



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00649/2018

THE IMMIGRATION ACTS

Heard at Field House
On 18th February 2020

Decision & Reasons Promulgated
On 9th March 2020

Before

**THE HON. MRS JUSTICE A FOSTER
UPPER TRIBUNAL JUDGE LINDSLEY**

Between

**JOSEF DZUGA
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Chakmakjain, of Counsel, instructed by Iqbal Law Chambers

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Slovakia born in 1979. He arrived in the UK in March 1996 with his parents and siblings, and was included as a dependent on his father's asylum claim. This asylum claim did not succeed, but his mother's claim

(on which he was not a dependent) was successful and his father remained as his mother's dependent. In March 2001 he applied to remain as a spouse, the application was rejected but the application was resubmitted in February 2002 and he was granted exceptional leave to remain. Slovakia joined the EU on 1st May 2004. In 2004 he and his family were refused indefinite leave to remain under the family indefinite leave to remain exercise.

2. In May 2016 the appellant was convicted in the Crown Court of conspiracy to traffic persons into the UK for exploitation. He was sentenced to 6 years imprisonment and given a 10 year slavery and trafficking prevention order. On 8th July 2016 he was served with notice of intention to deport. He appeals under the Immigration (EEA) regulations 2016 against a decision to make a deportation order. His appeal was dismissed by First-tier Tribunal Judge Bart-Stewart in a determination promulgated on the 8th October 2019.
3. Permission to appeal was granted by Upper Tribunal Judge Smith on 27th November 2019 on the basis that it was arguable that the First-tier judge had erred in law in failing to recognise the high level of risk which applies to meet the imperative grounds threshold, although she observed that it is possible that this threshold does not apply and that the error is therefore not material.
4. As a preliminary issue we asked Mr Chakmakjain to explain why an anonymity order had been made by the First-tier Tribunal as it did not appear that there was any risk of serious harm if the appellant's name appeared on our decision in the usual way. Mr Chakmakjain did not argue that such an order was needed, although he pointed out that it was possible that the original order was made because the appellant has children and/or because his mother was granted asylum with his father (but not the appellant) as a dependent in 2002 prior to Slovakia being admitted to the European Union. There was no evidence before us of any family member having an on-going well founded fear of persecution. The names of the appellant's family members are all anonymised in this decision and there are no details of their historic asylum claims. The appellant does not live with his youngest child who remains a minor but only with his current partner and oldest child who is now an adult. No reasons were given why anonymity was required to protect these children. We conclude, applying the principles set out in Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC) that in the interests of open justice it is not appropriate to anonymise the appellant particularly given this is a deportation appeal resulting from the appellant's criminal conviction.

Submissions – Error of Law

5. In summary the appellant argues as follows. Firstly, the First-tier Tribunal found that the appellant could only be expelled from the UK on imperative grounds of public security, paragraph 72 of the decision, the Secretary of State having conceded that he had permanent residence. The test for imperative grounds requires evidence of a compelling risk to public security, with a threat of a

particularly high degree of seriousness. It is argued that whilst there are adverse findings in the decision regarding the appellant's offending there is no proper explanation as to how this test is met. Secondly it is argued that the decision of the First-tier Tribunal is not lawful as it fails to show that the decision is justified on the basis of the personal conduct of the appellant showing he represents a genuine, present and sufficiently serious threat to a fundamental interest of society; and thirdly it is argued that the deportation of the appellant is disproportionate and therefore unlawful. With respect to the examination of proportionality it is said that there is a wholesale and wrong application of the domestic deportation framework at Part 5A of the 2002 Act and a failure to consider material evidence going to discrimination and harassment of Roma in Slovakia; the findings of the criminal court; and medical evidence relating to the appellant. Within the proportionality consideration it is also argued that there was a failure to consider the best interests of the children as a primary consideration.

