IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-004604
First-tier Tribunal No: DA/00181/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On Tuesday 6 December 2022

Decision & Reasons Promulgated
On Tuesday 28 February 2023

Before

THE HON. MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

H M
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, we continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant [HM] is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr P Turner, Counsel instructed by Milestone Solicitors Ltd

DECISION AND REASONS

[AMENDED PURSUANT TO RULE 42 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008]

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Dineen promulgated on 12 January 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 12 February 2021, making a deportation order against him. In 2016, the Appellant was granted a residence card as the non-EEA family member of an EU citizen. The deportation order was made therefore under the provisions of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Although the EEA Regulations have now been revoked, certain provisions are preserved for the purposes of ongoing decisions and appeals. There is no dispute as to the legal principles which apply in this appeal.

2. The Respondent sought to deport the Appellant following the commission of two connected offences. In December 2019, the Appellant was arrested and charged with common assault following an attack on his partner earlier that month. Whilst on bail with conditions not to contact her or go to her address, the Appellant sent text messages to her and then went to her home. That became the subject of a charge of harassment without violence. Thereafter, whilst on bail for both those matters, the Appellant made attempts to contact his partner on social media. He then managed to hack into her email account and sent emails to the police purporting to come from his partner, asserting that she had not told the truth when alleging assault and stating that she wished to withdraw the allegations. The Appellant was subsequently charged with perverting the course of justice in relation to that conduct. He was sentenced to a term of two years' imprisonment of which one year was on licence.

3. The Respondent accepted that the Appellant was permanently resident in the UK under EU law. She accepted therefore that serious grounds had to be provided to show that the Appellant was a genuine, present and sufficiently serious threat to one of the fundamental interests of society. She also concluded that her decision to deport was proportionate.

4. Having had regard to the sentencing remarks in relation to the index offence (of perverting the course of justice) and an OASys report completed 11 January 2021 ("the OASys Report"), the Judge found that the Appellant did

not pose a sufficient threat and that deportation was not proportionate. He therefore allowed the appeal.

5. The Respondent appealed on one ground (failure to give adequate reasons on a material matter) which Mr Clarke helpfully sub-divided into five grounds as follows:

   Ground one: The Judge failed to explain how he found that the Appellant was less likely to reoffend given his experience in prison in circumstances where the Appellant was on bail for the offences of common assault and harassment when he committed the index offence.

   Ground two: The Judge failed to explain why the risk being to the Appellant's partner and child did not affect the wider community, given the adverse impacts of domestic violence.

   Ground three: The Judge's finding that the Appellant's stated intention to challenge his conviction gave him reason not to reoffend bordered on the perverse. A failure to accept guilt generally indicates that an individual is not rehabilitated.

   Ground four: The Judge failed to provide reasons why the Appellant does not pose a genuine threat to the fundamental interests of society, given the public policy imperative at play.

   Ground five: The Judge failed to provide reasons why deportation would be disproportionate, particularly given his age, health and (lack of) family ties.

6. Permission to appeal was granted by First-tier Tribunal Judge Pickering on 27 January 2022, on the basis that it was "arguable that there is not a clear finding in respect of Regulation 27(5)(c)" and that, in relation to proportionality, it was arguable that the Judge had failed to provide sufficient reasons. Judge Pickering observed that whilst permission was granted on all points, "paragraphs 2-3 of the grounds may be less meritorious". That is a reference to the grounds which we have re-numbered as grounds one to three above.

7. The Appellant filed a Rule 24 Reply dated 15 November 2022 seeking to uphold the Decision.

8. The matter comes before us to determine whether the Decision contains a material error of law. If we consider that it does, we then need to consider whether to set aside the Decision for that reason. If we set aside the Decision, it is then necessary for us either to re-determine the appeal or remit the appeal to the First-tier Tribunal to do so. Having heard submissions from Mr Clarke and Mr Turner, we reserved our decision and indicated that we would provide that in writing which we now turn to do.

DISCUSSION AND CONCLUSION

9. Given the way in which the grounds are framed, the terms of the permission grant and the submissions made, it is appropriate to take together grounds one to three and then grounds four and five separately.

