19% risk of re-offending in year 1 and 32% in year 2 in the OASys report should be given significant weight.

Upper Tribunal hearing

16. The Upper Tribunal hearing on 16 October 2018 was adjourned for lack of court time, but Mr Paramjorthy said that the appellant was now in a position to provide evidence of his wife's exercise of Treaty rights. Mr Avery for the respondent considered the evidence and confirmed in writing later that the respondent accepted that the appellant and his wife had acquired a permanent right of residence.

17. I then gave directions for the future conduct of this appeal, requiring each party to serve and file written submissions, setting out all arguments and issues on which they relied, to an agreed timetable. The appellant had one month to file his submissions, and the respondent a further 15 days.

18. I ordered that after receipt of the submissions of each party, the Upper Tribunal would decide whether the appeal could be properly determined on the basis of the papers and submissions received, or whether a further oral hearing is necessary. There was liberty to apply.

19. If the appeal were to be relisted, the Upper Tribunal would endeavour to accommodate Mr Paramjorthy and Mr Avery's diaries.

Written submissions

20. Following the hearing, and having regard to evidence provided by the appellant through his solicitors, on 26 October 2018 Mr Avery for the respondent submitted a

brief note, confirming that the Secretary of State no longer wished to challenge the First-tier Tribunal's finding that the appellant's EEA spouse had a permanent right of residence following 5 years' residence in the United Kingdom in accordance with the Regulations, and that accordingly, he also had a permanent right of residence.

21. For the applicant, Mr Paramjorthy in his written submissions set out the offending history. Mr Paramjorthy argued that the appellant's appeal must be allowed since the respondent had not discharged the burden of showing that he represents a genuine, present and sufficient threat to society. Mr Paramjorthy's submissions did not seek a further oral hearing.

Rule 43 decision

22. On 4 January 2019, the Upper Tribunal promulgated my decision dismissing the appeal, in which I approached the appeal on the basis that the parties had not complied with my direction for written submissions.

23. In his application for permission to appeal to the Court of Appeal, Mr Paramjorthy noted that 'both the appellant and the respondent had refreshingly complied with the learned Upper Tribunal Judge's directions', relying on the respondent's email of 26 October 2018, and his own submissions of 16 November 2018. The respondent had made no formal further submissions apart from the 26 October 2018 email.

24. In grounds of appeal to the Court of Appeal, Mr Paramjorthy contended that in the 16 November 2018 submissions he had 'arguably posited sustainable challenges to the determination of the Judge at the First-tier Tribunal' and that there were, therefore, arguable material errors of law in the decision. That is a misunderstanding of the purpose of an error of law hearing: the grant of permission identifies an arguable error of law and the question for the Upper Tribunal at the error of law hearing is whether there is such an error, and if so, whether it is material to the outcome of the appeal.

25. In his Court of Appeal application, Mr Paramjorthy asked, that I should reconsider my decision and provide the appellant with an oral hearing; and stated that permission to appeal to the Court of Appeal 'is naturally sought'. Mr Paramjorthy's submissions are thus a mixture of an application under rule 43 and an application to the Court of Appeal. As he has succeeded under rule 43, the application to the Court of Appeal falls away.

26. I have considered Mr Paramjorthy's 16 November 2018 submissions. They do not seek a further oral hearing and I do not consider that one is necessary. I am, however, satisfied that there has been a procedural irregularity (paragraph 43(2)(d)) and that it is in the interests of justice to reopen and remake the decision (paragraph 43(1)). I therefore set aside the decision of 4 January 2019. I now proceed to remake that decision, on the documents and submissions before me, taking account of Mr Paramjorthy's written submissions.

Analysis

27. I deal first with the Judge's alleged indication at the hearing. If the Judge gave the indication that Mr Paramjorthy asserts that he gave, it was qualified by the clear statement that the decision was reserved. Even if the Judge had given a misleading indication, I have now received further written submissions which do not take matters any further, for the reasons below.

28. Mr Paramjorthy's submissions do not engage with Schedule 1 to the 2016 Regulations nor with the integration point, on which the decision of the First-tier Tribunal turned. The Judge was required by Regulation 27(8) to have regard to the considerations in Schedule 1 when considering the proportionality of removal, which he did. The Judge was also entitled to have regard to all of the observations in the OASys report, positive and negative, and in particular to the 32% risk of reoffending in the second year, the appellant's tendency not to consider fully the consequences of his actions, and the risk of his being tempted by financial motives. To that I add the history of theft by shoplifting and theft from the person, over a relatively long period, to which the sentencing judge had regard. All of these are matters relevant to the Schedule 1 considerations, but Mr Paramjorthy's submissions do not engage with that.

29. There is no want of reasoning in this decision and the matters relied upon by the appellant do not come close to the *R (Iran)* level of perversity or irrationality. On the contrary, the First-tier Judge's decision is robustly but carefully and adequately reasoned, in particular at [33]-[39] of the decision.

30. I find no material error of law in the First-tier Tribunal's decision, which I uphold. This appeal is dismissed.

Signed: *Judith A J C Gleeson* Date: 8 February 2019

Upper Tribunal Judge Gleeson