6. In summary the respondent argues that the First-tier Tribunal fully appreciated the high threshold set by the imperative grounds test and found that this was met by the circumstances of the appellant's offending. Mr Bramble argued that the First-tier Tribunal had directed itself properly by setting out the test from VP (Italy) v SSHD [2010] EWCA Civ 806 at paragraph 96 of the decision. At paragraph 97 the First-tier Tribunal found that there was serial and targeted trafficking criminality over a period of time, which put the Slovakian community in the UK at risk.
7. Secondly, the risk the appellant poses for the future is submitted to be properly reasoned with reference to the sentencing remarks and the content of the OASys report: the appellant had been involved with people trafficking; had failed to accept his guilt, lacks insight into his offending and expressed no remorse to his victims; he behaved in a threatening way in prison and after his release. There are argued therefore to be full and sufficient reasons supporting the conclusion that the appellant poses a genuine, present and sufficiently serious threat to a fundamental interest of society as set out at paragraphs 74 to 98 of the decision, despite the ultimate conclusion of the OASys report that the appellant posed a low risk of reoffending.
8. It is also said by the respondent that it is not arguable that proportionality was not dealt with properly, particularly as Part 5A of the 2002 Act was simply used as a guide by the First-tier Tribunal Judge. It was not arguable that material evidence was not taken into account as the appellant's fear of discrimination as a member of the Roma community is dealt with at paragraph 100 of the decision. There are also findings with respect to the appellant's children and their mothers being able to care for them and their best interests at paragraph 110. Further there is reference to the sentencing remarks and consideration of the medical evidence at paragraph 101 of the decision.

9. Mr Bramble confirmed that it was not challenged by the respondent that the appellant was entitled to imperative grounds protection.
10. At the end of the submissions we informed the parties that we found that the First-tier Tribunal had erred in law on all three grounds. We did not give an oral judgement but indicated that we found that the decision did not properly apply the relevant legal tests and was not sufficiently clearly reasoned on these key issues. We set out our reasoning for our decision that the First-tier Tribunal erred in law in writing below.
11. We then moved on to ask for submissions on remaking the appeal. Mr Bramble indicated that he had no further submissions to make and simply relied upon the skeleton argument submitted for the Secretary of State and his submissions with respect to the error of law. We heard submissions from Mr Chakmakjain, and reserved our decision on remaking at the end of those submissions.

Submissions - Remaking

12. Mr Chakmakjain submitted that the appellant's offence, whilst obviously serious, did not reach the high threshold for showing a compelling risk to public security, with a threat of a particularly high degree of seriousness.
13. Mr Chakmakjain argued that the OASys conclusion that the appellant posed only a low risk of reoffending was correct. This conclusion was based on the appellant's relative (in the context of criminality) old age; his lack of any previous convictions or issues with the police; and also reflected the fact that a number of risk factors for reoffending considered by the report such as problems with accommodation, drugs and alcohol did not apply to him. This was the appellant's only criminal conviction and he has resided in the UK for 23 years; and he had now been in the community again since June 2019 and had not been charged with or convicted of any further offences. The public is further protected as the appellant would not be able to commit further trafficking offences due to the slavery and trafficking prevention order as this would not permit him to hold documents which might enable him to exploit others. The appellant would also be deterred from committing further offences due to the powerful adverse effects of imprisonment on him, his partner and his son. It was of particular note that his time in prison led him to commit an act of self-harm, which indicates that he would be very significantly deterred from doing anything which might lead to his being imprisoned again as clearly the experience had been intolerable. Mr Chakmakjain concluded that the Secretary of State could not show that there was therefore a genuine, present and sufficiently serious threat to a fundamental interest of society posed by the appellant.
14. Finally Mr Chakmakjain argued that the decision was not proportionate for the following reasons: that the appellant had lived in the UK for 23 years without returning to Slovakia having arrived as a 16 year old child; he arrived in the UK as a dependent on his father's asylum claim and although the application and appeal did not succeed it was found by the First-tier Tribunal that he had

difficulties connected with this Roma ethnicity in Slovakia; that the appellant has no ties with Slovakia; the European Roma Rights Report of 2017 outlines that there continues to be discrimination in Slovakia against Roma people by the police, housing, education departments and in relation to access to drinking water so it would be very difficult for the appellant to reintegrate into that society; his 18 year old son J is a British citizen and lives with the appellant and the appellant's partner, and should be seen as continuing to be seen a child of his family and could not be expected to accompany the appellant as he has close relationships with his younger brother, K (who is a minor), and his mother who live together in the UK with her new partner; and the medical evidence from Medway Talking Therapies indicates that the appellant has severe depression and anxiety and is waiting for further help for these conditions, as well as having a number of physical health conditions as detailed in the GP notes.