Grounds One to Three

10. In spite of the observations made in the grant of permission, the main focus of Mr Clarke's submissions was grounds one to three. In making submissions on those grounds, both he and Mr Turner concentrated on the contents of the OASys Report which appears at pages 27-84 of the Respondent's bundle ([RB]). Before we turn to look at this, we set out the Judge's reasons for finding that the Appellant did not pose a sufficient threat and that the appeal should be allowed. Those are as follows:

> "29. The circumstances of the appellant's offending, as set out in the Judge's sentencing remarks and reflected in the OASys assessment, and as I find, are such that the offending in question is clearly related to the marital discord experience in the family.
>
> 30. I take into account the summary of risk of serious harm at section R10 of the OASys assessment. This identifies risk as being confined to the appellant's wife and children. While at R10.3 the assessment is to the effect that the appellant will attempt to contact his wife and children, this is subject to the caveat that when he previously breached his conditions he probably did not grasp the gravity of his offending, and that having spent a year in custody he might have a better understanding of the consequences of his actions should he attempt unlawful contact in the future.
>
> 31. Section R10.3 is also subject to the assessment in R10.2 that the risk of physical or emotional and psychological harm to his wife is in the context of serious reoffending being rated as low.
>
> 32. At R10.6 the risk of serious harm in the community is rated as medium in relation to the appellant's children. It is rated as medium in relation to the known adult, being his wife. These are, however, measurements of the seriousness of the risk to the extent that it exists in the first place. As set out above, the existence of such risk is low.
>
> 33. R10.6 assesses risk of serious harm to the public as low.
>
> 34. There is thus a number of layers of assessment which indicate reduction of risk to the appellant's wife and children, as well as an absence of risk to the public.
>
> 35. Additionally, the appellant is subject to the harassment provisions …of his sentence. Further, as he has expressed a desire to seek to overturn his conviction even at this late date, he has a clear incentive to ensure that he behaves lawfully.
>
> 36. It follows from the above, as I find, that there do not in the present case exist serious grounds of public policy and public security justifying the appellant's removal from the UK, and removal would not be proportionate."

11. In relation to the OASys Report, we did not understand Mr Clarke to argue, as Mr Turner at one point suggested, that the report was itself perverse. Nor did Mr Clarke argue that the Judge had misunderstood the report, although we at one stage thought that this might be the Respondent's position. As Mr Turner pointed out, the Respondent's pleaded challenge is firmly to the adequacy of reasoning of the Judge and not that he has failed to understand the way in which the OASys Report is formulated. Mr Clarke's submissions were rather that the Judge had failed to carry out a holistic assessment of

the OASys Report and to factor into his findings matters adverse to the Appellant.

12. As Mr Clarke pointed out by reference to the OASys Report (at [RB/72]), a low risk is found where "current evidence does not indicate likelihood of serious harm". By contrast, a medium risk arises where "there are identifiable indicators of risk of serious harm" and where "the offender has the potential to cause serious harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse."

13. For that reason, Mr Clarke directed our attention to various sections of the OASys Report dealing with those factors which might change. For example, he referred to the section dealing with "Accommodation" and the reference there to the Appellant being effectively homeless as a result of his offending. The section dealing with "Education" points to the Appellant's ability to manipulate technology in order to harass his wife (as he was found to have done as part of the index offence). The "Lifestyle" section refers to the Appellant's lack of any ties outside the relationship with his wife and children which is now broken. The Appellant is described at various points in the OASys Report as a controlling individual.

14. As Mr Turner pointed out, this is not a case where the Appellant's offending was caused or contributed to by drug or alcohol misuse. Those factors would not therefore alter the risk profile.

15. We are of course dealing with whether the Judge made an error of law and not what conclusions we might have drawn from the OASys Report. The Judge recognised that the Appellant's family relationships had broken down as a result of his offending ([29]). In the paragraphs which follow, the Judge was clearly considering whether there would be a change in circumstances in the ways perceived in the OASys Report, in other words whether the risk which the Appellant might pose to his wife and children was likely to materialise again.

16. Mr Clarke criticised the Judge's reason at [30] of the Decision as being accepting of the caveat rather than having regard to the likelihood of the Appellant seeking to re-establish contact with his wife and children. However, what is said at [30] of the Decision accurately reflects what is said in the OASys Report itself. The writer of the report recognises the risk that the Appellant will seek to re-establish contact but discounts that possibility on the basis that the Appellant may have learnt his lesson as a result of being in prison. The Judge was entitled to take the view that the caveat was sufficient reason for the Appellant not to reoffend. He did not have to give reasons for finding that the risk was reduced by the caveat.

17. As Mr Turner emphasised and as the Judge said at [31] of the Decision, the risk to the Appellant's wife also has to be seen in the context of the likelihood of serious reoffending which was assessed as being very low indeed (0.40% - see R10.2 of the OASys Report at [RB/71]). It was not immediately clear to us how that figure was arrived at given the risks of

reoffending as set out at [RB/79] but, as we understand it, the risks of reoffending there shown as 5% within one year, and 9% within two years are of general reoffending rather than serious offending and those figures are also in any event at the lower end of the scale.

18. The reliance on the low likelihood of serious reoffending is also underlined by the Judge at [32] of the Decision. In that regard, we do not accept the suggestion in the Respondent's pleaded ground that the Judge found there to be an insufficient risk to the community because the risk was to the Appellant's wife and children and not the wider public (see [34] of the Decision). It is clear from what is said at [32] and [33] of the Decision that the Judge was simply considering the risk as set out in the OASys Report, first in relation to the Appellant's wife and children and then to the general public. Indeed, Mr Clarke accepted that the second ground was probably based on a misreading of the Decision.

