

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00773/2018

THE IMMIGRATION ACTS

Heard at: Field House
On: 7 January 2020

Decision & Reasons Promulgated
On 15 January 2020

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALAN [K]

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr A Berry, instructed by Lexmark Legal Associates

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 [K]'s appeal against a decision to deport him from the United Kingdom pursuant to regulation 23(6)(b) of 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 [K] as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

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3. The appellant is a citizen of the Netherlands, born on 5 May 1997. He claims to have arrived in the United Kingdom on 29 December 2003, at the age of six years. He first came to the attention of the UK authorities when he was convicted of battery on 19 August 2015. On 14 July 2016 he was cautioned for attempted theft. On 3 March 2017 he was convicted of robbery and on 31 March 2017 he was sentenced to 4 years' detention in a young offenders' institution and ordered to pay a victim surcharge of £30.

4. On 13 April 2017 the appellant was served with a notice of liability to deportation. He responded to that notice with evidence of his residence in the UK under the EEA Regulations. On 29 November 2018 he was served with a decision to make a deportation order under the EEA Regulations 2016.

5. In that decision, the respondent noted the evidence produced by the appellant in regard to his education and his mother's tax credit awards and accepted that he had arrived in the UK in December 2003 and had been in full-time education from January 2004 to October 2013. The respondent did not, however, accept that the appellant had been resident in the UK for a continuous period of five years in accordance with the EEA Regulations 2016 as there was no evidence of him having comprehensive sickness insurance whilst he was a student and there was insufficient evidence of his parents exercising treaty right for the period when he was a student. The respondent also noted that the appellant had been refused a document certifying permanent residence on 4 October 2017 and again on 18 October 2017. Accordingly it was not accepted that he had acquired a permanent right of residence in the UK and the respondent considered whether his deportation was justified on the basis of the lower level of protection.

6. The respondent considered the index offence which consisted of the appellant and four other males approaching a car with two occupants and two of the appellant's associates stabbing the victims after they handed over their mobile phones and wallets. The appellant stood outside the car blocking the victims' escape. The respondent noted that the appellant's offender manager, in his OASys assessment on 5 June 2017, found that he posed a high risk of harm to the public, and that his probation officer, in his assessment on 19 November 2018, determined that he posed a medium risk of harm. The respondent considered that the appellant was involved in gang criminal activities and noted also his poor behaviour in prison. It was concluded that he continued to pose a risk of serious harm and had a propensity to re-offend and that his deportation was justified on serious grounds of public policy. The respondent noted the appellant's claim that all his immediate family members resided in the UK and that his extended family remained in Kurdistan which was not safe and that he needed to remain in the UK to care for his father who suffered from paralysis following post-surgery complications. However, it was considered reasonable to expect him to return to the Netherlands and resume life there and that his deportation would therefore be proportionate and in accordance with the EEA Regulations 2016. The respondent considered further that the appellant's deportation would not breach his Article 8 rights under the ECHR.

7. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 26 September 2019 by First-tier Tribunal Judge Morgan. The judge accepted the evidence from the appellant's family members, as set out in their witness statements, without hearing from them in person. He accepted that the appellant's mother

had been exercising treaty rights in the UK and that the appellant, as her dependant, had accrued a continuous period of five years residence under the EEA Regulations from 2004, so qualifying them to a permanent right of residence, and that there had been a further five years on the same basis prior to the deportation decision. The judge accordingly found that the correct test was that of "imperative grounds of public security". The judge considered the appellant's criminal offending to be appalling, but noted that his family circumstances, including his care for his father and his employment provided by his brother, had led to the latest OASys assessment in September 2019 concluding that the likelihood of re-offending was very low. The judge considered that, in the circumstances, the evidence of future risk was not sufficient to satisfy the general grounds and came nowhere near establishing imperative grounds of public security. He did not go on to consider proportionality, in light of such a finding, and allowed the appeal on the basis that the deportation decision was not in accordance with the EEA Regulations.

8. The respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed to conduct any adequate assessment of whether the appellant's integrative links had been broken and had therefore erred in the assessment of the imperative grounds test; that the judge had erred in his assessment of whether the appellant presented a genuine, present and sufficiently serious threat; and that the judge had failed to consider the prospects of the appellant's rehabilitation in the Netherlands.

9. Permission to appeal was refused in the First-tier Tribunal, but was subsequently granted by the Upper Tribunal on 18 November 2019.