Conclusions – Error of Law

15. The test for whether an appellant may lawfully be deported on imperative grounds of public policy or security was commented on by the Court of Appeal in Staszewski v SSHD [2015] EWCA Civ 1245 at paragraphs 22 and 23 as follows: “Ms Chan did, however, draw our attention to the decision in *I v Oberbürgermeisterin der Stadt Remscheid*, in which the claimant had been convicted of multiple offences of sexual abuse, sexual coercion and rape of a 14 year old girl in respect of which he had been sentenced to 7½ years' imprisonment. The CJEU was asked to decide whether the expression "imperative grounds of public security" referred only to conduct which threatened the security of the state itself, its population and the survival of its institutions or was broader in scope. In giving its judgment the court emphasised that member states retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, but that the requirements of the Directive must still be interpreted strictly. Criminal offences which constitute a particularly serious threat to one of the fundamental interests of society or which pose a direct threat to the calm and physical security of the population may fall within the concept of "imperative grounds of public security", as long as the manner in which such offences were committed discloses “particularly serious characteristics”.
16. The European Court of Justice held in *Tsakouridis (European Citizenship)* [2010] EUECJ C-145/09 [2011] 2 C.M.L.R. 11 [2013] All E.R. at paragraph 41: “The concept of ‘imperative grounds of public security’ presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness, as is reflected by the use of the words ‘imperative reasons.’” At paragraphs 43 -45 it is observed that the Court also found that public security includes both a Member State's internal and its external security; a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests; and possibly “the fight against crime in connection with dealing in narcotics as part of an organised group” particularly as “trafficking in narcotics

as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it". It is clear however that simply a long prison sentence would not suffice to show imperative grounds were made out.

17. In the decision in VP (Italy) v SSHD [2010] EWCA Civ 806 the Court of Appeal endorsed what was said in the Court of Appeal case of LG (Italy) as follows: "we cannot accept the elevation of offences to 'imperative grounds' purely on the basis of a custodial sentence of five years or more being imposed. As it was said by Carnwath LJ in LG ... there is no indication why the severity of the offence in itself is enough to make the removal 'imperative' in the interests of public security. Such an offence may be the starting point for consideration, but there must be something more, in scale or kind, to justify the conclusion that the individual poses 'a particularly serious risk to the safety of the public or a section of the public'. Terrorism offences or threats to national security are obvious examples, but not exclusive. Serial or targeted criminality of a sufficiently serious kind may also meet the test. However, there needs to be some threat to the public or a definable section of the public sufficiently serious to make expulsion 'imperative' and not merely desirable as a matter of policy, in order to ensure the necessary differentiation from the second level."
18. We do not find that this test has been applied by the First-tier Tribunal despite citing LG (Italy) at paragraph 96 of the decision. A long custodial sentence of six years was imposed on this appellant but there is a failure to identify in paragraph 97 of the decision, the only paragraph that addresses this issue with reference to the facts of this case, how the appellant's criminality had particularly serious characteristics. There is no reasoning with reference to the facts of this case why it is found that the criminality here was serial, targeted over an extended period of time. There are references to the OASys report which indicates that the appellant could pose a threat to vulnerable members of the Slovakian community and that he had threatened prison staff, but this does not address the key issue of how the test is met, and must be seen in the context of that report concluding that the risk of reoffending from this appellant is low. We find that there is ultimately a failure to reason how the human trafficking in this case could meet the test outlined in Tsakouridis in relation to drugs trafficking because there is no explanation as to how this appellant's criminality was part of "an organised group" and was of "a level of intensity that might threaten the calm and security of the population as a whole or a large part of it".
19. As we find that the First-tier Tribunal had not lawfully shown that there were imperative grounds of public security engaged in this case, it is clear that the decision must be set aside and remade.
20. We note also however that we find the reasoning insufficient with respect to whether the appellant poses a genuine, present and sufficiently serious threat to a fundamental interest of society, given, as Tsakouridis notes, the "concept of 'imperative grounds of public security' presupposes not only the existence of a

threat to public security, but also that such a threat is of a particularly high degree of seriousness". There was a failure to reason why, even if the appellant had little insight into his offending or empathy with his victims and had on occasion behaved badly in prison this would mean there was this level of risk he would reoffend with a high degree of seriousness given his age, lack of previous convictions, access to accommodation, lack of alcohol and substance abuse, the evidence about the salutary affect of imprisonment on him and his family, and particularly given the assessment of OASys that he was a statistically low risk of reoffending.

21. We also find that despite acknowledging at paragraph 107 of the decision that Part 5A of the 2002 Act does not apply in an EEA deportation appeal, that the analysis in the subsequent paragraphs relies upon the framework of those provisions to such an extent that it is not sufficiently clear that it has not been actually employed in determining the appeal contrary to the decision in Badewa (ss.117A-D and EEA Regulations) [2015] UKUT 00329. Further when considering the proportionality of the appellant's removal there is a failure to consider material evidence as there is no reference to the current country of origin materials regarding discrimination against those of Roma ethnicity, although it is accepted that the appellant is part of this ethnic group.

