Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00008/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons Promulgated**
On 7th January 2019	**On 15th February 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AF
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr J McGirr, Senior Home Office Presenting Officer
For the Respondent: Ms A Broome, Solicitor

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Albania, born in 1980. He arrived illegally in the UK on 4 January 2000 and claimed asylum. That asylum claim was refused and a subsequent appeal was dismissed. He was removed to Albania on 2 September 2003 but on an unknown date re-entered and claimed asylum on 25 February 2004. The claim was again refused and he was removed to Albania on 4 March 2004.

3. On 2 September 2004 he was encountered at Newcastle Airport whereupon he presented an Italian identity card and again claimed asylum but withdrew the claim. On 6 September 2004 he was again removed to Albania. He was next encountered on

22 September 2012 in an HGV by a custom's officer at Dover and was removed to Albania, for the fourth time, on 2 October 2012.

4. On 22 May 2015 in the Crown Court at Birmingham he was convicted of conspiracy to supply Class A drugs and received a sentence of imprisonment which was reduced on appeal on 5 December 2016 to three years and nine months' imprisonment.

5. The respondent accepts that the appellant is a family member of an EEA national. A decision to deport him pursuant to the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") was made on 22 December 2016.

6. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge V. A. Cox ("the FtJ") on 7 February 2018 whereby the appeal was allowed under the EEA Regulations. Aside from appealing under the EEA Regulations against the deportation decision the appellant advanced an appeal on asylum grounds. However, the FtJ dismissed that appeal. There is no cross-appeal on behalf of the appellant in relation to that matter.

7. The respondent's application for permission to appeal to the Upper Tribunal was in fact out of time. There was no application for an extension of time and there was no explanation for the delay in making the application. Nevertheless, time was extended by the Upper Tribunal Judge who granted permission.

8. No point was taken on behalf of the appellant in relation to that issue, my having raised it with the parties at the hearing. Mr McGirr explained that it appeared that the FtJ's decision on the appeal was sent to the Home Office in Birmingham whereas it should have been sent to Fleetbank House in London and, it was suggested, the application for permission was in fact lodged on the 14th day after it was received at Fleetbank House.

9. In the circumstances, it is not necessary to say anything further in relation to the issue of the grant of permission.

10. I summarise the grounds of appeal and the parties' submissions.

The grounds and submissions

11. The respondent relies on the decision in *Kamki v Secretary of State for the Home Department* [2017] EWCA Civ 1715 on the issue of reoffending and the seriousness of the consequences if there is such reoffending. Reference is made in the grounds to the OASys report in which the appellant admits to being easily influenced. Thus, it is suggested that he would be tempted to reoffend if presented with the same chances and the consequences would be very serious indeed, as reflected in the sentencing judge's remarks.

12. So far as the sentencing remarks are concerned, those showed that the appellant played a significant role in what would otherwise have been a successful supply of a large quantity of heroin into Birmingham, had the police not intervened. The

appellant was to receive £163,500 from the offence and if he were to have financial problems the temptation would still exist.

13. The grounds contend that the respondent's decision was "entirely proportionate". The appellant's residence in the UK had been mostly illegal and he had not demonstrated any integration into the UK. His immigration history reflected a lack of regard for UK law by re-entering on numerous occasions illegally and using false documents. There was no evidence of rehabilitation. The appellant was only entitled to the lowest level of protection against removal under the EEA Regulations. Because of the international organised crime element the respondent's decision "is definitely proportional" for someone with no children, no permanent right of residence and who is not integrated into the UK.

14. Although the FtJ considered that there was integration, he had failed to make a holistic assessment of the time spent in the UK by the appellant, it is said. There was no "qualitative assessment accounting for the appellant's behaviour, conduct and the substance of his residency".

15. The FtJ had referred to the appellant having "enhanced protection" as an EEA national. However, it had already been stated by the FtJ that the appellant had not acquired a permanent right of residence. Thus, it was not clear what the FtJ meant by enhanced protection. It was clear that he had not acquired a permanent right of residence.

16. Although the FtJ found that the appellant had a better chance of rehabilitation in the UK, in *MC (Essa principles recast) Portugal* [2015] UKUT 00520 (IAC) it states that substantial weight should not be given to the prospects of rehabilitation when the EEA national has not acquired permanent residence. That was the situation here.

17. In his submissions Mr McGirr relied on the written grounds. He referred me to various aspects of the OASys report in support of the submission that the FtJ had not considered that report in detail. Thus, the OASys report showed on page 12 that it was the appellant's lack of finances that prompted his involvement in the offence, he having expected to have been paid £163,500. On page 14 of the report it referred to his being easily influenced, having significant problems in terms of recklessness and risk-taking behaviour and that his lifestyle and associates were linked to offending behaviour. The report also referred on page 18 to his having some problems with the ability to recognise problems, and significant problems in problem-solving skills and awareness of consequences. It was submitted that the overall picture from the OASys report was that the appellant has poor judgement, is easily influenced and mixes in a criminal environment. The FtJ had failed to pay sufficient regard to those aspects of the report.

18. The appellant had become a police informant but that had resulted in a reduction in his sentence. He had received preferential conditions and treatment in prison.