10. At the hearing Mr Avery submitted that the judge had failed to follow the relevant test for "imperative grounds" as set out in B (Citizenship of the European Union - Right to move and reside freely - Enhanced protection against expulsion - Judgment) [2018] EUECJ C-316/16 (Vomero) as he had failed to consider whether the period of imprisonment had broken the appellant's integrative links to the UK. The judge had also erred in his assessment of continuing risk for the purposes of Regulation 27(5)(c). He had erred by factoring the level of integration into the question of risk, he had wrongly referred to a "very low" risk and had not properly engaged with the OASys assessment.

11. Mr Berry submitted that the judge had given consideration to his skeleton argument at the hearing which set out the relevant parts of Vomero and the relevant test for imperative grounds and had properly considered the question of "integrative links". In any event, the first ground of challenge was immaterial as the judge found that the lowest test was not made out by the respondent. The judge's assessment of risk was in accordance with the latest OASys assessment. The appellant had no ties to the Netherlands and his rehabilitation had all been in the UK. The decision was unimpeachable.

Discussion and conclusions

12. I do not agree with Mr Berry that the fact that the relevant test for "imperative grounds" was set out in his skeleton argument was sufficient, when taken with the judge's

reference to that skeleton argument, to conclude that the judge had himself considered and carried out the relevant test. Neither do I agree with Mr Berry that the judge's subsequent findings on the appellant's ties to the UK including his role in the family were part of his consideration of the question whether the appellant's detention had severed his integrative links to the UK, when the relevant period to be considered was the ten years prior to the expulsion decision and not the period subsequent to his release from prison. Accordingly I agree with the Secretary of State's grounds and with Mr Avery's submission that the judge had erred in law in his conclusion at [10], that the "imperative grounds" threshold applied, since he had failed to carry out the relevant assessment as set out at [70] of Vomero to consider whether the appellant's imprisonment had broken the integrative links previously forged with the UK in the preceding ten years.

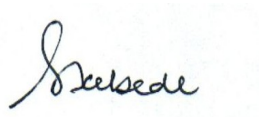
13. However the relevant consideration is whether or not such an error is material. The judge's conclusion, at [16] and [17], was that the lowest threshold had not been met by the respondent and that it had not been demonstrated that the appellant represented a genuine, present and sufficiently serious threat to the public to justify deportation, in which case the judge's conclusion that the relevant threshold was the highest one was immaterial. I do not agree with the assertion in the respondent's grounds that the application of the imperative grounds threshold infected the judge's findings on risk of offending, as the issues are entirely separate. Neither do I agree with Mr Avery's submission that the judge's reference at [14] to the likelihood of the appellant engaging in similar offences was "very low" was not consistent with the evidence, as it clearly came directly from the OASys Assessment of 17 September 2019 at R10.3 (page 67 of the appellant's bundle B). Mr Avery submitted that the judge failed properly to engage with the OASys assessment, but I do not agree. Although the OASys assessment at R11.12 (page 70 of the bundle) refers to the assessor considering the risk to be medium despite the actuarial score showing a low risk, the judge clearly gave detailed consideration to all the risk assessments and was entitled to accept the actuarial assessment and proceed on the basis of the likelihood of the appellant re-offending being low.

14. In reaching the conclusion that he did about the threat posed by the appellant, the judge plainly had regard to all the relevant factors under Regulation 27(5). He acknowledged the seriousness and appalling nature of the appellant's offending, he had full regard to his past offending and he considered the appellant's behaviour in detention. The judge gave cogent reasons for concluding, nevertheless, that the lowest threshold had not been met and he explained why those were sufficient to show that deportation was not justified, setting out at [14] to [16] reasons why the prospects for the appellant's rehabilitation in the UK were positive. It cannot be said that the judge failed to undertake a full assessment of all relevant and material matters. The grounds in this respect are essentially a disagreement with the judge's assessment and conclusions and I do not find the challenge to be made out.

15. For all of these reasons, and whilst I consider that the judge failed to undertake a complete assessment of the matters relevant to the imperative grounds threshold, I do not consider that there was any material error in the judge's conclusion that the appellant's deportation was not justified on grounds of public policy and security. The judge's decision is upheld.

DECISION

16. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring the decision to be set aside. The decision of the First-tier Tribunal to allow the appellant's appeal therefore stands.

Signed 
Upper Tribunal Judge Kebede Dated: 8 January 2020