Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/03797/2019
& DA/00358/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2022	**On 26 January 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUSEYIN KILIC

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr C Jacobs, instructed by Bostanci & Rahman Solicitors

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 Kilic's appeal against a decision to deport him from the United Kingdom under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

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

3. The appellant is a citizen of Turkey, born on 10 September 1990. He came to the United Kingdom in March 2006 with his mother and siblings and was granted indefinite leave to remain on 12 November 2009. On 19 April 2011 he was convicted of battery of his partner, Sebnem Istahlia. He was ordered to pay a fine and a restraining order was made against him. On 23 December 2011 he was convicted of common assault against his partner and received a sentence of eight weeks imprisonment, suspended for 12 months.

4. On 25 February 2012 the appellant married his partner under Turkish custom and on 30 May 2013 they had a daughter, Alara Kilic.

5. On 20 January 2014 the appellant was convicted of one count of assault by beating and one count of intimidating a witness (his partner), for which he received sentences of 29 months' imprisonment and five months' imprisonment, to run concurrently. A restraining order was made against him prohibiting him from contacting his partner and child except through his solicitor, until further order. On 24 May 2014 he was notified of his liability to automatic deportation and on 4 November 2014 he was served with a notice under section 72 of the Nationality, Immigration and Asylum Act 2002 and was advised of the intention to cease his refugee status.

6. On 26 June 2015 the appellant's refugee status was ceased, and he was made the subject of a deportation order on 3 July 2015. He appealed against the respondent's decision to deport him and pursued the appeal on Article 8 grounds, on the basis that it would be unduly harsh to expect his wife and daughter to remain in the UK without him. The restraining order had by that time been discharged on the request of the appellant's partner, in February 2016, and it was said that they had reconciled although they were not living together. The appeal was successful, but the decision was subsequently set aside by the Upper Tribunal and re-made by the First-tier Tribunal, which then dismissed the appeal on 30 June 2017. The appellant became appeal rights exhausted on 7 December 2017.

7. On 6 June 2017 the appellant applied for an EEA residence card as the unmarried partner of Sebnem Istahli, but his application was refused. The appellant had a second child with his partner, Almira, born on 17 December 2017. He made a further application, on 14 May 2018, on the basis of his family and private life, but that was rejected on 5 June 2018, and further representations made on 30 May 2018 and 29 January 2019 against deportation were also rejected. A further application for an EEA residence card made on 18 March 2019 was refused on 15 April 2019 on the grounds that the appellant had failed to provide adequate evidence to show that he was the partner of an EEA national or that he had a durable relationship with his sponsor. That was an unappealable decision. However, following an unsuccessful reconsideration of the application the appellant was given a right of appeal against the refusal decision of 27 June 2019. In that decision the respondent accepted that the appellant was in a durable relationship and that the sponsor was a qualified person, but considered that it was nevertheless not appropriate to issue a residence card under regulation 18(4)(c) of the EEA

Regulations 2016 owing to his criminality, namely three convictions of violent offences against the mother of his children. The appellant's appeal was listed before the First-tier Tribunal.

8. However, prior to the hearing, the appellant married his partner Sebnem Istahli, on 22 July 2019 and, as a result of his marriage to an EEA national, he was issued with a notice of an intention to make a deportation order against him on grounds of public policy, in accordance with regulation 23(6)(b) and regulation 27 of the EEA Regulations 2016 and a decision was made on 30 October 2020 to deport him under regulation 27.

9. In that decision the respondent considered that the appellant qualified for consideration under the EEA Regulations 2016 only from the date of his marriage to his EEA national partner, on 22 July 2019. As such, it was not accepted that he had resided in the UK in accordance with the EEA Regulations for a continuous period of five years and it was considered that he had not acquired a permanent right of residence. The respondent considered whether the appellant's deportation was justified on grounds of public policy and, having considered his history of assaults and threats against his partner, concluded that he represented a genuine, present and sufficiently serious threat to the public to justify his deportation. The respondent considered that it was reasonable to expect the appellant to return to Turkey and concluded that the decision to deport him was proportionate. As for Article 8, the respondent accepted that the appellant had a genuine and subsisting relationship with his two daughters and that it would be unduly harsh to expect them to live in Turkey, but considered that it would not be unduly harsh for them to remain in the UK without him. The respondent did not accept that the appellant's partner was British or that there was a genuine and subsisting relationship between them, but in any event considered that it would not be unduly harsh for his partner to live with him in Turkey or remain in the UK without him. The respondent considered that the exceptions to deportations under paragraph 399(a) and (b), as well as paragraph 399A of the immigration rules were not met and that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

10. The appellant appealed against that decision. Both appeals then came before the First-tier Tribunal on 29 June 2021 and were heard by Judge Hanbury. The judge dismissed the appeal against the refusal of the residence card, finding that it was the correct decision at the time it was made. However, he allowed the appeal against the deportation decision on the basis that the appellant had not offended for seven years and was a low risk to the public, that the violent offending had been confined to the family unit but had now ended, that the family unit was stable, and that the decision to deport him was therefore disproportionate. In so doing, he relied upon two expert reports: a psychological report from Susan Pagella, a psychotherapist and trauma specialist, which was based on an assessment of the appellant on 15 March 2019 and included her opinion on the risk he posed of re-offending; and a "Best Interest Report" dated 3 May 2019 from Sally-Anne Deacon, an Independent Social Worker.

11. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the judge had made no finding on whether the appellant was entitled to enhanced protection against deportation on the basis of five years lawful residence and/ or ten years' lawful residence; that the judge had failed to have regard to the conclusion, in the risk of offending report of 15 March 2019, that he posed a medium risk of re-offending; that the judge had failed to have regard to the risk of reoffending when considering the best interests of the children; that the judge had wrongly confined himself to consideration of violence in the context of the family unit; that the judge had only looked at the appellant's offending and not his conduct and had failed to have regard to an incident relating to the destruction of a fish tank; and that the judge had failed to give adequate reasons for finding that the appellant did not pose a sufficiently serious threat to the fundamental interests of society.

12. Permission to appeal was granted in the First-tier Tribunal and the matter then came before me for a hearing.

Hearing and submissions.

13. There was some preliminary discussion at the commencement of hearing, initiated by myself, as to the status of the appeal. I noted that that had been addressed by Judge Hanbury in his decision, but I was concerned as to whether the matter had been properly resolved. At [6] and [29] of his decision, Judge Hanbury referred to the appeal arising out of a decision of 15 April 2019 where the appellant's application for an EEA residence card as an extended family member of an EEA national was refused for lack of satisfactory evidence of the relationship. However, I noted that that decision was not an appealable one. The appealable decision was the subsequent one of 27 June 2019, which was based on different reasons for refusal arising not out of concerns about the appellant's relationship, but the appropriateness of issuing him with a residence card owing to his criminal conduct. Judge Hanbury did not refer to that decision at all. The only notice of appeal in the papers before me referred to the relevant decision giving rise to the appeal as being that of 15 April 2019 and not 27 June 2019. Nevertheless, the First-tier Tribunal had accepted a valid appeal from the appellant with a reference of EA/03979/2019. Further, and whilst not referred to in the decision itself, I noted that Judge Hanbury's record of proceedings referred to an appeal number of DA/00358/2020, which my own enquiries revealed was related to an appeal lodged by the appellant against the deportation decision of 30 October 2020 and which the appellant's representatives had requested be linked to the appeal EA/03979/2019. Neither party had any issue with the validity of the appeal and both were satisfied that the matter had been resolved properly in the First-tier Tribunal. Ms Cunha confirmed that the respondent was content that this was an appeal against the deportation decision of 30 October 2020. In the circumstances we proceeded on that basis, and I have therefore added the appeal reference DA/00358/2020 which it was accepted Judge Hanbury had simply omitted in error.

14. As a further preliminary matter, I enquired of the parties as to the source of the reference in the respondent's grounds of appeal to the appellant being a medium risk of re-offending, since it did not appear in the report of 15 March 2019, as the grounds suggested. Mr Jacobs advised me that it came from [11(ix)] of the judge's decision which was a mis-recording of his own submission, as he had in fact been referring to the pre-sentence report which preceded the Crown Court sentencing in 2014. I also enquired of the parties as to the source of the reference to the appellant smashing a fish tank, as recorded by the judge at [14(i)], and Mr Jacobs advised me that it came from a report from Enfield Council Social Services which the appellant had produced at the hearing. The report had confirmed that there were no concerns about the safety of the appellant's children arising from that incident and Mr Jacobs advised me that the respondent had never relied upon the incident as a matter of concern at the hearing before the First-tier Tribunal. It had been raised by the respondent for the first time only in the grounds of appeal.

15. Ms Cunha then made her submissions. She conceded that, in light of Mr Jacobs' clarification of the issues, the grounds had been drafted on the basis of how the judge had (wrongly) recorded the evidence, rather than on the evidence itself, and that the respondent's strongest ground was that the judge had not considered the correct threshold under Regulation 27. She submitted that the judge had proceeded on the basis that the appellant met the threshold relevant to permanent residence based on a period of five years of exercising of treaty rights. She submitted further that the judge had failed to consider the previous finding in the pre-sentencing report of the appellant posing a medium risk of re-offending and had failed to consider how the appellant's wife mitigated the risk. The judge had also failed to consider the courses the appellant had taken in prison to mitigate his risk when considering proportionality.

