Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00121/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2016	**On 19 May 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

DANDY OKOH NNAJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Read, Counsel instructed by Caulker and Co Solicitors
For the Respondent: Mr C Avery, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Germany whose date of birth is 13 February 1965. He appeals against the decision of Judge of the First-tier Tribunal E M Simpson who, in a decision promulgated on 8 January 2016, dismissed his appeal against the

respondent's decision of 15 April 2014 to make a deportation order against him under the Immigration (European Economic Area) Regulations 2006 (hereinafter 'the 2006 Regulations').

Background

2. The appellant was born in Nigeria. He travelled to Germany in the mid-1990s where he studied and worked for over seventeen years and he became a German citizen. He was joined by his wife, whom he married in Nigeria on 4 June 2004. They have three children who were all born in Germany and are all German nationals. The appellant's family came to the UK in September 2009 and the appellant followed them in March 2010.

3. On 18 January 2011 the appellant was discovered smuggling cocaine into the UK. He had within him 77 packages containing 780 grams of cocaine of 100% purity. This was estimated to have a street value of £250,000. He pleaded guilty to being knowingly concerned in "fraudulent evasion of prohibition or restriction on importation of a Class A controlled drug" and on 28 March 2011, he received a six and a half year prison sentence.

4. The respondent decided to deport the appellant pursuant to Regulation 19 of the 2006 Regulations. In her decision the respondent considered the factors in Regulation 21(5), the circumstances and the seriousness of the offence and the probation officer's findings on risk. The Secretary of State was of the view that it was appropriate to deport the appellant. He appealed the respondent's decision

First-tier Tribunal decision

5. At his appeal hearing on 19 August 2015 the judge heard oral evidence from the appellant and his wife. In her decision the First-tier Tribunal set out the judge's sentencing remarks and the probation report dated 11 July 2013. The First-tier Tribunal judge identified and considered the documents that had been provided in support of the appellant's appeal and made reference to the statements from the appellant and his wife as well as the oral evidence they gave. The judge then set out the legal framework and relevant authorities and made her findings.

6. At paragraph 68 *et seq* of her decision the judge found that the explanation given by the appellant in his oral evidence relating to his involvement in the offence was different to any account he had previously given. In essence, the appellant claimed that he had been coerced into bringing the cocaine to the UK by a person who was formerly a business partner or friend of his brother in Nigeria. The appellant claimed that his brother had been killed by this person in October 2010 (there was no documentary evidence in support of this assertion). The appellant had been contacted by this person who pressurised him in relation to money his brother was said to have owed. The appellant described how he was threatened with death unless he swallow the drugs and took them across the border and into the UK. The

judge noted that this account had only been alluded to in the briefest of terms in the probation report. The judge concluded that the appellant was effectively trying to run an appeal against his conviction. The judge concluded that the account presented by the appellant was an attempt to absolve him of culpability and to diminish his responsibility for the criminal offence.

7. The judge then turned to the legal framework and the question of whether the appellant posed a genuine, present and sufficiently serious threat to society. At paragraph 81(ii) the judge stated:

> "I do not consider that there was a shred of evidence to show that the Appellant had been the vulnerable party in the story, rather that the background was financial gain, plainly and simply his financial gain, and for a mature educated man of 46 years entirely absent of any humane or practical regard for the consequences of his actions not only upon members of the public but also his three young children. Notwithstanding it appeared that it was his first offence, the offender manager acknowledging that he had not had information concerning the Appellant's history in Germany, having regard to what I found to be essentially his lack of remorse and responsibility for his criminal conduct, against a background of a real lack of information from him concerning his financial and personal circumstances in the UK and his conduct during his period on licence, of which I found that there was shown real risk of harm if facing financial and like difficulties."

The judge concluded that the appellant, by his conduct and explanation at the hearing, did represent a genuine, present and sufficiently serious threat to the fundamental interests of society.

8. The judge went on to consider the issue of proportionality and concluded, having holistic regard to her findings and to the evidence presented to her, that the decision to remove the appellant was in accordance with the EEA Regulations and was lawful.

9. The judge then briefly considered (at paragraph 83) the Article 8 aspect of the claim by making reference to her earlier findings and the decision in *Razgar* [2004] UKHL 27. The judge concluded that the decision to deport the appellant did not breach Article 8 and dismissed the appeal.

