Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002604
on appeal from EA/52376/2021
[IA/09590/2021]

THE IMMIGRATION ACTS

Heard at Field House
by Microsoft Teams
On 26 September 2022

Decision & Reasons Promulgated
On 14 November 2022

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

PANAGIOT LOUKA
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Ms Susana Cunha, a Senior Home Office Presenting Officer
For the respondent: Mr Barnabas Lams of Counsel, instructed by Oaks solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 16 June 2021 to deport him to Greece, of which he is a citizen, pursuant to Regulation 23(6)(b) of the Immigration (European Economic Area) Regulations 2016 (as saved), on the grounds of public policy, public security or public health.

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2. **Mode of hearing.** The hearing today took place face to face. There was no oral evidence.

Background

3. The appellant is a Greek citizen, naturalised in 2013, but was born in Albania. On 16 May 2018, he was convicted by a final judgment before the Five-Member Court of Appeal for Crimes, in Patra, Greece, following an offence of exporting prohibited controlled Class B drugs, committed on 11 December 2016.

4. The claimant was then running a lorry driving company headquartered in Bulgaria, but working all over Europe. He had not been living in Greece for several years before his offence. Since coming to the UK, he has been in unspecified 'gainful legal employment'. He has minor health problems: he takes medication for high blood pressure.

5. When running his lorry business from Bulgaria, the claimant became heavily in debt, to the tune of over €12,000. He was offered a solution to his problems by some Albanian men in whom he confided. He agreed to help transport cannabis. He was arrested and imprisoned by the Greek authorities. The claimant was sentenced to 10 years' imprisonment and fined €10,000. He says he was a model prisoner.

6. The claimant's account is that this was his only criminal offence, in Greece or anywhere else, and that he pleaded guilty at the first opportunity, telling the trial judge how sorry he was and the shame it caused his family. It is not clear to me how he found himself before a Five-Member Court of Appeal, if that account is right.

7. Following the claimant's final sentence from the Patra appeal court in May 2018, one by one, his children and his wife left Greece and moved to the UK. His daughter are here, as well as the claimant's son Mr Antaio Louka, and the claimant's wife Ms Mailinta Pietri.

8. The claimant's daughter Ms Tesa Louka, her Albanian husband and their two children moved to the UK on 12 September 2018. The claimant's wife came to the UK on 29 December 2018. His son arrived on 27 January 2019, exercising Treaty rights by working as a butcher here.

9. The claimant followed the rest of his family in April 2019, after his release on licence. The claimant produced a letter from the Greek Embassy confirming that, from August 2019, he has complied with the terms of that licence. On any view, the offence in Greece was a significant one, of which the Greek courts took a serious view. He has not completed his sentence, albeit he is able to live in the community. He is under the supervision of the Greek Embassy here, and has been signing on every month since August 2019.

10. All of the claimant's immediate family live in the UK and have pre-settled status under the EU Settlement Scheme (EUSS). Both the claimant's children are adults. The claimant is said to be particularly close to his

grandson Nikolas, spending a lot of time with him at weekends and sometimes collecting him from school.

11. In October 2019, the claimant made an application for pre-settled status. His application form said that he had been sentenced to '2 months for weed'. A criminal record request was submitted to the Greek authorities under the EUSS, which revealed the seriousness of his conviction. The case was referred to the Secretary of State's Foreign Convictions Team in May 2020 to consider deportation. The claimant was given the opportunity to make representations, which he did, but on 16 June 2021, the Secretary of State decided that deportation pursuant to Regulation 23(6)(b) with reference to Regulation 27 of the EEA Regulations was appropriate. Her was uncertified, so he has an in-country right of appeal.

First-tier Tribunal decision

12. The claimant, his wife, his son and daughter and his son-in-law attended the First-tier Tribunal hearing but did not give evidence. The appeal was heard and determined on submissions only. The submissions are not set out in the First-tier Tribunal decision.

13. The issue in the First-tier Tribunal was whether the decision was proportionate, having regard to Regulation 27(8) and Schedule 1, paragraph 7 of the 2016 Regulations. It was common ground that there had been no further offending in the short period the claimant had been in the UK, reporting under licence to the Greek Embassy. There was no OASys report to assist the Tribunal as the conviction was a foreign conviction, and no sentencing remarks from the Greek courts.

