**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00140/2017

**THE IMMIGRATION ACTS**

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| **Heard at Field House** | **Decision & Reasons Promulgated** |
| **On 24 April 2019** | **On 10 July 2019** |
| **Ex tempore judgment** | |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**YANNECK [N]**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Ms S Ferguson, Counsel
For the Respondent: Mr B Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. Although the appellant in these proceedings is the Secretary of State, for the sake of clarity I continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of France born in August 1991. A decision was made on 20 February 2017 to make a deportation order against him in the light of his criminal offending. The appellant appealed against that decision and his appeal came before the First-tier Tribunal at a hearing on 4 June 2018. The appeal was allowed, both

with reference to the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) and with reference to Article 8 of the ECHR.

3. I start by summarising the judge's decision, the grounds of appeal and submissions, and then give my reasons for concluding that the decision is marred by error of law, such as to require it to be set aside.

4. By way of brief background, the appellant is said to have entered the UK in or about 2009. His convictions occurred between 20 May 2014 and 2 September 2016. In May 2014 he was convicted of theft (as an employee) and was made the subject of a community order. That was subsequently varied on 17 September 2014 because of his failure to comply with the community order and he was given a 16 week sentence of imprisonment, suspended for two years.

5. On 17 March 2016 he was convicted of criminal damage, using a controlled article for fraud, common assault and commission of an offence during the operational period of a suspended sentence. He was given a 10 week prison sentence and ordered to pay £1,995.00 in compensation. On 16 June 2016 he was convicted of theft by way of shoplifting and given a community order and a three month curfew requirement. He was convicted of a similar offence on 13 July 2016 and received a fine and ordered to pay costs.

6. The most serious offence he was convicted of was on 2 September 2016 at the Crown Court sitting at Southwark; two counts of burglary and theft, receiving a sentence of two years and nine months' imprisonment with the previous suspended sentences activated. It was that offending behaviour that led the respondent to make the decision to deport him.

7. After reciting some of the procedural history of the appeal the judge summarised the respondent's case in relation to the reasons for deportation and set out the evidence that he heard from the appellant and his partner. That summary included the explanations given by the appellant for his offending. He then summarised the submissions on behalf of the parties and gave his conclusions.

8. At para 30 he concluded that the appellant was not entitled to a permanent right of residence. His reasons included that there was insufficient evidence to show that the appellant had been engaged in qualifying activity because the record of his economic activity was "so patchy". He accepted that the appellant had been in the UK since 2009 and had started a family. The appellant and his partner have three children born on 23 February 2011, 11 December 2012 and 11 July 2015, respectively. The judge concluded that the appellant had not in fact established himself as an employee which is the basis upon which it was contended that he was entitled to a permanent right of residence.

9. At para 32 he concluded that the appellant was in the circumstances entitled only to the lowest level of protection. He referred to regulation 27 of the EEA Regulations and summarised its effect. He then referred to the need to make an assessment of the appellant in relation to his previous offending and how that may or may not indicate

that he represents "a genuine, present and sufficiently serious threat". At para 33 he gave his assessment of the appellant and his evidence. He referred to the appellant's background as a semi-professional goalkeeper in France, but that his expectations or hopes of succeeding in that regard in the UK were dashed by his offending.

10. He concluded at para 34 that the appellant was motivated to offend by a need to raise money. He further concluded that the appellant as a young father with responsibilities was unable to deal with the fact of not having made a success of a career in football in a mature way. He then said this:

> "I give him the benefit there, of concluding that the offending was not based on some deep-rooted, recidivist trend, but as the result of poor decision-making at a time when he was struggling".

11. He said at para 35 that that did not reflect well on him in that he was not able to share this experience with his partner or seek help. He also said that it did not reflect well on the appellant that it was a specious claim to say that he had been particularly affected by the illness of his partner's mother. He concluded that there were certain elements of self-denial by the appellant in relation to his own failings. He did nevertheless conclude that the appellant had had a very salutary experience of being imprisoned.

12. He found at para 36 that the appellant's persistent pattern of offending over a relatively short period of time was linked to his particular situation at the time. He referred very favourably to the appellant's partner, nevertheless finding that she was unable to prevent him from offending or reoffending, but concluding that she presented as a potentially very solid force in his life.

13. In para 37 the judge said that he was not satisfied that it was necessary for him to be removed in accordance with regulation 20(7). He found that it was not a proportionate decision to remove him having regard to the factors "as set out above". He said that that included considering his personal conduct and whether it demonstrated that he was a real risk to society. He concluded by saying that he was not satisfied that his previous offending was indicative of him remaining a sufficiently serious threat because he was satisfied that his risk of reoffending was relatively low.

14. In the next paragraph the judge turned to consider the OASys report, but significantly in my view having already decided that the appellant was at relatively low risk of reoffending. It is true to say that he had referred to the OASys report earlier on in his decision but only in the context of summarising the respondent's decision.