The grounds of appeal to the Upper Tribunal

10. The grounds submitted that the First-tier Tribunal judge failed to make a definitive finding in relation to whether there was a present risk of re-offending. This was relevant to whether the appellant posed a genuine, present and sufficiently serious threat. The basis of this ground stems from a probation report which concluded that the appellant was at low risk of serious harm. The grounds contended, with particular reference to the last sentence in paragraph 81(ii) as replicated above, that it

was unclear whether the judge was making a finding of risk of harm at the date the appellant was sentenced or at the date of the hearing and it was difficult to see how the judge could have arrived at a conclusion opposite to that of the probation service.

11. A second ground contended that the judge was not entitled to question the appellant's culpability for his past offending. This was with reference to paragraph 76 of the First-tier Tribunal's decision. It was submitted that, in effect, the appellant was being punished twice.

12. The third ground briefly stated was that the judge's Article 8 consideration was insufficient as a result of the aforementioned errors.

The grant of permission

13. Permission was granted by Upper Tribunal Judge Smith. She stated:

> "The main complaint in the grounds relates to the judge's finding that the appellant is a 'genuine, present and sufficiently serious threat' to the UK. In finding that he is at [81](ii) of the decision it is arguable that the judge has erred in failing to take into account the OASys Report. Although the judge has considered that report at paragraphs [6] to [14] it is arguable that she has failed to make any findings about it, whether she agrees with it and to explain how that report fits into her assessment at paragraph [81] and/or why she was departing from the findings of that report as to risk."

Upper Tribunal Judge Smith was less impressed by the other two grounds but nevertheless granted permission on all grounds.

The error of law hearing

14. At the outset of the hearing Mr Read sought to amend his grounds of appeal. He contended that the probation document before the judge was not in fact an OASys Report but was a normal probation service report prepared on behalf of the Home Office. It was contended that the judge mistakenly relied on that report as an OASys Report and that this demonstrated a degree of carelessness which infected her assessment. It was further contended that the judge inappropriately drew an adverse inference against the appellant on the basis that he failed to provide an up-to-date report when it was the duty of the respondent to provide the OASys Report. The application was resisted by Mr Avery.

15. I refused the application to amend the grounds. The application was made at the very last minute. There was no reasonable explanation as to why the challenge could not have been made at an earlier time. Moreover, this was a point that could have been raised at the appeal hearing before the First-tier Tribunal. It was not raised, nor was it raised in the Grounds of Appeal to the Upper Tribunal. In any event, regardless of the nomenclature of the report, it was clear that the judge was entitled

to rely on its contents. Nor was there anything preventing the Applicant from commissioning an independent probation report if he so wished.

16. Mr Read expanded upon the existing substantive grounds. He submitted that the First-tier Tribunal failed to make a clear finding in respect of any risk of recidivism. It was submitted that there was no assessment of the actual risk posed by the appellant and no reasons were given by the judge for departing from the conclusions as to risk reached in the probation report. Mr Read sought to rely on an unreported Upper Tribunal decision but I was not satisfied that there was any point of principle contained in that decision which would have assisted the Tribunal and, as Mr Read accepted, he sought to adduce the decision for illustrative purposes. Nor did he comply with the Practice Direction for the citation of unreported decisions. Mr Read submitted that the issue in play was whether justice had been seen to be done. He additionally submitted that the judge's reference to 'financial and personal circumstances' at paragraph 81(ii) failed to take into account the appellant's actual circumstances. It was submitted that the appellant had not offended whilst he was on licence and that he entered employment and continued to be in employment up to the date of the hearing.

17. Mr Read then moved on to his Article 8 submissions. He submitted that the judge failed to give consideration to section 55 of the Borders, Citizenship and Immigration Act, that there had been no consideration of the requisite case law, and that the judge was wrong in her proportionality assessment.

18. Mr Avery gave a brief reply and, in turn, Mr Read submitted that the judge was not entitled to go behind the sentencing judge's comments in respect of remorse or the seriousness of the offending.

Discussion

19. It is clear from the First-tier Tribunal's decision at paragraph 68 onwards that the judge attached significant weight to the explanation advanced by the appellant at his appeal hearing for the commission of his offence. The judge simply did not believe the story that had been advanced by the appellant and, in paragraphs 68 to 80, she gave a number of reasons for disbelieving that account. Her conclusion was one she was rationally entitled to reach for the reasons advanced. No challenge has been mounted to this aspect of the decision.