Conclusions - Remaking

22. The first issue is of course whether interpreting imperative grounds strictly, as we must do, the appellant's offending has particularly serious characteristics so as to qualify as a threat to public security alongside threats to the security of the state itself, its population and the survival of its institutions. As indicated above in our analysis of the errors of law we find the guidance in Tsakouridis with respect to drug trafficking most helpful in indicating that we are looking for something at least on a par with "an organised group" that "could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it". It is clear from LG (Italy) that the severity of the offence itself alone will not suffice, and there needs to be a threat to the public at large.
23. The appellant was convicted of conspiracy to traffic persons within the UK for exploitation with his brother as an equal participant, but was found not guilty of conspiracy to trafficking persons into the UK. As set out in the sentencing remarks of Judge Statman the appellant received financial gain by preying on vulnerable fellow adult members of the Slovakian community who were newly arrived in the UK through sophisticated, planned exploitation. The victims were housed in miserable conditions, made to work long hours, not properly paid for their work, and subject to social control, and kept in this situation by threats of homelessness and unemployment if they left and an assertion that he, the appellant, was "the boss". Two victims gave evidence in the trial, but the Judge was satisfied that one of these was part of a group of 12 people, the other victim gave evidence that there were up to 70 others under the control of the appellant and his brother but

the Judge was not satisfied this was the case although he did accept that the criminality definitely extended beyond the two victims. From material in the OASys report it would appear that the exploitation of at least one of the victims spanned a period of seven years.

24. There is no doubt that the offending is repugnant and serious, involving the deliberate degrading of fellow human beings via forced labour. The offending can also properly be described as serial as it went on for a period of about seven years and in addition it was targeted as it was aimed at newly arrived vulnerable adult Slovakian citizens. The seriousness of the offending is reflected in the 6 year sentences that the appellant and his brother received. However, on consideration of all of the facts, we do not find that is sufficiently serious to qualify as a threat to public security alongside threats to the state, its institutions and the population. We do not find that the operation the appellant and his brother ran was sufficiently expansive to be seen as a threat to the calm and physical security of a significant part of the population. As such we find that the respondent has failed to show that there are imperative grounds of public security for the appellant's deportation, and the appeal must therefore be allowed.
25. For completeness, and in case we are wrong in making the above finding, we go on to consider whether the appellant poses a genuine, present and sufficiently serious threat to a fundamental interest of society. We place reliance on the OASys report and the statements of the appellant and his family in considering this issue.
26. Factors in favour of a finding that the appellant poses a risk of future sufficiently serious offending are the following: he lacks insight and remorse in relation to his offending; that he might again be motivated by financial gain; that he might be motivated by the relationship with his brother (although he is currently working in Germany); that he has some problems with aggressive and controlling behaviour; and that if he did reoffend there is a medium risk of serious harm in the community.
27. Against such a finding is: that statistically based on his age and previous convictions/ interactions with the police he is at low risk of reoffending of all types; that he has much to lose by reoffending as he has a partner and son with whom he lives and who were both detrimentally affected by his previous imprisonment; the appellant found it very difficult to cope with imprisonment and took an overdose so it was a salutary experience for him; the appellant has no accommodation problems in the community; he has a strong commitment to his extensive wider family, including his younger son who lives with his ex-wife, who all live in the UK; he has no drug or alcohol problems which might drive him to offend; his education and employment is not linked with a risk of reoffending and he has acquired English qualifications whilst in prison; he has no emotional wellbeing or mental health issues linked to his offending; and he will be subject to a Slavery and Trafficking Prevention Order which will mean that he cannot

possess a number of documents relating to others which would inhibit his ability to commit again the type of crime of which he has been convicted.

28. We conclude that, taking all the evidence into account, the respondent is not able to show that the appellant poses a genuine, present and sufficiently serious threat to a fundamental interest of society. Whilst the appellant's lack of insight and remorse is disturbing he has many factors, as listed above, which would militate against him reoffending, particularly his close supportive relationships with family and the fact that he and his family suffered greatly from the separation whilst he was in prison, which lead us to conclude that the experience of prison will provide a significant deterrent to him reoffending. We ultimately therefore agree with the assessment of the OASys report that he poses a low risk of reoffending.
29. In light of these conclusions we do not need to consider whether the appellant's deportation would be proportionate.

Decision:

1. The decision of the First-tier Tribunal involved the making of errors of law.
2. We hereby set aside the decision of the First-tier Tribunal.
3. We re-make the decision in the appeal by allowing it under the Immigration (EEA) Regulations 2016.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 26th February 2020