15. Turning to the OASys report at para 38 he said that in one part of the report his risk of reoffending was assessed as being a low. In another category it was again asserted, based on his previous offending, that his risk of reoffending was high. The judge said that he had taken those factors into account, but had also based his

decision on his own analysis of the explanation given by the appellant during his evidence.

16. At para 39 he said, "I therefore do not consider that, in this case, the OASys reports are absolutely indicative of proven capacity to re-offend in the future."

17. He then turned to Article 8 from para 40, concluding that the appeal should succeed on Article 8 grounds as well. He took into account a letter to which he had previously referred, from the Montessori School in relation to one or more of the children. He found that the appellant's partner's evidence was "compelling" in its explanation as to how the family's life would be adversely affected without the presence of the appellant. He concluded that it would be unduly harsh for the appellant's partner and the children to reside in the UK without him, "notwithstanding his criminal record committed whilst he was a father and should have been exercising responsibilities towards his children".

18. He then reaffirmed the earlier conclusion that the appellant had satisfied him that he now sees that his future cannot be in offending but in relation to being a good father. He found that all the indications were that he is moving towards the next stage of adult life, which is to be a responsible father, and thus his removal would be unduly harsh on the partner and the children.

*The grounds and submissions*

19. I now turn to summarise the Secretary of State's grounds of appeal in relation to the decision and the parties' submissions. The judge's decision is criticised on the basis that the letter from the Montessori School did not indicate that the author of the letter was given the full picture in relation to the appellant's offending. It is argued that he did not refer to the part of the letter which states that the appellant's partner had not told the children the full story as to the circumstances resulting in the appellant's departure, nor was it evident that the author of the letter was aware of the appellant's criminality, or on what basis his departure was described as an injustice. There are in fact two letters from the Montessori School: one dated January 2018 and the other dated September 2016, but the point made in the grounds relates to one or both of those letters.

20. Next, the judge's decision is criticised on the basis of its assessment of the risk of reoffending, as set out in the OASys report. In essence it is argued that the import of the OASys report was not fully appreciated or taken into account by him. It is also argued that the judge erred in relying on the evidence of the appellant, a person found guilty of crimes of dishonesty.

21. Further, it is argued that he failed to have regard to Schedule 1 of the EEA Regulations which he was required to do by the Regulations themselves. As a criticism in relation to his assessment of Article 8 the decision in *MM (Uganda)* [2016] EWCA Civ 617 is relied on in the grounds although in submissions it was conceded that that decision has now been overtaken by the decision of the Supreme Court in *KO (Nigeria) & Ors v Secretary of State for the Home Department* [2018] UKSC 53.

22. In his submissions Mr Bramble relied on the grounds, and referred to various aspects of the judge's decision.

23. For her part Ms Ferguson submitted that there was no material error of law in the decision. She referred to various aspects of the judge's decision in order to make good the submission that he had in fact taken into account the OASys report. For example, it was pointed out that the report is referred to at paras 12 and 38 of the judge's decision in the summary of the respondent's decision. It was submitted therefore that the judge plainly did appreciate the full import of the report and had taken it into account. It was also pointed out that in at least three places he did refer to the report's stating that there was a high risk of reoffending.

24. The grounds were wrong to contend that the judge was not entitled to take into account the evidence of someone convicted of offences of dishonesty. It was up to the judge to decide how much weight he attached to the evidence given by the appellant. I was further referred to the aspects of the judge's decision where said he was impressed with the evidence of the appellant's partner. The overarching point made on behalf of the appellant was that the judge was entitled to assess the risk of reoffending as being low on the basis of the evidence of both the appellant and his partner, he having been particularly impressed with his partner's evidence.

25. As regards schedule 1 of the EEA Regulations, I was referred to para 37 of the judge's decision. It was submitted that, in effect, the judge had taken into account the schedule 1 considerations. One of those considerations (schedule 1 paragraph 7(k)) is the best interests of the children, which the judge had assessed.

26. As regards Article 8, it was submitted that the judge was entitled to conclude that it would be unduly harsh for the appellant to be separated from his children. He gave reasons for coming to those conclusions at paras 41 and 42.

27. In addition, he was entitled to take into account the information provided in the Montessori School report. It was submitted that the evidence from the appellant's partner was that she had always been very candid about the appellant's offending, in particular with the school.

28. In reply, Mr Bramble submitted that para 37 could not in any sense be considered to be a comprehensive catch-all paragraph that dealt with schedule 1. Although in that paragraph the judge had referred to the factors he had previously set out, it was submitted that the analysis was significantly lacking (my words, not Mr Bramble's). It was further reiterated that there was in fact no consideration of schedule 1.

29. I referred the parties to two decisions of the Upper Tribunal: *Munday (EEA decision: grounds of appeal)* [2019] UKUT 91(IAC) and *Badewa (ss 117A-D and EEA Regulations)* [2015] UKUT 329 (IAC) in relation to the interaction between the EEA Regulations and Article 8. However, I also expressed the view to the parties that for present purposes those decisions were not relevant in terms of whether the decision was marred by error of law. In those circumstances I did not invite submissions from the parties in relation to those cases.