14. The claimant explained the apparent deceit in his declaration of his criminal history thus:

> "40. He stated he used the assistance of an Albanian interpreter when filling out his EUSS application form and told her that he had served 27 months for drugs offences. He stated that it was never his intention to conceal his conviction and sentence, and that an error had been made by her in the application form. I find that as the [claimant's] criminal conviction is a significant part of the application form, it is implausible that he would not have checked it to ensure that he made full disclosure of his conviction and the length of his sentence before signing it. ..."

15. The bundle contains a badly written and misspelled email from Ms Pranvera Koci-Ditini (described by the claimant as an Albanian interpreter). Ms Koci-Ditini described herself as a self-employed 'accountant and consultant for non-English speaking'. She said that the claimant told her he 'did 27 months of prison' and that the details of his criminal offence were 'accidentally entered incorrectly, this is tapping error'. The First-tier Judge did not accept that, and neither do I.

16. In relation to rehabilitation, the First-tier Judge noted the claimant's evidence in his witness statement that he had worked as a cleaner during his term of imprisonment, 'but did not undertake any courses in prison as

these do not exist in the Greek penal system'. The claimant recognised that the offence he committed had caused his family, and his wife in particular, 'anguish'.

17. The First-tier Judge found that 'taking the evidence as a whole I do not find that the appellant represents a genuine, present and sufficiently serious threat to the fundamental interests of society'. In the alternative, the judge made reference to *Agyarko* [2015] EWCA Civ 440, and section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended), and then decided that:

> "47. I bear in mind that the appellant built up a private life in the United Kingdom at a time when he did not have settled status. I also bear in mind his health conditions, although it has not been argued on his behalf that he would not be able to receive appropriate medical treatment in Greece. I find that deportation would be disproportionate given the appellant's private and family life in the UK including his employment. I find that any interference in the appellant's Article 8 rights, will result in unjustifiably harsh consequences."

18. The appeal was allowed. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

19. Permission to appeal was granted by First-tier Judge Lodato for the following reasons:

> "2. It is argued that the judge did not provide sufficient reasons for concluding that the [claimant], sentenced to 10 years' imprisonment in Greece for drugs offending in 2016, was a reformed character and thus not a sufficient threat to the fundamental interests of the UK to warrant deportation. It is arguable that the finding that the [claimant] had wilfully withheld the full extent of his offending from the [Secretary of State] when making his application was not factored into the judge's consideration of rehabilitation. It is also arguable that there was not a sufficiently strong evidential foundation to find in the [claimant's] favour on the issue of rehabilitation, given how recently he was convicted of such serious offending. There is force to the grounds of appeal that the judge did not consider whether it would be unduly harsh for the [claimant's] family to relocate to Greece with him. All grounds may be argued."

Rule 24 Reply

20. There was no Rule 24 Reply on behalf of the claimant.

21. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

22. For the claimant, Mr Lams submitted that the decision could be sustained. The judge had made findings on the risk of reoffending which were open to him on the evidence. The claimant, an HGV driver, had been tempted into concealing drugs in his lorry because he ran into debt.

23. The First-tier Judge had considered the Secretary of State's arguments in detail, and taken them into account. The weight to be given to the evidence was a matter for the fact-finding judge and could be challenged only on grounds of perversity and/or *Wednesbury* unreasonableness, being contrary to the weight of the evidence, or unintelligible to the reviewing judge: see *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90].

24. The burden was on the Secretary of State to demonstrate risk: there were no sentencing remarks from the Greek court, nor any OASys report to assist the First-tier Tribunal. The decision made was open to the judge and the Secretary of State's appeal should be dismissed.

25. For the Secretary of State, Ms Cunha argued that Schedule 1 of the 2016 Regulations had not been properly applied. The Secretary of State's decision was proportionate. The First-tier Judge had not accepted the claimant's explanation that the reference to two months' imprisonment for 'weed' was a typographical error (see [27]) or that it was the fault of the Albanian interpreter (see [40]).

26. I reserved my decision, which I now give.

Analysis

27. Due to the short period of the claimant's residence in the UK, it is common ground that he is entitled only to the basic level of protection under the Immigration (European Economic Area) Regulations 2016 (as saved). Regulation 27 of the 2016 Regulations so far as applicable is as follows:

> "27.—(1) In this regulation, a "relevant decision" means an EEA decision taken on the grounds of public policy, public security or public health. …
>
> (5) The public policy and public security requirements of the United Kingdom include restricting rights otherwise conferred by these Regulations in order to protect the fundamental interests of society, and where a relevant decision is taken on grounds of public policy or public security it must also be taken in accordance with the following principles—
>
> > (a) the decision must comply with the principle of proportionality;
> >
> > (b) the decision must be based exclusively on the personal conduct of the person concerned;
> >
> > (c) 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 past conduct of the person and that the threat does not need to be imminent;
> >
> > (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
> >
> > (e) a person's previous criminal convictions do not in themselves justify the decision;
> >
> > (f) the decision may be taken on preventative grounds, even in the absence of a previous criminal conviction, provided the grounds are specific to the person.