20. The judge had regard to the probation report. This is clear from paragraphs 6 to 14 of the decision. There are further references throughout the decision (e.g. paragraphs 67 and 68) to the probation report. This suggests the judge did have the probation report in mind. I accept that the judge does not make further explicit reference to the risk assessment in the probation report but I am satisfied that the reasoning in paragraph 81(ii) is nevertheless sustainable. Based on the appellant's oral evidence the judge was clearly entitled to find that he was not in fact remorseful and deflected responsibility for his serious crime. The references in section 82(ii) to 'financial

difficulties' reflect the probation report as detailed in paragraphs 6, 10, 56 and 79 of the decision. The probation report indicated that risk factors would include situations where the appellant would be in the community and unemployed and experiencing financial difficulties. The probation report observed that any significant reduction in the appellant's income may increase the risk of offending behaviour.

21. At paragraph 56 of the decision the judge acknowledged the evidence relating to employment but found there was little in the way of documentary evidence to substantiate those claims. At paragraph 79 the judge again made reference to the absence of cogent evidence provided by or on behalf of the appellant concerning, amongst other things, his employment and his wife's employment. Reference was made to a single letter from an agency dated 16 April 2015 confirming the appellant's employment with them but otherwise not specifying that employment.

22. I am satisfied that the judge was entitled to conclude, given the absence of cogent evidence of the appellant's financial and personal circumstances and his attempt to diminish his responsibility for his offence, that he did pose a real risk of harm to the public. The final sentence of paragraph 81(ii) is not, regrettably, an example of the clearest reasoning. I am nevertheless satisfied that the reference to the word "found", in the past tense, can only rationally mean "find". The reference to conduct during the period of licence contained in 81(ii) must indicate that the judge was not considering the past risk but the present risk. I additionally have regard to the Tribunal case of *Vasconcelos (risk – rehabilitation)* [2013] UKUT 00378 (IAC) which indicates that a judge is not bound by conclusions in a probation report if her overall assessment of the evidence supports the conclusion of continued risk. A judge is entitled to consider the evidence before her in a holistic manner and I am satisfied that this judge was entitled to attach significant weight to the appellant's oral evidence and the limited amount of documentary evidence available to her in reaching her overall assessment. For these reasons I am not satisfied that the ground of appeal is made out.

23. The second ground of appeal takes issue with the judge's assessment of the appellant's culpability. I am satisfied that the judge was entitled to consider whether the appellant accepts responsibility for the previous offending. If an individual seeks to reduce their culpability this is a possible indication that they are not remorseful or that their behaviour which led to criminality has not changed. Confronting and accepting previous criminality is directly relevant to the question of present risk and, on the evidence before her, the judge was rationally entitled to her conclusion.

24. With respect to ground 3, for the reasons that I have already given, I am satisfied that the Article 8 assessment is not coloured by the claimed errors of law in grounds 1 and 2. At paragraph 81(iv) the judge clearly took account of all relevant circumstances in the proportionality assessment within the 2006 Regulations. The judge took into account the period of time that the appellant and his family had lived in the United Kingdom. The judge considered the lack of evidence relating to the assertion that the wife had suffered ill-health during the appellant's incarceration,

and she noted the relative ease with which the family could continue to visit and communicate. The judge considered the issue of rehabilitation and made express reference to the duty contained in section 55. The judge's assessment of proportionality under Article 8 was brief but it was made with express reference to her earlier assessment under paragraph 81(iv). Outside of the 2006 Regulations, having received a custodial sentence of more than four years, the appellant would need to demonstrate very compelling circumstances over and above those in paragraphs 399 and 399A of the Immigration Rules. I am entirely satisfied that the appellant had been unable to demonstrate the existence of very compelling circumstances based on the factual findings of the judge. In these circumstances the brief analysis of Article 8 does not disclose any material error of law. I therefore dismiss the appeal.

Notice of Decision

The appeal is dismissed under the 2006 EEA Regulations
The appeal is dismissed on human rights grounds

No anonymity direction is made.

12 May 2016

Signed Date
Upper Tribunal Judge Blum

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

12 May 2016

Signed Date
Upper Tribunal Judge Blum