*Conclusions*

30. As I indicated at the outset, I am satisfied that the judge's decision must be set aside for error of law. Under regulation 27 of the EEA Regulations the personal conduct of the person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, taking into account the past conduct of the person and that the threat does not need to be imminent.

31. It is true to say that the judge's decision does assess the issue of whether the appellant represents a risk of reoffending, a fundamental part of the assessment that he needed to undertake. However, I am satisfied that in undertaking that assessment he erred in law. I have referred already to paragraph 37 of his decision. He concluded that he was not satisfied that the previous offending in this case was indicative of him remaining a sufficiently serious threat because the risk of reoffending "is relatively low". In coming to that view the judge at that point had not assessed the import of the OASys report.

32. He did refer to the report at paragraph 38 but not in a way which was entirely clear and not in a way which fully reflected the assessments made in the OASys report. At page 10 of the report the risk of reoffending is said to be 59% within the first year of community sentence or discharge and 75% within two years. At page 36 the assessment of the risk of reoffending is said to be high overall in relation to those two 59% and 75% scores. It was said to be medium in terms of non-violent reoffending, 49% and 64% respectively, but it was only in relation to the violent type of reoffending that the assessment was said to be low.

33. In my judgement the judge's decision does not properly reflect those assessments in the OASys report. Furthermore, I am not satisfied that in assessing the appellant's risk of reoffending as being low the judge explained why he concluded that the assessment made in the OASys report, a comprehensive document of 40 pages, is not to be preferred over the oral evidence that he heard.

34. If the respondent's grounds of appeal in relation to the appellant's dishonest conduct are to be taken to mean that his evidence could not be relied on, I reject that contention. I agree with Ms Ferguson that it was up to the judge to make an assessment of the appellant's evidence, notwithstanding his convictions for dishonesty. If the grounds of appeal are intended to mean that an individual in the appellant's circumstances could never be relied on to tell the truth, I reject that contention also.

35. However, where an individual has a record of offending for offences of dishonesty, that is a factor that needs to be taken into account in an assessment of his evidence. That point it seems to me requires careful consideration in a case where there is an issue as to the risk of reoffending and in that sense, or in that context, I consider that there is merit in the respondent's argument as to whether there was a proper assessment of the risk of reoffending as set out in the OASys report. All those factors combine to lead to the conclusion that the judge's assessment of the risk of reoffending was flawed, requiring the decision to be set aside.

36. There is a further factor however, which again alone, but certainly in combination with the issue to which I have already referred, satisfies me that the judge's decision cannot stand. That is the lack of reference to the considerations set out in schedule 1. Regulation 27(8) states that:

> "A court or tribunal considering whether the requirements of this regulation are met must (in particular) have regard to the considerations contained in Schedule 1 (considerations of public policy, public security and the fundamental interests of society etc.)".

To repeat, the considerations in regulation 27 include, amongst other things, the issue of protecting the fundamental interests of society and the public policy considerations to be taken into account.

37. The matters set out at Schedule 1 are comprehensive. At paragraph 7 of Schedule 1 there is a detailed statement of the issues to be taken into account in assessing the fundamental interests of society. I need only refer to a few of them. One is maintaining public order; another is preventing social harm. Another is maintaining public confidence in the ability of the relevant authorities to take action to remove an individual. Likewise, one of the factors is combating the effects of persistent offending, protecting the rights and freedoms of others and protecting the public. Not all of those matters are of equal weight in an appeal of this sort with this appellant's background, but they are factors that the judge at least needed to advert to, and in my judgement expressly so. That consideration of schedule 1 was lacking in this case.

38. In those circumstances, notwithstanding the alternative consideration under Article 8, the decision as a whole needs to be set aside

39. In any event, looking at the judge's assessment of Article 8 as a separate matter, I am not satisfied that it represents a comprehensive assessment of the issue of undue harshness, even accepting the current position as set out by the Supreme Court in *KO (Nigeria)*. One of the factors that the judge needed to bear in mind is the issue of whether separation in itself was a sufficient basis from which to conclude that the appellant's deportation would be unduly harsh. The mere fact of separation in deportation cases is a common place. The assessment of Article 8 is itself therefore, flawed.

40. Thus the decision must be set aside in its entirety with no findings of fact preserved. I indicated to the parties that my preliminary view was that that the appeal should be remitted to the First-tier Tribunal for a hearing *de novo*, but that I would further reflect on that matter. Having given the matter further consideration, I am satisfied that the appropriate course is for the appeal to be remitted to the First-tier Tribunal to be heard before a judge other than First-tier Tribunal Judge Paul.

41. Ms Ferguson indicated that if the decision was set aside the issue of whether or not the appellant is entitled to a permanent right of residence is a matter that she would wish to reopen on the appellant's behalf. Given that no findings of fact are to be

preserved, I can see no reason as to why that course should not be open to the appellant.

*Decision*

42. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Paul, with no findings of fact preserved.

Upper Tribunal Judge Kopieczek 04/07/19