16. Mr Jacobs submitted that it had never been the case before the First-tier Tribunal that there was an issue about the threshold under Regulation 27. The appeal had proceeded on the basis of the lower threshold, with the issue being whether the appellant's conduct represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society. The reference by Judge Hanbury at [24] of his decision to an enhanced status, was simply a comparison of a deportation decision under the EEA Regulations to a non-EEA deportation decision. The judge had set out the correct test at [11(vii)]. The legal framework was never in dispute. The judge had taken account of the fish tank incident which the respondent had not relied upon in any event, and had concluded that the appellant's violent offending was at an end. Such a conclusion was entirely justified on the basis of the expert reports before him. The judge had given full and adequate reasons for reaching the conclusion that he did and there was no error of law in his decision.

Discussion and findings

17. As Ms Cunha helpfully conceded, the grounds of appeal were drafted on the basis of the judge's recording of the evidence and submissions rather than

on the evidence itself and that had led to errors in the grounds. One such error was in ground 3 which challenged the judge's decision on the basis that he had failed to have regard to the risk of re-offending report dated 15 March 2019 concluding that the appellant posed a medium risk of re-offending. In fact Ms Pagella's risk of re-offending report did not refer to the appellant posing a medium risk. The error appears to have arisen from the judge's mis-recording, at [11(ix)], of Mr Jacobs' submission. Mr Jacobs clarified that the reference in his submissions to a medium risk assessment had been in relation to the pre-sentence report before the Crown Court and not Ms Pagella's report. In that respect, the judge had full regard to the sentencing remarks of the Crown Court Judge who sentenced the appellant in 2014, referring to those remarks at [23], and was therefore fully aware of the risk assessment at that time. He was, however, persuaded by the more recent reports of Susan Pagella and Sally Ann Deacon, that the appellant had changed with the passage of time and no longer posed such a risk. Ms Pagella's report concluded that the appellant posed a low risk of re-offending and that was the conclusion that the judge relied upon at [25]. Likewise, the grounds wrongly assert that the independent social worker's report failed to have regard to the appellant's risk of re-offending in making a finding on the best interests of the children, when the report clearly did consider the matter, in particular at the end of page 4 and in the first paragraph of page 13.

18. There was no challenge by the respondent to the expert reports at the hearing and neither have the grounds challenged them. As such, the judge was entitled to rely upon the reports and to accord them the weight that he did.

19. As for the assertion in the grounds that the judge failed to take into account the incident relating to the smashed fish tank, it is clear from his findings at [25] that he did in fact have regard to that matter. Further, as Mr Jacobs' submitted, that was a matter raised by the appellant himself, there was evidence from the social services that they did not have concerns for the safety of the children arising from that incident, and in any event it was not a matter relied upon by the respondent at the hearing and was never part of the respondent's case. It has only arisen in the grounds. Likewise, and contrary to the assertion in the grounds, the judge did have regard to the appellant's conduct as opposed to considering only his offending, as he made clear at [11(vii)]. As for the assertion in the grounds that the judge appeared to have considered the fact that the appellant's offending was confined to the family unit as a mitigating circumstance, that was clearly not the tenor of the judge's findings at [27].

20. Having recognised these limitations in the grounds, Ms Cunha submitted that the respondent's strongest ground was the first one, namely that the judge had erred by proceeding on the basis that the appellant benefitted from the enhanced "serious grounds" level of protection under Regulation 27. However, she was unable to point out any particular reference to such in the judge's findings and conclusions, submitting simply that that was her overall reading of the decision. I do not read the decision in the same light. The judge refers at various points to the "high threshold" and the "high test" under

Regulation 27 and, at [24], to the appellant being entitled to an "enhanced status", but it is clear that he was simply distinguishing between EEA and non-EEA deportation cases. It was Mr Jacobs' submission that it had never been the case before the First-tier Tribunal that there was an issue about the threshold under Regulation 27 and that the relevant issue had been whether the appellant's conduct represented a genuine, present and sufficiently serious threat affecting the fundamental interests of society under the lowest level of protection. I have no reason to doubt his claim in that regard and indeed that seems to me to be apparent from the decision.

21. As for Ms Cunha's submission that the judge failed to consider proportionality and to conduct a proper assessment of the appellant's rehabilitation, it seems to me that that was adequately dealt with by the judge in his findings and conclusions. At [23] to [26] the judge weighed up the various factors relevant to the proportionality of the deportation decision and at [27] he provided his conclusion on that proportionality assessment. I had some difficulty in understanding Ms Cunha's submission about the role played by the appellant's wife in his rehabilitation, but what is clear is that the judge had full regard to the evidence in the two expert reports as to the changes he had made and the attempts to rehabilitate himself.

22. Accordingly, I agree with Mr Jacobs that the judge considered all relevant factors and provided adequate reasons for concluding as he did. The Secretary of State's grounds are, for the most part, based on errors, and are otherwise little more than a disagreement with the judge's decision. They were not carefully prepared. It may well be that another judge would have come to a different conclusion to Judge Hanbury, but the grounds fail to identify any basis for setting aside his decision. Accordingly, I find no errors of law in the judge's decision requiring it to be set aside and I uphold the decision.

DECISION

23. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to allow the appeal stands and the Secretary of State's appeal is dismissed.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 7 January 2022