19. So far as integration is concerned, the FtJ had found that after his marriage he had started integrating, despite his poor immigration history. However, that was during the time he was involved in a serious criminal activity. The architect of the offending

appears to have been in prison and the appellant would have known that dealing with such a person would mean that he was not integrating. The FtJ had failed to take that into account.

20. It was submitted that in allowing the appeal the FtJ did not take a rational approach to all the evidence and misinterpreted the OASys report. Although the report states that the appellant is at a low risk of reoffending, low risk is still a risk.

21. In her submissions Ms Broome referred me to various aspects of the FtJ's decision in support of the argument that the FtJ had considered all the relevant aspects of the appellant's circumstances. At [94] the FtJ had pointed out that there was no evidence from the respondent to refute the assessment of low risk of reoffending as set out in the OASys report. The FtJ referred at [97] to there having been no breach of the appellant's licence, and he dealt with integration from [86].

Assessment and Conclusions

22. It was agreed by the parties before the FtJ, and accepted by him, that the appellant had received a reduction in his sentence because he had been a police informant. Nothing specific turns on that issue, although it is part of the background to the appeal in the sense that it helps to explain the sentence that was imposed on the appellant which was originally a sentence of six years and nine months' imprisonment, varied on appeal to three years and nine months.

23. It is also worth pointing out that in relation to his assessment of the asylum ground of appeal the FtJ concluded that the appellant's claim was not credible, and that it was "littered with incredible and implausible suggestions and supposition". At [67] he said that the appellant's account of a fear of persecution is "incredible and is a fabrication designed to gain access to the United Kingdom". I mention those matters because they indicate that the FtJ did not blindly accept everything that the appellant asserted.

24. As regards the seriousness of the offence, he said at [49] that the appellant was a trusted and reasonably senior member of the criminal organisation which was involved in the offence. He made those remarks in the context of the appellant's claim that he would be at risk on return to Albania as a police informant.

25. In the respondent's grounds it states that "it is not clear what is meant by his finding…[the] appellant does not have any enhanced protection as an EEA national". That appears to relate to the FtJ having said at [112] that the appellant "can claim the enhanced protection against deportation as an EEA national". That is the penultimate paragraph of his assessment of the issues before his stating that the appeal under the EEA Regulations was allowed.

26. In isolation, one can see that what the FtJ said there could be taken to mean that he found that the appellant had protection against deportation other than the 'base level' protection, that is that he has acquired a permanent right of residence meaning that he could only be deported on serious grounds of public policy or public security, or that he had protection against deportation because of residence in the UK for a

period of at least ten years, thus preventing his deportation on anything other than imperative grounds of public security.

27. However, it is abundantly plain from the FtJ's decision that his reference to "enhanced protection" was a reference to the protection afforded to an EEA national or family member of the same which extends beyond the protections that would be afforded to a non-EEA national or family member. So much is plain from, for example, [70] where the FtJ said that the EEA Regulations means that a different level of protection exists for EEA nationals and their family members and that the appellant is not treated as a "foreign criminal" (within the meaning of s.117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")) and that the assessment of threat must be as in the EEA Regulations.

28. Similarly, it is evident that the FtJ assessed the level of protection afforded to the appellant against deportation under the EEA Regulations entirely correctly. At [12] he recorded that it was agreed on behalf of the appellant that his wife had not achieved five years' continuous residence such as to acquire a permanent right of residence, albeit that she was a qualified person. Again, at [70] he said that it was agreed before him that the appellant's wife had not exercised her Treaty rights for a continuous period of five years and thus the appellant had not acquired a permanent right of residence. At [72] he said that he must consider if the appellant's conduct satisfied the relevant public policy criteria "not the more stringent one applicable to those with a right of permanent residence".

29. Accordingly, there is no merit in the contention that the FtJ misunderstood the basis upon which the appellant was able to resist deportation under the EEA Regulations.

30. The argument that the FtJ failed to undertake a proper appraisal of the risk of the appellant's reoffending is also without merit. At [71] he said that even a low risk can constitute a "present threat" especially if the consequence of the offending could be serious. That precisely reflects the proposition advanced in the respondent's grounds' in reliance on the decision in *Kamki*. Furthermore, at [102] the FtJ said that when he was looking at reoffending he must also have in mind the seriousness of the consequences if he did reoffend, there referring directly to *Kamki*. He also said that "[d]rug taking (sic) is not victimless as the Respondent rightly sets out. He was there no doubt referring to drug *supplying* and agreeing with what is said by the respondent in the decision letter about the very harmful effects of drug supplying.

31. It is further apparent that the FtJ undertook a careful assessment of the extent of the risk of reoffending. At [88] he said that the appellant had shown a cavalier and unacceptable attitude to rules and boundaries of UK society, and that it did not matter to him whether or not he had the right to enter the UK. He said that he had a history of entering as he pleased, then working unlawfully and then deciding to commit crime when he needed money. He referred to the amount of £163,500 that the appellant was to be paid for his part in the criminal activity.