19. Although very briefly stated, we also view [34] of the Decision as important. The various sections of the OASys Report to which Mr Clarke directed our attention are referred to as "layers". As we understand the Judge's reasoning at [34] of the Decision, therefore, he is there acknowledging that the risk assessment is made up of various factors but that those are taken into account in the final conclusions. There is no error in that approach.

20. We can find no error in relation to the Judge's reasoning at [35] of the Decision. The Judge clearly recognised that the Appellant had re-offended whilst on bail for the earlier offence(s) as he incorporated the sentencing remarks at [6] of the Decision. The Judge expressly stated at [29] of the Decision that he had taken into account the circumstances of the offending as set out in those remarks.

21. Whilst we accept that a refusal to accept guilt is generally an indicator of a failure to rehabilitate, the Judge was entitled to reach the finding he did that the Appellant's wish to see his conviction overturned was reason for him not to reoffend ([35]). There is nothing perverse or even unreasonable in that conclusion. It is largely a matter of common sense that if the Appellant wished to portray himself as an innocent victim who has been the subject of a miscarriage of justice, he would be unlikely to commit further offences at least while his attempts to overturn the conviction were ongoing.

22. Mr Turner very fairly conceded that the Judge's reasoning might have been more detailed. That does not however mean that it is legally flawed as inadequate. Whilst briefly stated, the Judge has provided ample reasons for his conclusion that the Appellant does not pose a sufficient threat. Grounds one to three therefore do not disclose any error of law.

Ground Four

23. Given the terms of the permission grant, we were concerned, in relation to what we have categorised as the Respondent's fourth ground, that the Judge may have failed to have regard to the legal test which applies. However, by reference to [26] and [28] read together, it is clear that the Judge

recognised that the Respondent must demonstrate that there are "serious grounds" which establish that there is a sufficient threat and that the threat must be one which is "genuine, present and sufficiently serious" and must affect "one of the fundamental interests of society". The Judge's self-direction that this must be demonstrated by reference to (the Appellant's) "past conduct" and that "the threat does not need to be imminent" is an accurate self-direction. Mr Clarke and Mr Turner accepted that there is no case law which goes into much greater detail in relation to the test which applies to the risk issue. No error of law is disclosed by the Respondent's ground four ([4] of the pleaded grounds of appeal).

Ground Five

24. In relation to the fifth ground, Mr Clarke drew our attention to the case of AA (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 1249 ("AA"). He referred to [34] to [42] of that judgment as authority for the proposition that the Judge should have considered the case beyond simply the risk posed by the Appellant and that the Judge has failed to give any reasons for his finding that deportation is proportionate.

25. In our view, what is said in AA does not support the proposition for which Mr Clarke contends. The important paragraph in relation to that part of the judgment is at [35]:

> "… nothing in *Dias*, *Onuekwere* or *MG* is directed towards the criteria to be applied under the Directive, in particular pursuant to Article 27(2) and Article 28(1), when determining whether expulsion is justified by serious grounds of public policy or public security; criteria which are mirrored in regulation 21 of the EEA Regulations and were applied by the tribunals in this case. The CJEU decisions are concerned with the test for acquisition of the relevant status, not with the approach to be adopted towards the justification of expulsion once that status is acquired."

26. Although AA was not an "imperative grounds" case, the Tribunal had also gone on to consider integrative links in that context. Having concluded that serious grounds had to be shown, the Tribunal had reached the conclusion that the appellant in that case did not pose a sufficient threat. Accordingly, as the Court noted at [39] of the judgment, the Tribunal found that the appeal must fail. It had gone on to consider proportionality in case it was wrong in that conclusion. What is said by the Court at [42] of the judgment cannot be read as meaning that in every case where the Tribunal has found that an appellant does not pose a sufficient threat, the Tribunal is bound to go on to consider proportionality.

27. Whilst we accept that the Judge has failed to provide reasons for his conclusion at [36] that deportation would not be proportionate (beyond the fact that the Appellant has been found not to pose a sufficient threat), that does not involve any error of law in light of the conclusion in relation to risk. Even if that were an error, it would not be material given our conclusion in relation to the Judge's findings on risk.

CONCLUSION

28. For all of the foregoing reasons, the Respondent has failed to show that the Decision contains errors of law. Accordingly, we uphold the Decision with the consequence that the Appellant's appeal remains ~~dismissed~~ allowed.

DECISION

The Decision of First-tier Tribunal Judge Dineen promulgated on 11 January 2022 does not involve the making of an error on a point of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 16 December 2022

Dated as amended: 22 February 2023