> (6) Before taking a relevant decision on the grounds of public policy and public security in relation to a person ("P") who is resident in the United Kingdom, the decision maker must take account of considerations such as the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin. …
>
> (8) 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.)."

28. Schedule 1 at [1] notes that member States (as the UK then was) enjoy considerable discretion to define their own standards of public policy and public security. At [5] of Schedule 1, the Regulations state that removal is less likely to be proportionate where an EEA national 'is able to provide substantive evidence of not demonstrating a threat (for example, through demonstrating that the EEA national … has successfully reformed or rehabilitated'.

29. At [7(g)], the definition of the fundamental interests of society is said to include 'excluding or removing an EEA national …with a conviction (including where the conduct of that person is likely to cause or has in fact caused public offence) and maintaining public confidence in the ability of the relevant authorities to take such action'. Other sub-paragraphs of [7] are also relevant. There is no doubt that the claimant's offence, a significant drugs offence which attracted a long sentence, engages the fundamental interests of society.

30. The First-tier Judge did not engage with these provisions. She did reject the claimant's denial of responsibility for the statement that he had been sentenced to 'two months for weed'. It was his responsibility to check his EUSS application and if he did not do so, that did not improve his position.

31. The evidence before her as to the index offence was incomplete, but it did show that the claimant had received a significant sentence, and arguably that in saying he pleaded guilty at the first opportunity to 'the judge', he also sought to understate the appeal proceedings which brought him before a 5-judge appellate court in 2018, two years after the offence.

32. The claimant's argument, in effect, is that his offence was a one-off and that he has been rehabilitated. The claimant's private and family life claim amounts to this: that his family members all moved to the UK without him, while he was in prison, following their 'anguish' at what he had done, but that since arriving, he has rebuilt those relationships to some extent and in particular, with his grandson.

33. The judge's finding that the claimant has shown rehabilitation is contrary to the evidence. The claimant has been in the UK for a little over 3 years, during which time he remained on licence under the supervision of the Greek Embassy. Even if it is right, as the claimant alleges, that he was a model prisoner who was held for a time in an open prison and worked as a cleaner during his incarceration, the sentence is not complete. He reports

monthly to the Embassy as part of the conditions of his licence, on his own account, and is still serving his 10-year sentence, albeit in the community.

34. I agree with Ms Cunha that the decision as a whole reads as though the judge had intended to dismiss the appeal, and that the very brief reasons given in the final paragraph for allowing it are inadequate to support the opposite conclusion which she reached. There is no alternative but to set aside and remake the decision.

35. As there was no oral evidence at the First-tier Tribunal hearing, I am in the same position as the First-tier Judge when it comes to remaking the decision. The claimant has been in the UK for a short period, less than 4 years. He has undertaken some kind of work, though the payslips provided do not say what it is, and nor do his witness statements or those of his family members. The claimant has no particular health or Greek language problems. He does have high blood pressure for which he takes medication, but there is no evidence before me that the medication is unavailable in Greece.

36. I have read the witness statements of the claimant and his family members, which are all in very similar terms, and, at least in the Tribunal's bundle, neither signed nor dated. The main elements of those statements are summarised above. None of them contemplate that the claimant's wife or his children and their families would return to Greece with him if he were removed.

37. His children are adults and there is no *Kugathas* dependency. His grandson is fond of the claimant, and the claimant reciprocates, but that is no more than normal affection and the child is healthy and has parents and a sibling. All of the witness statements acknowledge that the family relationships could be maintained by modern means of communication.

38. I have read the interpreter's email and I take the same view that the First-tier Tribunal did: I do not believe that this was a typographical error and I consider that even if such a peculiar error had been made, it was the claimant's responsibility to check the EUSS application for accuracy.

39. I therefore set aside the decision of the First-tier Judge. The claimant's appeal is dismissed.

DECISION

40. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.

    I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Signed Judith AJC Gleeson Date: 4 October 2022

Upper Tribunal Judge Gleeson