32. At [90] the FtJ said, correctly, that the threat that the appellant posed must be serious enough to effect one of the fundamental interests of society, and that the threat needed to be sufficiently serious. At [89] he said that he had to consider the impact of

the offence and the significant number of victims affected by the "importation" of Class A drugs. He went on to conclude that that was a matter that was plainly contrary to the fundamental interest of maintaining public order, preventing social harm and protecting the public.

33. He referred to the burden being on the respondent to prove the level of threat and that it was genuine, present and sufficiently serious. At [94] he said that the respondent did not provide any satisfactory evidence to refute the assessment of risk in the OASys report, no updating information having been provided. It is to be noted that the OASys report indicated that the risk of reoffending was low.

34. Further in relation to the OASys report he said at [98] that it is not a wholly positive document. He also noted that it identified some of the appellant's answers as indicating that some aspects of the assessment were negative. He referred in that same paragraph to his problem-solving skills scoring "highly against him". He referred to the appellant's acceptance of the motivation for offending, his propensity to be depressed and bored. At [99] the FtJ said that a full consideration of the OASys report showed an acceptance of some weaknesses by the appellant. He further stated that the fact that he was "assessed as low risk" did not automatically entitle him to be considered as no risk or as someone that does not present a present threat. That was but part of the picture to be considered, he said.

35. It was not necessary for the FtJ to refer to every aspect of the OASys report which touched on the issue of the risk of reoffending. Quite apart from the fact that a judge does not need to refer to every piece of evidence, all the matters to which I was referred on behalf of the respondent in submissions were part of the OASys assessment which culminated in a conclusion that the risk of reoffending was low. In any event, the FtJ plainly did consider the OASys report as is evident from his summary of aspects of it. Accordingly, I do not accept that the FtJ's conclusions were flawed for want of consideration, or correct appreciation of, the import of the OASys report. He referred to that report at [83], [94], [95], [98], [99] and [103].

36. Similarly, the FtJ undertook a detailed assessment of the issue of integration. At [85] he correctly identified that it was not possible to integrate into UK society whilst imprisoned. In the same paragraph he concluded that the appellant had, to his mid-30's, led a life that involved him simply doing as he wished with an almost total disregard for others, but that he was a family member of an EEA citizen once they married and he had thereafter been able to demonstrate a period of integration. That was a conclusion that he developed from [86], although rejecting any suggestion that he could have integrated whilst he was offending.

37. At [87] he referred to letters from some friends about his place in their lives in UK society, stating that he attached "some small amount of weight" to them.

38. Thus, it is apparent that the FtJ recognised the limitations on the extent of the appellant's integration but did not rule out that there was some degree of integration, for the reasons he explained.

39. At [104] he concluded that although the appellant had been convicted of a serious offence, he had good prospects of rehabilitation and that such prospects are poor in the less regulated society in Albania where corruption was a concern. He took into account in that paragraph that there was no real risk of reoffending. The only point made on behalf of the respondent in the grounds in relation to the rehabilitation issue concerns the lack of weight to be afforded to the prospects of rehabilitation when a person has not acquired a permanent right of residence as in the case of this appellant. However, there is nothing to indicate that the FtJ accorded substantial or disproportionate weight to the issue of rehabilitation.

40. So far as proportionality is concerned, the respondent's grounds really do demonstrate that the complaint about the FtJ's decision is nothing more than a disagreement with his conclusions. Thus, it is asserted that the respondent considered her decision "entirely proportionate" and that "the respondent's decision is definitely proportional".

41. At [72] the FtJ recognised that there needed to an assessment of the proportionality of the decision and at [74] that he needed to balance "a number of factors" in coming to his decision. At [75] he again reminded himself that the decision must be proportionate and based on the facts of the case and the appellant's conduct, and that his criminal past does not in itself justify the decision.

42. I cannot see that there is any factor that the FtJ failed to take into account in his decision. The express or implied suggestion that he had not fully considered the seriousness of the offence is simply not borne out, the FtJ having referred on several occasions to the seriousness of the appellant's criminality and his disregard for UK law in terms of his very poor immigration history.

43. Quite apart from anything else, once the FtJ concluded that the appellant did not represent a genuine and present threat, i.e. that he did not present as other than a low risk of reoffending, but recognising that a low risk was still a risk, the outcome of the appeal could have been nothing other than a decision in the appellant's favour. As I have already indicated, there is no legal error in the FtJ's assessment of this issue.

44. It was entirely accurate for the FtJ to point out the appellant's cavalier and unacceptable attitude to rules and boundaries of UK society, and that it did not matter to him whether or not he had the right to enter the UK, entering as he pleased, then working unlawfully and then deciding to commit crime when he needed money. But for the difference between the deportation regimes that apply to EEA citizens or family members of EEA citizens and that which applies to non-EEA citizens or family members, it is very doubtful that this appellant would have succeeded in an appeal against deportation. The FtJ's decision was made within the legal framework that applied to this appellant.

45. There is no error of law in the FtJ's decision. His decision to allow the appeal under the EEA Regulations must therefore stand.

Decision

46. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to allow the appeal stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

I make an anonymity order because of what is said about the appellant having been a police informant. Therefore, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek Date: 08/02/2019